

LIDC B QUESTIONNAIRE

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UNDER WHICH CIRCUMSTANCES AND TO WHAT EXTENT SHOULD THE POSITIVE OBLIGATION OF PROVIDING INFORMATION BE IMPOSED BY REGULATION ON ADVERTISERS?

Members of the national Working Group: Dr. Gusztáv Bacher, Dr. Vilmos Bacher, Dr. Virág Balogh, Dr. Rita Bárdos, Dr. Réka Berekméri-Varró, Dr. Csilla Dékány, Dr. Judit Firniksz (national rapporteur), Dr. Krisztina Grimm, Dr. Zoltán Hegymegi-Barakonyi, Dr. Dániel Kelemen, Dr. Gábor Kordoványi, Dr. Péter Mezei, Dr. János Stadler, Dr. Judit Zsolnay,

REFERRED REGULATIONS

Act CLV of 1997 on Consumer Protection	<i>Act on Consumer Protection¹</i>
Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices	<i>Unfair Commercial Practices Act²</i>
Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices	<i>Competition Act³</i>
Act XLVIII of 2008 on the Essential Conditions of the Business Advertising Activity	<i>Act on Business Advertising Activity</i>
Act IV of 1959 on the Civil Code	<i>Civil Code</i>
Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees	<i>EC Directive 1999/44</i>
Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market	<i>EC Directive 2005/29</i>
Act IV of 1978 on the Criminal Code	<i>Criminal Code</i>

LIST OF ABBREVIATIONS

Hungarian Competition Authority	HCA
Competition Council of the Hungarian Competition Authority (decision-making body in competition-related administrative procedures initiated by HCA)	Competition Council
National Consumer Protection Authority	NCPA

¹ Amended by Act XLII of 2008 on the amendment of Act CLV of 1997 on Consumer Protection and regulations relating thereto – regarding also the provisions that will come into force on 1 September 2008, and 1 January 2009.

² Regarding also the provisions that will come into force on 1 September 2008.

³ Amended by Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices – regarding also the provisions that will come into force on 1 September 2008.

Hungarian Financial Supervisory Authority	HFSA
business-to-consumer	B2C
business-to-business	B2B

INTRODUCTION

The present national report for LIDC was prepared during a transitional period. The regulation package that implements the EC Directive 2005/29 harmonising the examined area of law on Community level, was announced in the last days of June 2008, prior to the finalisation of the report. Some implementing regulations came into force immediately after the announcement, while the transposing of others is proceeding gradually.

We endeavoured to present a picture of the dynamism of these changes in the present national report. Thus, in each answer we have outlined the main trend in changes, using the key elements of the former regulatory system as a reference point. Furthermore, we intended to introduce the cornerstones of legal practice relating to the given question.

1. DOES THE LAW IN YOUR COUNTRY IMPOSE A GENERAL POSITIVE OBLIGATION ON ADVERTISERS TO PROVIDE ALL RELEVANT INFORMATION (INFORMATION THAT ENABLES THE CONSUMER TO MAKE AN INFORMED DECISION)? IF THE ANSWER TO QUESTION 1 IS IN THE AFFIRMATIVE IT WOULD BE HELPFUL IF YOU DISCUSS THE FOLLOWING:

a) In which area of law and which branch of law is the general obligation located (unfair competition law, marketing practices law, consumer law; contract law, administrative law, other)?

Hereinafter the “positive obligation of information disclosure” shall mean the obligation of advertisers to provide all information of relevance to consumers’ decision-making.

Chapter IV of the Act on Consumer Protection, entitled “Consumer Information”, which used to contain the relevant general rules of the Act, was repealed, together with section 8 thereof, which regulated the general rules of information disclosure. In the new regulatory environment, to the intents of the lawmakers, the Unfair Commercial Practices Act will contain the general rules of consumer information.

The Unfair Commercial Practices Act, in particular sections 6 and 7 on misleading practices, impose a general obligation to provide consumers (i.e. the natural persons who are acting for purposes which are not related to their profession or business) with information. The general rules of information disclosure in the Unfair Commercial Practices Act coincide with the analogous provisions of EC Directive 2005/29, therefore the B2C requirements imposed on advertisers can be derived from the joint reading of the provisions for active and passive (misleading by omission) forms of misleading commercial practices.

b) Is the information that has to be provided qualified in any way and how (e.g. all information of relevance to consumers, only health-related information, only economically relevant information, etc.)? Are these qualifications set out in statutory law or established through case law? Please give examples.

The information that has to be provided in relation to certain products (e.g. pharmaceutical products or banking services), selling methods (e.g. special offers), or disclosure methods (e.g. advertisement on the internet) are set out in special statutory law. Besides these specific disclosure requirements, the case law deriving from HCA gives a general orientation regarding the information that has to be provided to consumers.

HCA case law establishes that information disclosing advertisements are required to provide consumers with the opportunity to perceive the true image of the goods (products, services). Disclosed information that is not fully accurate, thereby limiting consumers' freedom of choice, is considered unlawful. The HCA acknowledges that complete product description cannot be provided by all communication media (in particular in the form of advertisement) – however, if an essential feature has been disclosed, the disclosure must be accurate and facts crucial to the interpretation of that information must not be withheld. Consumers can be misled by stating true facts in a deceptive manner, especially by withholding some details that is crucial to the proper interpretation of that information. The disclosure can be unlawful even if the consumer has the possibility after the purchase to obtain complete information relating to the product. (Vj-78/2007)

When advertising special offers, it is a basic requirement to provide consumer information on the special offer, the conditions of participation therein, and the products involved. (Vj-55/2003)

c) By what means is the general duty interpreted and concretized: by secondary legislation, by case law, by administrative guidelines, by self regulation?

The information duties are mainly interpreted by special provisions, and by the case law deriving from HCA. See above answer under point 1. b).

d) If your country is a member of the European Union, what will be/is the fate of the positive duty to disclose information after the implementation of the Unfair Commercial Practices Directive (UCPD)?

The general disclosure requirements of B2B commercial practices are regulated by the Competition Act and the Act on Business Advertising Activity. Requirements of B2C practices are governed by the Unfair Commercial Practices Act, which aims to implement EC Directive 2005/29.

The Unfair Commercial Practices Act transposes the definition of “consumer” from the EC Directive 2005/29, therefore it regulates the commercial practices that may affect natural persons who are acting for purposes which are not related to their profession or business.

The simultaneously implemented section 2/A of the Competition Act classifies market participants positioned as customers, purchasers and users into consumers and business associates. Accordingly, any person who, for the purposes of the Unfair Commercial Practices Act, cannot be regarded as a consumer is considered a business associate. Due to this modification, the general provisions of the Competition Act which are used to cover both the B2C and B2B practices, now exclusively govern the business associates' transactional decisions.

The provisions implemented in the Act on Business Advertising Activity governing misleading advertising can only be applied if the person to whom the advertisement is addressed is a business, or a non-natural person who is acting for purposes which are outside his trade, business or profession.

