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# Fighting Back Against Misleading Competitor Advertising: How Garmin Successfully Navigated a Route to Banning Misleading Claims by TomTom in the United Kingdom and the Netherlands.

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## Introduction

Misleading advertising by a brand's competitors can take many forms. When it uses the 'target' brand's trade marks, and therefore falls within the narrow definition of explicit comparative advertising and potentially of trade mark infringement, the paths of legal recourse are well trodden. However, when the 'target' brand sees a rival striving to obtain a competitive advantage by making claims which it believes to be exaggerated, unsubstantiated, or otherwise misleading, but which do not use the target brand's trade marks, its options are more limited.

Modern technology and the growth of advertising on the internet are also creating new challenges. For example, a brand may have its place of establishment in one country, but its marketing function based in another, from where the marketing claims on its website are controlled. But when a consumer visits that website, with a '.com' domain name, the website can read the consumer's IP address and direct him to the appropriate national sub-site. This will mean the consumer sees pages in his local language, with localised content and prices quoted in the local currency. In that case, where should complaints about that advertising be heard? In the country where the advertiser is 'established' or the one from where its marketing is controlled? But if the advertising is localised, should it be heard in the country where the relevant complainant is based, regardless of whether that complainant is a competitor or a consumer?

In this article we will examine the legal and regulatory options available to an advertiser that wants to challenge misleading advertising by a competitor which is damaging to its brand, and which may identify it by implication, but which does not use its trade mark, so the option of trade mark infringement proceedings is not open. We shall look at these issues in relation to a particular case study, which resulted in the UK's Advertising Standards Authority upholding complaints in February 2015 by the satellite navigation company, Garmin, about advertising by its Dutch competitor, TomTom. The claims appeared in both traditional media and on TomTom's own website.

**Background**

More than just mere ‘knocking copy’, the recent history of comparative advertising is laden with industry defining disputes and memorable campaigns. In 2010, Adweek declared Apple’s PC v Mac spots to be the best advertising campaign of the decade. Marketing budgets have been commandeered to fight cola wars, razor wars and console wars. In order to stand out from the competition, we’ve been promised whiter whites, faster broadband, better tasting coffee and longer lasting washing up liquid.

The practice, however, is not without its risks. Comparative advertising has also caused its fair share of legal actions and PR disasters. It has even prevented some campaigns getting to air. In 2012, Sodastream was forced to abandon use of its £11 million global ad campaign after the UK clearance body Clearcast decided it denigrated the soft drinks industry and refused to clear it for broadcast.

Comparative advertising can take various forms including:

- explicit comparisons with named competitors (such as supermarket price comparison campaigns);
- implicit comparisons (such as the British Airways “the world’s favourite airline” strapline);
- negative ads pointing out negative aspects of competing offerings (such as Apple’s PC v Mac campaign); and
- descriptions of a product/service by reference to a competitor’s product/service.

The practice of comparative advertising has long been established in the United States. As early as 1963, the Federal Trade Commission (FTC) declared “*we know of no rule of law which prevents a seller from honestly informing the public of the advantages of its products as opposed to those of competing products*”. In the Member States of the European Union (EU), however, as recently as the late 20$^{th}$ century, comparative advertising was prohibited in several jurisdictions due to concerns such as unfair competition and intellectual property infringement, particularly trade mark infringement. In some countries, such as the United Kingdom (UK), comparative advertising was seen as a stimulus to competition and innovation, allowing competitors to promote the advantages of their products and services to consumers. In some sectors, such as automotive, comparative advertising was tolerated by car manufacturers, despite the fact that UK trade mark law did not even permit the use of third party trade marks until the implementation of the Trade Marks Act 1994. In Germany, on the other hand, comparative advertising was seen to be anti-competitive, confusing consumers about the relative advantages of different products. It required a change in the law at the European level before comparative advertising would be permitted across the EU, including Germany.

