

Hungary

Seller beware! The use of trademarks in unfair commercial practices

Have you ever misled a customer? Have you ever forced a customer to buy something he or she did not want? Have you ever failed to inform a client as to key details of your services? If you answered 'yes' to any of these questions, you need to think again – new regulations have come into force to defend consumers and combat misleading and aggressive sales and marketing tactics.

As part of the ongoing process of harmonising Hungarian national law with EU law, the rules on consumer protection have been comprehensively revised. The majority of the amendments came into effect on September 1 2008. This chapter looks at the new regulations designed to target the unfair business-to-consumer (B2C) commercial practices set out in Act XLVII of 2008, with particular focus on the aspects of the new legislation dealing with trademark infringement.

New legislation

The purpose of the new regulation is to contribute to the proper functioning of the market and achieve a high level of consumer protection in Hungary. It brings national law into line with the EU Unfair Commercial Practices Directive (2005/29/EC).

The new legislation is designed to protect consumer economic interests from unfair B2C commercial practices. The new regulations do not cover unfair commercial practices which harm only competitors' economic interests or which relate to transactions between traders. However, the provisions may indirectly protect legitimate businesses from their competitors and thus guarantee fair competition – for example, by preventing a party from promoting a product similar to a product made by a particular manufacturer in such a way as to mislead the consumer deliberately into believing that the products are made by the same manufacturer. This is one of the key points of the new legislation, according to which this type of trademark

infringement not only harms business-to-business interests, but is also considered an unfair business practice from the B2C point of view.

Misleading commercial practices

Under the new legislation, unfair commercial practices are generally prohibited. A commercial practice shall be deemed unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely materially to distort the economic behaviour of the average consumer at whom the product is addressed, or the economic behaviour of the average member of the group where a commercial practice is directed at a particular group of consumers.

A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful, or if it deceives or is likely to deceive the average consumer in any way (even if the information is factually correct), in relation to one or more of the elements set out below, and in either case causes or is likely to cause the average consumer to take a transactional decision that he or she would not otherwise have taken.

An unfair commercial practice may deceive the average consumer in relation to the following elements:

- the existence or nature of the product;
- the main characteristics of the product (eg, availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, the method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin, the results to be expected from its use or the results and features of tests or checks carried out on the product);
- the price or the manner in which the price is calculated, or the existence of a specific price advantage;

- whether the product is tax free or whether it entails any tax allowance or further benefits;
- the need for servicing, parts replacement or repair;
- the existence of a customer service or complaint-handling centre for the product;
- the nature, attributes and rights of the trader or its agent (eg, its identity, assets, qualifications, status, approval, affiliations or connections, ownership of industrial, commercial or IP rights or awards and distinctions);
- the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, and any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product; and
- the consumer's rights or the risks it may face.
- hidden such material information or provided it in an unclear, unintelligible, ambiguous or untimely manner; or
- failed to identify the commercial intent of the commercial practice if it is not already apparent from the context.

Practices always considered misleading

For the purposes of this chapter, the most important misleading commercial activity is the promotion of a product similar to another product made by a particular manufacturer in such a way as to mislead the consumer deliberately into believing that the products are made by the same manufacturer. This is not just unfair commercial activity, but also clearly gives rise to a trademark infringement action – through the promotion the infringer implies that it is the owner or exclusive licensee of a well-known brand without the permission of the original trademark owner. The intention behind such actions is obvious: to exploit a good reputation and gain business advantages as quickly as possible without making any effort to establish the product on the market.

Other commercial practices which are always deemed to be misleading include:

- claiming to be a signatory to a code of conduct when the trader is not;
- claiming that a code of conduct has an endorsement from a public or other body which it does not have;
- displaying a trust mark, quality mark or equivalent mark without having obtained the necessary authorisation;
- claiming that a trader (including its commercial practices) or a product has been approved, endorsed or authorised by a public or private body when it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation;
- making an invitation to purchase products at a specified price without disclosing the existence of reasonable grounds that the trader may have for believing that it will be unable to offer for supply or procure another trader to supply those products or equivalent products at that price within a reasonable period and in reasonable quantities, having regard to:
 - the product;
 - the scale of advertising of the product; and
 - the price offered (known as 'bait' advertising);
- making an invitation to purchase products at a specified price and then refusing to show the advertised item to consumers or refusing to take orders for it or deliver it within reasonable time, or
- omitted material information that the average consumer needs;

