**Pribula László[1]: The surreptitious advertisement**

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The characteristic feature of the regulation of advertisements is that the legal regulations about advertising activity do not appear in a consistent system of laws. The regulations also work like that in those countries where independent law about advertising exists, such as in Hungary, in Spain or in Portugal. Those countries also follow the same method where the legislator has not found it necessary to put the main regulations into one codex. Unified regulations about advertisement do not exist. For long time the emphasized point of view was that advertising was also protected by the four freedoms of the internal market of the European Union. Obviously the freedom of advertising was not unlimited but the bounds could be deduced from the Treaty establishing the European Economic Community that was why the European Union did not enact further regulations. From the 1980's there was a change, directives were accepted which dealt with certain elements of advertising activity, but it is still typical that the member states' regulations differ.

The main part of the regulation in connection with advertisement consists of restrictions and prohibitions on the method, volume and subject of the advertising activity. According to legal history, different eras of such regulations can be distinguished. Before the 1850's only the placement of advertisements was controlled but the advertising activity itself not. From the 1850's prohibitions and restrictions were introduced based on competition law, after World War II. consumer protection became an additional element of the regulation. Although the countries followed different ways in their legislation there was a common trend in the development. At first measures were taken against those advertisements which contained false information in regard to the fact that an advertisement could be the most harmful if it transmitted untrue information in connection with goods or service according to what the consumer took decisions prejudicial to him. Later on this point of view was moderated because the legislator took into consideration that advertisements had their own specific language, they were not to be taken so serious. At the same time it was discovered that advertisement could transmit information differing from reality without stating false data. That was why misleading and unfair advertisements became prohibited instead of advertisements containing false information. Further on restrictions were complemented by regulations on different goods and services such as medicines, tobacco, alcoholic beverages, hazardous substances. Restricting or banning various advertising methods came into appearance later.

The advertising law is interdisciplinary, the number of regulations is so vast that it is hard to see through it. That is the reason behind that the system of restrictions on advertising is difficult to summarize. Three levels of restrictions and bans can be distinguished according to the fact that advertising activity is also an activity on the market. Primarily the boundaries of advertising activity are marked out by competition law, (regulation of advertising activities, based on competition law), secondly general limitations and bans specifically on advertising activity evolved (regulation of advertising activities based on general regulations of advertising law). The legislator also initiated special rules in connection with the different fields where advertisements appear (e.g.: advertisements broadcast in television or radio) regulation of advertising activities based on the special regulation of advertising law). The courts are allowed to use the sanctions of criminal law or infringement law if the rules of advertising activity are violated seriously. With this possibility the system of regulations is even more improved.

On the other hand the legislation promotes the ambition that if the rules – set up by professional organizations dealing with advertising – are broken insignificantly, the professional organization should check itself (first and foremost according to the advertising ethic) instead of the court system.

According to the regulation of advertising activities - based on general regulations of advertising law - restrictions can be divided into three groups: regulations introducing restrictions in connection with goods (typically goods like drugs, tobacco, alcoholic beverages), limitation of advertising activity in order to prevent particular interests, such as the development of minors, personality rights, public morals. The third group contains restraints of different advertising methods. As opposed to the first two groups, the elements of the third group have become similar in the member states of the European Union, nowadays they are almost the same.

With the only exception of the debates about the regulation of tobacco advertising, the restrictions of this third group turned out to be the most controversial of all both theoretically and practically. There exists a point of view what is considered to be radical recently which states if the acts of the advertiser do not interfere with the interests of the fellow competitors and the consumers directly, the freedom of the publishing method of the advertisement cannot be limited. This stand point would allow the advertisers decide how to popularize their goods and services, it also would let them choose the forum, the method and the content of the advertisements – on condition that these acts of the advertisers must not offend against any other prohibitions. This viewpoint coincides with the fundamental idea of marketing communication according to what it is needed to publish as much information, on as many forums, through as many channels or ways about the goods and services as possible, in addition different methods of indirect advertising should also be used.

