REDRESSAL MECHANISM FOR COMPETITORS AGAINST MISLEADING ADVERTISEMENTS

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INTRODUCTION

We live in a commercialized world and advertisements form its backbone. Our senses and cognition perceive advertisements all the time. Advertisements are intended to create a need in consumers and to appeal their psyche in order to increase sales. In order to achieve this goal, advertisements may be well crafted so that most consumers can identify themselves with the product. Celebrities, catchy tag lines etc. are the ingredients which make advertisements more appealing. Advertisements aim at promoting a certain brand and showcasing that that one brand is superior to the majority of products available. Hence, advertisements also have an integral linkage to competition. Advertisements may not only sway the public towards a particular product, they may also reduce the market share of a competitor if an advertisement disparages a competitor's products, since such disparagement would lead to loss of public faith in such competitor's products. Therefore, there is a thin line which distinguishes appealing advertisements from misleading and unethical ones. This paper majorly aims to analyse (i) the concept of commercial speech with regards to Article 19 of the Constitution of India, (ii) the issues related to misleading advertisements, (iii) the challenges faced by competitors and the available regulatory framework and finally, (iv) to suggest a revision in the existing legislations and the redressal mechanisms.

ARTICLE 19 AND FREEDOM OF COMMERCIAL SPEECH

"Our lives begin to end the day we become silent about things that matter."

– Martin Luther King, Jr. [1](on his view about freedom of speech and expression)

Besides being the essence of a democratic setup, freedom of speech and expression is the ailment to scores of civil, political and other fundamental cancers that devour the state. Hence the plinth of fundamental rights, over which the freedom of speech and expression reclines, is only justified.

Article 19 of the Indian Constitution lays down the fundamental right of freedom of speech. It basically means the right to express one's opinion through various mediums. It gives individuals the right to speak as well as listen and to attain information.

[1] NORWICH, GRACE, I AM #4, MARTIN LUTHER KING JR., SCHOLASTIC INC. (2012).

A closer look at Article 19 would help us understand its evolution and its current compass. Pragmatically, it has been laid down in the case of *Romesh Thappar v. State of Madras,*[2] that freedom of speech and expression also include that of the press. It includes the expression of ideas through signs, pictures or movies, the right to publicize his expression etc.[3] Hence, it can be concluded that the scope of Article 19 is a wide one.

Commercial speech has been defined as "*commercial speech is that whose dominant theme is simply to propose a commercial transaction."*[4] In other words "*An advertisement is an information that producer provides about its products or services*[5]". "Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold and the acquisition of the article to be sold constitutes the only inducement to its purchase."

- Justice McKenna [6]

Half a century ago, the right was construed to have restricted application, only applicable for safeguarding the freedom of speech and expression of individuals. The Supreme Court opined that "*an advertisement, no doubt, is a form of speech, but its true character is to be determined by the object which it seeks to promote. It may amount to an expression of ideas and propagation of human thoughts and, thus, would fall within the scope of Article 19(1)(a). But a commercial advertisement having an element of trade and commerce, and it no longer falls within the concept of freedom of speech for its object is not to propagate any ideas- social, political or economic or to further literature or human thought."* [7]

In the case of *Sakal Papers Ltd. v. Union of India* [8] the Supreme Court widened its stance realising the importance of the revenue earned by newspapers through advertisements. The Supreme Court held "*that the curtailment of the advertisements would bring down the circulation of the newspaper and as such would be hit by Article 19(1) (a) of the Constitution of India*".[9]

But with the eventual advancement in the jurisprudence, the Supreme Court in case of *Indian Express Newspaper v. Union of India,*[10] by implied means, considered commercial speech to be partially protected under Article 19. The court stated that "*We are of the view that all commercial advertisements cannot be denied the protection of Article 19(1)(a) of the Constitution merely because they are issued by businessmen and its true character is detected by the object for the promotion of which it is employed*".[11]

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[2] AIR 1950 SC 124.
[3] Secretary Ministry of I&B v. Cricket Association of Bengal 1995 SCC (2) 161.
[4] Bolger .v. Young's Drug Products Corp 463 US 60 (1983).
[5] ICICI Bank v. Municipal Corporation of Greater Mumbai AIR 2005 SC 3315.
[6] John W. Rast v. Van Deman & Lewis Company 240 U.S. 342 .
[7] Hamdard Dawakhana (WAKF) LalKuan, Delhi and Another v. Union of India AIR 1960 SC 554.
[8] AIR 1962 SC 305.
[9] Ibid .
[10] 1985(2) SCR 287.
[11] Ibid.

