
Surreptitious Advertising as an Act of Unfair Competition

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Abstract: This article presents the issue of surreptitious advertising against the background of the provisions of the Act on Combatting Unfair Competition. The paper presents an analysis of issues related to advertising, surreptitious advertising and the act of unfair competition. Surreptitious advertising is thus characterized as an act of unfair competition. The author also focused on the issue of surreptitious advertising on social media, which is a relatively new phenomenon that raises doubts in legal terms. The paper also describes the civil liability of entrepreneurs for committing an act of unfair competition in the field of surreptitious advertising. Problems with the creation of a uniform definition of advertising are indicated, which in turn cause difficulties in determining the definition and scope of surreptitious advertising. As a result of the analysis, the lack of a comprehensive legal act regulating the fight against unfair market practices and applicable to all trading participants was negatively assessed. This article is based mainly on the Act on Combatting Unfair Competition of 16th April 1993, as well as Polish and EU legal acts, court decisions, scientific literature, and also codes and recommendations created by governmental and non-governmental organizations.

Keywords: surreptitious advertising, act of unfair competition, advertising, unfair competition

1. Introduction

The principle of the social market economy, as guaranteed in article 20 of the Polish constitution (Konstytucja Rzeczypospolitej Polskiej...) and constituting the basis of the country's economic system, cannot be fully realised without ensuring the existence of free competition. In order to implement this principle, the state has the obligation to create the appropriate conditions for competition on the market. This means, amongst others, ensuring control and supervision of participants in the economy, the imposition of penalties on entrepreneurs breaking the law, and protection against unfair competition practices. Meanwhile, the obligation is imposed on entrepreneurs conducting economic activity to follow the rules of fair competition included in article 9 of the Act on the Law of Entrepreneurs (Ustawa z dnia 6 marca 2018...), which sets out a positive model for entrepreneurs. According to the principle of fair competition, an entrepreneur is obliged to conduct economic activity with respect for good

practices and the legitimate interests of other entrepreneurs and consumers. This is also applicable to an entrepreneur's activity in the field of advertising, in which they must abide by the law and follow good practices.

In the economy, advertising fulfils many functions, including an informational function, a persuasive function, the function of building and maintaining a positive opinion of the entrepreneur and their products, and the function of creating consumer needs. In the literature, the informational function is ascribed vital importance, as by presenting the benefits of goods or services, it assists the entrepreneur in reaching potential clients (Kępiński, 2014, pp. 418-419). Kraus and Zoll also underlined that "actions that result in cheapness or quality of production are not sufficient in attracting customers, as attention must also be drawn to the products through the use of advertising" (Comment from the Act on Combatting Unfair Competition from 1926, p. 6). This argument is still relevant, however in the literature and public opinion it is increasingly indicated that traditional advertising has "lost its impact" (Namysłowska and Sztobryn, 2008, p. 217). Competition between entrepreneurs to attract clients has led to the development of illegal advertising that is damaging not only to competition, but also to consumers. One such unfair competition practice in advertising is the use of surreptitious advertising.

The Polish legal system includes two legal acts on combatting unfair competition, which separately regulate professional and consumer economic activity. These acts aim to protect the interests of participants in economic activity, in situations where they appear both in the role of entrepreneurs and as consumers. This division is the result of the implementation method of the 2005/29/WE directive of the European Parliament and Commission of 11th May 2005 on unfair trading practices used by entrepreneurs with regard to consumers in the internal market, as well as directives 97/7/WE, 98/27/WE and 2002/65/WE of the European Parliament and Commission amending the Commission's 84/450/EEG directive, and regulation (WE) no. 2006/2004 of the European Parliament and Commission (Dyrektywa 2005/29/WE Parlamentu Europejskiego i Rady...; Dyrektywa 2006/114/WE Parlamentu Europejskiego i Rady..., hereinafter Directive 2005/29/WE on unfair market practices). Despite the option to issue one comprehensive legal act regulating unfair market practices and applicable to all participants in economic activity, the Polish legislator decided on two separate regulations.

