

POLAND



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1. Issue	Unfair advertising by SPAM.
Who:	Jarosław N. – Firma edukacyjna "Impuls – Plus" (educational company)
Where:	Decision of the Chairman of the Office for Competition and Consumer Protection (OCCP)
When:	30 th September, 2003
What happened:	<p>Jarosław N, an entrepreneur - educational company "Impuls – Plus", was pursuing business activity including organization of professional trainings and courses. On May 3rd, 2003, an email containing his business offer was sent to an undetermined number of recipients. The message was sent to mailboxes retained in paid networks. Their users didn't agree in any way to receive such advertisement. The message was sent by an entity that concluded with the entrepreneur a contract on provision of advertising services.</p> <p>As a result of a complaint brought by the Poviát's (county) Consumer Right Spokesman, the legal action was instituted by the OCCP. The Chairman of the OCCP rendered a decision confirming that this activity constitutes practice infringing collective consumer interests in the meaning of provisions of the Act of 15 December 2000 – Law on Competition and Consumer Protection - article 23a section 1 (consolidated text in Journal of Law No 03.86.804). The decision imposed on "Impuls – Plus" an obligation to discontinue the practice of diffusing such advertisement and to publish an announcement in a specified form.</p> <p>In the justification to the decision, the Chairman of the OCCP recognized that Article 23 a, Section 1, is applicable to the action of the entrepreneur if it may be proved that such action meets two conditions.</p> <p>First, the action must be unlawful. The Chairman recognized here, that the diffusion by email of unsolicited advertisement constitutes violation of the Article 10, Section 1, of the Act of 18 July 2002 – Law on Provision of Services by Electronic Means. This provision requires the consent of the addressee, which cannot be "alleged or implied from a declaration of will of another content" for receiving this kind of advertising. Pursuant to Section 3rd of this Article, such activity constitutes an act of unfair competition. Consequently, the Chairman's Office confirmed the infringement of Art 3 of the Act of 16 April 1996 on Combating Unfair Competition.</p> <p>Second, the action must infringe collective consumer interests. This prerequisite requires that the action "threatens the interest of the wide circle of market participants, however unidentified as to the number and identity". The Chairman of the Office declared that this action did not concern individuals, but a wide circle of market participants.</p>
Comments:	This decision, being one of the first issued in Poland, concerns problem of aggressive advertising, in particular SPAM. This decision qualifies correctly

	such actions as a practice infringing collective consumer interests. The promptness of the legal action (the decision must be issued within 3 month) and the necessity to provide such decision with effective sanctions requires the administrative procedure as an effective method to combat such practices.
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2. Issue	Misleading advertising
Who:	Entrepreneur BIOTONIC
Where:	Decision of the Chairman of the Office for Competition and Consumer Protection (OCCP)
When:	7 th June, 2004
What happened:	<p>The company BIOTONIC offers through mail orders slimming products and, among other products, EXTRA FIT pills. BIOTONIC published in the high issued press advertisements promoting those pills. The advertisement contained inter alia the confirmation that the consumption of the advertised product would reduce by 1 kg the amount of fat in 24 hours. The advertisement claimed also that the consumer does not have to modify his feeding habits – slogan: <i>You can eat as much as you want</i>, and the result will be obtained without any physical activity – slogan: <i>she lost over 16 kg without any diet or physical exercise</i>. To make such confirmation more credible the advertisement referred to an institution named The International Slimming Institution. This institution distributes EXTRA FIT pills in Europe.</p> <p>As a result of a complaint of the Poviats (county) Consumer Right Spokesman, a legal action was instituted by the Office for Competition and Consumer Protection. The Chairman of the OCCP rendered its decision. Decision confirmed that such activity is a practice infringing collective consumer interests in the meaning of the provisions of the Act of 15 December 2000 – Law on Competition and Consumer Protection - Article 23a Section 1 (consolidated text in Journal of Law No 03.86.804).</p> <p>In the justification of the decision, it was recognized that BIOTONIC did not dispose of any proof to support the statements contained in the advertisement. The International Slimming Institution, invoked in the advertisement, was only internal department of the company BIOTONIC responsible for marketing. The advertisement misleads the consumers and may affect their market behavior. Such an action by the entrepreneur is a practice of unfair competition in the meaning of the provisions of the Act of 16 April 1996 on Combating Unfair Competition. Such advertising meets the condition of an unlawful character required for the qualification of the advertising as a practice infringing collective consumer interests. It meets also the second condition: the action threatens the interest of the wide circle of market participants.</p>
Comments:	The advertising published by BIOTONIC exemplifies misleading advertising. In this particular case, misleading consisted in the application of objectively false statements. Moreover, the name given to the institution confirming the qualities of the advertised product was creating false impression among the consumers that this institution is connected with science.