In 1964, a typical example was the case of *New York Times v. Sullivan* [12] which spoke about the concept of "editorial advertisement." Basically, any advertisement to promote an idea would come under this ambit hence there was a distinction drawn between advertisements for products like "Ban Pesticides", "Save Whale" as opposed to "use spaghetti" and "buy cars."

Finally in the case of *Tata Press Ltd v. Mahanagar Telephone Nigam Ltd.*[13] *"commercial speech"* was made part of freedom of speech guaranteed under Article 19(1) (a).

Freedom of speech, therefore, includes in its ambit any form of information that is so decapitated which ensures that the individual attains self-fulfilment, discovery of truth, aims at balancing between stability and change, and informs a person enough to ensure that he takes decisions. Basically, this widens the ambit of right to freedom of speech and expression to the right to know as there is transmission of factual information to the consumer on the basis of which the consumer takes a decision.

UNFAIR TRADE PRACTICES

"*Advertising is legalized lying*" – H.G. Wells [14]

The macrocosm of business is a vicious circle of rivalry and clashes. This is more than evident as competitors try to engulf on the goodwill and profit of the other market players. Various tactics to increase the sales of their product including advertisements, offers, discounts, promotional schemes are a living example of this phenomenon in the vicious cocoon of the market. The glitter of outshining others is such an attraction, that business ethics remains a long-forgotten notion.

"Unfair Trade Practices" is another controversial business tactic. Routinely, usage of the term "unfair trade practices" can be understood as any fraud or deceptive act done by a company to earn profit at another's cost. The term is defined under Section 36A of Monopolies and Restrictive Trade Practices Act, 1969 as:

"*A trade practice which, for the purpose of promoting the sale, use or supply of any goods for the provisions of any services, adopts any unfair method or unfair or deceptive practices*"[15].

[12] 376 U.S. 254.
[13] (1995)5 SCC 139.
[14] FERNANDO, AC, BUSINESS ETHICS AND INDIAN PERSPECTIVE, 5.11 (1st Ed. 2010).
[15] Section 36 A Monopolies and Restrictive Trade Practices Act, 1969.

The above provision lays down a wide ambit covering oral, written as well as visual representations. Also, the section lays down the various possible permutations and combinations in which the companies can be unfair in its dealings.

The term has also been defined under Section 2 (r) of the Consumer Protection Act, 1986 is: "*A trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—*

(1) the practice of making any statement, whether orally or in writing or by visible representation which,—

(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

(ii) falsely represents that the services are of a particular standard, quality or grade;

(iii) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;

(iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;

(v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;

(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

(vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof"[16]

Though the definition of Unfair Trade Practices is very comprehensive under the abovementioned provision, the issue with this in the current context is that the provision can only be used for the consumers and not any other aggrieved party. Hence its scope does not include in its ambit, manufacturers, producers, etc., thus rendering it irrelevant for the present focus of this article.

Since "Consumer protection" and not "Fair Competition" is the primary focus of the prominent legislations and definitions, it can be safely stated that these definitions though very comprehensive have very limited pertinence with respect to advertisements.

[16] Section 2(r) of the Consumer Protection Act, 1986.

In this paper we, therefore, try to discuss all possible legislations made to try to solve the possible misleading advertisements and see how effective is there mechanism in providing a remedy to a competitor.

MISLEADING ADVERTISEMENTS

Advertisements involve making ethical choices as to what should be shown, what products to be advertised and what content has to be ignored. Between these choices, sometimes the pure truth is just neglected and the useful truth is considered, which might result in misleading the consumers as well as competitors.

Misleading Advertising has been defined by P. Ramanatha Aiyar, in his dictionary Advanced Law Lexicon as:

"*Advertising that deceives or is likely to deceive those to whom it is addressed or whom it reaches and, because of its deceptive nature, is likely to affect consumers' behaviour or injures or is likely to injure a competitor*".[17]

No right is ever absolute and the same principle applies to the right of publishing advertisements. The advertisements are also required to match some value standards. There are reasonable restrictions in order to protect the interest of consumers and competitors.