**EU law**

Two key EU directives underpin the legal framework that regulates misleading and/or comparative advertising:

1) Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (the “Unfair Commercial Practices Directive” or “UCPD”).
   The UCPD introduced a prohibition against unfair commercial practices with the aim of creating a harmonised high level of consumer protection across the EU. The definition of commercial practices includes commercial communications (such as advertising and marketing) by a trader directly connected with the promotion, sale or supply of a product to or from a consumer.

The UCPD introduced a three tiered system of protection:

(a) A general prohibition on unfair commercial practices (effectively a general duty to trade fairly);
(b) A prohibition on misleading acts or omissions and aggressive practices; and
(c) A prohibition on 31 specified commercial practices which will be considered unfair in all instances (the "blacklisted practices").

Whilst the blacklisted practices will always be considered unfair, for other commercial practices to be in breach of the UCPD it must be shown that they may cause the average consumer (who is defined as reasonably well-informed and reasonably observant and circumspect) to take a different transactional decision than he would have otherwise.

2) Directive 2006/114/EC concerning misleading and comparative advertising (the "Comparative Advertising Directive" or "CAD")

In introducing this legislation to allow use of the practice across the EU, the EU Commission stated that comparative advertising, when it compares material, relevant, verifiable and representative features and is not misleading, may be a legitimate means of informing consumers of their advantage.

CAD determines the conditions under which comparative advertising must be permitted by EU Member States. Comparative advertising is widely defined under CAD as 'any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor'.

Article 4 of CAD sets out a checklist of eight conditions for comparisons, all of which must be met before a comparison is permitted.

I. It is not misleading (by act or omission);
II. It compares goods or services meeting the same needs or intended for the same purpose;
III. It objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
IV. It does not discredit or denigrate the trade marks, trade names, or other distinguishing marks, goods, services, activities or circumstances of a competitor;
V. For products with designation of origin, it relates in each case to products with same designation;
VI. It does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
VII. It does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;
VIII. It does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor.

If a comparison uses a third party trade mark but does not meet all of the Article 4 requirements, the advertiser will lose the protection provided by CAD against trade mark infringement. Advertisers should take note, however, that the protection provided is not absolute. For example, condition VI requires that advertisers should avoid taking unfair advantage of a trade mark's distinctive character or reputation.

Both the UCPD and Article 4 checklist of CAD are deemed maximum harmonisation measures, so Member States cannot apply either a lower level of protection (which would amount to an inadequate implementation of the Directive) or a higher level of protection (which would therefore mean the Directive was no longer the 'maximum' level of protection) into their enabling legislation, other laws or self-regulatory rules.

One key difference in national implementation between Member States that will affect the practical use of the Directives is whether they grant a freestanding private right of action for businesses to enforce their requirements. In the UK this is not the case, although consumers now have a private right of action to enforce the UCPD as a result of changes implemented by the Consumer Protection (Amendment) Regulations 2014. In jurisdictions such as Germany and the Netherlands, by contrast, there are private rights of enforcement for brand owners, which make them interesting options for challenging misleading advertising, particularly where there is no element of trade mark infringement. Brands seeking to challenge misleading advertising by competitors will need to consider whether direct enforcement is available in the relevant jurisdiction and, if not, what other options are available, particularly through the local self-regulatory regime.

**Self-regulation**

In addition to the requirements under EU law, the majority of Member States have an advertising self-regulatory organisation (“SRO”). In the UK, the SRO is the Advertising Standards Authority (“ASA”). The ASA enforces two codes of practice: The UK Code of Broadcast Advertising (“BCAP Code”) and the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (“CAP Code”). The Codes are very similar in content but contain differences to reflect the different applicable media. In addition, broadcast advertising regulation is based on statutory regulation but is administered by the ASA under a co-regulatory arrangement with the Ofcom, the independent regulator and competition authority for the UK’s communications industries.

Both Codes contain general provisions that apply to all advertising and provisions that apply to specific sectors, such as alcohol, gambling, and medicine. With regards to misleading and comparative advertising, as stated above, the relevant EU legislation implements maximum harmonisation measures and consequently both Codes mirror the requirements of UCPD and CAD. Nevertheless, despite this, given the differing structure, resources and processes of the UK courts and the ASA, it is by no means certain that the outcome of a complaint to the ASA would be the same as if a court considered the issue. Historically, UK courts have sometimes tended to favour free speech considerations to a greater degree than the ASA and have been willing to credit the 'average consumer' with a higher degree of scepticism and insight.