There is an unusual duality in the history of the regulation of advertising: its primary reason is that the conception of economy and the conception of consumer protection in connection with advertising are different. It's unquestionable that the advertising activity is also an activity on the market and until World War II. it seemed to be enough to regulate advertisements only on the basis of competition law. If the main limit for the market activities is fair trade why would it be different concerning advertisements? Actions taken against those advertisements which cause injury or restraining advertisements of different goods and services fit well into the previous train of thought. For example the limits of drugs advertisements are based on the limits of product trading, and if the legislator prohibits for example the advertisements encouraging violent behaviour it is likely that it also prohibits those market activities which urge aggression but it uses different methods.

Certain banned or restricted advertising methods appear only in connection with advertising activities, they can be deduced from the typical logic of advertisements and they do not have counterpart in competition law. Terms like hidden competition, subconscious competition or comparative market behaviour do not exist but these types of advertisements are regulated. These institutions – surreptitious advertisement, subconscious advertisement, comparative advertising, special offer - became the first special institutions of advertising law.

The difference between the aforesaid two points of view in connection with advertisements comes about the problem that the definitions of advertisement are not exact. The economy considers direct and indirect monetary interest as a basic element of advertising policy and marketing communication and determines the advertisements(paid form of impersonal communication about ideas and products which represent themselves in the most important media), personal sale (verbal communication with the intention of selling with the prospective costumer), urging shopping (form of urging shopping what aims at customers and the

marketing), media publicity (presence of information about the product or shop without paying for the place or for the time of presence) as their instruments.[2] Opposing the legislator only deals with the economic type of advertisements and it does not take into consideration advertisement with social purpose. The economic advertisement is a piece of information what promotes the utilization of the product or services, it popularizes the name the marking or the activity of the enterprise, or makes the product or indication become well known.
That point of view which does not consider the method of advertising as the matter of only the fellow competitors comes from the idea that advertisements have their own specific language and logic. Bernard Brochand and Jacques Lendrevie emphasize that the advertisement is a committed communication.[3] Although it gives information but from a special point of view, from the point of view of the advertiser. It needs to exaggerate on the advertiser's behalf but this exaggeration must not overstep the mark when the consumers do not take it serious anymore. The advertisement is neither art nor science, something between them. The advertisement does not present the product from scientific point of view because this would push into the background its entertaining character. The advertisement does not use only the instruments of art because this would overshadow its informative function. Nowadays the advertisement is expected to have artistic and scientific characteristic features but in a balanced way. The advertisement reflects optimistic attitude what can be traced back to the popularization of the product or service. It only can arouse people's interest if it suggests positive message, it only can urge people to consume if it shows a harmonious and cheerful world. The advertisement is relative and seasonal. The transmitted message, the method of exhibition, the circle of the addressed consumers depend on the social, economic and cultural sphere where the advertisement is presented. The advertisers cannot neglect these circumstances because it would endanger the success of the campaign.

Because of these reasons the world of advertisement is decisively different from the usual communication of market behaviours. That is why it is a basic requirement to make consumers see whether they meet an advertisement or other type of information. The consumers need to know how to approach such pieces if information because generally they fully aware of the specific features of advertising. This requirement led to the appearance of an institution in the 1980's which previously was unknown to the European regulation of advertising, it was the requirement of identification of advertisement.

The former point of view did not find it necessary to make the consumers see the difference between an advertisement and another type of information. It did not consider restrictionable if the advertisement and different pieces of information got mixed in time or in space. It was not prohibited if the press (in its neutral communication) suddenly showed advertisements, it was not prohibited to show commercials during movies in the television, sports events or programmes inseparatedly from the programme. It was not restricted either to announce information containing advertisement without pointing out that it was an ad during a show. As a result of this point of view types of advertising addressing consumers directly gained ground, people transmitting advertisements could accost consumers on the street or could visit them at home without prior notice about the information they would receive.