2. IF THE ANSWER TO QUESTION 1 IS IN THE NEGATIVE, IS A FAILURE OF AN ADVERTISER TO PROVIDE RELEVANT (SUFFICIENT) INFORMATION GENERALLY CONSIDERED AS MISLEADING ADVERTISING (NEGATIVE INFORMATION DUTY; MISLEADING BY OMISSION)? THE FOLLOWING CAN BE DISCUSSED:

a) In which area of law is this rule located (unfair competition law, marketing practices law, consumer law; contract law, administrative law, other)

▪ **The law of unfair competition**

The regulatory concept regarding misleading by omission pursuant to section 7 of the Unfair Commercial Practices Act is the same as in EC Directive 2005/29. A commercial practice shall be regarded as misleading if, taking into account all of its circumstances and the eventual limitations of the communication medium, it omits, hides or provides unclear, unintelligible material information that the consumer needs to take an informed transactional decision, or the merchant fails to identify the commercial intent of the commercial practice if not already apparent from the context.

The omission shall be regarded as an infringement if it causes or is likely to cause the consumer to make a transactional decision that he would not have made otherwise. It is also regarded as an omission when the trader omits to disclose information set out in the directly applicable Community law, the special regulations implementing mandatory Community rules or special provisions governing information to which the Unfair Commercial Practice Act does not apply. Such information is considered as material, for the purposes of Paragraph (3) of section 7 of the Unfair Commercial Practices Act, in the context of commercial communication governed by special provisions.

▪ **Law on advertising**

The provisions of the lately issued Act on Business Advertising Activity governing misleading advertisements can only be applied if the person to whom the advertisement is addressed is an undertaking, or a non-natural person who is acting for purposes which are outside his trade, business or profession, therefore such provisions do not cover B2C practices.

▪ **Consumer protection law**

The Act on Consumer Protection was used to govern mandatory disclosures about the significant characteristics of a product, as a general obligation, relating to consumers' right to information. In the new regulatory system, the Unfair Commercial Practices Act governs the general obligations of disclosure, and the Act on Consumer Protection shall contain special requirements, such as price indications of products, or conformity assessment.

▪ **Civil law**

Parties, pursuant to section 205 (3) of the Civil Code, shall cooperate during the conclusion of a contract and shall respect each other's legitimate interests. Parties have to inform each other regarding all essential circumstances in relation to the proposed contract before the contract is concluded. Advertisements may be governed by these provisions, however, according to our actual knowledge in the case law of the courts the provisions are mainly applied to the documents or information that have been handed over to the other party during the conclusion of a contract (see point 2. b), and point 3.).

The Unfair Commercial Practices Act lays down a body of rules for B2C commercial practices before, during and after a commercial transaction. However, the Act, pursuant to section 1 (3), is without prejudice to the rules on the formation, validity and effect of a contract, and to the civil law claims arising from commercial practices. The Act does not set out a definition for "commercial transaction", therefore the new regulatory system's legal practice is expected to clarify the relation between the new B2C provisions for the different

phases of commercial transactions and the civil law regulations that govern the different stages of the conclusion of a contract.

- **Administrative law**

Neither the borders of competition law, nor those of the consumer protection law are set clearly: in the present system where the administrative authorities have the power to act on competition law and consumer protection issues a close connection is established with administrative law.

- **Criminal law**

Pursuant to section 296/A of the Criminal Code any person who, in respect of any essential feature of a product, publicly states false facts, or true facts in a deceptive manner, or provides deceptive information on any essential feature of the product for the purpose of rendering it more desirable, is guilty of a misdemeanor.

The relationship between statement and omission outlined above is the same in criminal law, however it is essential that the responsibility is of objective nature in competition and consumer protection law, a punitive sanction in criminal law may be imposed only in the case of intentional infringement of law.

b) The omission of what kind of information is considered misleading? Please give examples from case law or administrative practice.

- **The unfair competition law/law on business advertising – misleading practices**

The definition of “material information” was the key to analyzing “misleading by omission” cases in the case law of the former regulatory system. Responsibility for passive infringements such as incomplete disclosure or omission, has typically been observed more rarely than for active infringements. This fact indicates the difficulties in assessing the nature of material information, however as the Competition Council has declared in several of its resolutions, information shall be regarded as material if it is relevant to choosing between competitors or competing products (Vj-17/2007, Vj-129/2007).

The Competition Council acknowledged that complete descriptions of products cannot be provided by all communication media (in particular by an advertisement) – however if an essential feature has been disclosed, the disclosure must be accurate and facts crucial to the interpretation of this information must not be withheld. The essence of advertising is attracting attention and providing information, however the aim of advertisement must also be taken into consideration: to encourage consumption, to affect consumers’ choices between products or services.

Competition law requires the text of an advertisement to be true in itself. Furthermore, a significant fact or circumstance e.g. a special offer, cannot be withheld. Regarding omissions, the information flow capacity of the given medium must also be considered. On these grounds, an internet banner or a radio advertisement with a narrow information flow capacity cannot be expected to provide the same amount of detailed information as e.g. a leaflet. So-called integrated marketing campaigns, according to ruling No. 2. Kf. 27121/2007/8. of the Budapest High Court of Appeal in the Competition Council’s case No. Vj- 111/2005, in the terms of competition law cannot be regarded as a homogeneous unit, however this kind of campaign may consist of inseparable communication elements. (Vj-170/2006, Vj-129/2007)

We remark that the above-mentioned cornerstones of legal practice regarding B2C practices will presumably be applied during the application of the provisions for misleading omission of the Unfair Commercial Practices Act.

As for the case law of HCA to be developed based on the new regulatory framework, it must be considered that the Unfair Commercial Practices Act defines the practices of misleading

omission in a narrower sense. In the assessment, the Act requires it be taken into consideration whether the means of communication is limited from the perspective of space or time, and all actions that the commercial practice's executor took in order to bring the information to the consumers.

The assessment has to take as a benchmark the average consumer, who is reasonably well-informed, and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. In our modern world, consumers require that they be provided with all the material information – in a manner adequate to the relevant medium. However, information overload should be avoided, as well. To consumers who are well-informed and who behave reasonably in the modern communication environment, these frequently-used advertising methods are well-known. Therefore the HCA's former point of view can be considered rather strict when it required that all relevant detailed information had to be disclosed in advertisements; or it stated that the statements marked with asterisks do not create a consistent part of the advertisements. This interpretation cannot be easily harmonised with the present information society in which the consumers can find orientation based on information gathered quickly and easily. Very often consumers need further information even if the information provided by the advertisement raised their awareness. When encountering an integrated media campaign, the consumer can use numerous sources of information. It can be obvious that no infringement can be stated if an advertisement broadcast on TV contains adequately justifiable statements, and some supplementary advertisements provide the relevant detailed information. Stemming from the very nature of the medium, a TV-spot can raise awareness, but it is an inadequate means for disclosing detailed information.

- **Civil law**

From the developing case law on misleading practices, there is one case with overriding importance in which the court found that an insurance company misled the person concluding a life insurance contract regarding an essential circumstance, by promising a preferential home loan after a certain amount of time, although the credit construction did not exist at the time the life insurance contract was concluded and the setting up of the construction was impossible under the conditions disclosed. (BH 2006. 398.)

3. WHAT KIND OF RELATINOSHIP EXISTS BETWEEN THE LAWS REGULATING UNFAIR COMMERCIAL PRACTICES (REGULATION OF ADVERTISEMENT, UNFAIR COMPETITION) PRESCRIBING INFORMATION DISCLOSURE OBLIGATIONS AND THE REGULATION ON CONTRACTS?