Like CAD, the CAP and BCAP Codes do not require a competitor to have been explicitly named for the ASA to apply its rules relating to comparisons against an identifiable competitor. Both Codes also stipulate that comparisons in relation to unidentifiable competitors must not be misleading and that the elements compared must not give the advertiser an unrepresentative advantage.

Whilst the ASA is a self/co-regulatory body, compliance with the Codes is mandatory. The ASA does not have the power to fine advertisers who breach the Codes but relies instead on a suite of sanctions including media refusal and, as a last resort, referral of the advertiser to Trading Standards or Ofcom.

In practice, the main sanction is negative publicity. The ASA publishes its decisions online every Wednesday and these are picked up by the press. An element of uncertainty for a brand is that there is no way of knowing which ruling will be the focus of press attention in any particular week. All rulings remain accessible on the ASA's website for the next 5 years and this creates the risk that search engines will return results that include the ASA's ruling or corresponding media reports.

The Dutch self-regulatory system is quite similar to the system in the UK. The Dutch SRO is the Advertising Code Authority ("*Stichting Reclame Code*"). The Advertising Code Committee ("ACC") and the ACC's Board of Appeal are tasked with the enforcement of the Dutch Advertising Code and several special codes on specific types of advertising. If an advertisement is found to be in breach of one of the Codes, the ACC will issue a recommendation to no longer advertise in this manner. If an advertiser does not comply with a ACC recommendation, it may be named and shamed on the website of the Advertising Code Authority and the case may be referred to the Netherlands Authority for Consumers & Markets. The ACC cannot impose fines. However, its decisions are generally followed: the Advertising Code Authority states a 96% compliance rate in its most recent annual report.

**Enforcement options**

Where a brand considers a competitor's comparative advertising is either unlawful or in breach of the self-regulatory system, the route of enforcement it chooses (if any) will naturally depend on the particular circumstances.

Cost will always be a key factor. If the budget for legal costs is small, the case against the advertiser not particularly strong, or the cost-benefit analysis only marginally favours taking action, it is likely that the self-regulatory route should be adopted. Complaints to SROs are often free of any application fee, unlike legal proceedings. The more simplified process by comparison with the legal system also ensures that professional fees will typically be far less. Cost recover is also a key consideration; the successful complainant will not be able to recover its costs from the 'defaulting' advertiser, even if the complaint is upheld.

As well as the financial advantage, there is also a key procedural advantage for a brand in taking on the role of 'complainant' to an SRO, rather than 'claimant' to a court. SROs often operate a 'reverse' burden of proof. Rather than the complainant or the SRO having to prove that the advertiser is in breach of the relevant code, it is for the 'defendant' advertiser to prove that its advertising adhered to the relevant requirements at the time of publication, and furthermore that it did not subsequently become misleading as a result of a change in the factual situation. In this year of the 800th anniversary of *Magna Carta*, it is interesting to note that the principle of 'innocent until proven guilty' has yet to take hold in the area of advertising regulation, but sometimes, when you are the complainant, that can be very advantageous.

As mentioned above, Member States do not necessarily cater for direct enforcement of the CAD or UCPD. In those jurisdictions the options available for a brand to pursue its enforcement under the Directives will be more limited. For example, in the UK, whilst other enforcement options exist, they are only likely to be realistic in narrow circumstances. These include an action for trade libel, copyright infringement, malicious falsehood or passing off. In addition, a disgruntled brand may be able to consider a private prosecution under the Consumer Protection from Unfair Trading Regulations 2008 (the UK's implementation of the UCPD), but in practice, this option is rarely exercised.