The current legal status is that the Act of 16th April 1993 on combatting unfair competition (Ustawa z dnia 16 kwietnia 1993..., hereinafter ACUC) regulates professional activity, that is it prevents and combats unfair competition in economic activity, above all regarding the interests of entrepreneurs. This concerns entrepreneurs' behaviour which in relation to other professional entities, the public interest and clients' interests, constituting an act of unfair competition. The regulations of this Act concern relations between professionals, namely situations in which entrepreneurs appear on both sides of a relationship (B2B, Business To Business). However, they do not apply to relationships between entrepreneurs and consumers (B2C, Business To Consumer). Nevertheless, the literature underlines that on the basis of this Act, consumers are protected indirectly by ensuring fair competition on the market and the fair activity of entrepreneurs (Namysłowska and Sztobryn, 2008, pp. 52-65). The Act in question also regulates the scope of civil and criminal liability for entities committing an act of unfair competition in the field of advertising, and grants specific compensation to the affected parties, whilst the act of 23rd August 2007 on combatting unfair market practices (Ustawa z dnia 23 sierpnia 2007..., hereinafter ACUMP) regulates consumer activity, i.e. the relationship between entrepreneurs and consumers (B2C). This legal Act also provides for compensation with regard to civil and criminal liability. According to article 1 thereof, the Act on combatting unfair market practices defines unfair market practices in economic and professional activity, as well as outlines the principles for combatting them, and also directly protects the interests of consumers.

From the perspective of the Act on combatting unfair market practices, the general clause 'unfair market practices' appearing in article 4 of the Act, plays a crucial role. According to Ślęzak, a market practice is unfair if it is contrary to good practices, and in addition significantly distorts or may distort the market behaviour of the average consumer to whom the advertising is addressed (2011, pp. 36-38). The Act also deems a misleading and aggressive market practice to be an unfair market practice.

In defining the consumer, it refers to the regulations of the Civil Code (hereinafter CC), i.e. to article 22(1) of the CC, according to which the consumer is a natural person conducting a legal transaction with an entrepreneur not directly related with their economic or professional activity (Ustawa z dnia 23 kwietnia 1964...). The concept of the entrepreneur has been defined in many legal acts, among which are the definitions in the CC, CL (Company Law), ACUC and ACUMP, as well as in the Act on competition and consumer protection (Ustawa z dnia 16 lutego 2007..., hereinafter ACACP). On the basis of the ACUMP, entrepreneurs are natural persons, legal persons and organisational units without legal personality that conduct economic or professional activity, even if such activity is not organised and continuous in character, as well as people acting in the name of or on behalf of such entities. However, in the understanding of the ACUC, entrepreneurs are natural persons, legal persons and organisational units without legal personality that conduct paid activity, even incidentally, or which participate professionally in economic activity. These definitions of entrepreneurs are broader than those indicated in the CC and CL.

To sum up, in the Polish legal system, surreptitious advertising is currently considered as an act of unfair competition in B2B relationships on the basis of the Act on combatting unfair competition, and as an unfair market practice in B2C relationships on the basis of the Act on combatting unfair market practices (Namysłowska, 2012).

2. The Act of Unfair Competition – Concept and Characteristics

Before defining and characterising the act of unfair competition, attention should be paid to the definition of the word 'unfair' (in terms of dishonesty). According to the Polish dictionary, 'dishonesty' is acting unethically, illegally or not in line with accepted principles, norms or the truth, but also reflects a person's lack of honesty or integrity (PWN Dictionary of the Polish Language). Article 3 paragraph 1 of the ACUC defines an act of unfair competition as an action contrary to the law or good practices that threatens or violates the interests of another entrepreneur or a client. Meanwhile, in paragraph 2 of this article, the legislator listed an open catalogue of acts of unfair competition, which included: misleading labelling of an enterprise, goods or services, actions involving slander or dishonest praise, as well as unfair or prohibited advertising. The act of unfair competition appears in the ACUC as a general clause, as it refers to a system of norms and values that is outside the law, in particular to 'good practices'. In consequence, the use of this general clause transfers assessment of the actual state of affairs onto the judge who is resolving a given dispute (Szwaja, 2019).