- **Advertisement statements and claims related to warranty**

Statements included in advertisements, even though they qualify as invitations to offer the conclusion of a contract, may have a substantial effect in connection with the assessment of the obligations on warranty. Section 277 (1) of the Civil Code on defective performance of contracts takes into consideration the public statements (especially the ones in advertisements) made regarding the specific features of the service.⁴ This provision significantly increases the obligations of the service provider related to warranty, because public statements made prior to the conclusion of the contract shall be considered as parts of the contract, even though the

⁴ According to section 277 (1) b) „the service, at the time of the performance of the contract has to bear the attributes and provide a performance similar to those accustomed by similar services, and in line with the expectations of the obligee, taking into consideration the nature of the service, and the statements made publicly (with special regards to statements made in advertisements or on labels of the product) by the manufacturer, the importer or their representatives in connection with the specific features of the service.”

contract of the parties does not contain them explicitly. The liability is further increased by the fact that the obligor is liable not only for its own statements, but also for the statements of other persons (manufacturer, importer, their representative).

The significance of the statements made by the advertiser is also increased by the provision of section 248 (2) of the Civil Code, according to which the obligor is also bound to the warranty liability in line with the conditions included in the advertisement.⁵

There are numerous laws regulating the features of the product/service affected by the information disclosure obligation of the obligor (see point 1.). Since public statements have to be taken into consideration in connection with the breach of contract and therefore the service not compliant with the statements (besides the sanctions provided by the given branch of law – see point 7.) provides basis for warranty liability, the laws mandating information disclosure obligation are especially significant.

Section 277 of the Civil Code on performance of contracts is based on EC Directive 1999/44. Although the Directive's provisions only govern consumer contracts, the amendment of the Civil Code on defective performance affected the provisions on all types of contracts concluded between all kinds of parties.

This solution allows the maintenance of the unified structure of private law, to avoid the separation of the provisions on warranty to commercial and consumer protection law. Section 277 of the Civil Code is applicable both in B2C and B2B relations.⁶

Misleading public statements may lead to sanctions both in the field of competition (and advertising law), and civil law. However, the difference between the protected subjects of the two areas of law cannot be left out of consideration: the subject of competition law is the protection of the community of consumers and the undistorted competition process, the civil sanctions aim at the reparation of individual incidences of harm by means of the legal consequences of the provisions on defective performance. Therefore, the base of competition and civil law (warranty) liabilities are independent of one another. There may be a situation where the obligor is not sanctioned by means of competition law (e. g. because the defective statement does not have or has a minor effect on the market), however its warranty liability can be established. Furthermore, a given public statement could be considered as misleading from a competition law point of view, but is not in connection with a specific feature, therefore the statement cannot be taken into consideration upon the judgment of the performance of the contract and cannot lead to warranty liability.

The other difference between the concepts of liability in competition law and civil law is that upon the judgment of the performance of the contract the statements of the manufacturer's, the importer's and their representatives' public statements also have to be taken into consideration, while upon the judgment of misleading the consumers from a competition law point of view, the behaviour of other, independent undertakings cannot provide a basis for liability.

The elements of the system of regulation are further amended by the liability rules of section 9 of the Unfair Commercial Practices Act. This section states that, as a main rule, the undertaking which is directly interested in the selling and the promotion of the product affected by the unfair commercial practices shall be liable for the unfair commercial practice.

⁵ Section 248 (2) of the Civil Code states that the „obligor of the warranty bears liability in line with the conditions contained by the contract establishing warranty liability, statute or advertisement related to the service.”

⁶ Examples: in connection with the judgment of the performance of the contract, the statements made in advertisements regarding the features of an apartment in a residential area, an office for rent, or a used automobile are to be taken into consideration.

This undertaking is also liable in that case in which the unfair commercial practice is performed in its interest or for its benefit by another person, on the basis of a contractual relationship.

Due to the different nature of the regulation, the content of the statements and the sanctions are judged by different authorities. However, it is desirable that the misleading nature of the statements are judged in the same way by the HCA proceeding on the grounds of unfair competition, and by the court proceeding on the grounds of defective performance. Therefore, it is advisable to use the same model of the “average consumer” in both areas of law as a basis.

- **Challenging the validity of the contract on the basis of aggressive marketing activity**

Explicitly aggressive marketing activity and circumstances distorting the understanding of the offer can provide a basis for challenging the validity of the contract on the grounds of deception. (EBH 2000. 307 – decision of the Hungarian Supreme Court).

Section 205 (3) of the Civil Code states that the parties are obliged to cooperate upon the conclusion of the contract. They have to inform each other prior to the conclusion of the contract of the material circumstances related to the contract to be concluded. In the case mentioned above, the seller organized a presentation on the selling of a right to use a holiday resort, but the material conditions of the conclusion of the contract did not come to light at the presentation. Only the advantageous features of the service were outlined, material obligations of the customers (penalty fees, administrative costs, costs of upkeep of the apartment) were not presented. The employees of the seller emphasized that those who left the room would lose the opportunity to purchase. Due to the spare lighting necessary to create an “atmosphere” in the room, the customers were not able to read the draft contract and nor could they refer to the fact that they didn’t have their glasses with them and that they intended to read the draft contract at their homes. The employees of the seller calmed the customers by stating that only those conditions would form a part of the contract which had been presented. The court qualified the circumstances set by the seller as a deception of the elderly persons who did not understand the presentation, were not able to read the contracts presented to them and signed the documents in an expectable faith that if they had changed their minds they could have had withdrawn from the contract and lose the amount of the advance payment in the worst case.

- **Contracts concluded at a so-called “discount” price**

According to judicial practice, if the price of the product is presented as a “discount” price, but eventually the price is indicated incorrectly, the validity of the contract concluded under such conditions cannot be challenged, even if the buyer can be considered a professional merchandiser. In the common thinking “discount” price means special buying option, therefore the buyer could not have realized the deception of the seller and the challenging of the contract is also not possible on the basis of the value of the services being disproportionate. Discount selling (determining discount prices) also excludes the possibility that the buyer could have realized the possible deception of the seller, because besides the circumstances related to the product, other aspects such as commercial aspects have to be taken into consideration, as well.

4. ARE THERE PROVISIONS IN YOUR COUNTRY REGULATING POSITIVE OBLIGATION OF THE ADVERTISERS TO PROVIDE INFORMATION? IN CASE OF A POSITIVE ANSWER, PLEASE DISCUSS THE FOLLOWING:

a. Which area of law, which branch of law regulates the following obligations? (Unfair competition law, consumer protection, advertisement law, civil law, administrative law, criminal law, etc.)

Referring to point 2. a) above, the obligation related to the compulsory content used to be regulated by a general rule of the Act on Consumer Protection. According to this rule, the information disclosure had to enable the consumer to acquire information which would ease the choice between products and services, furthermore which informed the consumer about the usage and upkeep of the product, basic features of the product or the service, quality, price, fees, of the product or the service, instructions on the usage of the product, dangers related to the usage of the product.⁷

Most of the industry-specific rules currently in effect still contain various provisions specifying the general rule mentioned above.

As described in point 2. b), there are several laws in the Hungarian legal system, which (either because of the implementation of the legal sources of the EU, or because of the intentions of the national legislation) contain sanctions in connection with omission to provide information on material features of products, propagated by the legislation. In the current legal system, compliance with these provisions is supervised by the NCPA and other authorities. The general characteristic of these provisions is that they regulate obligation to provide information disclosure on certain elements of content on markets and sectors (e. g. food products, pharmaceuticals, financial services), in which information asymmetry exists between the undertaking and the consumer, which means that there is a difference between the knowledge on the given product or service between the undertaking and the consumer. Besides the regulation with positive obligations, the laws prohibiting certain elements of content have to be mentioned, too.

