

CREATIVE ADVERTISEMENT OR MISLEADING INFORMATION

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Over recent years the issue related to spreading of misleading information has become one of the most topical in the field of unfair competition. Every year a number of cases considered by the Antimonopoly Committee of Ukraine (the Committee) related to violation of the newly introduced Article 15-1 of the *On Protection against Unfair Competition Act of Ukraine* is on the rise as is the size of the penalties. In 2013 the penalties for certain violations amounted to more than UAH 1 million and the Committee constantly widens the scope of business, the advertisement of which has to be checked.

According to Article 15-1 of the *On Protection against Unfair Competition Act of Ukraine* the dissemination of misleading information means to give to one, or several, or indefinite number of persons, including in advertising, incomplete, inaccurate or false statements, in particular, at the result of chosen method of their presentation, certain facts concealment, or indistinct formulations that have affected or shall affect these persons to purchase (to order), or to realize (to sell, to deliver, to execute, to supply) products and services.

Misleading information includes statements that:

- contain incomplete, inaccurate or false data related to the origin of the product, manufacturer, seller, manufacture method, source and method of purchasing, realization, quantity, consumer values, quality, package contents, validity, standards, specifications, features of products' realization, operations, services, price and promotional events on them, as well as the essential terms of agreement;
- contain incomplete, inaccurate or false data related to financial standing of the entity or its economic activity;
- refer to production output, purchase, sale or supply of products, works and services that were not performed at the day of spreading information.

It is necessary to understand that the list given above is not exhaustive, but at the same time the Committee renders the norms of Article 15-1 in a very strict manner free interpretation of which is not allowed. In fact, the Committee took the position similar to the position of offices of competition and consumer protection in Germany, Austria and Poland where advertisement statements should contain accurate information and should not include possible exaggerations and assumptions (or include minimum of them).

Of course, such an approach of the Committee limits the possibilities of the company to create interesting and attractive advertisement that from one side could emphasize the advantages of

the product, and from another side could hide its disadvantages. Moreover, it limits the possibility to use a comparison in the advertisement.

The situation becomes even more complicated because there are no clear and published approaches or regulations related to allowed and/or forbidden methods, words, expressions that shall be used in the advertisement and the Committee does not publish its reviews or their practice summaries on case consideration related to Article 15-1 of the *On Protection against Unfair Competition Act of Ukraine*.

Nevertheless, in the last few years the Committee conducted a great number of investigations related to spreading of misleading information that is why it may be stated that a certain practice proved by courts decisions has already been established.

There are several key principles from the Committee's view that the correct advertisement should follow:

- 1) statements used in the advertisement should be proved by the respective documents and information;
- 2) advertisement should not hide certain essential qualities of the product, its application and/or purchase terms as well as other information that affects on customer's choice of this product;
- 3) clarifying information, remarks should be placed in the advertisement in a way that will not make it difficult for customers to read or to perceive such information;
- 4) marking of product should contain all information stipulated by the legislation; it should be readable by the customers; in case of promotional event for the product its main conditions, in particular, its term should be placed at the product's package;
- 5) general impression about the advertisement should not provoke customer's misunderstanding about the product or its characteristics.

We propose you to review in details each of the abovementioned principles.

USE OF CLEAR STATEMENTS

This principle first and foremost refers to the use of categorical statements or

announcements about the product or its characteristics. Such statements include references to certain consumer's properties, contents, existence or absence of any ingredients in the product (for example, GMO free, 100% natural components, etc.), effect term, effective date or term of waiting period for product effect (for example, stay fresh for 24 hours, immediate action, operate 10 hours on one battery, etc.). Also, such statements includes providing information about certificates or awards, priority of the product among others related to it (first sales product, No.1 in Ukraine, the best, etc), being more effective among others, etc.

From the Committee's point of view, such statements and announcement are possible to apply only when the company is able to provide respective documents in order to prove this information. For example, if we speak about product features, its priority among others related to it, such announcements should be based on respective researches. It is also recommended to conduct such researches by the independent research centers, or if the company conducts its own research its results should be proved by independent research centers.

If we speak about the product ingredients the company should not only prove that a certain ingredient is added to the product according to the standard specifications or product sheets, but it should prove that this ingredient is, in fact, added at the stage of production. For example, the company may have respective documents on this ingredient purchasing.

CONCEALING PRODUCT INFORMATION

Such violation is typical for advertising medicines and various financial services. We speak about information that was deliberately concealed because if the customer had known it he would not buy this product.

For example, speaking about medicine advertising, concealing information related to its contra indications, or forbiddance to be taken by the children and other violations are quite widespread. Thus, several times the Committee imposed penalties on various manufacturers for using word-

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Antika Law Firm was founded in 2010. The firm provides legal services to national and international companies that do business in Ukraine and abroad.

The main areas of practice are:

- antitrust;
- dispute resolution and arbitration;
- criminal defense for business;
- construction & real estate;
- subsoil use;
- energy & energy efficiency;
- project financing;
- corporate/M&A;
- legal expertise.

The firm has been recognized by authoritative international and Ukrainian guides to legal profession such as The Legal 500 EMEA, Chambers Global, Chambers Europe, Best Lawyers, Ukrainian Law Firms, 50 Top Law Firms of Ukraine, and is recommended in the area of antitrust, corporate/M&A, dispute resolution, banking, finance and capital markets, real estate, land and subsoil use.

