

THE LEGAL ASPECTS OF ADVERTISING IN THE SLOVAK REPUBLIC WITH THE SPECIAL FOCUS ON THE PROMOTION OF CHOSEN PRODUCTS

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ABSTRACT

The topic of the paper that is anchored in the area of marketing offers the outstanding overlaps into the area of constitutional and administrative law. It directs to multidisciplinary research of the issue whose concept and legal regulation remains to a large extent, after years of professional and amateur discussions (not only) in the slovak legal environment unfinished. Advertising as a part of products' marketing, promotion of pharmaceuticals and protection of consumer against inappropriate influences of this advertising should represent the main aim of legal regulation in this area of law. The essential legal enactments except the Constitution of the Slovak Republic are mainly Law no. 167/2001 of Journal of Laws about advertising subsequently amended, Law no. 308/2000 of Journal of Laws about broadcasting and retransmission and about the change of Law no. 195/2000 of Journal of Laws subsequently amended.

The aim of this paper is to analyze the chosen issues with the help of scientific methods, that society has to deal with when it regulates the acceptance of information in connection with products' advertising and promotion.

Keywords: *advertising freedom of speech, marketing, protection of consumer, right to information*

1. INTRODUCTION

Advertising is an important part of commercial communication enabling mainly businessmen to promote products, services or other products that are objects of business activities for consumers or entrepreneurs and it is the important source of information. It enables better orientation and decision making on the market when choosing products and services.

The Slovak Republic is according to the enactment of Article 1, paragraph 1 of the Constitution of the Slovak Republic, a sovereign, democratic and legally consistent state, where is the Constitution the basic law source, that is superior to other sources of law. The keystones of legal regulation from the point of view of advertising are mainly the two articles of the Constitution of the Slovak Republic – Article 26 and Article 55. Advertising has the indisputable meaning from the point of view of informing consumer. It is one of the forms of application of freedom of speech and realization of the right to information. It is one of performancies that fulfills the Article 26, paragraph 1 of the Constitution of the Slovak Republic which says that „*freedom of speech and right to information are guaranteed.*“ It is possible to restrict these rights guaranteed by the Constitution only to prevent unfair competition and propagation, untruthful and misleading information. In the states where advertising operates in

stable, liberal market economy, the form of ethical advertising codes was fixed for the regulation of advertising ethics. These codes are respected by legal subjects running businesses in the area of advertising even though these codes are not legally binding. Respecting these codes is guaranteed by the authority of special societies where entrepreneurs doing business in the area of advertising are organized. (Milošovičová, Nováčková, 2014, pp 88-99)

2. ADVERTISING IN GENERAL

The original basis of legal enactment of general requirements for advertising of some products or for advertising spread by some distinctive means of communication as well as of supervision over advertising was enacted in the Law of National Council of the Slovak Republic no. 220/1996 of Journal of Laws effective from 30th of April 2001. Its four-year application has shown many imperfections in the definition of advertising itself, in the restrictive regulations in advertising of some products, as well as in the execution of supervision of obeying the law. For example, if law in provision of § 4 of par.2 banned the spreading of advertising by means of electronic computer network, but this ban was being breached in general and its breaching was not controlled or sanctioned by any supervisory authorities. After the law entering into the force, other important directives were adopted that regulate misleading and comparative advertising, as well as advertising about tobacco products. That was the reason why it was necessary to implement these directives into legal systems of the Slovak Republic in the interest of accession process of the Slovak Republic to the European Union. From this reason, it was also more convenient to make the new legal regulation that by the complicated restatement of the law of the National Council of the Slovak Republic no.220/1996 of Journal of Laws as subsequently amended.

In the new legal enactment, the legislator comes out from the four basic regulations that are legitimacy, honesty, truthfulness and politeness. In these terms, the general requirements for advertising are formulated. For the advertising of some products as pharmaceuticals, nursing substances, alcoholic beverages, tobacco products, weapons and munition, it was necessary to define special conditions and restrictions. The law on advertising does not aim to regulate all area of advertising in complex and leaves in validity the legal enactment of some products or spreading advertising in the certain media for special laws, as for example the legal enactment of the advertising of groceries to the law no.152/1995 of Journal of Laws about groceries or spreading advertising in radio and television broadcasting according to law no.195/2000 of Journal of Laws about telecommucations.