In opting for the self-regulatory route, however, brands should be mindful of the limitations. Complainants will not be able seek the remedies that would be available from a court e.g. an interim injunction or damages. The time scale for an investigation can vary enormously, from a few months, to well over a year, depending on a range of factors which are largely outside the control of the complainant. In the meantime, it is almost certain that the advertising will continue to run, unless the advertiser accepts that it is in breach and hopes to negotiate an informal resolution with the SRO.

Significant management time may also be required to organise a compelling complaint to an SRO, or to respond to an investigation, but this is still likely to be substantially less than would be needed to deal with litigation.

Confidentiality is another key issue. Although the complainant may have to divulge some confidential information to the SRO in order to prosecute the complaint, if particular material is identified as confidential, then this may not be divulged to the advertiser, although that may have a negative impact on the complainant's case. In the UK, the ASA will also share a draft recommendation of the ruling with both the complainant and the advertiser, and there will be a further opportunity to ask for confidential information to be redacted before the recommendation is sent for final determination by the Council of the ASA.

Whilst an SRO’s less rigid process may provide more flexibility in decision making that benefit comes with a corresponding reduction in certainty. The decisions of an SRO can also seem rather unpredictable, and they are less likely to feel constrained by precedent than the courts. So even if an advertiser believes that it has a solid complaint, there is no guarantee that the SRO will deliver the expected decision. Furthermore, complainants more accustomed to the procedural requirements of the courts should also familiarise themselves with the procedures of the relevant SRO as those differences can often be quite marked. For example, where a complaint is made to the ASA, neither of the parties will see the other party’s submission; they are only provided with the ASA’s summary of that submission.

Even once the investigation has finally run its course, and assuming that the SRO has arrived at the desired decision and upheld the complaint, the ability of an SRO to enforce its decisions will also need to be considered. An upheld complaint will be of limited use if it does not prevent the problematic comparison from reappearing.

Campaigns that span borders bring added complexity but also further enforcement options. In relation to complaints to SROs, whilst theoretically brands may need to raise a separate complaint in each jurisdiction, obtaining a favourable result in just a few, or perhaps even just one, key jurisdiction(s) may successfully derail a comparative campaign.

**Case Study: Garmin/TomTom: Background to the dispute**

In the latter half of 2013, TomTom International BV (“TomTom”) sought to promote the traffic services available via its personal navigation devices. The campaign, headlined “TomTom gets you there fastest” (the “fastest claim”), sought to persuade consumers that use of its traffic services would result in them reaching destinations faster than if they used unnamed competing services. TomTom referred to two studies it had commissioned which it considered substantiated this claim. In addition, ancillary claims were included that set out the basis by which TomTom considered it outperformed the competition. Amongst other media, the campaign featured on TomTom’s website and in point of sale material in third party retail outlets.

The following facts are also of relevance to the dispute:

1) TomTom's registered office is in Amsterdam;
2) TomTom did not refer to Garmin by name nor feature any Garmin trade marks. Garmin, however, were implicitly identifiable given (a) the relevant market shares of TomTom and Garmin and (b) references in the ad were specific to the capabilities of Garmin's products and services; and
3) The campaign was translated into local languages and amended to feature references to local markets. All of TomTom's national websites operate under the TomTom.com domain name; visitors to TomTom.com are redirected to the relevant national site based on their geographical location (e.g. TomTom.com/en_gb/ for UK users).

On review of the claims and the supporting evidence, Garmin (Europe) Limited ("Garmin") considered that both the fastest claims and a number of the ancillary claims were misleading as TomTom did not hold robust data to substantiate them.

**Enforcement route**

The choice of enforcement route for Garmin given the facts was fairly limited. TomTom had not included any of Garmin's trade marks in the campaign and so an action for trade mark infringement was not an option. Garmin's primary concern was the claims made in the UK market in which no freestanding private right of action under the UCPD or CAD is available. Complaints to Trading Standards to bring an enforcement action were unlikely to prove successful given the recognition of the ASA as an established means of enforcing the UCPD, as well as the pressing need to Trading Standards to prioritise their work given their very limited resources.