Given the existence of an open catalogue of acts of unfair competition resulting from use of the phrase 'in particular', it is necessary to also point to the existence of unstipulated acts of unfair competition. The legislator's purposefulness in including only example acts of unfair competition also confirms the justified government project for an act on combatting unfair competition (Szwaja, 2019). This project demonstrated the impossibility of determining an exhaustive list of acts of unfair competition due to the continuous rivalry between entrepreneurs to sell their goods and services, and the continual appearance of new forms of acts contrary to the law or honesty. The legislator then stated that if "a specific act is not found in the catalogue of acts clearly prohibited by the act, courts can, on the basis of the general clause as a universal prohibition of unfair competition, consider a specific act as prohibited and apply the sanctions provided for in the Act" (Lower House of the Polish Parliament (Sejm) 1st term document, No. 278). Such acts include, among others, violating the reputation of another entrepreneur, and product placement contrary to the law.

Article 3 paragraph 1 of the ACUC should be considered in relation to article 1 of the ACUC, as only combined analysis of the two allows to establish the conditions for an act of unfair competition. According to Nowińska (2022), to consider a given behaviour as an act of unfair competition, the following elements must be cumulatively fulfilled: taking or failing to take action related to conducting economic activity that is illegal, i.e. contrary to the law or violating the general 'good practices' clause,

and which threatens or violates the interests of another entrepreneur or client. What is more, as seen currently in jurisprudence, this act must be competitive in nature. This means that competitive activity should be deliberate, aiming to strengthen or maintain an entrepreneur's market position or weaken the position of a competitor. The threat to the interests of entrepreneurs or clients must by nature be direct and real (Wyrok SA w Warszawie z 13.05.2014...). Additionally, in jurisprudence it is emphasised that the Act on combatting unfair competition cannot be treated as an instrument for eliminating competition in general in order for an entrepreneur to preserve a dominating market position (Wyrok SA w Lublinie z 30.09.1998...). Only the cumulative fulfilment of these conditions allows an entrepreneur whose interests have been threatened or violated to hold accountable the entity which carried out the act of unfair competition.

3. The Concept of Advertising and Surreptitious Advertising

A description of surreptitious advertising should begin with a presentation of the definition of advertising. As indicated in the literature, the concept of advertising is not unequivocal, the more so as it is an interdisciplinary issue. Advertising involves the work of, among others, sociologists, psychologists, visual communication researchers and lawyers (Ślęzak, 2020). According to the PWN Encyclopaedia definition, advertising is a set of means used in order to generate interest in specific goods and services as well as encourage their purchase, or to draw attention to a given manufacturer or retail entity. It is indicated that the original function of advertising was to provide information about goods and the sources where they could be purchased, but that currently advertising fulfils the function of presentation, shaping demand, and creating and maintaining a sales market (*Nowa encyklopedia powszechna PWN*, 1996). In the subject literature, jurisprudence, European Union law and Polish legal acts, it is described in many ways. However, there is no definition of advertising in the Act on combatting unfair competition, nor in the Act on combatting unfair market practices. This article presents only some of the definitions of advertising in order to properly understand the concept and to use the above-mentioned acts correctly for specific real-life situations.