The relationship between the general and special provisions on information disclosure obligations can be described by section 1 (4) of the Unfair Commercial Practices Act. This provision states that other laws can regulate the obligations to inform consumers in a more detailed or stricter manner. The provision referred to above names the following areas in this context: financial and insurance services⁸; real properties, requirements in connection with medical and security qualities of the product, environmental requirements, the basic rules for performing certain professions as regulated by the statute on the acknowledgement of foreign certificates and diplomas.

According to section 1 (5) of the Unfair Commercial Practices Act, the areas above are restrictions to national-level legislation, since beside the activities listed above, other areas can also be regulated in a more detailed or stricter manner, if such regulation is necessary in order to implement a binding law of the EU, or if it is permitted to do so by a binding law of the EU.

Section 7 (3) of the Unfair Commercial Practices Act can be described logically in accordance with the relationship between general and special provisions on information disclosure

⁷ Section 8 a) of the Act on Consumer Protection – To be withdrawn by section 66. (1) c) of the Act XLII. of 2008 on the amendment of the Act on Consumer Protection and other related statutes.

⁸ Section 1 (4) a) of the Unfair Commercial Practices Act states that the following services belong here: financial and financial supplementary services, insurance, insurance mediation, insurance advisory services, investment service activity and supplementary investment service activity, stock exchange service, services provided by pension funds, private pension fund services.

(naturally, it is directly connected to what has been explained in point 2.). This provision qualifies the information regulated by the special rules on information disclosure obligations (listed below) as significant in relation to commercial communication.

- directly applicable legal sources,
- special legal provisions aimed at the implementation of compulsory EU laws,
- legal provisions in connection with the services outlined by section 1 (4) a-d) of the Unfair Commercial Practices Act (financial and insurance services, real properties, medical or security qualities of the product, requirements related to environmental protection),
- special legal provisions based on the permissive regulation of an EU law related to certain products or a group of products.

With regard to section 7 (1) a) of the Unfair Commercial Practices Act⁹, the information disclosure regulated by the legal provisions listed above is considered at all times automatically necessary for the consumer to make a reasonable market decision.

b. Emphasize some examples of the provisions on special information disclosure, concerning exclusively the following:

The lists below show the temporary situation in which the requirements of the Unfair Commercial Practices Act on special legal provisions are not applicable yet, indicating the fact that further de-regulation is required to create the “clear” system described in the Act. We have added the most important changes of the Unfair Commercial Practices Act to the list.

- **certain categories of products (e.g. food products, pharmaceuticals, tobacco, alcohol, electric devices, motorized vehicles, toys, cosmetics, etc.);**
- Advertising a product with medical effects requires the package information leaflet to be approved by the National Institute of Pharmacy, and the possession of a marketing authorisation;
- Cosmetic products can only be advertised in accordance with the content of their package leaflets and labelling;
- Registered veterinary medicines can only be advertised in accordance with the content of the marketing authorisation;
- The labelling of food products has to contain the place of origin, if the lack of such content led to the deception of the consumer regarding the actual origin of the product;
- Pesticides can only be advertised in accordance with the content of the permit and in line with the provisions of special laws;
- The statements made in television and radio advertisements have to be true and fair;
- In the case of cross-border television services, the advertisement and TV-shopping have to be fair;
- Tobacco advertisements in the press and on outdoor advertising boards have to contain the following text as a general warning: „Smoking seriously damages your health and the health of the persons around you” as well as the nicotine and tar content of the tobacco product.
- **certain categories of services (e.g. services related to tourism, financial services, services related to real estate);**
- The travel contract and the program brochure have to contain certain specific elements;

⁹ According to section 7 (1) a) of the Unfair Commercial Practices Act, “...taking into consideration all factual circumstances, limitations of the means of communication, a piece of information is omitted which is necessary for the reasonable decision of the consumer in the given situation and therefore material”

- In the offer aiming to the conclusion of, and the commercial communication related to deposit agreements, the attention of the consumer has to be drawn to the fact that the detailed description of the deposit agreements can be found in the internal rules and regulations. If the interest or any costs of the deposit are mentioned in the offer or the communication, the amount of the „UDIRI” (Uniform Deposit Interest Rate Index) has to be indicated directly after the interest of the costs by indicating the abbreviation and the amount (out to two decimals points), with a font size and appearance similar to the preceding text. In the case of a verbal advertisement, the amount has to be articulated clearly. If there is state aid connected to the deposit, and the interest or any costs of or the state aid related to the deposit is mentioned in the offer or the commercial communication, the UDIRI has to be indicated both with and without the amount of the state aid. If the financial institution takes into consideration any kind of discount upon determining the amount of the UDIRI and the discount in question depends on certain conditions (either on the financial institution’s or the consumer’s side), the commercial communication has to contain at least a reference to where the exact detailed conditions can be found. In case of automatically revolving deposits with a discount interest rate, the offer and the commercial communication have to contain the amount of the UDIRI without the discount in accordance with the conditions’ list valid on the day of the disclosure and the discount UDIRI as well. If the financial institution offers a complex service under which it is mandatory, in addition to depositing, to purchasing investment fund shares, the offer or the commercial communication has to contain the following text after the amount of the UDIRI related to the deposit: “The yield of the investment fund constituting the other part of the offer may change, depending on the yield of the investment instruments. The past yield of the fund does not mean there is a guaranteed yield for the future.
- If the offer or commercial communication related to a securities transaction indicates an interest, specified yield or any cost in connection with the transaction, the amount of the “SYI” (Securities Yield Index) has to be presented with the abbreviation and the amount (out to two decimal points), with a font size and appearance similar to the previous text. In case of a verbal advertisement, the amount has to be articulated clearly.
- The internal rules and regulations, public prospectus and offer of the financial institution posted on the premises of the institution have to contain the amount of the “ACC” (Actual Credit Costs) in a well-marked manner. If the interest rate, any kinds of cost, arrears or any remark connected to them are mentioned in the commercial communication of the financial institution, the amount of the ACC has to be indicated with the abbreviation and the amount (out to two decimals points), with a font size and appearance similar to the previous text. For a verbal advertisement, the amount has to be articulated clearly. If the credit provider takes into consideration any kind of discount upon determining the amount of the ACC and the discount in question depends on certain conditions (either on the credit provider’s or the consumer’s side), the commercial communication has to contain at least a reference to where the exact detailed conditions can be found. The commercial communication related to a credit card offered with discount conditions has to contain the ACC amount calculated with the non-discounted conditions as well.
 - **certain product characteristics (e.g. dangerous product characteristics, health-related qualities, ecological (environmental) qualities);**
- Hazardous materials and dangerous products can only be advertised in accordance with provisions set forth by all the relevant rules. Furthermore, advertisements must contain an explicit reference to the danger level of the product.
- Pesticides cannot be advertised by stating that they are pose no danger;

- It is forbidden to advertise dangerous materials and dangerous products, which are to be launched, as safe, or to use expressions or descriptions which are capable of causing improper evaluation of the danger;
- The labels of Biocide products may not indicate “biocide product of minor hazard”, “not toxic” or “safe”, or other inscriptions which are capable of causing consumers to reach identical or similar conclusions.
 - **specific methods of sale**
- The seller is obliged to inform the consumer, in due time, before the conclusion of the contract, that it will have the right to rescind from the contract;
 - **certain contractual rights and obligations**
- General terms, public prospectuses and offers posted on the premises of financial institutions must clearly indicate the ACC. It must also be indicated, that ACC was calculated based on the current conditions and applicable laws, and that ACC may vary if the conditions change.

c. Does the law in your country impose on advertisers a duty to provide information about their own identity and contact details? Is this obligation limited in certain aspects?