**Other Legal Options**

In some circumstances, there may be other legal options available but none of those appeared to be realistic for Garmin. For example, TomTom had not used any copyright works belonging to Garmin, therefore there was no possibility of copyright infringement. There also did not appear to be any facts that would have given rise to a claim for passing off. For example, there was no reference or allusion to Garmin's advertising which would have confused or misled consumers into thinking that they were seeing advertising by Garmin rather than TomTom. Some advertisers have succeeded in bringing cases for malicious falsehood in circumstances where they had not been named and therefore their trademark has not been infringed. However a significant hurdle to a malicious falsehood claim was that Garmin would have needed to have shown that TomTom either knew that the fastest claim was false or was reckless in relation to the falsity of the claim. That would have been a very high bar to overcome, particularly as TomTom had its own research which it considered substantiated its claim, albeit that Garmin disagreed.

As a result, Garmin's most viable option was a complaint to the ASA. In the case of competitor complaints, the ASA requires the complainant to attempt to settle the matter directly with the advertiser before contacting the ASA. In line with this requirement, a letter was sent to TomTom outlining Garmin's concern with the campaign and a request that its advertising be amended. TomTom responded that it considered its claims were accurate and that it held adequate substantiation and consequently a complaint was raised to the ASA about the fastest claim and the ancillary claims that appeared on TomTom's website (point of sale materials are outside the ASA's remit). It is worth noting, however, that in certain circumstances, receipt of such a letter can be all it takes to convince a competitor to review and amend its advertising and thus avoid the need for a complaint to the ASA.

**Jurisdiction issue**

After some initial consideration of the complaint, the ASA responded to Garmin to state that it was unable to investigate the complaint on the basis that TomTom's website was not a 'UK website'.

The remit of the CAP Code expressly includes:

> *Advertisements and other marketing communications by or from companies, organisations or sole traders on their own websites, or in other non-paid-for space online under their control, that are directly connected with the supply or transfer of goods, services, opportunities and gifts, or which consist of direct solicitations of donations as part of their own fund-raising activities.*

It excludes, however:

> *marketing communications in foreign media. Direct marketing communications that originate outside the United Kingdom and sales promotions and marketing communications on non-UK websites, if targeted at UK consumers, are subject to the jurisdiction of the relevant authority in the country from which they originate if that authority operates a suitable cross-border complaint system. If it does not, the Advertising Standards Authority (ASA) will take what action it can…*

The ASA considered that all webpages that sat behind the domain name TomTom.com amounted to one website and, because TomTom was based in the Netherlands, its website was a non-UK website. As such, the ASA considered that Garmin's complaint should be dealt with by the Dutch SRO in line with the European Advertising Standards Alliance ('EASA') cross border complaints process. EASA is a non-profit organisation the membership of which includes the SROs of various European countries (and some non-European members). Amongst other roles, it operates a cross-border complaints process which has two main principles. Firstly, a country of origin principle applies (i.e. advertisements must comply with the rules of the country where the media is based) and secondly, EASA members must agree to accept advertisements which comply with the self-regulatory rules in the country of origin of the media.

The lack of a meaningful definition as to what constituted a 'UK website' hampered any attempts by Garmin to dispute the finding that TomTom's UK web pages did not amount to a separate UK website. Despite users being automatically redirected to the relevant national website based on their location and that website being a self-contained set of pages featuring the same content as the other national websites albeit customised for that market (e.g. local language, maps, pricings, cultural references, applicable law) the ASA maintained that TomTom.com was exclusively a Dutch website. This was particularly frustrating for Garmin given a large number of inconsistent decisions by the ASA that similar websites were UK websites. Whilst decisions made by the ASA are subject to judicial review, the cost and delay involved meant this was not a feasible option. Furthermore, the bar is set high when attempting to judicially review the decision of a public body in the UK and historically the ASA has been particularly impervious to such attempts. Of potential benefit to Garmin (and other advertisers who find themselves in this position) was that, according to the ASA's interpretation, all of TomTom's national websites amounted to one website based in the Netherlands and should therefore be bound by the decision of the Dutch SRO.