The psychological reach of marketing and advertisements was analysed through the theory of behaviourism as propounded by John B Watson.[18] It goes without saying that the strategy of commercial giants is such that it encourages people to identify themselves and subject themselves to advertisements.

Hence there has to be attached to this phenomenon a neutralizing technique, that comes in the form of a responsibility. A corporate social responsibility that people cannot be misled into believing a false attribute of the product so supposed to be sold to them.

Misleading advertisement poses a palpable threat for the well-being of the economy since they detriment not just the consumers but also the competitors. Even though the threat is equal for both the stakeholders, more emphasis is paid towards the protection of the consumers thereby neglecting the interest of the competitors.

REDRESSAL MECHANISM

[17] AIYAR, P. RAMANATHA, ADVANCED LAW LEXICON, VOLUME 3, WADHWA AND COMPANY NAGPUR, 3034 (3RD ED. 2005).

[18] Theory of behaviourism states that all human behavior is a response to external stimuli. In the current context, most consumers purchase goods by falling prey to advertisements which are attractive external stimuli. Example, a young girl would like to buy cosmetics, which have goodlooking female models as brand ambassadors as she would identify with the brand. On the other hand a young boy would not buy the same cosmetics for himself because he would not identify himself with cosmetics. Hence the consumers' psyche is moulded.

COMPETITION ACT, 2002:

Though misleading advertisements are not prima facie covered within the ambit of antitrust laws, a closer analysis of the dual impact that such misleading advertisements have, reveals that it affects not just consumers but also competitors. On one hand, a consumer can be influenced by a misleading advertisement and buy something which was fraudulently portrayed as a better product while on the other hand, a competitor may stand to lose his business and repute to false claims made by opponents.

The Black's Law Dictionary defines a competitor as:

"A person endeavouring to do the same thing and each offering to perform the act, furnish the merchandise, or render the service better or cheaper than his rival."[19]

The interplay of competition law and misleading advertisements can be analysed only upon the knowledge of the history and intent of the Competition Act, 2002. Monopolies Restrictive Trade Practices (MRTP) Act, 1969 [20] was a precursor to the Competition Act, 2002. The MRTP Act, as is evident from its name, was enacted with a vision to prevent monopolisation of markets and businesses. Since India was a relatively young independent country at the time of enactment of the MRTP Act, the Government was majorly aided in its vision by socialist principles and was not willing to give away its right on resources to private entities. Economists in that era felt that the Indian economy being at a nascent stage required proper vigilance in order to avoid benefits to a select few at the cost of the majority, who were well below the poverty line. The MRTP Act was an elaborate act displaying the authority of the Government over its resources and implementation of the socialistic principles imbibed in the Indian Constitution.

However, with advent of time and a drift in economic agendas, the MRTP Act's applicability gradually withered away. There were gradual changes in the economic policy of India as it shifted from the Nehruvian[21] model to a liberalised economy, attracting and encouraging new domestic and foreign players to enter the market without too much Government intervention. As a consequence, the Raghavan Committee[22] was set up in order to formulate a new law repealing the MRTP Act, 1969. Based on the committee report the Competition Act was enacted on 13th January, 2003.

[19] BLACK'S LAW DICTIONARY, 284 (6TH ED 1991).
[20] Hereinafter, referred to as the MRTP Act.
[21] Named after the first Prime Minister of India; simply referred to as democratic socialism.
[22] Raghvan Committee, Committee report on Competition Law, May 2000; available on: https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf.

The act can be majorly divided into the following heads:[23]

1. Anti-competitive practices/ agreements (Section 3) - Horizontal/ Vertical

The act ensures that there are no unfair agreements between market players causing undue interference in market stability.

2. Misuse of Dominance (Section4)

It prevents Misuse of Dominance where a company with considerable market share may try to use its position to the detriment of other consumers or his contemporaries.

3. Combination, Mergers and Amalgamation (Section 3)

Companies combining, merging or amalgamating may result in situations which turn out to have an adverse effect on competition. Agreements, pertaining to buying as well as selling stakes in a company or acquiring control over companies, come within its ambit.

