PROF. DR. GYÖRGY CSÉCSY

Prof. Dr. György Csécsy, *University Professor of Law, Head of Civil Law Department University of Debrecen Faculty of Law*

HUNGARIAN AND INTERNATIONAL ASPECTS OF ADVERTISEMENT LAW*

1.)

Exact definition for advertisement law does not exist in the Hungarian legal system. Since the legislator intended to regulate only the economic rules of advertising and marketing as activities, no common position exists about what the definition of advertisement is.

This situation gets more complicated when we take into account the fact that the definition of advertisement is different from the standpoint of a lawyer and an economist. Economy sees advertisement as a way of spreading information to get more profit. This means for an economist that social advertisements and political ads cannot be marketing activities, while sponsoring and product distribution are all parts of advertisement activity.

To summarize this we can say that according to the Hungarian law no common definition exists for advertisements and both practice and jurisprudence use the terminology of advertisement with doubt.

In my opinion the general definition of advertisement is the following: the advertisement is an instrument to spread out and or contain information with the purpose to pique the attention of potential costumers and encourage them for consumption. Economic advertisements are also important instruments in market competition as their goal is not only to increase the saleability of a certain product but to prove that the product is worth to be bought or the service is worth to be used and are better than others in the market. This significance of the advertisement also results the problem of unfair competition as for survival it is almost inevitable to infringe the reputation of other competitors or deceive consumers. And this is why the legal regulation of advertisement law has its validation and necessity these days.

2.) Advertising and marketing law in foreign countries

Since the 1970s in most of the western countries with developed advertisement culture emphasized the importance of consumer protection in their advertisement law. Before those days advertisement law was only regulated from a merely competition law angle and was considered to be an exclusive matter between competitors. This new approach is more dedicated to enact prohibitions and restrictions in order to protect the addressees of the advertisement including those with special positions because of their ages or lifestyle.

György Képes gave a definition for the necessity of a consumer protection oriented advertisement law: *"The starting point for regulating advertisement law is that most consumers are not considered to be professionals, they do not have detailed information about the market and competition and when they vote for certain products or services to please their necessities and desires they almost always rely on information coming from the market actors offering these product and services. This information is the key when consumers are forming their own judgments"*[1].

In the history of advertisement law we may realize a trend although most of the countries follow different conceptions and theories in the regulation of advertising and marketing law. This process is the following:

– At the very beginning advertisement law focused on false statements. An advertisement can cause the most serious damages if spreading out information that is not true. A consumer relying on this false information can only decide against his or her true will.

– Advertisements achieved a unique terminology and linguistics. It was not necessary to make false statements in order to deceive consumers and paint a false picture for them. Suppressing certain information, making connection between information from different sources might lead to the deception of consumers as well. That is why soon after the evolvement of advertisement law the focus for false statements transferred into deceptive statements bringing the terminology of deceptive advertisements to life.

– Soon after prohibitions of certain methodology of advertisements appeared. Especially in the first half of the 20th century some methods of advertisements used special position of consumer groups such as accosting consumers on the street, delivering goods without ordering, cold calling and other ways of infringement against the private sphere. Hidden advertisements and other unconscious methods of pressing advertisement elements of a product or service also appeared. It is different from state to state which method is the most dangerous one for the free will of the consumers but in many countries boundaries and prohibitions exist for certain methods of advertising.

– Finally if the legislator decided that the consumption of certain products or the usage of certain services can effectively be decrease with limitation of their advertisement, product and service specific advertisement prohibition were also enacted under the law. Some obvious examples are drugs, tobacco, liquor, dangerous goods. When a directive of the European Union does not cover the advertisement of a product, member states often adopt different rules for it.

After World War II regulating advertisement law got a more detailed and thorough form in most legal systems. Apart from the activity of the International Chamber of Commerce there was almost no history for advertisement law in an international level. That is why each country adopted its very own theory of advertisement law.

