

## National Court Confirms Sanctions for Unfair Advertisements on Health Claims Relating to Chewing Gums

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Unsurprisingly, the Regional Administrative Court of Lazio (T.A.R. Lazio, Section I, n. 62/2017) confirmed the legitimacy of a decision of the Italian Competition Authority (hereinafter ‘ICA’; ‘*Autorità Garante della Concorrenza e del Mercato*’ - or ‘AGCM’ - in the original designation), which condemned a well-known Italian enterprise for publishing advertisements in breach of the health claims discipline under Reg. (EC) 1924/2006 (the ICA case is Happydent-Vivident-Daygum-Mentos-Chewing Gum [PS8493] - decision n. 2446).

In more detail, the ICA contested that the promotional messages at issue were misleading in their content. It held that the spots - although without mentioning it explicitly - surreptitiously suggested that the consumption of the product (in the present case chewing gums) would have as many beneficial effects for health as those arising from ordinary dental care. Therefore, in the absence of any scientific reliability – which follows from the lack of authorization to utilization by the European Food Safety Authority (‘EFSA’) – the company had put into practice deceptive promotional messages, unlawful under Reg. (EC) 1924/2006.

The latter lays down harmonised rules for the use of nutrition and health claims, aiming at ensuring a high level of consumer protection. It purports to make sure that any claim made in the EU is clear, accurate and substantiated, so that consumers are enabled to make informed and scientifically-founded choices. Claims that in various capacities must be authorized by EFSA can be either “nutrition claims” (under Art. 2(2)(4), any claim which states, suggests or implies that a food has particular beneficial nutritional properties due to its caloric value, nutrients or other substances); “health claims” (under Art. 2(2)(5), any claim that states, suggests or implies that a relationship exists between a food category, a food or one of its constituents and health); and, finally, “reduction of disease risk claim” (under Art. 2(2)(6), any health claim that states, suggests or implies that the consumption of a food category, a food or one of its constituents significantly reduces a risk factor in the development of a human disease). In any event, no inscription can be introduced and used unless explicitly authorized beforehand through the procedure outlined by Artt. 13 and 14 Reg. (EC) 1924/2006.

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In Italy, the ICA is the body entitled to control and sanction violations concerning EU claims discipline. Its more recent decision on the subject matter represents therefore only the last piece of a jigsaw made up of hundreds of acts, many of them eventually sanctioning the private actor.

In the light of this huge amount of decisions issued by the administrative authority, two main questions arise: on the one hand, whether and to what extent the decisions issued by ICA reflect a consolidated approach in the carrying out of its task; on the other hand, whether the plaintiff can rely on a thorough judicial control against ICA administrative acts so as to limit the administrative body's discretion.

As regards the first problem, the ICA seems to have taken more or less the same stance in most of the cases brought before it. Most of the time, the ICA applied a teleological approach which resulted in strict sanctions, acting as a sort of "shakeout player". Indeed, it often ends up *de facto* emphasizing the overarching principle of Reg. (EC) 1924/2006, *i.e.* the need for a thorough protection of the consumer's right to choose. This was the case of Aloe Ghignone-Proprietà Terapeutiche (PS10420); Exquisa Latticino-Solo 0,0025% Di Colesterolo (PS10373); Pata S.p.a. (PS9524), San Carlo S.p.a. (PS9082), Ica Foods S.p.a. (PS9525); Amica Chips S.p.a. (PS9526); Named (PS9400); Co.ge.di. International (PS9629). Moreover, whereas in some cases – unlike what estimated in Happydent-Vivident-Daygum-Mentos-Chewing Gum – the ICA deemed acceptable the efforts carried out by companies to round off the deceptive element from promotional messages (Dolomiti Fruits S.r.l (PS10169)), in some cases the ICA went even beyond what stated in Happydent-Vivident-Daygum-Mentos-Chewing Gum. In fact, in Meglio In Salute-Apparecchi Trattamento Acqua Potabile (PS10106), ICA established that even an explicit mention (that the utilization of the product will by no means replace the relevant medical care) cannot *per se* be sufficient to keep the company away from sanctions, if in practice a deceptive effect is objectively produced.

It is then fairly evident that the ICA vindicates the enjoyment of a wide discretion in the "cleaning up" of the market from deceptive practices. However, does the judicial authority accord it such a role?

It would appear that the answer to this question is affirmative. The case-law is settled in the Italian State Council (the last-instance administrative court of the country, hereinafter 'S.C.')

that judicial control on those matters can only cover the legitimacy of ICA decisions, not the merit. In other words, it includes the choice of the norms to apply, their correct application and the existence – in case – of logical gaps in the reasoning of the administrative body. In sum, it consists of a formal and procedural control, which does not affect the substance of the decision, entirely left to the ICA (see, *inter alia*, S.C., n. 6050/2014; S.C., n. 2002/2013; S.C., n. 4873/2012). There follows ample freedom for the

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ICA in its final rulings. It is therefore no news that the Regional Administrative Court of Lazio confirmed the sanction given in Happydent-Vivident-Daygum-Mentos-Chewing Gum, as also confirmed by other recent first-instance courts' rulings (the decision expressly recalls T.A.R Lazio, Section I, n. 12708/2015; other recent decisions are T.A.R. Lazio, Section I, n. 8801/2016; T.A.R Lazio, Section I, n. 12708/2015; T.A.R Lazio, Section I, n. 372/2015).

Such a tendency, in the writers' view, depends on purely legal circumstances and can be explained in two ways.

First, Italian independent administrative authorities (like ICA) play a very important institutional and administrative role, particularly enjoying full independence from the Government as well as from any other constitutional power. A thorough judicial control on their action may end up impairing their independence.

Secondly, within the range of Italian independent administrative authorities, some enjoy more discretion than others, depending on the nature of their activities. In particular, the national Telecoms Regulator ('*Autorità Garante delle Telecomunicazioni*' – or '*AGCOM*' in the original designation) is free to act as it operates *ex ante*, therefore modelling and structuring the market as a whole. In this case, the judge must adopt a 'preventive perspective', ruling as if it had been in the position of the authority when adopting the act. On the contrary, the ICA operates *ex post*, only assessing the final equilibrium of the markets, which explains the solely procedural nature of judicial assessment (see T.A.R. Lazio, Section I, n. 1742/2013).