4. Bid rigging

Bidding procedures should be fair and neutral. This imposes prohibition on sharing of information and entering into arrangements which might render an otherwise fair bidding procedure sabotaged.

5. Cartel formation.

The act prohibits cartel formation adversely influencing the prices of goods.

At the outset of the paper it was stated that it is meant to concentrate on situations where a competitor may suffer due to unfair trade practices or more specifically misleading advertisements by companies. By the process of elimination, it becomes easier to look for remedies available to such a competitor.

A brief analysis of the classification and their description mentioned above, spells out that the situation of a company incurring losses due to deceitful claims of their competitor's products can possibly be dealt by one of the two heads, "Misuse of dominance" or "Anti-competitive activities".

I. *"Anti-competitive activities"*

[23] Nishith Desai and Associates, Jurisprudential Trends and the Way Forward; April 2013.

Agreements relating to Anti-Competitive activities are prohibited under Section 3 of the Competition Act. Section 3 prohibits agreements relating to:

"…production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India"[24]

An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements include, but are not limited to:[25]

"…an agreement to limit production and/or supply; an agreement to allocate markets; an agreement to fix price; a bid rigging or collusive bidding; a conditional purchase/ sale (tie-in arrangement); an exclusive supply/distribution arrangement; a resale price maintenance; and a refusal to deal."

The above list of agreements is not exhaustive, but it can be used to understand the intent of the legislators. The concept of anti-competitive agreements is generally in reference to contractual relationships between parties to the same production, supply or distribution chain. An advertiser, who agrees to publicise a company's products cannot possibly fall into the category of parties referred above. The nature of the relationship between an advertiser and a company is that of a service provider and client and hence, publication of the false claims by an advertiser cannot possibly fall under this section.

II. *Abuse of Dominance*

This concept deals with situations where a company with a considerable market share misuses its position in order to dominate its competitors, take undue advantage by charging consumers more or impose restrictions on the supply of their products. Basically, anything that violates the existence of a healthy competition comes within its ambit.

Dominance refers to a position of strength which enables an enterprise to operate independent of competitive forces or to manipulate its competitors, consumers or the market in its favour. Abuse of dominance, as a phenomenon, impedes fair competition between firms, exploits consumers and makes it difficult for other players to compete with a dominant undertaking on merit. Abuse of dominant position includes: imposing unfair conditions or price, predatory pricing, limiting production/market or technical development, creating barriers to entry, applying

[24] Section 3 Competition Act, 2002.
[25] FAQs issued by Competition Commission of India, available on : http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/FAQ.pdf

dissimilar conditions to similar transactions, denying market access and using a dominant position in one market to gain an advantageous position in another market.[26]

The term abuse of dominance is self-explanatory. The problem of making false claims is not restricted to a dominant company. We see in our everyday life that a lot of emerging companies use these tactics to establish their brand name or to increase their market share. The thought of considering misleading advertisements a habit of the big fish in the pond is illogical and incomplete.

It is pertinent to mention here that the MRTP Act, 1969 while defining Unfair Trade Practices in Section 36 specifically includes misleading advertisements. However, the Competition Act, 2002 as discussed above does not provide for redressal against misleading advertisements.

Such omission in the Competition Act, 2002 can be gauged by the varying legislative intents behind both acts. The legislative intent of the MRTP Act illuminated that the provisions dealing with Unfair Trade Practices were primarily consumer-oriented whereas the Competition Act seeks to redress the grievance of consumers with regards to unfair trade practices. Due to the redundancy of MRTP Act, the need for a new statute was felt. During the same time, the Consumer Protection Act was passed seeking to redress consumer grievances against manufacturers, producers, suppliers and retailers. The Act incorporated provisions regarding fraud and deceptive practices hence developing a new law for unfair trade practices. In light of the same, the need to include provisions regarding unfair trade practices was not felt during the enactment of the competition act. The competition act broadly serves the interest of consumers and smaller competitors against their contemporaries. Though the act has dealt with their problems to a larger extent, it still has some grey areas including the issues arising due to misleading advertisements and their implications on the competitors.