* Стаття друкується мовою оригіналу

There are countries (e.g. France) where the rules of advertisement law can be found in scattered sources of law, while in other countries (e.g. Portugal) a special code was designed to advertisements. In some countries boundaries and limitations for advertisements are among the rules of competition law (e.g. Germany), while in other countries the Civil Code enacts special provisions for advertisement boundaries (e.g. France). The judicial practice also deals with the problem with different approaches all over Europe. The main difference is how courts define and develop some legal institutions regarding advertisement law. In some countries judges may hardly take responsibility for this area of law (e.g. France), while in other countries courts interpret and develop these legal institutions defined by the law almost exclusively (e.g. Italy). In some legal systems advertisement prohibitions are also sanctioned by the instruments of criminal law (e.g. France), but in most countries it is absolutely not an option and only civil and administrative sanctions exist for infringing such prohibitions. The main purpose of regulating advertisement law is to ensure the success of consumer protection (e.g. Sweden) or maintain fairness in market competition (e.g. Germany). In some countries legislators leave a significant gap and role for self governing instruments of marketing profession (e.g. United Kingdom) and in other countries it is almost non existent and advertisement and marketing ethics is small (e.g. France). Regarding marketing and advertisement prohibitions for certain products some legal regimes are quite strict (e.g. Italy), while others follow a more liberal approach (e.g. Ireland). Another significant difference is how countries fight against prohibited advertisements. Some countries rely solely on the legal enforcement of the injured party (e.g. Germany), while others operate special bodies and authorities dealing with generating law suits and other procedures in the name of the injured consumers (e.g. United Kingdom, Sweden).

Many academics wrote about the obstacles in the way of enacting a unified European advertisement law. The most detailed one among these is the opinion of Arnold Vahrenwald, who gave a list of 12 obstacles. This list contains the different level of development in self governance of advertisement in the member states, differences in how judges interpret and consider the importance of advertisement law, different measure for protected interests, etc. I would like to express the followings from Prof. Vahrenwald's opinion:

"The core of national advertisement laws is usually the practice of injurious falsehood and unfair competition. Laws and acts governing these areas differ from state to state. In England passing off and injurious falsehood may generate common law procedures. In France and Italy the civil codes take care of the basics of protection, while other countries like Germany put the emphasis onto the practice of wrongful advertisements and unfair trading and commercial practices in separated acts."[2]

3.) EC directives governing advertisement law

In the laws of the European Union we can hardly find unified guidelines governing the area of advertisement law and ensuring a common position for the member states. That is why advertisement law remained a national territory for legislation for member states. This is the main reason why similar problems are treated differently in almost every member state.

In some special areas the European Union enacted directives governing parts of advertisement law institutions.

The first in a row was the 450/1984 EC directive (promulgated in OJL 250 – 09/09/1984) about deceptive advertisements. The directive is almost laconic and only deals with the most essential questions. The directives define deceptive advertisements: an advertisement may be deceptive if it is able to deceive those who are in the target group of the advertisement or those persons who receive the advertisement. The characteristic of a deceptive advertisement requires some kind of negative effect. The directive emphasizes three of these: the advertisement makes a negative impact on the economic behavior of the target group or it causes actual damage for competitors or at least it is able to cause damages for competitors. The directive gives a list of some circumstances to take into account for the decision whether an advertisement is deceptive or not: the content of the product, the method of calculating the price, the status, position and rights of the advertiser.

The second directive was the 552/1989 EC directive (promulgated in OJL 298. – 17/10/1989) about advertising in television. The second advertisement law directive deals with not a special method of marketing but a special and very important instrument of marketing activity. The directive requires that advertisements have to be identifiable in television and have to be separated from other program elements in the TV. As a general rule the directive establishes the requirements of honesty and fairness in television marketing. There are prohibitions in the directive against hidden marketing methods and methods that use an unconscious way of manipulating viewers. It also prohibits the marketing of tobacco products. The directive also prohibits the advertisements about medicines and medical treatments in those countries, where the usage of such medicines and medical treatments are only available for a doctor's order. The directive allows the advertisement of products containing alcohol but only if minors are not in the target group and the ads do not show minors consuming alcohol.

The first directive of the European Union that regulates a special group of products was adopted in 1992, the 28/1992 EC directive (promulgated in OJL 113 – 30/04/1992.) about the advertisements of human medicines. The directive prohibits the advertisement of those medicines available only with the recipe and order of a doctor. It also regulates the content of a medicine advertisement in details. There are positive (elements that a medicine advertisement must contain) and negative (elements must not be included in a medicine advertisement, like medical examination is unnecessary because of the consumption of a medicine) requirements in the directive as well.

In 1997 and important directive was born. This was the 55/1997 EC directive on comparative advertisements (promulgated in OJL 290 – 23/10/1997.). Finally this entangled area of marketing law became regulated under the European Union. The reason of accepting the directive was the divergent practice in the member states as it can be read in the works of Ferenc Jyzsef Vнgh: *"There is no other area of advertisement law like the problem of comparative advertisements. It is regulated in a thousand ways in every country."*[3]

The directive gives out positive and negative requirements for comparative advertisements.