- Such obligation does exist for contracts concluded regarding distant selling;
- Institutes offering adult education are obliged to use their registration number on school supplies (e.g. attendance sheets, journals, certificates) used during the performance of their activity and on business documents connected to education. They are also obliged to inform their clients of their registration number, in addition, to indicate such data in prospectuses distributed about their activity, and also to display it on a highly visible spot;
- In e-commerce services, and other e-services, the service provider is obliged to publish the following details and information electronically, directly, constantly, accessibly and in Hungarian:
 - a) the name of the service provider and, if the service provider is not a natural person, the name of its representative;
 - b) the address, and registered seat or office, respectively.

The Unfair Commercial Practices Act stipulates that in commercial practice considered as “invitation to purchase”, the indication of the following is considered substantial information: identifiable indication of the enterprise’s name and address, and identifiable indication of the enterprise on whose behalf the executor of the commercial practices is acting.¹⁰

d. Does the law in your county impose on advertisers an obligation to provide information about price? Is this obligation limited in certain respects?

- Generally, it is not obligatory to indicate the price in the advertisement, but if a comparative advertisement is published, and it contains the comparison of products’ prices, this must be done in an objective manner.

The Unfair Commercial Practices Act stipulates that in the commercial practice falling under the category of invitation to purchase, the following are considered substantial information:

- price including VAT and other mandatory extra charges;

¹⁰ According to section 2 g) of the Unfair Commercial Practices Act it is considered an invitation to purchase, if in the commercial communication the characteristics, price and fees of the product are indicated in such way – considering the means of communication used – that it becomes possible for the consumer to buy or use the product.

- if the extra charges, or due to the nature of the product, the price cannot reasonably be determined in advance, the calculation of the price or extra charges and indication of all additional costs (latter especially including shipping costs, postal costs), or if such costs cannot reasonably be determined in advance, indication of what further costs may occur.

e. Is an infringement of specific obligations to provide information considered a violation of general rules against unfair competition (unfair marketing or unfair commercial practices)?

The Official Commentary on the Unfair Commercial Practices Act stipulates the following in connection with the relation of the general and special rules: “the requirement of exclusivity does not prevail over those areas, where the community law itself – by recognizing the particularities of the given products or a special interest that requires protection – sets forth stricter regulations or grants the enterprises allowances in their commercial practice with consumers.”

The Official Commentary connected to the Unfair Commercial Practices Act has the practical consequence on legal practice that in the concerned areas, the three levels of regulations set forth by the Directive 2005/29/EK are supplemented with a further level, which also needs to be examined when determining whether a commercial practice is unlawful. First, it needs to be examined whether special regulations have been infringed. Only in the absence of such circumstance can the horizontal regulation set forth by the Directive take effect, based on which the unfair character of the commercial practice can be established even in the absence of a special infringement. This emerges from section 3 (4) of the Directive 2005/29/EK, which sets forth that in the event of collision the relation of the directive and other community legal regulations must be established in such manner that the latter has higher priority.

The HCA’s former practice was to judge the given practice from a competition point of view, assessing whether the information was apt to affect consumer decisions in an unfair manner. By this means the infringement of competition rules, or the lack of it, was established irrespective of the infringement of the special provisions of information disclosure.

If an undertaking pursues unfair commercial practices, a competitor may file a claim based on the general clause of the Competition Act. In the Hungarian regulatory framework, the HCA may initiate procedures if the public interest is affected by misleading practices, the assessment of competitors’ offences belongs under the jurisdiction of court. Misleading advertisement gives unfair advantages against the competitors who pursue their practices in line with the legal requirements (Kf.II.25.766/1993/7.). The defendant was not entitled to apply the given qualification (BNV-Nagydíj) and in his marketing activity he used as reference buildings which were built of elements distributed by the competitor undertaking. By this behaviour the defendant jeopardised the competitors’ legitimate interest, and at the same time it infringed the consumers’ interest, as well. Based on qualifications as BNV-Nagydíj consumers draw consequences regarding the high quality of the product. If a qualification is capable of raising the consumers’ awareness, it can raise the demand for the product. If the qualification is used unlawfully, it can obviously damage the competitor’s interests. (Pf.II.20.040/2007/3)

5. DOES THE LAW IN YOUR COUNTRY SET OUT ANY REQUIREMENTS AS TO THE WAY IN WHICH INFORMATION SHOULD BE PROVIDED TO ADVERTISERS (E.G. CLEAR AND COMPREHENSIBLE MANNER, LANGUAGE, ETC.)?

Section 7 (1) of the Unfair Commercial Practices Act, which deals with misleading omissions, expounds the linguistic expectations related to the wording of the communication in the widest manner. The aforementioned section stipulates, that one type of such omission is if commercial practice provides the consumer in the specific situation with essential information

required to make an informed decision, which is formulated in an ambiguous, incomprehensible or in an outmoded way, and therefore makes the consumer reach a decision which the consumer would otherwise not have made, or if the given practice is capable of causing such consumer decision.

In connection with the commercial target group, the Unfair Commercial Practices Act also refers to the fact that during the assessment of the commercial practice special attention needs to be paid to the form of communication, or the linguistic, cultural and social aspects of the product. Section 4 (3) of the Unfair Commercial Practices Act is related to the special case of the use of idioms. According to the aforementioned section, the use of exaggerating statements, or statements which are not to be understood in a verbatim manner, cannot be considered capable of distorting consumer conduct, if their use is conventional and are used to an extent which does not exceed what derives from the nature of the advertisement.

6. DOES THE CHARACTER OF THE MEDIUM THROUGH WHICH THE ADVERTISEMENT IS COMMUNICATED TO CONSUMERS AFFECT THE SCOPE OF EXISTING OBLIGATIONS OF ADVERTISERS TO PROVIDE INFORMATION?

a. Is an explicit provision in this sense laid down in statutory law or is the importance of the advertising medium reflected in the legal practice?

▪ Laws

In the former regulatory environment there was no general specification regarding the manner of publication or necessary comprehensiveness regarding particular media. However, certain laws set forth provisions on how information is presented.

In certain cases, the methods of information provision are given, which circumstance also affects the possibilities of publication. Section 144 (2) of Act No. C of 2003 on Electronic Communications states that if the law demands the notification of the subscriber, the service provider may fulfill its notification obligation in the following manners: a) direct written notification of the subscriber (notification by letter); b) in an electronic mail; c) by other means of electronic communication; d) depending on the group of subscribers that need to be modified, in a nation- or countywide newspaper by publishing an announcement twice, with the simultaneous display of the notification at the customer service office.

Compared to the above, the Unfair Commercial Practices Act brings a basic change to the legal approach of the significance of communication means. When assessing misleading omissions, the communication means and the resultant limitations are significant factors: if the means of communication is limited from the perspective of space or time, all actions that the commercial practice's executor took in order to bring to the information to the consumers need to be taken into consideration.

