

Act XLVIII of 2008

on Essential Conditions of and Certain Limitations to Business Advertising Activity

/competition law related provisions of the Act/

In order to protect the health of citizens, in particular of juveniles, to drive back impacts harmfully affecting the social order and, to sustain market competition which serves economic efficiency and social welfare, in order to protect the interests of undertakings observing the requirements of fair business practices, while recognizing the importance of professional self-regulation and strengthening for this purpose the monitoring of the compliance with codes of conduct formulated in the framework of self-regulation, Parliament hereby passes the following Act.

General Provisions

Article 1

(1) This Act shall apply to business advertising activities performed by persons in their capacities as advertisers, advertising service providers or publishers of advertisements, to sponsorship and to codes of conduct relating to them.

(2) Statutes or laws adopted for the implementation of those statutes may lay down special rules in relation to business advertising activities concerning certain goods or carried out by certain means of communication. In the absence of different provisions determined by separate statutes, the provisions of this Act shall apply *mutatis mutandis* to infringements of those rules.

(3) The provisions laid down in Act I of 1996 on Radio and Television Broadcasting shall apply to radio or television advertising where those provisions establish requirements different from those laid down by this Act.

Article 2

The provisions on misleading advertising of this Act shall apply insofar as the addressees of the advertising are exclusively undertakings, or non-natural persons acting for purposes, which do not relate to their respective independent professions and economic activities.

Article 3

For the purposes of this Act

[a)-c)]

d) „Business advertising” means any communication, information or method of representation the aim of which is to promote the sale or use in any other way of movable property that is tradeable and capable of appropriation, including money, securities, financial instruments and natural resources that can be utilized in the same way as things (hereinafter together referred to as “products”) and of services, immovable property and acquired rights, which constitute intangible assets and which do not (directly) relate to immovable property (hereinafter altogether referred to as “goods”) or the aim of which is, in connection with the objective mentioned above, to popularize the name, designation or activity of an undertaking, or to make better known goods or designations of goods (hereinafter referred to as “advertising”);

[e)]

f) „Publication” means the act of making the advertisement available either to the public or to individual addressees;

g) “Code of conduct” means an agreement or set of rules created in the framework of market self-regulation, which determines behavioural rules in relation to a particular commercial practice or business sector for undertakings that undertake to be bound by the code;

h) „Misleading advertising” means any advertising which, in any way, including its representation, deceives or may deceive the persons to whom it is addressed or whom it may reach and which, by reason of its deceptive nature, may affect the economic behaviour of these persons or which, for those reasons, injures or may injure the rights of other undertakings that are engaged in the same or a similar activity as that of the advertiser;

i) „Comparative advertising” means any advertising, which by implication or explicitly identifies other undertakings that are engaged in the same or a similar activity as that of the advertiser or goods manufactured, sold or displayed by such undertakings, the intended use of which is the same as or is similar to that of the goods featuring in the advertising;

j) „Addressee of the advertisement” means any person targeted or reached by the advertisement;

k) „Publisher of the advertisement” is the person which possesses means suitable for the publication of the advertisement, and uses those means to make the advertisement available.

l) „Advertiser” is the person in the interest of whom the advertisement is published, or who orders the advertisement;

m) „Advertising service provider” is the person who creates or produces, in the framework of his independent economic activity, the advertisement or who provides other services related thereto;

n) „Printed materials” are individual issues of periodicals, radio and television program guides, books, flyers and other textual publications (not including bank notes and securities); furthermore, publications containing musical compositions, graphics, drawings or photographs; furthermore, maps; furthermore, film strips, video tapes, video disks, audio tapes and records with entertainment designed for public presentation; furthermore, any other technical means with information or entertainment designed for public presentation;

o) „Outdoor advertising media” are any means located outside buildings for the purpose of the publication of advertisements;

p) „Sponsorship” means any contribution to an event or activity or, in connection with an event or activity, to a person, with the aim or direct or indirect effect of encouraging the purchase or use of certain goods,

q) „Subliminal advertising” means any advertisement at the publication of which, as a consequence of the short duration of the publication or for any other reason, a stimulus generated by an image-, sound- or other effect of lower strength than that which would reach the stimulus threshold of conscious perception in the psychological sense, exerts an effect on the addressee of the advertisement;

r) „Undertaking” means any person who is acting for purposes relating to his independent profession or economic activity. .