The Act is not exhaustive and operates hand in hand with other laws and the provisions shall have effect notwithstanding anything inconsistent therewith contained in any other law.[27]

FSS ACT, 2006 AND ASCI

False claims about food articles and their consequent violation are punishable under the FSS Act 2006[28]. The definition of "misbranded foods" under Section 2 (zf) includes food articles which

[26] *Ibid.*
[27] Dubey, Rajesh, Indian Competition Act: An Overview, 27 July, 2005; available at http://www.mondaq.com/india/x/33971/Antitrust+Competition/Indian+Competition+Act+An+Overview
[28] http://fssai.gov.in/Portals/0/Pdf/Adviosry_on_misbranding_&_misleading_claims(04-07-2012).pdf

have misleading or deceptive claims. In order to be punishable for misleading advertisements under the FSS Act, 2006, two conditions must be satisfied:

1. Such advertisement has to meet the criterion laid down under Section 2 (b) of the FSS Act which deals with "advertisements" i.e. "*any audio or visual publicity, representation or procurement made by means of any light, sound, smoke, gas, print, electronic media, internet and website and included through any notice, circular, label, wrapper, invoice to other documents;*
2. Such advertisement must be incomplete, incorrect or ambiguous to attract the penal provisions under Section 53. Section 53 clearly lays down that a person who publishes or is a party to the publication of an advertisement which falsely describes food or is likely to mislead a consumer with respect to the nature, quantity or composition of the food would be liable to a penalty extending to Rs. 10 lakh.

By virtue of there being a large number of provisions under the FSS Act, 2006 that highlight the meaning, issue and forms of misleading advertisement, it is often assumed that the concept is covered in its entirety. It is only after a detailed analysis of all statutory provisions, that the realization of a lack of redressal for the competitor under the FSS Act, 2006 brims up. Legislatively speaking, Section 23 of the FSS Act, 2006 elucidates that the packaging and labelling of the food needs to be appropriate and not misleading. It includes broad and concrete guidelines which lay down instances of misleading advertisement. The marking and labelling for such consumer goods, majorly foods should be strictly in accordance with Section 23 of the FSS Act, which talks about "Packaging and labelling of foods".[29] In addition, there should not be any labels, statements, claims, designs etc. in the packaging which has untruthful statistics about the nutritive value or the quantity of the product. Moreover, there should be no medicinal or therapeutic claims. The ambit of Section 23 further extends to the shape, appearance, packaging materials, manner in which they are arranged and the display is not misleading either. The language and intention of the FSS Act, 2006 is *prima facie,* to protect the consumers from deceptive business operators. Further misleading advertisements or false representations are prohibited under Section 24 of the Act as they are an unfair trade practice. Such prohibited activities include the following:

[29] Section 23- Packaging and labelling of foods. (1) No person shall manufacture, distribute, sell or expose for sale or despatch or deliver to any agent or broker for the purpose of sale, any packaged food products which are not marked and labelled in the manner as may be specified by regulations: Provided that the labels shall not contain any statement, claim, design or device which is false or misleading in any particular concerning the food products contained in the package or concerning the quantity or the nutritive value implying medicinal or therapeutic claims or in relation to the place of origin of the said food products. (2) Every food business operator shall ensure that the labelling and presentation of food, including their shape, appearance or packaging, the packaging materials used, the manner in which they are arranged and the setting in which they are displayed, and the information which is made available about them through whatever medium, does not mislead consumers.

a. Falsely representing that the foods are of a particular standard, quality, quantity or grade-composition;

b. Making a false or misleading representation concerning the need for, or the usefulness of the product;

c. Giving to the public any guarantee of the efficacy that is not based on an adequate or scientific justification thereof;

These activities according to such legislations have an unfair impact on the public at large. This is a fair yet an incomplete approach. The limitation arises because there is nothing in the FSS Act, 2006 which prevents a competitor from disparaging the product of another competitor through a misleading advertisement. Instead, broad classifications are laid down primarily to protect the interest of the public, thus clearly indicating that, the FSSAI is an agency being run **only** in public interest ensuring that there is minimum adulteration and deceit with regards to advertisement, labels, packaging etc. It is not a legislation that revolves around the competitor or the market conditions. The competitor still faces a dearth of options here.