As we will also describe in Point 7, the HCA will initiate proceedings because of unfair commercial practice if the commercial practice materially affects the competition. When assessing these criteria, not only the size of the enterprise needs to be considered, but also the extent of the commercial practice. The means of communication has a dominant role in this latter aspect. The material effect on competition does always exist, irrespective of other aspects, if the commercial practice is performed through a nationwide broadcaster or in a nationwide periodical.

▪ Legal practice

In the legal practice related to the former provisions of the Act on Business Advertising Activity and of the Competition Act, the HCA established in various cases that there was a

difference between the means and the channels of marketing communication from the aspect of whether they are capable of communicating only limited or detailed information.

The Competition Council did not challenge the standpoint that full product-descriptions cannot be expected from a certain means of communication, such as an advertisement for example. However, if a communication portrays or emphasizes an essential circumstance, then this needs to be done accurately, so that the consumers can learn the connected and inseparable details from the advertisement simultaneously. Considering the above, if the advertiser propagates the product in a television ad, he is required to do so in a way visibly/audibly perceptible to the consumer. In this way, the means of communication used will have an effect on the comprehensiveness of the publication.

Based on their capacity to transmit information, advertising media can be divided into following groups: (i) means with the smallest transmitting capacity: mass media (press, television, radio, billboards); (ii) means of direct marketing capable of providing more detailed information (flyers, letters, catalogues sent to the homes) (Vj-74/2006).

For advertisements published in the mass media, and more precisely in the press, placement, accentuation and formal layout of the information is significant, as the headlines and highlighted parts have a much more important role than small print.

So-called integrated marketing campaigns, even if from a communication perspective, contain elements that are based on one another, cannot be assessed as one integrated whole from a competition law perspective, according to the Municipal Court's ruling No. 2. Kf. 27121/2007/8 in case No. Vj-111/2005.

Regarding the internet as an advertising medium, what needs to be underlined is the extraordinary detailed and large amount of information it can provide. Also, what needs to be positively assessed in connection with communications published on the internet, is the consumer's opportunity to obtain further and more detailed information within a short time by clicking on links.

According to the Competition Council, the perceptibility of the advertisement can be interpreted in two ways: on the one hand, by defining the elements of the advertisement by viewing it and by formal approach; and on the other hand, as the opportunity for the consumer, to precisely perceive them. This means that an ad or a billboard (e.g. with very small fonts) formally contains certain information, however this is not necessarily perceived by the consumers. If the consumer wants to learn more about the small print, he can naturally obtain such information (in the specific situation though, this is not possible due to the formal layout and the way the consumer got in connection with the advertisement). However, not this, but the message accentuated in the advertisement which provides the basis of the assessment from a competition law perspective. A message that is, from a formal perspective, in the background, or is only referred to by footnote references, is not capable of supplementing the advertisement's accentuated message (Vj-176/2007.).

b. Is the scope of the obligation to provide information limited or extended in respect of TV advertising, advertising via internet, advertising via mobile phones, other media?

Both in respect to the former practice, and the changes in the laws, the scope of regulation related to the provision of information is rather broad, as the general provisions are not related to single means, so they are applicable to all communication and advertisements. In certain cases, however, this causes some difficulties in applying these provisions, which the legal practice was striving to bridge over by considering the recent developments (e.g. in the case of TV advertisement, by considering the new methods for obtaining information provided by digital TV).

7. HOW ARE THE EXISTING POSITIVE OBLIGATIONS TO PROVIDE INFORMATION ENFORCED (E.G. BY WAY OF ADMINISTRATIVE SANCTIONS, BY WAY OF POSITIVE INJUNCTION, BY WAY OF NEGATIVE INJUNCTION (CEASE AND DESIST), BY WAY OF CRIMINAL SANCTIONS)?

▪ Administrative procedures and sanctions

Under Point 1. d) we have summarized the Unfair Commercial Practices Act's effect on the concept of regulation. Along with the change of the substantive law, the legal practice is also changing at the same time. As a main rule, the NCPA, which has the general competence, is competent for infringements of the provisions against unfair market practices. Based on the business, the HFSA has competence for the commercial practices of such enterprises, the activity of which is related to activities that are supervised by the HFSA under the status act, i.e. Act CXXXV of 2007 on the Hungarian Financial Supervisory Authority.

The HCA is competent for infringements of the provisions against unfair market practices if the specific practice has a basic effect on competition. On a theoretical level, there is no change from the perspective of the relevant authority, as the HCA oversees both the B2C practice (according to the authority granted to it by the Unfair Commercial Practices Act), as well as B2B behavior (based on the Competition Act and the Act on Business Advertising Activity), if they are capable of distorting competition.

Apart from the main similarities, it also must be expressed that the Unfair Commercial Practices Act has introduced new provisions on the specification of competences. For example, section 10 (4) of the act excludes from the HCA's competence commercial practices, which are exclusively performed: on the packaging of products; are otherwise attached to products; are included in the package information leaflet or guaranty attached to the product; or are in relation to the infringement of disclosure obligations as set forth in section 7 (3) of the act (see Point 4.a) and 4.e) on this matter).

The aspects listed in section 11 of the Unfair Commercial Practices Act provide practical indications as to the effective determination of competences. According to these, when establishing the basic effect on competition – and also considering the particularities of the given relevant market – the extent of the applied commercial practice also needs to be considered (especially the means of communication, the size of the geographic territory affected and the number of shops affected by the distortion, the duration of, or the quantity of the products affected by the infringement) along with the size and net income of the enterprise responsible for the infringement.

The rule of thumb established in section 11 (2) of the Unfair Commercial Practices Act is a new approach in the regulation. This new “rule of thumb” establishes that the competition is basically affected without considering other circumstances, if the commercial practice:

- is performed through a nationwide broadcaster; or
- is performed in a nationwide periodical, or in a periodical that is published in three counties; or
- is performed by direct approach of the customers and is aimed at customers in three counties; or
- the incentive to sell performed at the place of sale is organized in at least three counties.

It is important to emphasize that apart from the NCPA and HCA, which have competence for administrative proceedings related to infringement of general disclosure rules, the regulatory authorities, who enforce special laws affecting certain business sectors, also play a very significant role (e.g. the National Communications Authority, the National Institute of Pharmacy, Health Insurance Supervisory Authority).

The scope of measures the administrative authorities may take usually includes injunction to desist from unlawful status, and also injunctions to desist from further infringements. Section

18 of the Unfair Commercial Practices Act provides the authorities with a special measure to enforce the laws: if the enterprise responsible for the infringement uses an intermediary to perform the infringement and they do not desist from the infringement within a term set forth in the authority's order, the authority may oblige the intermediary by a separate order to execute that part of the order aimed at stopping the unfair market practice, provided that the infringement cannot be abolished in any other way and the intermediary was also notified about the original order. The Unfair Commercial Practices Act, and as well as the Act on Business Advertising Activity make it possible to prohibit disclosure in advance, if it can be assumed in the proceeding that, if the disclosure was published, it would qualify as an infringement. In the event of infringement of disclosure provisions, the Competition Act provides for the possibility to have a rectification communication published related to the communication capable of deceiving.

The proceeding authority has the possibility to impose a fine. The amount of the fine must be set in accordance with all circumstances of the specific case, considering especially the scope of the consumers' infringed interests, the seriousness, duration and recurrence of the unlawful conduct. The amount of the fines can vary significantly. The NCPA and the HFSA may impose fines in a range between HUF 15,000 and HUF 2 billion for the most serious cases. According to the Competition Act, the amount of the fine may not exceed 10% of the net income of the enterprise – or the corporate group of which the fined enterprise is a member of – as identified in the order for the business year preceding the year in which the order was issued. In addition, certain regulations considering specific business sectors may also contain serious sector-specific sanctions, e.g. the Health Insurance Supervisory Authority may even initiate exclusion of the product concerned by the conduct from the range of products subsidized by the social security system.