The competencies of the supervisory authorities are in connection with acceptability of comparative advertising completed with authorisation of supervisory authorities to require from the sponsor of advertising, i.e. from the person that ordered advertising or the person to whose benefit is advertising spreading, to submit evidences about the accuracy of the information that advertising includes. (Nováčková, Milošovičová, 2011, p 84)

If the sponsor of advertising does not bear the burden of truth about the accuracy of information spread by means of advertising, advertising is regarded as misleading or inadmissible comparative advertising. The law includes penalties that supervisory authority can impose for breaching the act provisions. In connection with the adaptation to the definition of misleading advertising as it is understood in the European Union, it is also necessary to change the definition of misleading advertising in §45 of Commercial Code. As the comparative advertising enables to spread the accuracy of the information about products and conditions of other contestant, that are in some sense able to cause harm to other contestant, the comparative advertising can not be considered as detracting according to §50 of Commercial Code, that is necessary to fill in this provision.

As the National Council of the Slovak Republic approved law no.308/2000 of Journal of Laws about broadcasting and retransmission and about the change of law no. 195/2000 of Journal of Laws about telecommunications, where it is regulated the broadcasting of advertising in radio and television in the way that there are not followed all intentions of the harmonization of law with the law of the European Union in this area, it was necessary to solve the relation of law no.308/2000 of Journal of Laws to law on advertising. By the adoption of this law no requirements to state budget were arisen as well as to creation of new jobs in public administration.

This law is fully in accordance with the Constitution of the Slovak Republic and international treaties, that the Slovak Republic is bound with, and it is fully compatible with the European Union laws where is this issue regulated for example in Directive of Council 84/450/EHS dated 10th of September 1984 that tackles misleading and comparative advertising in Directive 97/55/ES, Directive 92/28/EHS on advertising of human pharmaceuticals, Directive 91/321/EHS on groceries for alimentation of infants and small children.

The law, with its content belonged to the preferred areas of approximation of law in Article 70 of European Agreement, in the part of consumer protection and belongs to the priorities recommended in the preparation of the associated countries of central and eastern Europe for integration into the domestic market of the Union.

The Directive 84/450/EHS subsequently amended in the Directive 97/55/ES in the interest of consumer protection, economic competition and public, bans spreading misleading advertising and regulates conditions of spreading comparative advertising. The Directive imposes to the member states of EU to accomodate courts or administrative supervision bodies with competencies that enable them to require the evidence of accuracy of information in advertising, to ban spreading of advertising and to publicize decisions. The Directive 92/28/EHS on advertising of human pharmaceuticals regulates, regarding the specifics of relationships of consumers to pharmaceuticals, advertising determined for public and professionals. The directive bans advertising of non-registered pharmaceuticals and regulates the performance of propagators of advertising. The Directive 91/321/EHS on groceries for alimentation of infants and small children regulates mainly the conditions for composition and marking of these products and regulates also some conditions of its advertising.

The aim of the law is defined in four areas: regulation of general requirements for advertising, regulation of conditions for advertising of some business products, regulation of legal protection against the effects of misleading advertising and comparative advertising in the form that is inadmissible and regulation of competencies of public authorities in obeying the enactments of law. The advertising spread in radio and television broadcasting is regulated in the special law no.308/2000 of Journal of Laws on telecommunications subsequently amended. Law enactment of §2 specifies the basic terms that are from the content point of view the most important for the legal regulation. The term advertising is defined in the way that the legal enactment in the Slovak Republic would be similar to the legal enactment valid in EU.

The definition of this term according to already non-effective law no.220/1996 of Journal of Laws on advertising subsequently amended is not according to the Directive 84/450/EHS amended in the Directive 97/55/ES on misleading advertising. In relation to the definition according to the actual legal enactment, advertising does not have to have the character of public information, but it can be spread as addressing legal act. The term of advertising is narrowed down only to the presentation of business products and not to the presentation of any values of tangible and intangible character. It does not relate nor to political advertising. The presentation of business products is any form of demonstration, presentation or approximation of business products with the aim to catch the attention of potential consumers. Product is all the result of business activities, as well as rights and liabilities of intangible character connected to any

business activity. The counting of data and performances that are not considered as advertising should also help to the precisising of the term advertising. (Masár, D. 2013, p 52)

The basic requirements for advertising come from legally binding rules of economic competition, ethical principles and consumer protection. First of all, advertising must not be misleading. Misleading advertising is not a special type of advertising. Falseness of advertising is considered from the point of view of its content, all its data, characters and information in relations to persons, to whom is determined or who affects and which in the result of its misleading content misleads these persons or can mislead them and thus it will influence their economic behaviour on the market by inconvenient manner or it can even damage them.