A latest controversial example of this would be a derogatory advertisement of mustard oil by "Patanjali" against which a show cause notice was issued. A typical scenario that arose here was that a false claim in relation to the extraction process of the oil was made and it drew this comparison with the other vegetable oil manufacturers in the field. FSSAI and ASCI being "public oriented" bodies took action on the advertisement of the product because such false advertisement would widely cheat the public. However as far as the other vegetable oil producers were concerned, towards whom such advertisement may have been derogatory, false and probably would have the effect of substantially lowering their sale and decreasing their profits margin, such entities did not really have a legal recourse under specific statutes to protect their interest. While theoretically, the competitors could approach FSSAI along with the aggrieved consumers, FSSAI being a body that has a bias towards the consumers might not take action, if only the rights of the competitor are violated in the market and not of the consumers. This is precisely the issue that the competitors of Patanjali faced. The controversy was highlighted only when the consumers felt that the advertisement was misleading them. FSSAI and ASCI being consumer-oriented bodies have been given the power to suo motu deal with the cases of misleading advertisements. Even today, Indian laws are silent on the recourse available to the competitors who have to bear the adverse effects of such misleading advertisements.

Apart from FSSAI, the ASCI plays a prominent role in trying to curb misleading advertisements. ASCI is a non-statutory, voluntary body which is a corroborative platform for advertisers (Indian Society of Advertisers), advertising agencies (Advertising Agencies Association of India) and media (Indian Newspapers Society). It is set up as an independent body as it is run by an elected Board of Governors who are leaders and professionals in the field of advertisement. However, a pragmatic understanding shows that ASCI was an independent body and after May 26, 2016, GAMA (grievance against misleading advertisements), regulated by FSSAI corroborated with ASCI. [30] GAMA is essentially run by the department of consumer affairs under the Ministry of Consumer Affairs, Food and Public Distribution. Hence ASCI indirectly acts under the Government for consumers, to ensure that the faith of the public remains intact in advertisements and such advertisements are truthful, legal, honest and decent. This formalized corroboration of the two bodies has ensured yet again that in the interest of the consumers at large, misleading advertisements should be curbed. The corroboration was done, primarily to protect consumers. The Consumer Complaints Council of ASCI's role is to deal with the complaints received from the consumers and industry. However, as an independent voluntary body, its role remained majorly limited to recommendations. The corroboration of ASCI with GAMA and also the Department of Consumer Affairs has ensured that ASCI has a direct platform to redress the grievance of the consumers and take legal action along with FSSAI as well as update FSSAI advertisement norms as well as the market functioning. The independence that was taken away from ASCI, practically changed its agenda to the extent that competitors lost their faith in being protected against misleading advertisements, as this platform treated consumers with an upper hand. The motto of ASCI itself, which is "Advertising that works with a conscience, a salute to Indian **Consumerism**" makes the scenario more evident. The Advertisement Standard Council of India's code as a backbone to the motto, lays down the framework within which advertisement is permissible and public interest is not diminished. The intricacies of the lack of options with the competitors can be understood by studying another guideline laid down in the code. Chapter IV of the ASCI code, dealing with permissible comparisons is worded as follows:

Advertisements containing comparisons with other manufacturers or suppliers or with other products including those where a competitor is named, are permissible in the interests of vigorous competition and public enlightenment, provided:

[30] FSSAI press release dates 28th June, 2016, available at: http://www.fssai.gov.in/Portals/0/Pdf/Press_Release_MOU_ASCI_28_06_2016.pdf

(a) It is clear what aspects of the advertiser's product are being compared with what aspects of the competitor's product.

b) The subject matter of comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.

(c) The comparisons are factual, accurate and capable of substantiation.

(d) There is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared.

(e) The advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication.

However allowing this comparison is a slightly vague idea because it ensures, that the negative aspects of the competitor are highlighted overshadowing the positive implications of a product. An example of this here would be a seller who manufactures beverages with artificial sweeteners, comparing his product on the basis of calories with his competitor manufacturing a similar beverage with sugar. The comparison maker, i.e. the manufacturer producing beverages with the artificial sweetener gets away with the implications on health of such artificial sweeteners in the long run. Such sweeteners being carcinogenic, have been banned by massive world class consumers including US, may further cause sugar cravings and have the same reaction in the brain that nicotine has. A popular argument given by the comparison maker in this scenario is that the consumer makes an "informed choice". The irony of this "informed choice" is that most consumers fall prey to the unchecked comparisons and choose carcinogenic substances over naturally occurring ones, since the competitor, the beverage manufacturer with real sugar remains paralysed and has no chance to rebut the accusation he is arrowed with.