As the same claims had been used by TomTom in other UK media, Garmin's complaint to the ASA was allowed to continue in relation to that media. The ASA's investigation, however, was put on hold whilst the Dutch SRO reached its decision.

**Cross border campaign**

In accordance with the EASA referral system, Garmin's complaint was forwarded by the ASA to the Dutch SRO: the Dutch Advertising Code Committee ("ACC"). The ACC ordered a hearing to be held at the offices of the ACC in Amsterdam. This is in contrast to the ASA complaints process which does not allow oral hearings. Following the hearing, the ACC held that the two studies used by TomTom to substantiate its "fastest claim" provided sufficient basis for that claim. Garmin's complaint was only upheld with regard to an ancillary claim about the accuracy of TomTom's traffic reports. As Garmin's primary concern was the fastest claim, an appeal was lodged with the Board of Appeal of the ACC. There was another hearing in Amsterdam and, five months after the original ACC decision, the Board of Appeal rendered its own decision. The Board of Appeal found that TomTom's two studies were not robust enough to present as a fact that TomTom's traffic service would bring a driver to his destination fastest. As a consequence, TomTom's fastest claim was found to be misleading. The Board of Appeal annulled the decision of the ACC and, in accordance with its rules of procedure, issued a recommendation to TomTom "*to no longer advertise in this manner*". TomTom had expressly argued that a recommendation, if issued, should be restricted to advertising claims in the United Kingdom, since otherwise the recommendation would apply to other countries as well. However, the Board of Appeal worded the recommendation in general terms, thus accepting that its recommendation would apply to advertising claims in countries other than the United Kingdom. Apparently, the Board of Appeal agreed with the ASA's interpretation that all of TomTom's national websites should be bound.

TomTom complied with the Board of Appeal decision and proceeded to remove the fastest claim (and ancillary claims) from all of its national websites, including the UK website.

Following the ruling in the Netherlands, Garmin would have been entitled to expect the ASA to quickly reach its own decision mirroring that rendered by the Dutch Board. The complaints to each SRO and the 'average consumer' were identical. Furthermore, the codes of practice of both SROs are subject to the maximum harmonisation requirement of the UCPD. Despite this, it was a further four months before the ASA published its ruling. The delay was primarily caused by the ASA allowing TomTom to source new evidence to attempt to support its claim. Doing so is not in accordance with the ASA's own procedures as advertisers are required to hold evidence to substantiate their claims before publishing advertising. The ASA´s purported rationale for doing so was that TomTom's 'new' evidence was not new as such but sought to clarify the existing evidence. Despite TomTom's efforts, both the fastest claims and all of the ancillary claims were found to be in breach of the CAP Code. Frustratingly for Garmin, no new evidence was referred to in the ASA's ruling. This indicates that either TomTom was unable to source new evidence that indicated its original evidence adequately substantiated the advertising claims or that TomTom's request for further time was merely to delay the ASA's final ruling until after the critical Christmas sales period.

The final ruling raises an interesting procedural issue. Unlike the Dutch ruling, the ASA upheld each point of Garmin's complaint. In a legal action, the principle of res judicata would have applied to prevent this outcome occurring. It also calls into question whether the decision was made in compliance with the maximum harmonisation requirement of the UCPD. This is perhaps indicative of one the facets of the self-regulatory system; whilst its flexibility compared to the legal system may be advantageous in certain circumstances, the uncertainty and potential for incongruous outcomes can cause difficulties. An example of this occurred in the Dutch hearing in which TomTom was able to make new arguments attacking an expert witness report thus giving Garmin no opportunity to consider and respond as further submissions were not permitted after the hearing.

Although there was little in the way of negative PR (similar to court rulings, only certain ASA ruling lend themselves to media attention, e.g. those involving celebrities or topical issues), TomTom, as is the case with the overwhelming majority of reputable advertisers, complied with the ASA's ruling and modified both the fastest claim and the ancillary claims. It is worth noting, however, that the final ruling came more than a year after the initial submission of the complaint to the ASA. Whilst this is not typical of complaints made to the ASA, nor is it a rarity, especially with competitor complaints. If a significant factor in opting for the self-regulatory route is speed of resolution, advertisers should bear this in mind.

