**Misleading advertising**

**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 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. 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 research-and-writing project (50%); and (2) your contributions to our meetings (50%).

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 approximately 1500 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-mailby 5 PM on the day preceding the class andbring 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.

With respect to (2), your grade will be based on attendance, participation and presentation. Each of you is expected to be in a position each week to contribute to the discussions of the readings. Each student will be required to make a 15-minute in-class presentation. For students choosing to fulfill the essay requirement may present their draft paper. All other students will be assigned a presentation, to be made in a class meeting of their choice, during meetings #3-14 (see course plan below). These presentations will be based on the assigned materials.

**Outing:** students usually enjoy our outing when we hold some of the lectures outside the town, spending two days together. Please note that this may involve extra costs of about 5-6 000 Ft per student.

**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**

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.

*Suggested reading*

Directive 2005/29/EC on Unfair Commercial Practices

[**Federal Trade Commission Act, incorporating U.S. SAFE WEB Act amendments of 2006**](http://www.ftc.gov/ogc/FTC_Act_IncorporatingUS_SAFE_WEB_Act.pdf)

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

**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##)

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

**2.** **Advertising in a market economy context**

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*

**Mark Armstrong: Interactions between competition and consumer policy; CPI Vol4. No 1. 97-148.**

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

**Glaeser and Ujhelyi: Regulating Misinformation** [***NBER Working Paper No. w12784***](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953207##)

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 comunication. The concept of unfair commercial practices. The concept of transactional decisions. Black listed practices.

*Suggested reading*

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

EU guidance paper, available at:

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

**4.** **How to detect misleadingness?**

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?

*Suggested reading*

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

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.

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

**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*

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*

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

**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***

**Frank Auton: Direct-to-ConsumerAdvertising (DTCA) of Pharmaceuticals: An Updated Review of the Literature and Debate Since 2003** [***Economic Affairs, Vol. 26, No. 3, pp. 24-32, September 2006***](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925320##)

**7.** **Cosmetics and other magic products**

Ads promising effective results. Objective and subjective effects.

*Suggested reading*

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*

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

**Markowitz and Grossman: Alcohol Regulation and Violence Towards Children**[***NBER Working Paper No. w6359***](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=226108##)

**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.** **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*

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

C-356/04Lidl 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

**11.** **Compliance: public enforcement and self-regulation**

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.

*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

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

**12.** **Effective sanctions and remedies**

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*

FTC Act

**13.** **Seminar paper presentation, as needed**