**JOKV491XA0 Misleading advertising law**

**Summary**

The seminar introduces students to the most important rules and relevant case law in the field of false and misleading advertising. We will examine critically how the rules regulate and restrict business communication for the benefit of consumers. The problems will be analyzed at a global level, comparing the legal approaches of the EU, some of its Member States. Specifically, the course will open with an overview of economic theories, including behavioral decision theory and the moral foundations of the laws. We will analyze the principles of European law, EU institutions and in some more detail the directive on unfair commercial practices that harmonized national legislation all over Europe. Thereafter, we will examine a variety of sectors, types of advertisements. Topics to be addressed include misleading omissions in the telecoms sector, health claims, comparative advertising. We will conclude by evaluating which institutional background and which type of sanction provides the most effective way of enforcement.

**Office Hours:** by appointment, you can reach me at toth.tihamer@jak.ppke.hu.

**Materials:** Collected materials for the seminar will be available. The sources listed below provide some of the material for your weekly assignments, may also serve as optional reading for those interested in broadening or deepening their knowledge with our topics.

Recommended e-book: Rebecca Tushnet and Eric Goldman: Advertising & Marketing Law: Cases and Materials (e-book, July 2012), pp 1-460 and 784-843.

(<http://www.scribd.com/doc/99904133/Advertising-and-Marketing-Law-Casebook-July-2012-SEE-NOTE>).

**Requirements and Grading:** This seminar meets once each week for 90 minutes. It is therefore important that you attend every meeting and come prepared to discuss and apply the assigned readings. The purpose of the seminar is to serve as a vehicle for us to read, think, discuss, and write about a range of interesting questions relating to false and misleading advertising.

Your final grade in this course will be comprised of (1) your contributions to our meetings and your work with assignments (50%), (2) the result of an interim test and (3) your research-and-writing project (25%).

With respect to (1), your grade will be based on attendance, participation and presentation. Depending upon the size of the class, students can give a 15-20 minute in-class presentation based on the assigned materials (during meetings #3-11, see course plan below). The topic of the presentation may overlap with that of the essay. Each of you is expected to be in a position each week to contribute to the discussions of the readings. Some home assignments will require that you answer a couple of questions by the day before the forthcoming lecture.

As to (2), you will write a short test proving your knowledge of the basic statutes of the course (especially the UCP Directive and economic principles). This test is planned for the 5th meeting.

With respect to the writing project you are expected to write an essay on a topic discussed with the lecturer of approximately 1500 words. Students should decide their topic before the 8th lecture and submit their draft papers for consultation before the 11th lecture.

**Attendance**

Students are expected to attend all seminars. Students may be excused from class in the event of illness, family emergency, or a university-excused absence. After two unexcused absences, I will lower your course grade by one grade point for each additional absence.

**Course plan - Misleading Advertising**

1. **Regulatory approaches to false and misleading advertising**

Sales promotion and advertisements. Types of advertisements. Competition policy and regulatory approaches. Constitutional law background: freedom of commercial speech. The most important sources of law in the U.S. and Europe. Federal and state rules. The moral context: the Catholic Church’s social teaching.

*Suggested reading*

<http://europa.eu/legislation_summaries/consumers/consumer_information/l32010_en.htm>

1. **Advertising and efficient markets**

How does false advertising distort efficient competition? The overlap of antitrust and consumer protection policies. Informed consumer decision. Types of consumer/transactional decisions. The role of behavioral economics. How does scientific study of human judgment and decision making influence legal rules and their implementation?

*Suggested reading*

# Mark Armstrong: Interactions between competition and consumer policy; CPI Vol4. No 1. 97-148. <http://discovery.ucl.ac.uk/7634/1/7634.pdf>

# Fundamental principles of consumer policy, GVH policy paper; <http://www.gvh.hu/en/analyses/fundamental_principles/6269_en_fundamental_principles_of_consumer_policy_2009.html>

# John Vickers: Economics for consumer policy; <http://www.google.hu/books?hl=hu&lr=&id=R24HwO0XWeMC&oi=fnd&pg=PA287&dq=economics+of+misleading+advertising&ots=lfoX6pICcv&sig=SJDElSq3opRXjWEJX3T8WkBImEM&redir_esc=y#v=onepage&q=economics%20of%20misleading%20advertising&f=false>

# J. Howard Beales III: Consumer protection and behavioral economics: To BE or not to BE; CPI Vol4. No 1. 149-169.

# <http://ec.europa.eu/consumers/behavioural_economics/index_en.htm>

1. **The structure of the European UCP directive**

Scope. B2C comunication. The concept of unfair commercial practices. The concept of transactional decisions. The three-layer prohibition. Black listed practices.