3. Issue	Advertising for alcoholic drinks, in the case of indirect television advertising arising from the appearance on screen of hoardings visible during the transmission of sporting events
Who:	Bacardi France SAS, v Télévision française 1 SA (TF1), Groupe Jean-Claude Darmon SA and GiroSport SARL

Where:	Judgment of the European Court, reference for a preliminary ruling (article 234 EC)
When:	13 July 2004
What happened:	<p>Law No 91-32 of 10 January 1991 on the campaign against smoking and alcoholism (“Loi Evin”), restricts direct and indirect advertising for alcoholic beverages whose alcoholic content exceeds 1.2°. In 1995 the French authorities responsible for monitoring of television broadcasters, that is to say the CSA, the Ministry for Youth and Sports and the French television channels drew up a Code of Conduct on the interpretation of the rules of the Loi Evin. Although it is not legally binding, the Code of Conduct fulfills an auto-regulating role. The Code specifies two categories of sporting events. The first one comprises sporting events taking place abroad that are considered as not being aimed principally at the French public (<i>multinational events</i>). In reference to television broadcasting of those events, according to the Code, French broadcasters are not to be suspected of complicity with respect to advertising appearing on the screen where they have no control over filming conditions of the event. The second category of events comprises events taking place abroad, where the transmission is specifically aimed at a French audience (<i>Bi-national events</i>). In reference to television broadcasting of those events, according to the Code, French broadcasters must use all available means to prevent or limit the appearance on their channels of brand names of alcoholic beverages, especially on screen of hoardings visible during the transmission of sporting events. Thus, a French broadcaster must, at the time when it acquires the retransmission rights, make necessary arrangements to avoid symbols of alcoholic beverages being placed on shirts and around sports arenas. In case it turns out to be impossible, the French broadcaster must use all the technical means available to avoid showing hoardings advertising alcoholic beverages by “deleting” the images.</p> <p>Relying on the fact that TF1 and the other companies put pressure on foreign clubs to refuse to allow Bacardis brand names to appear on advertising hoardings around sports stadium, Bacardi brought the case to court as being incompatible with Article 59 of the Treaty.</p> <p>The national court decided to refer to the Court of Justice for a preliminary ruling on the validity and the compliance of the national law with Directive 89/552/EEC - Television without frontiers –and Article 59 of the Treaty. The Court ruled that Directive 89/552 does not preclude a Member State from applying its national law like in the presented case. It results from the fact that advertising placed on hoardings is not to be considered as television advertising, and accordingly the directive is not applicable to such advertising. As far as application of Article 59 of the Treaty is concerned, the Court observed that the national’s rules constitute a restriction on freedom to provide services, but such restrictions are justified by the goal of protection of public health. The Court observed also that such measure respects the principle of proportionality</p>
Comments:	<p>The judgment of the Court in the BACARDI case is questionable, in particular as to the argumentation of the Court applied to avoid giving its opinion on the compliance of the national regulation with the Directive on Television Without Frontiers. The first observation of the Court is right: the presented advertising is not to be classed as television advertising within the meaning of the Directive. This statement leads the Court to the next conclusion, and namely, that the directive is not applicable to such advertising. This second conclusion in our opinion goes too far.</p>

A transmission of sporting events remains television broadcasting, even if it's not an advertisement, and consequently it falls within the scope of application of the Directive. The Court should in consequence evaluate the national law as to its compliance with the Directive. Such evaluation would be very important, since the directive comprises a rule that broadcasting falls under the scope of application of national law.

Moreover, the argumentation of the Court is doubtful as to the principle of proportionality limiting the freedom to provide services. The aforementioned freedom is subject to essential limitation under the French regulations. Such limitation established in order to ensure the aim of protecting public health, is questionable. The fact that France allows advertising of alcoholic beverages if they are not transmitted on television speaks against it.