**Conclusion**

In the end, the options available to an advertiser who believes that it is the victim of misleading advertising by a competitor will be driven by the facts. If it is an express comparison in which the trademarks of the brand have been used in a way which conflicts with CAD, then proceedings for trademark infringement will be the fastest and most effective option, but will also carry the greatest costs risk. Where the trademark has not been used, the options will be more limited and pursuing legal proceedings may be more difficult and therefore more costly and more risky. If the facts permit, it may be worth considering bringing proceedings in jurisdictions such as Germany or the Netherlands where unfair competition laws can be more readily enforced by competitors against each other. Otherwise, a complaint to the local SRO, such as the Advertising Standards Authority, may be the best option. Although there can be uncertainty about the outcome and the time that it will take to achieve a result, the costs and risks are a great deal lower than legal action and the sanction of negative publicity can be very powerful, particularly when enhanced by the successful complainant.

**Practical guidance**

**For advertisers**

- Due diligence: Review similar SRO decisions and guidance to ascertain precedent in relation to a particular claim.
- Ensure robust substantiation is held: simply maintaining a paper trail of 'evidence' is a risky strategy; the data should be reviewed and stress tested to ensure it will stand up to third party scrutiny
- Avoid denigrating competitors: concentrate of the strength of your product rather than the weakness of your competitors.
- Market test your advertising: consider possible negative reaction especially if you are market leader/large brand.
- Do not forget verification: where advertising includes a comparison with identifiable competitors, the ad should contain a signpost to where consumers and competitors can find information to verify the claims.

**For competitors**

- Focus on your objectives: A complaint to an SRO (which could potentially take over a year to resolve) may be of no use if the immediate removal of an ad is the objective. Whilst more costly and risky, legal action may be required in such circumstances.
- Check precedent: Has the relevant regulator already upheld a complaint about a similar claim or issued guidance? An existing position will help inform your decision as to the appropriate action to take.

- Is a complaint in your best interests? Complaints that are not upheld could be as damaging, if not more than, the original campaign. Carefully assess the merits of your complaint/claim before pressing ahead.
- Is a campaign response necessarily a good idea? It is particularly risky where you are the market leader or a dominant brand as it may not generate the goodwill hoped for.
- Seek to resolve the issue with your competitor directly: even where this is not a requirement of the requirement of the SRO, this, in certain circumstances, can be the quickest and most cost effective method of resolving the matter.

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**Garmin** is a leading worldwide provider of navigation and communication devices. Garmin has five primary business units, auto/mobile, aviation, fitness, marine, and outdoor recreation. Garmin designs, develops, manufactures, markets and distributes a diverse family of handheld, wearable, portable and fixed-mount GPS-enabled products and other navigation, communications, and information products. Garmin has more than 11,000 associates in 35 offices worldwide.

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**Lewis Silkin LLP** is recognised as a leading firm in the fields of Advertising & Marketing Law, with unrivalled strength in depth along with unparalleled experience of all aspects of advertising and marketing work. The firm works with a wide variety of both advertiser and agency clients, as well as technology companies, new media and digital agencies, advising on all aspects of traditional and newly emerging marketing techniques, in any media and on any platform. Lewis Silkin is the member for the United Kingdom of the Global Advertising Lawyers Alliance.

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**Hoogenraad & Haak** (www.hoogenhaak.nl) is an independent boutique law firm based in Amsterdam. The firm counsels international and domestic corporate clients, mainly operating in the advertising, food, retail, fashion, entertainment and design industries. Hoogenraad & Haak is widely recognised as the pre-eminent firm for advertising law in the Netherlands, and is the Dutch member of the prestigious Global Advertising Lawyers Alliance (GALA). The firm can also boast a high profile broad IP practice, counselling clients such as Royal Ahold. In addition, Hoogenraad & Haak is one of only a few Dutch firms truly specialising in health, beauty and food law.