First Italian case on advertising of electronic cigarettes

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On 5 November 2019, the Court of Rome, by adopting a restrictive interpretation of Italian legislation, ordered two companies to block the delivery of some commercial communications relating to electronic cigarettes (e-cigs) and liquid refills, as an urgent measure.

Article 21, paragraph 10, of Legislative Decree No. 6/2016 (which implemented the EU Directive 2014/40/EU on tobacco products) provides for a ban on the advertising of e-cigs and refill liquids. Specifically, it prohibits the following activities which have the aim or the direct or indirect effect of promoting electronic cigarettes and refill containers:

Commercial communications in information society services, in the press and other printed publications, except for publications that are intended exclusively for professionals in the trade of e-cigs or refill containers and for publications which are printed and published in third countries, where those publications are not principally intended for the European Union market; Commercial communications on the radio; Any form of public or private contribution to any event, activity or individual person which may have transnational effects; and Audiovisual commercial communications to which Directive 2010/13/EU (Audiovisual Media Services Directive - AVMSD) of the European Parliament and of the Council applies.
In the case at hand, an association of consumers sued two companies, alleging that the advertising activities they were carrying out were in contrast with Article 21, paragraph 10, and therefore illegal. The court ordered the following advertising activities to be immediately blocked: (i) Publication of e-cigs pictures on the Internet, specifically on the companies' websites and in their social media (that is, Facebook, Instagram), including the re-post by the companies on their social channels (also through the use of links) of messages autonomously posted by third parties (for example, influencers) with hashtags that recall a brand or model of e-cigs; and (ii) Posting of posters and advertising billboards in public places or places open to the public or on public transports (as was the case in Rome).

First of all, the court recalled that the only texts allowed are those containing information, descriptions and instructions on the use of e-cigs without promotional contents (that is, information on prices and the technical characteristics of the product, such as ingredients, taste and nicotine content). Consequently, the company may only provide such information on its official website and social

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channels. For the same reason, only images of e-cigs and liquid refills used to help in the choice of the product to be purchased or to describe the products' technical characteristics are allowed. Therefore, any information or image provided without this intent falls within the ban provided for by Article 21 of Legislative Decree No. 6/2016, due to the nature of commercial/advertising communication.

Secondly, the court clarified that the "commercial communication" prohibited by Legislative Decree No. 6/2016 includes any form of communication intended, directly or indirectly, to promote the sale of goods and services to consumers, pursuant to Legislative Decree No. 70/2003, by using a wide interpretation of this wording.

Thirdly, the court specified that the prohibition of commercial communications in the "press and other printed publications" covers commercial communication carried out not only in the press, but also on "any type of typographical or photographic reproduction intended for publication on media other than printed paper" such as posters and advertising billboards placed in public places or open to the public and on public transport.

The decision of the Court also includes some guidelines, most notably:

Texts containing information, descriptions and instructions on the use of e-cigs without promotional contents are allowed; Images of the products can be published on the homepage of the company's website in order to immediately inform the consumer of the fact that they have accessed the official site of a company that produces and/or markets that particular type of e-cigs; The company may have an official website as well as social media channels where the information above can be published; and Posts published by third independent users without any kind of compensation (that is, user-generated contents), with hashtags that recall a certain model or brand of e-cigs, are out of the companies' responsibility.

Tribunale di Roma, sezione XVII civile specializzata in materia di Impresa, ordinanza 5 novembre 2019, n. 57714

Court of Rome, civil secction XVII specialized on commercial affairs, ordinance no 57714 of 5th November 2019

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