In the 1970's and 1980's, in the European Union the consumer protection highly improved what directly effected the regulation of advertising activities. The first directive in connection with advertisement was the 1984/450 EEC directive (published: OJL 250-09/09/1984.) regulating misleading advertising only wanted to regulate those advertisements which were able to mislead or cause harmful effect to those people who were aimed at or reached. The next one was the 1989/552 EEC directive (published: OJL 298-17/10/1989.) regulating commercials in television introduced numerous innovations used even today but aimed only at advertisements broadcast in television and radio. Among the innovations the most

important was that the directive laid down as a general demand that commercials in television must be recognizable and separated from other parts of the programme clearly. These regulations brought with themselves the prohibition of advertisements using surreptitious and subconscious techniques, because these two types of advertisement definitely violate the requirement of identification. Later on the same principle appeared in the directive on privacy and electronic communication, in the 2002/58 EC directive (published: OJL 201-31/07/2002.) which set up the demand that those electronic mails which contained advertisement must be recognizable and that such mails must not be send to anybody who did not give permission.

The definition of surreptitious advertisement is not given very clearly in the laws of different nations. The ambition is obvious and easily recognizable: the consumer needs to know whether he meets an adv or a neutral piece of information.

Recently the consumers are fully aware of the fact that the meaning of advertisements differs from disinterested communication. The surreptitious advertisement is fraught with risk because it takes advantage of the consumer's confidence that he may think that the communicated message is part of the received information, he may take it even more serious and that is why he cannot consider its real meaning. The adoption of surreptitious advertisement would not cause any problem if the promotion of the product, the service or the notice appeared only in separated ads. Because of the specific characteristic features of advertising the foresaid do not happen always like that. The strict approach of the prohibition of surreptitious advertisement would restrict marketing communication because with convincing argumentation every piece of information could be accused of containing advertisement-like message (for example: giving information about the change of place of the head office of a company or the appearance of a product during a programme or publication of a book, or giving information about the beginning of an activity). The judiciary is not in an unproblematic situation in connection with setting limits of the regulation surreptitious advertisement. That process seems to evolve according to what the freedom of speech on the field of commerce succeeds over the protection of customers.

Lilla Hargitai pointed out the difficulty of the determination of the definition of surreptitious advertisement in her study. She draws attention to the fact that it is hard to define if a piece of information contains advertisement-like elements. Any form of frequent repeating of a trademark, or organization of news-like programmes, or publicity equals the effect of advertising.[4]

In connection with the placing of products it is really difficult to decide whether the appearance of a product or a service is considered to be surreptitious advertisement. The characters of a show drive some kind of car, wear some kind of clothes, read newspaper, go to restaurant or take part in programmes – so things like that happen in everyday life and they bring advertisement-like elements with themselves accidentally and irrelevantly. It would be artificial and expensive to make all products and services unrecognizable. People meet hidden ads in many cases, for example a publicity can be seen on the spot of an accident, or during sports programmes it is natural that ads are on the backboard or on the strips of the players. Presenting the products of a programme's sponsor seems to be similar to surreptitious advertisement. Certain programmes – because of their topic – continuously popularize particular products or services, such are the cultural or educational programmes.

The jurisdiction tries to restrict the interpretation of surreptitious advertisement. If an advertisement of a product, service, institution, organization, etc. contains the advertisement of another product, service, institution, organization, etc., for example its logo, typically this is not considered as a surreptitious advertisement, this act falls within the competence of the advertiser. The appearance of the sponsor's products in a sponsored programme is not

regarded as surreptitious advertisement. Presentation of cultural services is not considered to be surreptitious advertisement either if its appearance serves for giving information.

It must not contain advertisement-like elements and must not recommend products or services.

Judges have to balance between the protection of the consumers' interests and the unreasonable restriction of freedom of speech on the field of commerce. The basis of the decision would be reality, it is discernible that judges do not want to make informing senseless by forcing its publisher to pay more attention than the average to avoid surreptitious advertisement. It is natural that in a cultural programme people talk about book, music albums, exhibitions. It is natural that in a sponsored programme the presenter wears the dinner jacket and uses the scenery of the sponsor. It is natural that on the scene of football matches ads are presented. It is natural that in a series actors use recognizable brands. On the other hand it is not natural if these features are overemphasized and ignore the appearance of objectivity. Although it is easy to draw up these ideas in theory but they produce a lot of difficulty.