A commercial practice shall also be regarded as misleading if, taking into account all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that it would not otherwise have taken and it involves marketing of a product, including comparative advertising, which creates confusion with the products, trademarks, trade names or other distinguishing marks of a competitor. Referring to another party's trademark in a way that does not confuse the public or tarnish the mark may qualify as fair use. Examples include discussions of a product by name in a news article or product review, or certain instances of fair comparative advertising. To constitute 'fair use', the advertisement must accurately identify the original product or service without misleading the public about its source or its affiliation with the advertised products or services. A company's use of another party's trademark as the name of its own product or service never constitutes fair use. Trademark infringement occurs when one party uses a trademark that is identical or confusingly similar to an existing trademark for similar goods, services, products or technologies without permission or a licence from the original trademark owner. The infringement can be intentional or unintentional – the latter occurring when a party is attempting to ensure fair use, but fails to satisfy all the legal requirements.

A commercial practice shall also be regarded as misleading if, taking into account all its features and circumstances and the limitations of the communication medium, the practice causes or is likely to cause the average consumer to take a transactional decision that it would not otherwise have taken because a trader has:

demonstrating a sample of it with the intention of promoting a different, lower-quality product (known as 'bait and switch');

- falsely stating that a product will be available for only a limited time, or that it will be available only on particular terms for a limited time in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice;
- undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the member state in which the trader is located, and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction;
- stating or otherwise creating the impression – including the free distribution of the product itself – that a product can legally be sold when it cannot;
- presenting rights given to consumers in law as a distinctive feature of the trader's offer;
- using editorial content in the media to promote a product where a trader has paid for the promotion without making it clear in the content or by images or sounds clearly identifiable by the consumer that the promotion was paid for (known as 'advertorial' content);
- making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or its family if the consumer does not purchase the product;
- establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products;
- claiming that the trader intends to cease trading or move premises when it does not;
- claiming that products can facilitate winning in games of chance;
- falsely claiming that a product can cure illnesses or disabilities;
- passing on materially inaccurate information regarding market conditions or regarding the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions;
- claiming to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent;
- describing a product as '*gratis*', 'free', 'free of charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item;
- including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he or she had already ordered the marketed product;
- falsely claiming or creating the impression that the trader is not acting for purposes relating to its trade, business, craft or profession, or falsely representing itself as a consumer; and
- creating the false impression that after-sales service in relation to a product is available in a member state other than that in which the product is sold.

Aggressive commercial practices

A commercial practice shall be regarded as not just misleading but also aggressive if, taking into account all its features and circumstances, it impairs significantly or is likely to impair significantly the average consumer's freedom of choice or conduct with regard to the product and thereby causes or is likely to cause him or her to take a transactional decision that he or she would not otherwise have taken through harassment, coercion (including the use of physical force) or undue influence.

Practices always considered aggressive

Commercial practices which are always deemed to be aggressive include:

- creating the impression that the consumer cannot leave the premises until a contract is concluded;
- conducting personal visits to the consumer's home, ignoring the consumer's request to leave or not to return;
- making persistent and unwanted solicitations by telephone, fax, email or other remote media except in circumstances where they are related to the contractual obligations of the trader;
- requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant in regard to whether the claim was valid or systematically failing to respond to pertinent correspondence in order to dissuade a consumer from exercising its contractual rights;
- including in an advertisement a direct exhortation to children to buy advertised products or to persuade their parents or other adults to buy advertised products for them;

- demanding immediate or deferred payment for the return of products supplied by the trader but not solicited by the consumer (known as 'inertia' selling), except where the product is a supplied substitute;
- explicitly informing a consumer that if it does not buy the product or service, the trader's job or livelihood will be in jeopardy; and
- creating the false impression that the consumer has already won, will win or will, on carrying out a particular act, win a prize or other equivalent benefit, when in fact either there is no prize or other equivalent

benefit, or taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

Comment

Companies which fail to rethink their marketing policies in light of the new regulations are likely to face serious penalties resulting from actions taken by the Hungarian authorities and by the owners of infringed trademarks. Thus, companies would be wise to consider and implement the provisions of the new regulations.

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