*Suggested reading*

Directive 2005/29/EC on Unfair Commercial Practices

EU guidance paper, available at:

<https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.guidance.show>

1. **How to detect misleadingness?**

The message of the advertisement, the relevance of media used. The average consumer test in Europe and its application. Vulnerable groups (i.e. the elderly and the sick) – professional consumers? The measurement of consumer beliefs. When are “up to…” or “even…” like promises misleading? What does “designed to save fuel” mean?

*Suggested reading*

C-470/93 Mars, judgment of the Court on 6th of July 1995

# Rebecca Tushnet: It Depends on What the Meaning of 'False' is: Falsity and Misleadingness in Commercial Speech Doctrine; [*Georgetown Public Law Research Paper No. 1117587*](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117587##)

Edward Russo et al.: Identifying misleading advertising; Journal of Consumer Research Vol 8. September 1981

1. **Misleading omissions: how to promote complex services and products?**

Inherent limits imposed by the medium applied. Small letter ads. Internet banners. Advertisement campaigns vs. individual ads. Examples from the telecom and banking markets to show what material information shall be disclosed.

*Suggested reading*

Selected advertisements for discussion

1. **Drug promotion and health claims**

European regulation and enforcement by Member States: examples from Hungary. The regulation of claims relating to foods with positive effects on health.

*Suggested reading*

P. H. Rubin: Regulation of information and advertising; CPI Vol 4. No 1., 169-193.

Pauline M. Ippolito and Alan D. Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market,* Bureau of Economics Staff Report, Federal Trade Commission, Washington, D.C., August 1989

1. **Cosmetics and ‘magic’ products**

Ads promising effective results. Objective and subjective effects. Mandatory disclosure of information.

*Suggested reading*

FTC: Weighting the claims of diet ads <http://www.consumer.ftc.gov/articles/0061-weighing-claims-diet-ads>

Regulation No. 1223/2008/EC on cosmetics

1. **Origin claims**

“Made in the EU or Hungary” ads may attract consumer attention. When are these claims misleading? The practice and guidance of the Hungarian competition authority.

*Suggested reading*

Made in the U.S.A: <http://www.law.cornell.edu/uscode/text/15/45a>

FTC Enforcement policy statement (1997) <http://www.ftc.gov/os/1997/12/epsmadeusa.htm>

1. **Comparative advertising**

Advertisements comparing two competing products were regarded as unfair market practice in many jurisdictions. Today it is acknowledged as the most effective way of promoting a product. What conditions should be met to be lawful? EU Court judgments and Hungarian cases from the telecom and retail sectors.

*Suggested reading*

C-356/04Lidl Belgium GmbH & Co. KG v Etablissementen Franz Colruyt NV, judgment of the EU Court of Justice of 19 September 2006.

Micklitz, Stuyck, Terryn (eds.): Cases, Materials and Texts on Consumer Law, Hart Publishing 2010., p. 133-139.

Barigozzi and Peitz: Comparative advertising and competition policy;   
International University in Germany Working Paper No. 19/2004

1. **Compliance: public and private enforcement, self-regulation**

Public versus private enforcement. The importance of active law enforcement and guidelines, legal certainty. U.S. institutions with jurisdiction over false advertising. The UK experience: the roles of the Office of Fair Trading and of the Advertising Standards Authority. Hungary: the competition authority and the national advertisement association.

Overview of various sanctions applied by administrative agencies, courts in the U.S. and EU Member States. Jail or fines? The role of commitment decisions. Actions for damages, collective actions.

Class actions.

*Suggested reading*

Micklitz, Stuyck, Terryn (eds.): Cases, Materials and Texts on Consumer Law, Hart Publishing 2010., p. 500-538.

C. Tesauro and Russo: UCP, the Italian implementation of the rules; CPI Vol4. No 1. 216-222

Michael S. Greve : Consumer Law, Class Actions, and the Common Law

<http://www.ftc.gov/bcp/workshops/classaction/writ_materials/greve.pdf>

Reebok settlement: <http://www.ftc.gov/opa/2011/09/reebok.shtm>

websites of the FTC, OFT, ASA and GVH and self-regulatory associations

1. **TBD (i.e. green claims, food advertisement, kids ads)**