The prohibition of surreptitious advertisement is underlined because of consumer protection, as the aim is to limit the range of the applicable means in the hand of the advertiser, means whose target is to acquire profit directly or indirectly. The situation is more complicated if the necessary and barely avoidable appearance of surreptitious advertisement is part of a socially important and primarily non-commercial campaign.

In most of the countries the institution of Corporate Social Responsibility seems to gain ground (according to its abbreviation, to what follows: CSR). Its main point is that certain enterprises – beside their main activity – act for the benefit of society, culture, environmental protection and for other aims useful for the community. It is a voluntary and non-profit activity. Of course those people who are supported should be informed somehow about this movement. Although in many cases such actions met with the interpretational obscurity of surreptitious advertisement.

First of all it is complicated to decide whether the information should be considered as surreptitious advertisement if it contains the name or characteristic feature of the enterprise doing activity as part of CSR. It is tough to disregard that behind any appearance of profit orientated enterprises the only motivation is to advertise themselves. As Zoltán Haszán pointed out: "It is difficult to get rid of the stereotypy that every advertisement is commercial advertisement if it contains the name or the logo of a company, independently from the fact that in that given situation the aim is not to maximize the profit or at least not directly."[5]

Whereas the information which may contain advertisement-like elements is not as important as the positive consequences of taking social responsibility. Indeed the consumer who is more critical in connection with the existence and role of the advertisements accepts this kind of advertisement. It is reasonable to present such activities widely but the object is not to urge to take advantage of it as a business activity.

The legislation of the European Union also moves toward a less strict approach of the prohibition of surreptitious advertisement. The Commission submitted a proposal on 13 December 2005 to renew directive 89/552/EEC, the aim was to ensure an even wider interpretation of the freedom of speech on the field of commerce. The placing of products - as a form of surreptitious advertisement - would be permitted in series and movies but before the beginning of the movie the spectators should be informed that the movie contains surreptitious advertisements. In the news and programmes for children or religious

programmes such advertisement would be prohibited in the future too. In addition the surreptitious advertisements in the movie should not be overemphasized, but this last terminology may cause the difficulties of interpretation. According to the proposal the strict conditions of the identification of the advertisements would be eased up because it would allow advertisements to be presented not only in blocks.

Recently it seems that the strict regulation of the prohibition of surreptitious advertisements would be replaced by lighter regulation which focuses rather on the interests of the advertisers. It is doubtful whether the lighter regulation is an unnecessary step back from the point of view of consumer protection. If the starting point is that the consumer has to be protected in every situation where he cannot decide unambiguously if he faces an advertisement or other type of information, such regulation is definitely a step back. On the other hand the advertisements and the economic interest behind them often break through the strictly construed rules of consumer protection and it is the question of interpretation whether such means are not allowed. The marketing-communication knows the concept of merchandising which is beyond the range of legislation. The essence of merchandising is the image transfer that is well known people, cartoons, their characters or scenes are used in advertisements. The advantage of this from the point of view of advertisers is that the used elements have positive meaning in themselves and the consumers like them even as the indication of advertisements. It is unquestionable that consumers, mainly children cannot separate the positive content of people, characters, scenes used as indication from the message of the advertisement. The legislator is not in a position to take steps against these means or even it does not consider acting in such situation necessary. Presumably the advance or repression of surreptitious advertisement causes plenty of debates. It is sure that both the legislator and the jurisdiction are forced to take into consideration such interests among what it is hard to find balance.

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[2] David Jobber: Európai marketing (KJK-Kerszöv Jogi és Üzleti Kiadó Kft. Bp. 2002. 320.o.)

[3] Bernard Brochand – Jacques Lendrevie: A reklám alapkönyve (KJK-Kerszöv 2004. – 12.-18. o.

[4] Hargitai Lilla: Gondolatok a médiatörvény reklámszabályainak lehetséges módosításáról www.mediakutató.hu 2000. nyár jogi rovat

[5]Haszán Zoltán: CSR: társadalmi felelősségvállalás a cégeknél (Népszabadság 2006. december 29.)