Antika's team includes 15 lawyers, who have significant experience in various fields of legal practice.

Our lawyers are professionals with wide experience and skills able to provide comprehensive and creative solutions. We follow traditions in law. Meanwhile, having a good understanding of today's challenging business requirements and a deep knowledge of the legal environment we bring an innovative, creative and practical problem-solving approach to all of our work.

The firm's main principles are high quality and timely legal services, strict confidentiality and a bespoke approach to every client's projects. The firm's professional liability is insured.

Antika serves Ukrainian, Russian and international companies doing business in telecommunications, heavy machinery, chemical and food industries, automotive, complex development, construction and real estate, subsoil use, wholesale and retail, media and sports, banks and financial services market, energy efficiency and energy conservation. The firm's representative clients are as follows: AWT Bavaria, Cargill, Dyckerhoff, Enesa, Esan Eczacıbaşı Industrial Raw Materials, Ghelamco, Heitman International, Henkel Ukraine, Henkel Bautechnik Ukraine, Imperial Tobacco, International Resources Group (the USAID Municipal Heating Reform Project in Ukraine), Nadra Ukrayny, Nasosenergomash, Russol, Stroytransgas, ViDi Group, Vitra.

The firm also advises the World Bank, the European Bank for Reconstruction and Development, USAID on energy and utility efficiency projects implementation in Ukraine.

The firm is a member of the American Chamber of Commerce in Ukraine, the Canada-Ukraine Chamber of Commerce, the European Business Association, and the International Turkish Ukrainian Businessmen Association.

The firm's partners are members of: the Scientific and Advisory Council of the Higher Economic Court of Ukraine; the Public Council of the Antimonopoly Committee of Ukraine; the Managing Council (on behalf of Ukraine) for Supporting Competition in the CIS Non-Profit Partnership; the International Bar Association; the Ukrainian Bar Association; Kiev and Kiev Region Bar Association.

ing such as "child resistant", "allowed for children" in their advertisements, but in fact such medicine are allowed to be taken by children from a specific age.

Speaking about financial services, the main violation is related to concealing of credit terms or its cost. Among other obvious suppressions of hidden charges, we should mention the Committee's viewpoint as for mandatory insurance; namely, obtaining credit for a car it is necessary to get CNC insurance in definite insurance companies and/or on definite rates that have an influence on the cost of credit. Taking into account the above-mentioned, advertising car sales on credit among other information should include information about insurance and its rates.

CLARIFYING INFORMATION AND REMARKS

The Committee's main issue here is that clarifying information and remarks are unreadable and difficult for customers' perception due to small print, its color and background that melt into each other, or make reading uncomfortable for eyes, etc. An increase in the speed of a speaker's voice's, which is common for radio advertising is considered as a violation as well.

Unfortunately, this question is very subjective and that is why there are often disputes between the Committee and the companies related to whether it is possible or impossible to read the text written in small print. In this case, it is necessary to take into account where this advertisement is going to be placed. For example, it is possible to explain partially the advertisement in the newspaper, where the remark sign is well-defined and the remark itself the customer can read by taking the advertisement closer. The situation differs with the small print on the billboard, or any other external advertising where remarks should be used very carefully.

MARKING OF PRODUCT

The most widespread violation here is using different methods of making it difficult for the customer to read the marking of a product aimed at creating their mistaken impressions. It should be noted that, considering such violation, the Committee often takes into account the sales conditions of the product and its shop board position. For example, the Committee considered stating the weight of the grits on the reverse side of a package as a violation. The Committee paid attention that the standard packing of

the grits is 1 kilogram that is why stating weight on the reverse side of the package may mislead the customer.

It is also very important to comply with the Committee's approaches while conducting promotional events related to the product. If the product is furnished with information about the promotional event, the mandatory condition is to state the term of such event. In addition to this, such information should be identifiable and readable. In particular, the violation happens to be if the product package is furnished with the sticker "Promotion", but the term of promotion event is stated only in the brochure enclosed in the package.

GENERAL IMPRESSION ABOUT ADVERTISEMENT

This principle stipulates that the advertisement or the product package as a whole as well as its audio-visual components should not cause misleading customer's impression about the product. For example, the violation of this principle happens when a picture of the product at the product package (juice, yogurt) shows fruits that were not used for making this product (juice, yogurt). Despite the fact that there is information about the factual product ingredients at the product package, the Committee considers it a violation because when the customer sees certain fruits he expects that these particular fruits were used for making this product.

Another example of this principle violation is information in the advertisement that states that this product is free from harmful ingredients assuming that according to legislation or standard specifications the similar product of any other manufacturer must be free of such ingredients. Pursuant to the Committee's view, if such a situation occurs the consumer may receive the mistaken impression that this product is safer than others. This is violation of Article 15-1 of the *On Protection against Unfair Competition Act of Ukraine*.

Summing up what has been said, in order to comply with requirements of Article 15-1 of the *On Protection against Unfair Competition Act of Ukraine* it is necessary to follow the above-mentioned principles and approaches while creating product advertisement or product marking. Otherwise, there is a huge risk to attract the Committee's attention to the unfair advertising. Taking into account the Committee's tendencies related to imposing penalties such a risk may be incommensurable to the potential profit from creative advertisement or package.