Some of the positive requirements are: only those products can be compared in an advertisement that have the same designation and function, aim to satisfy the same needs. In case of the comparison of products with designations of origin only those products can be compared that have the same designation. Finally in general comparison can only be objective.

Some of the negative requirements: comparison cannot lead to the point where products and trademarks can be easily mixed up. No advertisement can disparage the product, service, activity or trademark of the competitor or make use of the goodwill of the competitor's special product or trademark.

Several directives dealt with the advertisement of tobacco products. First the 43/1998 EC directive (promulgated in OJL 047 – 18/02/1998.) established the prohibition on advertising tobacco products in the European Union. Direct and indirect marketing are equally prohibited and free trading and sponsoring are also on the no-no list of the directive. As an exception under this prohibition it is allowed to advertise tobacco products at the place where they are being sold. Advertisements with a professional purpose are also allowed. Those advertisements published or printed outside the European Union are also exceptions under the prohibition but only if these do not target the market in the European Union primarily.

The European Court of Justice annulled the directive in the case C-376/98[4]. Although the Court gave its reasonings from a formal point of view and that is why it found the absolute prohibition of tobacco advertisements against the Roman Treaty, some points of the reasoning gave excellent examples far beyond the regulation of advertisements for the lack of harmonisation in the area of advertisements. Zoltán Bárczy summerized the decision: *"The message of the decision is thet the jurisdiction of the European Communities are not without boundaries in the field of harmonizing law in order to ensure the effective operation of the internal market. There is almost no real situation in life when an act of laws has absolutely no impact on at least one of the four freedoms if this act is about an economic or market activity. Almost every act on this area has an impact on stopping the boundaries in the way of internal market competition. Because of these facts the interpretation of EC jurisdiction and harmonization established an almost limitless power for the Communities in a broad construction. This decision of the ECJ ended this limitless conception of EC jurisdiction in the field of harmonization and made a remarkable distinction between the jurisdiction of the member states and the EC."*[5]

After long debates the European Parliament and the Council adopted a stricter and more coherent directive about the prohibition of tobacco advertisemenst and sponsoring (33/2003 EC directive, promulgated in OJL 152 – 20/06/2003). The directive established a general prohibition on tobacco advertisements both in printed press and other channels of advertising and marketing. The only exceptions under the strict prohibition are the ads with professional purpose and press intended to target people outside the European Union.

In June 2002 a new directive was adopted on data protection in electronic communication (58/2002 EC directive, promulgated in OJL 201 – 31/07/2002). According to this directive e-mails containing advertisements can only be sent to the recipient with his or her former consent.

Another directive regulates how traders and sellers can communicate with consumers in order to sell their products or services (29/2005 EC directive, promulgated in OJL 149 – 11/06/2005). The reason why the European Union adopted this directive is to strengthen the confidence of consumers in international and crossborder commercial activities. The directive gives a general clause against the unfair trading practices and defines the meaning of a regular consumer. Beside the general clause the directive also put an emphasis on the deceptive commercial practices and the aggressive commercial practices along with a black list with detailed commercial methods and practices that are prohibited under any circumstances. Opposite the common position the directive was adopted with the purpose of maximum harmonization. Quoting Kinga Pбzmбndi: *"this theory did not leave any playground for the member states when adopting the directive with the instruments of implementation."*[6]

The 114/2006 EC directive implemented the directive on deceptive and comparative advertisements in consolidated structure without significant amendments (promulgated in OJL 376 – 27/12/2006.).

4.) Significances of Hungarian advertisement law

After the change of the regime the role of advertisements also changed dramatically in Hungary. A new and real market competition evolved and among these circumstances of the free competition advertisements are not only good for strengthening the need for consumption but for stressing the product or service of one or another company. Commercial radio and later TV stations arose that almost always rely on the income from paid advertisements. Advertisements using international methods and ads from abroad also spread out fast in the country. These changes resulted a new conflict in the market and with that the need for a new legal regulation. Ildiky Takбcs writes the followings about this phenomenon: *"The leading sector in the Hungarian change of the regime was the advertisement industry. Advertisement industry was a success story even before 1990 taking into consideration the frames and boundaries back those days. We cannot deny that the money spent on commercials in 1994 (42 billion forints) belonged to about 20 multinational marketing firm in 80 %, while the remaining 20% was shared by several medium enterprises and many small firms with only 2-10 members"*[7].