The definition of misleading advertising is in the enactment of §45 of law no.513/1991 of Commercial Code subsequently amended. However, originally this definition did not fit to definition of misleading advertising according to legal acts of EU, that is why its definition has changed. Advertising restricts itself by its content that breaches the values protected by legal order. It deals with the protection of human life, health, environment, freedom, conscience, morale respected by the society, protection of assets etc. The influence of advertising to minors is especially emphasized. The restrictions of advertising come out of the traditions and experience gained in the course of development of advertising. They have the common international standard, that is also codified in the Slovak Republic in Ethical advertising Code that was published by advertising agencies association and its body – Advertising Council.

The surreptitious advertising for the purposes of radio and television broadcasting is defined in the provision of §32 part 13 of law no.308/2000. The surreptitious advertising is the advertising whose aim is the purpose and effect of advertising composed to the content of other information that is not advertising. The distinction of surreptitious advertising should not make any problems in practice, if the content of the spread information has all definition characters of advertising.

According to Article 4, part k) of law on advertising, advertising must not include personal information, information about assets of persons without their prior acceptance. Sending advertisement to the specific addressee is not in contradiction to this provision, as the necessary personal information serving for advertising delivery to addressee are not the part of the content of advertising in terms of its definition and it is only attached to advertising.

The prior acceptance of users is necessary for the spreading advertising by certain media, for example by automatic phone calling system, telefax or by e-mail. The purpose of this restriction is to prevent inadequate molestation and invasion of privacy or property rights of advertising addressee. Advertising must not be spread to the addressee by other communication means if the addressee of advertising refuses the delivery of advertising before. The refusal of advertising delivery is not defined in law and can be done by any relevant legal act, for example by marking the post box by the way that postman can not put advertising there or by written announcement to postman, advertising agency or other marketing company. (Stoličná, 2012. p 24)

In the legal order of the Slovak Republic, comparative advertising was banned till 2001. It came from the rule that it is not polite if someone without any special motive and without compulsion by special conditions of the case deals with the conditions of other businessman and interferes in his interests in economic competition. The release of comparative advertising is a serious breaching of this rule that is in interests for harmonization of law with the law of EU, according to which the comparative advertising is allowed. As it is the sensitive area of economic competition, comparative advertising has special requirements and conditions that means that comparative advertising is allowed only by law and other comparative advertising is not allowed at all. Comparative advertising does not have to compare products of two competitors directly, it is considered comparative when it presents other competitor or his products.

3. ADVERTISING OF PHARMACEUTICALS

Pharmaceuticals are products that considerably influence peoples' health. That is why advertising of pharmaceuticals requires special arrangement. The strictly restricting measures of advertising tackle only some groups of pharmaceuticals, those that need a medical prescription or are paid from health insurance or are not registered in the Slovak Republic. Pharmaceuticals can not be presented in advertising in a way that would force people to use them excessively or without the need of medical examination.

Advertising of pharmaceuticals involves any form door-to-door information, agitation performance or instigation directed to the support of prescription, selling or consumption of pharmaceuticals. (Capandová, 2015, pp 1-8)

Advertising of pharmaceuticals is defined by law as advertising of pharmaceuticals aimed to the public, advertising of pharmaceuticals aimed to persons authorized to prescribe pharmaceuticals and to persons authorized to dispense and sell pharmaceuticals i.e. physicians and pharmacists, visit of the person authorized to prescribe pharmaceuticals and the person authorized to dispense pharmaceuticals to commercial representatives of holder of decree about pharmaceutical's registration, i.e. medical representative, whose aim is to promote pharmaceuticals, provision of samples of pharmaceuticals to the public, persons authorized to prescribe pharmaceuticals and persons authorized to dispense pharmaceuticals, to provide incentives directed to prescription or dispensation of pharmaceuticals as gifts, offers or promises of whatever inducements or extraordinary financial or material reward with the exception of those, whose value is insignificant, sponsoring of promotional events where are persons involved who are authorized to prescribe pharmaceuticals or persons authorized to dispense pharmaceuticals, sponsoring of scientific conferences, where are persons involved who are authorized to prescribe or dispense pharmaceuticals, including the paying the travelling and accommodation expenses, which are connected to the participation in that event.