ASCI guidelines state that advertisement must not be misleading or deceptive. All scientific claims should be backed by studies and experiments and should not show inappropriately large portions of any food or beverage. Examples of specific instances of its operation off late, have been written notices by ASCI to

1. ITC, for "Aashirvaad Multi grain aata" the nutritive value of which does not substantiate the label, [31]
2. Pan Parag for not having a proper disclaimer, [32]

[31] ASCI Consumer Complaint Council decision, January 2016, Press release on 5th April, 2016.

3. Dabur for adulterated honey etc.[33]

The analysis of such application of guidelines show that complaints majorly came into light after consumers objected or approached it. Needless to say, while competitors can approach ASCI as well, it remains evident that they are "second class citizens" in respect of misleading advertisements owing to the intent behind setting up of ASCI. Legal notices and legal actions are given by ASCI in corroboration with FSSAI giving the impression that it works in the interest of the public majorly.

Therefore, it can be concluded that the two bodies act in symbiosis for the interest of the public. Competitors may approach ASCI but the practicality of this has been reduced widely, simply because of the intent behind setting it up (which favours the interest of public over the interests of competitors) and also because there has been a loss of its independence as it has been acting in corroboration with FSSAI.

CONCLUSION

Though there exist legislations covering unfair trade practices and market balances, they still lack specific provisions with respect to the adverse effects of misleading advertisements on competitors. A part of that can be attributed to the fact that such competitors inherently want to stay away from legal hassles even if it is at the cost of their rights, while others are themselves knee-deep into committing this offence. Most competitors would find even the slightest legal proceedings defamatory as well as expensive. There also exists a major risk of false legal notices by competitors to degrade a popular brand name in the market. Moreover, mostly consumers approach ASCI or consumer forums and keep a basic check on the quality levels, packaging etc., even if the issue of misleading advertisements may not be taken up by them on a day to day basis.

As discussed earlier, the major issue with the current approach is that India being a welfare nation, the primary focus is on the issues faced by consumers and not the issues faced by the competitors. We cannot blame the legislation makers for the same entirely, as this problem has not been highlighted by the competitors themselves for various practical consequences that may follow. At the end of the day, they all are doing the same thing. However, the radar of the Competition Act needs to be increased further to include this issue, which has for a long time been hushed between voices of corporate survival.

[32] ASCI Consumer Complaint Council decision, February, 2016, Press release on 5th May, 2016.
[33] ASCI Consumer Complaint Council decision, January 2016, Press release on 5th April, 2016.

In furtherance, there needs to be an independent redressal platform for competitors. An independent redressal platform for competitors essentially means one which does not give prime importance to the grievances of the consumers and treats consumers as well as competitors on the same wavelength. Most organizations like ASCI have lost independence and have now become majorly consumer-oriented grievance platforms. This independent platform should comprise of fifteen people, including experts like data analysts and nutritionists, for a more versatile opinion about every case. This panel should have retirement by rotation and experts running it should be nominated luminaries in the field of advertisements. Further there should be a Presiding Officer, who would be the senior most member in the panel, however, he should be given an edge only to supervise the general discussion and debate for every case that comes up to them. Veto power is not necessarily required for such presiding officer. Every member should have an equal say in the issue in front of the panel for discussion and there should be a quorum as well that must be ensured. The decisions should be taken by simple majority and the losses faced by a competitor due to unfair advertisements should be carefully scrutinized while such a decision is to be given. This would ensure fairness and practicality as it would be a fairly independent body. If the court feels that such injunctions, penalties etc. are prima facie irrational an order curtailing such act of the quasi-judicial tribunal may be passed. This would keep a check on the power of the panel and ensure there would be no misuse. Also, there should be a time limit of 6 months for the efficient analysis and decision making by such panel. Moreover there should be a strict procedure for removal of members from the panel if decisions by such member are taken in his personal interests etc. A body like this, with the said variation in its constitution and a diversity of legal opinion along with a strong check on its effective functioning, would ensure that there is light for a redressal mechanism for competitors.