The competition (antitrust) act entered into force (Act LXXXVI. of 1990) on January 1st 1991 filling a major gap in Hungarian legislation. Before that competition law was only regulated because some international obligations of the country based on the Paris Union Convention of 1909 and only refered to classic competition law institutions. Earlier there was the Act IV. of 1984 about competition law but clearly this source of law was adopted under different circumstances that had nothing to do with real market relations and competition. Despite of this fact most pro-

visions of the former act was compatible with the needs of modern competition law since many Western European examples and experiences were taken into consideration when legislator adopted the act in the 1980s. The brand new situation in economy after the change of the regime still needed a modern and complex regulation on the field of competition law. Imre Vμrμs believes that competition law in Hungary had a linear development throughout history: *"It is a well known fact that Hungarian development was an example in the region and for the countries in the region. We should say that in Central and Eastern Europe Hungarian competition law is considered to be a pioneer. One of the reasons why Hungarian competition law had an impact on the region is that back in the 1970s jurisprudence, legislators and judicial practice stated proposals for codification with using experiences and models in many Western European countries. These proposals were implemented in the act adopted in 1984. That is why we think Hungarian competition law as a result of an organic and linear development in the country."*[8]

The first act about media law was adopted in 1996 in Hungary (Act I. of 1996). One of the major aims of the act was to *"help absolving the monopol situation of the Hungarian Radio and Hungarian Television and introduce competition on this market as well. On the other hand it was important to make sure that these two firms remain basic institutions and important actors in the market of Hungarian radio and television industry."* The act entered into force on February 1st 1996. It was another milestone in the history of Hungarian advertisement law as a special chapter was dedicated to commercials and ads in television and radio. The act also established definitions and terms for hidden advertisement, unconscious advertising methods. These terms were later used in the act of advertisements.

The first advertisement act of Hungary (Act LVIII. of 1997) was far from being a conflict in politics. It was one of the few acts in the 1990s that passed the Parliamentary debate with consent and without major debates and political reactions. We have to mention that a special ethical code of the Hungarian Association of Advertisers existed since 1991 and a special body was established to review cases and deliver opinions. These opinions and standpoints were a major help for the legislator and were used when adopting the provisions of the act. The act of advertisements entered into force on September 1st 1997. Gabriella Lanczner summarized the importance of this act: *"The act filled a gap existed for a long time. Before it entered into force laws of advertisement were scattered into almost a hundred regulations in various acts and ordinances. Sometimes these regulations were controversary and resulted serious problem in the application. It was just about time to adopt a code that regulates modern rules for advertising and marketing activities."*[9]

Finally with the code the former situation of scattered regulations was evaporated and the laws got unified. The act defines the term and types of advertisement, enacted certain prohibitions in advertising. Some of the prohibitions are common and applicable for any kind of products, and some are only applicable for special goods and services. The act also lists sanctions against infringements and a procedure in which liability can be found.

The most important amendment of the advertisement act was the Act I. of 2001. This amendment established aggrevation in the regulation of advertising tobacco products, medicines and the advertisement of pornography. In addition the amendment also refined some formerely known definitions and institutions.

When Act I. of 2001 modified the original act of advertisement activities it seemed an era was over that was both dinamic and interesting and resulted an euroconform way of regulation in Hungarian advertisement law. Everybody thought that after 2001 a more peaceful period was coming without amendments in the Hungarian advertisement law. Some directives of the European Union rewrote this scenario with adopting 29/2005 EC directive on business communication with consumers and 114/2006 EC directive on deceptive and comparative advertisements. These directives made a heavy and important impact on the Hungarian advertisement law and the act as well.

These circumstances led to the adoptation of the second act about advertisement law in Hungary, Act XLVII. of 2008.

The most important strategic and conceptual change in the new code is that it does not use the term 'consumer' any more and regulates advertisement activity in every possible form, even if the addressees are not consumers but other business partners. The National Consumer Protection Authority remained the main depository of such procedures and the legislator also gave jurisdicition to the Hungarian Competition Law Authority. In case of comparative advertisements ordinary courts got the job to protect the injured addressees of advertisements. The structure of advertisement prohibitions and boundaries did not change fundamentally except for the fact that there is no prohibition of hidden advertisements in the valid act and provisions for medicine commercials can be found in a separate act.

The National Consumer Protection Authority has a general jurisdiction in advertisement law cases. Consumer Protection Agency handles the problem of deceptive advertisements and if a comparative advertisement is against the positive requirements. If a comparative advertisement affronts the negative requirements, courts have jurisdiction. In case of infringement agains rules of electronic e-mail advertisements (spams) the procedure belongs to the jurisdiction of the National Communications Authority.