The legal order of the Slovak Republic bans advertising of pharmaceuticals that are not registered in the Slovak Republic, that involves narcotic drugs and substances, whose dispensation is bound to medical prescription or veterinary medical prescription or whose dispensation is not bound to medical prescription but they are paid on the basis of public health insurance according to law no.577/2004 of Journal of Laws on the range of healthcare paid on the basis of public health insurance and on the payments for services related to the provision of healthcare subsequently amended. However, this ban is not related to vaccination campaigns organized by the holder of the decision about pharmaceutical registration or by the deputy of the holder of the decision about pharmaceutical registration if they are permitted by Ministry of Health of the Slovak Republic and for advertising determined to the persons authorized to prescribe pharmaceuticals and persons authorized to dispense pharmaceuticals.

Except of measures above mentioned, it is not allowed to distribute pharmaceuticals directly to the public for the purpose of advertising, to perform, with the aim of the promotion of pharmaceuticals, visits of the people authorized to prescribe pharmaceuticals during their office hours and it is also not allowed for the persons authorized to prescribe human pharmaceuticals to have during their office hours visits of pharmaceutical representatives with the aim to promote human pharmaceuticals. (Srebalová, 2008, p. 61)

Advertising of pharmaceuticals determined to public must not involve any item, which for example makes impression that medical examination or operation is not necessary, offers diagnosis or way of treatment by means of correspondence, makes impression that effects of pharmaceuticals are guaranteed and are not accompanied by any adverse effects or are better or equal to the effects of other pharmaceuticals or treatment, indicates that a good health condition of the person could improve by taking the pharmaceuticals, indicates that a good health condition of person could be influenced by not taking pharmaceutical, this ban is not related to the above mentioned vaccination campaigns, addresses exclusively or mainly children etc.

4. THE SUPERVISION AND PENALTIES FOR BREACHES OF LAW

The special authorities are not set up for the supervision of the enforcements of the provisions of advertising law, but this activity is given to public administrative authorities, that are set up according to special laws and supervise the market in the area of corresponding products, goods and services. Under the control of advertising of pharmaceuticals, this responsibility is given to State Institute for Drug Control, Institute for state control of veterinary bioproducts and medicines under the advertising of veterinary medicines, Institute of public health of the Slovak Republic etc. (Vačok, 2014, p 34) The special actions of supervision authorities are in measures which these organs can impose for ensuring correction. It deals with the decision about the prohibition of spreading advertisement, about the authorization to require from buyer of advertising to submit the evidence about the truthfulness of information in case of suspicion of misleading advertisement or impermissible comparative advertising and the possibility of imposing the obligation to buyer of advertising to publicize the decision of supervision authority. By breaching the law, the legally protected interests are endangered, that is why, in the interest of reaching the correction and precautionary effect, there are also penalties imposed for the arrangement of correction as well as obligations imposed to the person responsible. If supervision authorities find out breaching of this law, they are allowed to ban spreading of advertising. It is necessary to emphasize that they have this possibility also in the case when there is danger of breaching the regulation of §4 part 3 of law on impermissible comparative advertising. In the decision about the ban of spreading of advertising, the supervision authority can impose the obligation to publicize this decision or its part and the obligation to publicize this announcement in mass telecommunication medias.

5. CONCLUSION

With the entry of market economy, development of society informatization, advertising has become rooted also in the Slovak Republic. It deals with the industry that is dynamically developing also thanks to many important advertising agencies that have been established on the slovak market. The support and promotion of pharmaceuticals can not and is not out of the attention regarding the profit of pharmaceutical industry. Within this context, it is necessary to strengthen and point out the role of public authorities to regulate advertising and impose sanctions to infringers of law restrictions by means of legislation and controlling mechanisms, as legal directives enable and impose them.

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