Article 4

Codes of conduct may not encourage conducts infringing the provisions of this Act.

[Article 5]

Article 6

(1) Except where otherwise regulated by statute, advertisements may be communicated to natural persons by the method of directly contacting them as the addressees of those advertisements (hereinafter: “direct solicitation”), in particular by electronic mails or equivalent individual means of communication, with the exception defined in Section (4), only if the addressees of the advertisement gave their preliminary consent, clearly and expressly, to being contacted in this way.

(2) A statement of consent can be made by any method ensuring that the statement contains the name and address of the person making the statement and, for the case that the advertisement to which the consent relates may only be made available to persons of a certain age, also the place and date of his birth; furthermore, that it identifies the personal data to the management of which the person making the statement gives his consent, and that it also makes a mention of the consent being given voluntarily and in the possession of appropriate information.

(3) Statements of consent within the meaning of Section (1) may be withdrawn cost free at any time without any limitation and without the need for the withdrawal to be reasoned. For such a case, the name and the personal data of the person making the statement shall immediately be deleted from the record specified in Section (5) and thereafter no advertisements may be communicated to him in the way defined by Section (1).

(4). Advertisements in direct mail advertising specified by Act CI of 2003 on Post may also be sent, by direct solicitation, to natural persons as the addressees of those advertisements, even in the absence of a preliminary express consent of the addressee, the advertiser and the advertising service provider shall nevertheless ensure that the addressee can prohibit the advertisement, at any time, cost free and without any limitation, from being sent. In the case of such a prohibition, no advertisements may be sent by direct solicitation to the person concerned thereafter.

[(5)-(8)]

General Prohibitions and Limitations on Advertising

[Articles 7 to 10]

Article 11

Subliminal advertising shall be prohibited.

Misleading Advertising and Comparative Advertising

Article 12

(1) Misleading advertising shall be prohibited.

(2) In determining whether advertising is misleading, account shall be taken in particular of any information and communication it contains concerning:

a) The characteristics of goods,

b) The price of goods or the manner in which the price is calculated, and the other contractual terms and conditions on which the goods are purchased or used,

(c) The appraisal of the advertiser, such as his nature, attributes and rights, his assets, qualifications, awards and distinctions.

(3) For the purposes of point a) of Section (2), characteristics of goods are in particular their design, composition, technical specification, quantity, geographical and commercial origin, method and date of manufacture or provision, availability, delivery, usage the knowledge needed for their use and maintenance, fitness for purpose, the results to be expected from their use, the danger and risks attached to their use, their impact on health, their environmental effects, energy consumption characteristics, tests and checks on them or the results of those tests and checks.

Article 13

(1) Comparative advertising

a) May not harm the reputation of, or the reputation of the trade names, goods, designations of goods or other distinguishing marks of, another undertaking;

b) May not create confusion between the advertiser and another undertaking that is engaged in the same or a similar activity as that of the advertiser, or between the advertiser's trade names, goods, designations of goods or other distinguishing marks and those of such other undertaking;

c) May not create an unfair advantage resulting from the exploitation of the reputation of another undertaking's trade names, goods, designations of goods or other distinguishing marks; and

d) May not infringe the prohibition of imitation of goods, or the characteristics of goods specified by Article 6 of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (hereinafter referred to as „PURA”), of another undertaking.

(2) Comparative advertising

a) May only compare goods intended for the same purpose or meeting the same needs,

- b) Shall objectively compare one or more material, relevant representative and verifiable features of the goods,
 - c) Shall make an objective representation of the comparison of prices of goods where it makes such a comparison;
 - d) For products with the same designation of origin, it shall relate in each case to products with the same designation.
- (3) In the case of legitimate comparative advertising, the holder of a trade mark may not prevent third persons, based on the exclusive rights conferred to him, from appropriately using his trademark in comparative advertising, when such a use is indispensable to make the comparison and it does not go beyond the extent what is absolutely necessary.