▪ **Criminal Law**

Beside the administrative procedure of government enforcement, in the existing legal system, as *ultima ratio*, there are certain criminal law categories that facilitate the enforcement of information disclosure rules. According to section 296 of the Criminal Code, any person who produces a product with a distinctive appearance, packaging, labelling or name, from which a competitor or its product that has distinctive features can be recognized, and who does so without the consent of such competitor, or who acquires such product for the purpose of placing it on the market, commits the crime of False Marking of Goods. False Marking of Goods is deemed a felony punishable by imprisonment for up to three years.

According to section 296/A of the Criminal Code, which defines the crime of Misleading Consumers, any person who, in respect of any essential feature of a product, publicly states false facts, or true facts in a misleading way, or provides misleading information on any essential feature of the product for the purpose of rendering it more desirable, is guilty of a misdemeanour punishable by imprisonment for up to two years, community service work, or a fine.

8. WHAT (IF ANY) IS THE LIABILITY OF ADVERTISING AGENCIES AND THE MEDIA THROUGH WHICH THE ADVERTISING IS COMMUNICATED (E.G. TV AND RADIO BROADCASTERS) FOR ADVERTISING THAT FAILS TO COMPLY WITH INFORMATION OBLIGATIONS IMPOSED ON ADVERTISERS?

The elements of the liability system – as referred to in Point 3 – have been completed with new liability rules by section 9 of the Unfair Commercial Practices Act, according to which any undertaking which is directly interested in sales or the stimulation of sales of the product concerned through the commercial practices, shall bear responsibility for the infringement of the prohibition of unfair commercial practices. The undertaking so defined shall also bear

responsibility for cases in which the commercial practices in question are performed by a third person on behalf of the undertaking, based on a contractual relationship between them.

There is another new liability rule, according to which any person who publishes commercial communication by means of appropriate channels for publication, or who creates such commercial communication or provides any other services related to this in the course of his business activity, shall bear joint and several liability with the above undertakings in the case of any infringements related to the manner of portrayal commercial communication. Those cases in which the infringement due to the manner of portrayal is a result of carrying out the instructions of the undertaking which is directly interested in the sales or the stimulation of sales of the product concerned through the commercial practices, is deemed as an exception to the above rule.

According to section 23 (1) of the Act on Business Advertising Activity, generally the advertiser, the advertising service provider and the publisher of the advertisement shall all bear responsibility for the infringement of the provisions of this Act. The advertiser, the advertising service provider and the publisher of the advertisement shall bear joint and several liability for any damage caused due to infringement of these provisions. Section 23 (2) of Act on Business Advertising Activity defines the liability of the publisher of the advertisement with respect to each specific case of infringement derived from the content of the advertising. Therefore if the publisher of the advertisement is deemed an advertising service provider according to the provisions of the Act on Electronic Commerce and on Information Society Services, then it can only be exempted from liability if it otherwise complies with the conditions applicable to it. With respect to unaddressed consignments, the publisher of the advertisement shall not bear liability for the content of the advertisement. Further, in any other cases, the publisher of the advertisement shall only bear liability regarding the above if the content of the advertising was or could be known to it.

For the infringement of the provisions regarding misleading and comparative advertising, section 23 (6) of Act on Business Advertising Activity defines the liability rules. For the infringement of these provisions, the advertising service provider and the publisher of advertising shall only bear liability if the infringement derives from a reason related to the manner of portrayal of the advertising, which is not due to carrying out the advertiser's explicit instructions.

9. WHAT PRIVATE AND PUBLIC BODIES ARE GRANTED STANDING TO SUE OR COMPETENCE TO ENFORCE THE INFORMATION OBLIGATIONS VIZ. ADVERTISERS?

a) Government Authorities (Competition Authority, Consumer Protection Authority)

The HCA, the NCPA and the HFSA are all entitled to conduct the necessary procedures and to determine obligations with respect to advertisers. All three of the above authorities are also entitled to commence actions in the public interest in cases affecting a wide range of consumers or cases in which significant harm was caused by the behaviour in question. According to the Act on Consumer Protection, in cases in which any unlawful activity was performed, NCPA, organizations protecting consumer interests and the public prosecutor are also entitled to commence the above action.

We note that according to section 92 of the Competition Act, HCA is entitled to commence actions for the consumers' civil claims, if the behaviour of the undertaking in question infringing the provisions of the Competition Act or the Unfair Commercial Practices Act falls within its jurisdiction and affects a wide range of consumers, which cannot be defined by the individuals affected, but by the nature of the infringement.

b) Competitors and joint ventures of those

Both competitors and the joint ventures of those competitors are entitled to submit a petition (notification or complaint) to the authorities whose competence derives from the provisions of the Unfair Commercial Practices Act, or with respect to the relevant provisions of the Act on Business Advertising Activity or the Competition Act regarding B2B activities, to HCA. The authorities concerned shall initiate the relevant procedure *ex officio*, if the necessary procedural conditions persist.

Regarding any offences caused by competitor, the above entities are entitled, based on the general clause prohibiting unfair economic activities, included in Chapter II of the Competition Act, to file a lawsuit against the competitor in question.

c) Consumer Protection Organizations

These entities are also entitled to submit a complaint to the authorities whose competence derives from the provisions of the Unfair Commercial Practices Act, and social organizations protecting consumer interests are entitled to commence an action in the public interest as mentioned in Point 9.a).

d) Individual consumers

To resolve his individual case, an individual consumer can contact the authorities whose competence derives from the provisions of the Unfair Commercial Practices Act. Furthermore, he can turn to an alternative means of dispute resolution indicated in the Act on Consumer Protection, through the procedure of conciliatory bodies.

Additionally, consumers are entitled to commence actions for their individual claims. As of 1 November 2005, in the course of private enforcement before court, it is possible that the provisions of Chapters III-V of the Competition Act (section 88/A) may apply, and so the HCA shall be involved in the court procedure as *amicus curiae* (section 88/B).

e. Other

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10. WHAT IS THE ROLE OF SELF-REGULATION AND OF VOLUNTARY ADVERTISING CODES AND THEIR RELATION TO STATUTORY INFORMATION DUTIES IMPOSED ON ADVERTISERS?

The Hungarian Code of Advertising Ethics, the industry codes of conduct and the bodies acting for the enforcement of these rules, e.g. the Self-Regulating Advertising Committee, all take part in the formation of the information disclosure rules. In domestic practice, self-regulation works as a voluntary, *ex ante* type of filter, so the standpoints of the bodies concerned facilitate the enforcement of the obligatory rules of law.

11. IS THERE ANY DISCUSSION IN YOUR COUNTRY ON THE RELATIONSHIP BETWEEN A POSITIVE OBLIGATION TO PROVIDE INFORMATION IN ADVERTISING AND FREEDOM OF COMMERCIAL COMMUNICATION OR OTHER CONSTITUTIONALLY PROTECTED RIGHTS AND FREEDOMS?