Firstly, attention should be paid to the fact that the legal definitions found in individual legal acts are created for the purposes of the legal text in which they were included. The number of definitions means that advertising takes of various meanings depending on the normative act in which it was regulated. According to article 4 point 17 of the Act on radio and television, "advertising is a commercial message from a public or private entity related to its economic or professional activity that aims to promote the sale or unpaid use of goods or services" (Ustawa z dnia 29 grudnia 1992...). This provision then indicates that self-promotion is also advertising, that is every message from a provider of media services that serves to directly or indirectly promote their programmes, goods or services. In turn, article 52 paragraph 1 of Pharmaceutical Law contains a definition of advertising with a broad scope of meaning, giving also the example of the forms of medicine, and indicating which messages are not considered to be advertising on the basis of this Act (Ustawa z dnia 6 września 2001...). EU legislation provides a definition of advertising in article 2 letter a of Directive 2006/114/WE, according to which it is "presenting in any form as part of commercial, economic or artisan activity or conducting freelance professions in order to support the sale of goods or services, including property, rights and obligations" (Dyrektywa 2006/114/WE Parlamentu Europejskiego i Rady...). It is also worth drawing attention to the broad definition of advertising found in the Advertising Ethics Code (Advertising Council, Advertising Ethics Code, hereinafter 'the code'). According to article 3 of the code, advertising is "a message containing in particular information or an utterance, especially paid or for remuneration in another form, that accompanies any person's activity and that aims to increase sales of products, a different form of using such products, or to achieve another effect desired by the advertiser, excluding public relations activities. Advertising also includes sales promotions, offers directed towards recipients via direct marketing or sponsoring, as well as elements of visual identification and messages referred to in the previous sentence and made available on the Internet on a www server or on social media and

other places that aim for it to reach recipients; in situations in which the recipient of advertising is a consumer, evaluation of the advertising is conducted based on the model of the average consumer". The later part of the provision constructs a negative definition of advertising, indicating which message in the understanding of the code is not advertising. However, this code is not a source of generally applicable law, and its provisions are not absolutely binding; it is merely a collection of principles by which an entrepreneur should operate.

Article 16 paragraph 1 of the ACUC contains a catalogue of types of acts of unfair competition in the field of advertising, including: advertising contrary to the law or good practices, or violating human dignity; advertising that misleads the client and that therefore may influence their decision as to the purchase of goods or services, factually incorrect advertising; a message that in encouraging the purchase of goods or services gives the impression of providing neutral information; intrusive advertising; comparative advertising. In this case also, the legislator included an open catalogue of transgressions that can be committed in the field of advertising. From this provision it follows that advertising can also constitute practices which on the basis of specific product regulations are qualified as not being advertising, but instead are, for example, promotion or information about sponsoring (Szwaja, 2019). This is of key importance from the point of view of hidden advertising on social media, addressed later in the article.

Surreptitious advertising, also known as hidden advertising, is an act of unfair competition regulated in the Act on combatting unfair competition. This Act does not contain the term 'surreptitious advertising' nor 'hidden advertising', however, these terms are widely accepted in the Polish subject literature and in legal and juridical language. In article 16 paragraph 1 point 4 of the ACUC, the legislator merely indicated that it is a message which, in encouraging the purchase of goods or services, gives the impression of neutral information. It is also important to take into account the Act on combatting unfair market practices, which in article 7 point 11 introduces the concept of surreptitious advertising, "which involves the use of journalistic content in the mass media in order to promote a product where an entrepreneur has paid for such promotion, but in which this is not clear from the content, images or sounds easily recognisable by the consumer". According to Stefanicki, "regarding the general premise of unfair market practices specified by the legislator, the above-mentioned clause falls within the scope specified in article 6 paragraph 3 point 2 of the ACUMP". However, this provision states that "a misleading omission may include, in particular, (...) failure to disclose the commercial purpose of the practice if this is not clear from the circumstances and if this causes or is likely to cause the average consumer to take a decision regarding a contract which they otherwise would not" (Stefanicki, 2009).

The use of surreptitious advertising is also not permitted in the European Union. This prohibition was included in Appendix No. 1 to Directive 2005/29/WE on unfair market practices (hereinafter Appendix No. 1), constituting a so-called black list of market practices in which the use of surreptitious advertising was forbidden outright. According to point 11 of Appendix No. 1, it is forbidden to "use journalistic content in the mass media in order to promote a product where an entrepreneur has paid for such promotion, but in which this is not clear from the content, images or sounds easily recognisable by the consumer". The provision also constitutes the EU definition of surreptitious advertising.