Prohibitions and Limitations on the Advertising of Certain Goods and on Sponsorship Carried out in Connection with that Advertising

[Articles 14 to 22]

Responsibility Rules

Article 23

(1) The advertiser, the advertising service provider and the publisher of the advertisement shall all bear responsibility for the infringement of the provisions of this Act, with the exceptions defined in Sections (2) to (7). The advertiser, the advertising service provider and the publisher of the advertisement shall bear joint and several liability for any damage caused by the infringement of these provisions.

(2) In cases of an infringement originating from the content of an advertisement, the publisher of the advertisement,

a) Shall be relieved of responsibility if he qualifies as intermediary service provider within the meaning of Act CVIII of 2001 on Certain Aspects of Electronic Commerce and of Information Society Services (hereinafter referred to as „ECA”) and if he meets the requirements specified by Articles 8 to 12 of ECA;

b) Shall only bear responsibility, in cases not regulated by point a), with the exception of point c), if he acquired or could acquire knowledge of the content of the advertisement;

c) Shall not bear any responsibility for the content of mail advertisements not qualifying as direct mail.

(3) For the infringement of the provision laid down in Article 4, the person or persons formulating the code of conduct, those responsible for the revision of the code and those responsible for the control of compliance with the code by undertakings that undertook to be bound by the code, shall bear responsibility.

[(4)-(5)]

(6) For the infringement of the provisions laid down in Articles 12 and 13, the advertising service provider and the publisher of the advertisement shall bear responsibility only insofar as the infringement originates from such a reason relating to the method of representation of the advertisement, which resulted from an act other than the carrying out of an express instruction given by the advertiser.

[(7)]

Proceedings against infringements of the provisions of the Act

Article 24

(1) The consumer protection authority shall have the power to proceed against infringements of the provisions relating to business advertising activity and prohibited sponsorship, with the exceptions defined in Sections (2) and (3).

(2) The Hungarian Competition Authority or the court shall have the power, as it is set out in Section (3), to proceed against advertising infringing Articles 12 and 13 and against codes of conduct encouraging conducts infringing these provisions.

(3) The Hungarian Competition Authority shall have the power to establish whether the provisions of Articles 12 and 13(2) are infringed and whether codes of conduct encourage conducts infringing these provisions; the court shall have the power to establish whether the provisions of Article 13(1) are infringed and whether codes of conduct encourage conducts infringing these provisions.

(4) The National Communications Authority shall have the power to proceed under the provisions of ECA, where advertising carried out through information society services or, with the exception of voice telephone calls, through electronic communications, infringes the provisions of Article 6.

(5) Proceedings conducted under this Act shall not prevent injured parties from enforcing civil law claims, which are based on the infringement of the provisions of this Act, directly in court.

Article 25

Proceedings may not be initiated after a period of three years following the publication of the advertisement infringing the provisions relating to business advertising activity or the termination of the event or activity through which prohibited sponsorship is performed or the date from which on the unlawful rule of the code of conduct is no more applied.

Article 26

[(1)-(3)]

(4) For the purposes of CPA, * the provisions of this Act qualify as consumer protection provisions, with the exception of those laid down by Sections (2) and (4) of Article 24.

(5) Fines imposed on program providers shall be paid into the Broadcasting Fund.

Article 27

The proceeding authority or court shall have the power to prohibit the publication of advertising that has not yet been published, if misleading advertising has not yet been published, where it establishes that the advertising, if published, would infringe provisions relating to business advertising activity. No fines may be imposed besides such a prohibition of the publication.

Article 28

(1) When the Hungarian Competition Authority proceeds under Article 24(2), 24(3) or 31, the provisions relating to the procedure conducted against conducts infringing the provisions laid down in Chapter III of PURA shall apply *mutatis mutandis* to its procedure, with the exceptions defined in Articles 29(2) and 30, furthermore, by Article 27, of this Act.

(2) When the court proceeds under Article 24(2) or 24(3), the provisions laid down in Articles 86 to 88, furthermore, in Articles 29(2) and 30(4), furthermore, in Article 27, shall also apply to its procedure.

Article 29

(1) The proceeding authority may request the advertiser to furnish evidence as to the accuracy of factual claims in advertising. In the absence of compliance by the advertiser, factual claims shall be deemed not to be accurate. Advertisers shall be made aware of this fact in the request issued by the authority.

