[FR] Dispute over Commercial – CSA Position Upheld by the Courts

IRIS 2008-6:1/11

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The courts have finally intervened in the "opposition" debate between the *Bureau de Vérification de la Publicité* (advertising regulatory board – BVP) and the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory authority – CSA) over the commercial for the sale of medicines not refunded under the health service in Leclerc hypermarkets (see IRIS 2008-5: 8). Disregarding the BVP's negative opinion, the CSA had authorised the broadcasting of the commercial in which the chain of hypermarkets, noting that the increase in the prices of medicines sold in chemist's dispensing shops that were not refunded by the health service, called for its parapharmacy departments to be allowed to sell them "at Leclerc prices". Once the CSA's favourable opinion had been made public, unions of pharmacists, who are at present the only people authorised to sell such medicines in their chemist's shops, referred to the judge sitting in urgent matters at the Regional Court in Colmar to have the advertising campaign withdrawn as they felt it was misleading and excessive. On 21 April 2008, the court found in their favour, holding that the advertising could be qualified as an unfair commercial practice inasmuch as it created a confusion between the products sold in a chemist's shops and those authorised for sale in a parapharmacy shop or department, and because its presentation was misleading as to the existence and the availability of medicines in supermarkets. The message was also deemed simplistic and in violation of Article L.121-1-12b of the Consumer Code, in that it failed to determine the characteristics of the product and led consumers to believe that all that was needed was to set up inside the supermarkets a dedicated area under the supervision of a qualified pharmacist. In doing so it denigrated pharmacists. The judge sitting in urgent matters concluded that the ambiguous presentation of the issue of the price of medicines not refunded by the health service in this aggressive, unfair advertising was causing a manifestly unlawful nuisance. The television commercial and the printed advertisement have therefore been banned, on pain of payment of a fine of EUR 20,000. The Leclerc Group immediately appealed against this unfavourable decision, and in a decision delivered on 7 May 2008 the Court of Appeal in Colmar overturned the previous judgment. Firstly, the claim of misleading advertising brought by the unions of pharmacists cited in the initial proceedings was rejected, since "it is not possible to consider *a priori* that the allegation of the beneficial effect of opening up to competition is manifestly false". The Court found that the advertising did not constitute "true denigration" of chemist's shops either. Thus it affirmed that the

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image of the necklace of pills used in the advertising was “probably rather aggressively ironic, but does not manifestly exceed the limits of what is permitted in terms of humorous expression”. Similarly, the allegation of competition was judged to be “manifestly inapplicable”. In the end, "none of the claims made in a rather vague manner by the parties concerned are in fact characteristic of a manifestly unlawful nuisance likely to be caused by the advertising organised by the Leclerc Group”. Hence in accordance with the CSA’s opinion, the disputed advertising could once more be freely broadcast.

TGI de Colmar (ord. réf.), 21 avril 2008, SAS Univers Pharmacie c/ SC Galec et Leclerc

Regional Court of Colmar (sitting in urgent matters), 21 April 2008, S.A.S. Univers Pharmacie v. S.C. Galec et Leclerc

Cour d’appel de Colmar (1e ch. civ. sect. B), 7 mai 2008, SA SG Galec et Groupements d’Achats des Centres E. Leclerc c/ SAS Univers Pharmacie

Court of Appeal in Colmar (1st chamber, civil section B), 07 May 2008, S.G. Galec et Groupements d’Achats des Centres E. Leclerc S.A. v. S.A.S. Univers Pharmacie

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