

Misleading advertising (Megtévesztő reklámozás)

Összegzés

A kurzus célja jogösszehasonlító és esetjogi módszereket alkalmazva, tanulmányok és hatósági, bírósági döntéseket olvasva bemutatni a tisztességtelen kereskedelmi gyakorlatnak minősülő megtévesztő reklámozás magyar, EU-s és amerikai jogát. A tanultak hasznosíthatók versenyjogi, fogyasztóvédelmi és reklámjogi tárgyak szempontjából. Az UCP irányelv alapos elemzése után foglalkozunk a banki, egészségügyi, kozmetikai, ügyvédi és összehasonlító reklámokkal, valamint az intézményi-eljárási megoldásokkal. A hallgatóktól elvárás az órára készülés és aktív részvétel.

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 U.S., the EU and some of its Member States, especially Hungary. 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 in some more detail the European 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, cosmetic and banking sectors, health claims, lawyer ads, comparative advertising. We will conclude by evaluating which institutional background and which type of sanction provides the most effective way of enforcement. We will thus discuss both broad policy questions, drawing on seminal U.S. and European decisions and judgments, evaluate the misleading nature of certain advertisements, as well as relevant reports of the enforcement agencies and academic commentary.

Office Hours: by appointment. I can also be reached by email at toth.tihamer@jak.ppke.hu.

Materials: Collected materials for the seminar will be available in advance. 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.

Requirements and Grading: This seminar meets once each week for 90 minutes. It is therefore important that you attend every meeting and come fully prepared to discuss 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 presentation/writing project (50%), (2) an interim test (30%), and (2) your contributions to our meetings (20%).

With respect to (1), you may write *either* (a) an essay on a topic discussed with the lecturer *or* (b) three short response papers of each approximately 500 words. Response papers should develop a simple, focused argument regarding some aspect of the assigned readings or issues discussed. Each response paper should bear a title that clearly states its main argument, in the form of either a statement or a question. Students should submit their response papers via e-mail by 5 PM on the day preceding the class and bring a hard copy of the papers to the seminar. You may submit more than four papers, in which case the four papers with the highest grade

will be taken into account. Instead of the writing project, you may also choose to present a topic discussed with your lecturer.

Your interim test (2) will focus on topics related to the Unfair Commercial Practices Directive. With respect to (3), your grade will be based on attendance, and active participation. Each of you is expected to be in a position each week to contribute to the discussions of the readings. From time to time, students will be asked to submit short assignments related to the topic, either at the end of the class or from home, before the class meeting.

Please note that some missing attendance can be replaced by participating at the UCP Conference to be held on May 8th.

Size of the seminar: the seminar will start with 5 students, but with no more than 20.

Course plan - Misleading Advertising

1. Regulatory approaches to false and misleading advertising

History of sales promotion and advertisements. Competition policy and regulatory approaches. Constitutional law backgrounds: freedom of commercial speech. The most important sources of laws in the U.S. and Europe. Federal and state rules. EU directives, regulations and their implementation in Member States. The moral context: the Catholic Church's social teaching.

U.S. institutions with jurisdiction over false advertising. Hungary: the competition authority and the national advertisement association. An 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.

Suggested reading

Federal Trade Commission Act, incorporating U.S. SAFE WEB Act amendments of 2006

James P. Nehf: Misleading and unfair advertising; *HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW*, G. Howells, et al., eds., 2008

The Compendium of the Social Doctrine of the Church, produced by the Pontifical Council for Justice and Peace (2004)

2. Markets and advertising

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

Suggested reading

OECD: BE and consumer policy, especially pp 7-10

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP\(2016\)3/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2016)3/FINAL&docLanguage=En)

Summary of the FTC BE conference

<https://www.ftc.gov/sites/default/files/documents/reports/summary-report-ftc-behavioral-economics-conference/070914mulhollandrpt.pdf>

Mark Armstrong: Interactions between competition and consumer policy

https://mpra.ub.uni-muenchen.de/7258/1/MPRA_paper_7258.pdf

John Fingleton (OFT): Joining up competition and consumer policy; available at: http://www.oft.gov.uk/shared_oft/speeches/2009/consumer-comp-policy-pres.pdf

3. General rules of the European UCP Directive

Scope. B2C communication. The concept of unfair commercial practices. The concept of transactional decisions. Black listed practices.

Suggested reading

Directive 2005/29/EC on Unfair Commercial Practices

EU Commission webpage and summary

https://e-justice.europa.eu/content_unfair_commercial_practices_directive_200529-595-en.do

EU guidance paper, available at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016SC0163>

OFT Guidance (2008)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284442/oft1008.pdf

4. The average consumer

The average consumer test in Europe and its application. Vulnerable groups (i.e. the elderly and the sick). The measurement of consumer beliefs. When are “up to...” or “even...” like promises misleading? The different approaches of free movement and consumer rules.

Suggested reading

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](https://www.law.gwu.edu/research/paper-repository/1117587)

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

Stephen Weatherhill: Who is the average consumer? in: The regulation of unfair commercial practices under EC Directive 2005/29, ed. Weatherill & Beritz, p. 115-139.

5. 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. Citing examples from the telecom and banking markets to show what material information shall be disclosed.

Suggested reading

video: https://www.consumer.org.hk/ws_en/unfair_trade_practices/p245

Selected advertisements for discussion

6. Drug promotion and health claims

The role of Food and Drug Administration. The FDA was given jurisdiction over prescription drug advertising in 1962. European regulation and enforcement by Member States: examples from Hungary. The regulation of claims relating to foods with positive effects on health.

Suggested reading

Article + FDA warning letters:

<https://www.raps.org/regulatory-focus%20/news-articles/2016/12/fda-warns-two-pharma-companies-over-misleading-ads>

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

Vodra, Cortez and Korn: The Food and Drug Administration's Evolving Regulation of Press Releases: Limits and Challenge; *Food and Drug Law Journal*, Vol. 61, p. 623, 2006

7. Cosmetics and “magic” products

Ads promising effective results. Objective and subjective effects.

Suggested reading

FTC: health claims

<https://www.ftc.gov/news-events/media-resources/truth-advertising/health-claims>

FTC: Weighting the claims of diet ads

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

8. Promotion of tobacco and alcohol products

The role of sector specific regulations.

Suggested reading

EU: https://ec.europa.eu/health/tobacco/advertising_en

Clarke and Prentice: Will Plain Packaging Reduce Cigarette Consumption? La Trobe University, April 18, 2012

https://www.latrobe.edu.au/_data/assets/pdf_file/0009/208575/2012.03.pdf

Alcohol marketing regulations in the EU

https://ec.europa.eu/health/ph_projects/2004/action3/docs/2004_3_16_frep_a2_en.pdf

9. Origin claims

“Made in the U.S., EU or Hungary” ads may attract consumer attention. When are these claims misleading? The practice and guidance of the Hungarian competition authority and the FTC. The Hungarian legislator adopted specific rules to define “Hungaricums”.

Suggested reading

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

10. Digital markets

Specific problems related to digital platforms, digital services. Apple, influencers, hotel booking, etc.

Suggested reading

The GVH’s digital strategy:

https://www.gvh.hu/pfile/file?path=/en/gvh/strategy/GVH_Stategia_Digitalis_fogyved_startegia_2018_09_27_a&inline=true

11. 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-356/04 Lidl Belgium GmbH & Co. KG v Etablissementen Franz Colruyt NV, judgment of the EU Court of Justice of 19 September 2006.

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

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=699583