

Misleading advertising in the light of the actual decision of the Hungarian Competition Authority

In the context of a recent event, the legal rules for advertising misleading to consumers and the background of such rules once again captured public attention. Dr. Lajos Merics, the legal expert of Kovács Réti Szegheő Attorneys-at-law sets out the case for the readers of Origo and draws the relevant conclusions.

In its decision made in February 2016, the Hungarian Competition Authority found in respect of a cosmetic awarded with the Hungarian Quality Product Prize, a product named “HillVital Herbal Master Balsam” that Global Partners System Kft., the company authorised to market the product unlawfully advertised it. The company claimed that the product was suited to cure specific diseases and is 100% natural cosmetic.

Act XLVII of 2008 (“Unfair Commercial Practices Act”) prohibits unfair commercial practices against consumers. The basis for the measure taken is to stipulate a general requirement that operators authorised to market the products should furnish true and accurate information regarding the essential characteristics of the products to the consumers. It is a clear requirement for advertising addressed to consumers that it should enable consumers to create a realistic picture on the basis of such advertisement.

The commercial practice must be assessed based on the behaviour of a consumer who is acting reasonably well-informed, with thoughtfulness and circumspection as generally expectable from him in a particular situation. In its decision, the competition council proceeding in this case ascertained that the commercial practice investigated was principally targeted at consumers seeking alternative therapies in order to minimise medicines to be taken and/or seeking alternative options to cure their existing health problems. This way, these consumers form an expressly vulnerable consumer group.

The expert of the KRS Law Office explains: Legislation is concentrating on the requirement that the undertaking is obligated, at the request of the authority proceeding in the matter, to verify that the allegation forming a part of the commercial practice is true. If the undertaking fails to fulfil this obligation, it shall be deemed that its allegation has proved to be untrue. Therefore, it shall also be regarded as unfair commercial practice when the undertaking despite a request from the Hungarian Competition Authority is unable or unwilling to verify that the product is suited to cure specific diseases or specific dysfunctions or disorders in the human body.

The decision of the Competition Council points out that the studies and documents regarding the healing effects of certain herbs and their substances must be scientifically justified subject to strict conditions.

According to jurisprudence, neither positive product experiences nor opinions given by patients and their treating physicians can be considered alone as scientific knowledge. For the purposes of providing substantiated evidence for the healing effect, a thorough set of experiments covering all effects and side effects of the product on organism must be conducted, the outcome of which must be described in a medical opinion.

Under the Unfair Commercial Practices Act, a commercial practice is also misleading where the product contains untrue information regarding its essential characteristics, thereby urging consumers to make a transactional decision that they would not have otherwise made – dr. Lajos Merics explains.

Following the decision of the Hungarian Competition Authority, the representation stating that the product is a cosmetic made of 100% natural basic materials must be regarded as an important characteristic. In selecting from various products, more and more consumers are influenced by the fact that a cosmetic is only made of natural basic materials and contains no additives of artificial and synthetic origin.

In accordance with the decision, it is important to emphasize that it is the natural origin of the components which is important for consumers rather than whether the products contain naturally occurring substances. The difference is that a certain portion of naturally occurring substances can also be produced artificially and so the origin of basic materials must be proved rather than the fact that they occur in the nature. The undertaking was unable to prove it for the 7.8% rate of ingredients of HillVital Herbal Master Balsam.

According to the Hungarian Competition Authority, consumers are not required to examine whether the message conveyed to them is true and correct. They cannot be expected to question the reliability of the advertisements or to expect that advertisers never tell the truth and to search for actual facts. Based on the foregoing, the responsibility of the undertakings must be particularly emphasized to ensure that consumers have a clear insight into the advertised products.

In many advertisements, the conditional is used in the message so conveyed (for example, "...it could produce its effects already in 10 minutes", or "...you could reduce already by X percent"). In doing so, advertisers evade their obligation to prove the veracity of their claim as they do not claim that the product produces the desired effect within 10 minutes without exception. However, the message is "passed" to consumers substantially the same way as if it was a factual claim in terms of advertising psychology.

It is likewise important if not more important to call consumers' attention to the fact that, in addition to legislation, it is their consciousness that is the most decisive factor in the consumer protection practice since the bigger consumer awareness advertisers must face, the more beneficial it will be also for them to apply fair commercial practices to achieve their goals – the legal expert of the KRS Law Office stresses.