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[1] *György Képes*. A megtévesztx reklám, Cég és Jog 2004/4. p. 28.

[2] *Vahrenwald, Arnold*, The Advertising Law of the European Union, European Property Review, 1996/5. p. 280.

[3] *Jyzsef Ferenc Vígh*, Az összehasonlíty reklám szabályozása jogközelítési kötelezettségünk szemszögébxl, Külgazdaság Jogi Melléklete, 1996/3. p. 45.

[4] Case – 373/98 Federal Republic of Germany v. European Parliament and Council of the European Union (2000) I-8419

[5] *Zoltán Bárczy*, Dohányreklám és nemzeti szuverenitás az Eurypai Uniyban, Magyar Jog 2001/3. p. 175.

[6] *Kinga Pázmándi*, A fogyasztykkal szembeni tisztességtelen kereskedelmi gyakorlat tilalma, Gazdaság és Jog, 2008/9, pp. 3-7.

[7] *Ildiky Takács*, Gondolatok a reklámszabályozás jogi lehetxségeirxl, Jogtudományi Közlöny 1996/2. p. 86.

[8] *Imre Vörös*, Reklámszabályok a versenytörvényben, Jogtudományi Közlöny 1997/11. p. 453.

[9] *Gabriella Lanczner*, see above, p. 16.

Резюме

У статті розглядаються угорські та міжнародні аспекти інформаційного права, досліджуються питання про визначення поняття реклами, значення реклами для споживачів. Автор проводить аналіз міжнародних законів про рекламу.

Ключові слова: реклама, реклама продукції, захист прав споживачів.

Резюме

В статье рассматриваются венгерские и международные аспекты информационного права, исследуются вопросы об определении понятия рекламы, значение рекламы для потребителей. Автор проводит анализ международных законов о рекламе.

Ключевые слова: реклама, реклама продукции, защита прав потребителей.

Summary

In the article the aspects of publicity right Hungarian and international are examined, questions about determination of notion of advertising, value of advertising for users are explored. An author conducts the analysis of international laws about advertising.

Key words: advertising, advertising of products, defence of rights for users.

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У. Б. АНДРУСІВ

Уляна Богданівна Андрусів, *старший викладач Львівського державного університету внутрішніх справ, аспірантка Інституту держави і права ім. В.М. Корецького НАН України*

ФІНАНСУВАННЯ СУСПІЛЬНОГО МОВЛЕННЯ В УКРАЇНІ: ПИТАННЯ ПРАВОВОЇ ОХОРОНИ

У демократичних країнах за допомогою відповідних законів суспільство намагається забезпечити незалежність преси як від втручання державної влади, так і від якихось приватних груп. Однією з форм створення незалежних пресових об'єднань є суспільне телебачення та радіомовлення, яке є гарантом неупередженого якісного інформування суспільства про події та явища дійсності.

Особливої уваги при цьому потребує вирішення питання фінансування організацій суспільного мовлення.

Визначення джерел фінансування суспільного мовлення розв'язує цілий комплекс проблем – навчання та підвищення кваліфікації персоналу, придбання та оновлення сучасного обладнання, придбання передач тощо.

Втім, вирішуючи проблему фінансування організації суспільного мовлення, ми фактично також маємо вирішити дві проблеми – забезпечення стабільності та достатності такого фінансування та унеможливлення тиску шляхом маніпулювання такими джерелами. Безумовно, суспільне мовлення має бути фінансово незалежним.

Однак доводиться констатувати, що основоположні засади фінансування організацій суспільного мовлення практично залишилися поза увагою законотворців. Так, Закон Україну «Про систему Суспільного телебачення і радіомовлення України» містить лише перелік джерел фінансування, не окреслюючи при цьому їх сутність, механізми стягнення, порядку визначення розміру, форми ведення контролю, не встановлені пільги при сплаті і т.д. З огляду на це, не можна недооцінювати роль та необхідність вдосконалення правової регламентації суспільних відносин у цій сфері.

Шляхом вивчення міжнародного досвіду у сфері фінансування організацій суспільного мовлення, а також аналізу існуючих вітчизняних тенденцій, ми спробуємо віднайти шляхи вирішення назрілих проблем.

Передусім зазначимо, що в різних країнах залежно від національної специфіки діють різні моделі фінансування системи суспільного мовлення. За структурою фінансування фахівці виділяють понад 45 концепцій. Всі вони тією чи іншою мірою являють собою мікс абонплати, урядових (державних) субсидій, доходів від реклами, фінансової підтримки спонсорів та продажу додаткових послуг.