(2) In proceedings of the court under Article 24(3) or 24(5), the burden of proving the accuracy of factual claims in advertising shall rest on the advertiser.

Article 30

(1) Differently from Article 70(1) of PURA, the investigator shall issue an order opening an investigation in all cases in which an infringement of those provisions of this Act, under which the Hungarian Competition Authority has the power to proceed, is likely.

(2) With the application of point c) of Article 72(1) of PURA also a measure under Article 27 of this Act may be ordered.

* Act 1997 on Consumer Protection, first referred to in this Act by Article 26(1).

(3) Commitments pursuant to Article 75 of PURA may also be offered by and made binding on parties who terminated the infringement in the meantime. In such cases, parties may offer commitments to refrain from repeating the infringement.

(4) Sections (1) to (6) of Article 88/B of PURA shall apply *mutatis mutandis* in lawsuits initiated under Article 24(5) of this Act, where under Article 24(3) the Hungarian Competition Authority would have the power to proceed.

Article 31

(1) In the enforcement of Regulation (EC) No 2006/2004 of the European Parliament and of the Council, the Hungarian Competition Authority shall apply the national laws transposing Directive 2006/114/EC of the European Parliament and of the Council against intra-Community infringements.

(2) In mutual assistance procedures, the Hungarian Competition Authority shall proceed in compliance with Commission Decision 2007/76/EC as amended by Commission Decision 2008/282/EC.

(3) The Minister responsible for Justice shall publish, on the homepage of the ministry headed by him, an informative list of the laws transposing Directive 2006/114/EC of the European Parliament and of the Council

[Articles 32 to 38]

Closing Provisions

Article 39

(1) This Act shall enter into force, with the exceptions defined in Section (2), on 1 September 2008; the procedural rules laid down by it shall be applied in proceedings initiated after this date.

(2) Point a) of Article 3, furthermore Articles 5(4), 19, 23(5) and 42 shall enter into force on 1 March 2009.

[Articles 40 and 41]

Article 42

Act LVIII of 1997 on Business Advertising Activity is repealed.

Article 43

[(1)-(3)]

(4) Persons dealing with direct solicitation shall inform the natural persons concerned to be found on their respective direct solicitation lists, at the first time when they contact those persons concerned following the entry into force of this Act, but until 31 May 2009 at the latest and with the content determined by Article 6(7), about the possibility that under Article 6(4) those persons concerned can prohibit direct mail advertisements from being sent to them.

[Article 44]

Article 45

(1) This Act serves the purpose of compliance with the following legal acts of the European Union:

a) Directive 2006/114/EC of the European Parliament and of the Council (of 12 December 2006) concerning misleading and comparative advertising (codified version) [Article 2, points d), g) to l) and r) of Article 3, Article 12, Sections (1) and (2) of Article 13, Sections (3) and (6) of Article 23, Sections (2) and (3) of Article 24, Articles 27 to 29 and Sections (1) and (4) of Article 30 of this Act];

b) Directive 2003/33/EC of the European Parliament and of the Council (of 26 May 2003) on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, with the exception of Article 5(2) [points a) and p) of Article 3, Sections (1) and (2) and points a) and b) of Section (4) of Article 19, Articles 20, 23(7) and 26(2) of this Act];

c) Directive 89/552/EEC (of 3 October 1989) of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, as amended by Directives 97/36/EC and 2007/65/EC, point e) of Article 3e(1) and Article 15 [Article 18(1) of this Act].

(2) This Act lays down provisions, relating to the responsibilities and the procedure of the Hungarian Competition Authority, for the implementation of the following legal acts of the European Union:

a) Regulation (EC) No 2006/2004 of the European Parliament and of the Council (of 27 October 2004) on cooperation between national authorities responsible for the enforcement of consumer protection laws, paragraphs (1) and (6) of Article 4 [Articles 28(1), 30(3) and 31(1) of this Act];

b) Commission Decision 2007/76/EC (of 22 December 2006) implementing Regulation (EC) No 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws as regards mutual assistance [Article 31(2) of this Act];

c) Commission Decision 2008/282/EC (of 17 March 2008) amending Decision 2007/76/EC implementing Regulation (EC) No 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws as regards mutual assistance [Article 31(2) of this Act].