The Constitution of the Republic of Hungary protects the freedom of speech, section 61 (1) states: "In the Republic of Hungary everyone has the right to freely express his opinion, and furthermore, to access and distribute information of public interest". The above protection is also confirmed by the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) (promulgated by Act XXXI of 1993) (the "Convention"): "Everyone has the right to the freedom of expression. This right shall include

freedom to hold opinions and to receive and impart information and ideas without interference of public authorities and regardless of frontiers”.

The above question is concerned in several decisions of the Constitutional Court (1270/B/1997. AB, 37/2000. (X.31.) AB decision). The Constitutional Court stipulated that “the Constitution of the Republic of Hungary protects the right to freedom of expression – individual behaviour and the social process – regardless of its substance”. The right to freedom of expression protects the opinion of an individual regardless of its value or true content. Business advertising is deemed as commercial speech, the main goal of which is to facilitate the sale or employment of a product, service, real property, right or obligation (“product”), the popularization of the name, label or activity of an undertaking, or the promotion of a product or geographical indication. The disclosure of the information by means of commercial speech is also under the protection of section 61 (1) of the Constitution of the Republic of Hungary. Not only certain ideas, facts or opinions are subject to the constitutional protection, but the freedom of expression itself, which undoubtedly includes business advertising, as well as commercial speech.

The reason commercial speech is under constitutional protection is that information flow is ensured this way, and therefore instead of the right of expression, the protection has been directed by the necessity of information. It is the public interest regarding the free flow of commercial information that is under this protection, rather than the business interest of the publisher of the commercial speech. The right to freedom of expression, being a fundamental right, can only be restricted extraordinarily, even by statute; for the reason of protecting another fundamental right or constitutional value (so the restriction must be necessary). Further, the restriction must comply with the requirements of proportionality as well: the importance of the goal to be achieved through the restriction must be in proportion to the offence to the fundamental right caused for the sake of that goal. In the course of the restriction of a fundamental right, legislators must turn to the most moderate tool eligible for the achievement of the goal in question. Therefore, the restriction of the right to freedom of expression is unconstitutional if it is applied arbitrarily, without an imperative reason, or if the gravity of the restriction is disproportionate to the goal to be achieved.

Although business advertising activity is under the constitutional protection of the freedom of expression, with respect to commercial speech a wider range of government intervention can be justified, compared to other cases of expression. The constitutional protection of freedom of speech is mainly for the protection of an individual’s self-expression and is an indispensable tool in the development of his/her personality. This constitutional protection aims at the facilitation of the individual’s participation in the democratic society. However, business advertisements are not directly connected with the basic values of the right to freedom of expression, as the main goal of those is to facilitate the sale or popularity of a product or a service, not to enhance an individual’s self-expression or participation in the democratic dialogue.

With respect to the above, in cases of commercial speech, freedom of expression can be restricted in a wider range. Business advertising activities and other kinds of commercial speech – although they give consumers the opportunity to get acquainted with the products and services proposed to them -, can be restricted in proportion to the goal to be achieved, with respect to the right to human dignity and the directly related personal rights and consumer rights, or even with respect to fair competition.

From the perspective of competition issues, business advertising is regarded as market behaviour. In the course of ensuring free and fair competition, the government is obliged to guarantee the enforcement of consumer rights. In the absence of the above, those market players which perform unfair business activity in the course of their participation in competition would obtain unlawful competitive advantage.

Due to the constitutional right to freely enter into contractual relationships, consumers have a subjective right to get appropriate information. Information is appropriate if it puts the consumer in a position where he/she is able to choose between certain products and services, and his/her choice is based on a reasonable decision. Besides, consumers also have a subjective right to safe products and services. The above can be deduced from the right to human dignity, the main component of which, the persons' right to physical integrity, demands that products and services not be a danger to consumers' life and physical health.

Deriving from the above, as regards the disclosure of commercial information, the restriction of the freedom of expression could be justified in a wider range. The reason for this is not only that the primary goal of the disclosure of advertisements is not self-expression, but that the disclosure of false commercial information or the misleading omission of true information can result in such harmful consequences to human health, which justify the restriction of disclosure.

“With respect to certain notifications indicated on the product concerning product safety, consumers must be deemed to be dependent, as on the basis of the relationship between them and the manufacturer/distributor they are entitled, with reason, to rely on the diligence of the manufacturer regarding the observance of technical and safety requirements, therefore this expression is not under the protection of the right to freedom of expression. Furthermore the freedom of negative expression also applies differently than in cases of clearly public communications.” “Freedom of expression presumes that, most of all, not the government but the speaker/the person giving expression is able to adjudge the appropriate content of his/her speech. This cannot be applied to commercial speech, from which a certain amount of extra information is desirable, e.g. notifications, appeals or disclaimers, so that the expression does not get misleading.”¹¹

Though in specific cases, through the freedom of expression the denial of a few false expressions can remedy possible offences, false or misleading advertising can sometimes result in irreversible consequences.

12. WHAT ARE THE ARGUMENTS ADVANCED IN THE LEGAL POLICY DEBATE IN YOUR COUNTRY FOR AND AGAINST IMPOSING POSITIVE INFORMATION DUTIES ON ADVERTISERS (PROTECTION OF THE ECONOMIC INTEREST OF CONSUMERS; INCREASING MARKET TRANSPARENCY, REMEDYING INFORMATIONAL MARKET FAILURES DUE TO PRODUCT COMPLEXITY/IMPOSSIBILITY OF CONSUMERS TO ASCERTAIN QUALITY; PROTECTION OF HEALTH; PROTECTION OF THE ENVIRONMENT; OR ALTERNATIVELY, INFORMATION OVERKILL)?

Questions related to the content of legal regulation have been put into the lime-light of disputes because of industry- and product-specific information disclosure rules that are redundant in several cases, and the relationship of these rules to one another creates obstacles to the clarification of competencies as well. Therefore, the harmonization of the content of information disclosure rules with the Unfair Commercial Practices Act system is currently in progress as well. In the course of the deregulation process, it should be considered that the primary goal of the regulation regarding positive information disclosure is the protection of consumer interests. Obligations to provide information regarding certain elements are to be determined in markets and sectors where information asymmetry (i.e. the difference of the level of knowledge regarding the actual product) between the consumer and the undertaking is significant. With respect to the market of credential goods, regulation is highly important as

¹¹ Dr. Liber Ádám: “A reklám és a szabad véleménynyilvánítás” (“Advertising and the freedom of expression”), Magyar Jog 2006. 10.szám

consumers are not in a position regarding these products from which they are able to make a decision based on obvious empirical facts regarding the quality of the chosen product.

Another aspect to consider is if the transparency of the market in question is low, then consumers do not get the amount of information necessary to make a reasonable decision. This leads to significant disadvantages for the consumers and could result in a large number of bad consumer decisions, especially if the undertakings take an unlawful advantage deriving from this information asymmetry. This problem is particularly significant in sectors where the properties of the product or service in question are already more difficult to judge (e.g. banking sector, pharmaceutical industry).

The accessibility of too little information is obviously harmful with respect to consumer decisions, however, “information overload” could result in a similarly disadvantageous situation. To react to the information noise that he/she is flooded with, the consumer may decide not to get acquainted with most of the information accessible to him/her, as the time and energy spent on this do not hold out such extra knowledge which he/she considers useful in the given situation. An obligation determining the disclosure of too large an amount of information may result in a situation in which consumers lose the chance to decide because neither are they able, nor are they disposed to choose the elements necessary to make their decisions from the mass of information they are flooded with.