Committing a transgression, according to article 16 paragraph 1 point 4 of the ACUC, requires the following conditions to be fulfilled: the 'message' must be of an advertising nature, and the content of the message must be contained in 'neutral information'. However, here there is no requirement for payment, which is characteristic of commercial advertising (Kępiński, 2014, p. 478). Messages which encourage the purchase of goods or services will be of an advertising nature. As the legislator did not indicate which specific message this refers to, it should be understood that the scope of this concept includes verbal, visual and audio messages. The above-mentioned article also has a broad scope of application as it can be used for all types of mass media, i.e. advertisements in the press and on the Internet, radio and television. Meanwhile, neutral information is that which is not recognisable by the average recipient as advertising. Giving the impression of neutral information involves hiding an advertising message within such content. Interpretation of article 16 paragraph 1 point 4 was referred to by the Supreme Court in decision III SK 20/07 of the 6th December 2007, indicating that this article

is applicable only in such cases in which “the advertising nature of the message is hidden in such a way that the recipient of the message does not expect that a given utterance (message) is of an advertising nature, not only due to the manner the message is formulated as a de facto advertisement, but also due to the concealment of any references to the actual source of the message or to relationships between the entity whose message is directed toward consumers and the entrepreneur whose products the message refers to. In other words, the scope of application of article 16 paragraph 1 point 4 of the ACUC is limited to such advertising practices that involve disseminating information about a product in such a way and in such circumstances that – from an objective point of view, and therefore irrespective of the actual beliefs of the recipient of the message – the recipient does not understand them as originating from an entrepreneur or entity related to them whose products such messages concern” (Wyrok SN z 6 grudnia 2007...). The Appeals Court in Warsaw also ruled on the interpretation of the above-mentioned article in the ruling VI ACa 543/06 of 21st December 2006, in which it noted that the correct interpretation of the provision indicates that the intention to conceal the promotional nature of the message is decisive, and not from whom it originated, as a message that encourages the purchase of goods or services or gives the impression of neutral information is an act of unfair competition, including hidden advertising (Wyrok SA w Warszawie z 21.12.2006...). Summing up, surreptitious advertising misleads the recipient, as while they may think that they are receiving objective messages and neutral information, they are in fact subject to advertising.

4. Surreptitious Advertising on Social Media

Threats related to hidden advertising also come from social media, which as they developed brought with them new advertising possibilities and subsequent legal problems, which have either been regulated minimally or not at all. Entrepreneurs quickly saw the potential inherent in influencers, exploiting at the same time the lack of suitable legal regulations. Fixated on making money, entrepreneurs and influencers forgot about consumer protection and fair competition, for which the legislator had not yet managed to pass the necessary legislation. The lack of signposting of advertising on social media can violate not only the interests of consumers, but also the entrepreneurs who conduct activity which competes with that advertised. It is also worth noting that the law, and not only Polish law, is still not at ease with Internet cyberspace (Grzybczyk, 2020), and one of the relatively new problems is surreptitious advertising on social media.

According to the principle of market transparency in force in Polish consumer legislation, entrepreneurs are obliged to signpost advertising, including advertisements that are self-promotion, promotional, or contain information about sponsoring. This obligation was not however fully respected by entrepreneurs, a fact that was noted by the Polish government agency. At the end of September 2021, the President of the Office for Competition and Consumer Protection initiated explanatory proceedings, the aim of which was to control sponsored content so that influencers and entrepreneurs approached their messages reliably and responsibly, and so that consumers were not misled, but received clear messages as to what was advertising and what was objective review and opinion (Matczuk, 2021). The result of the proceedings were recommendations issued by the President of the ACACP on the 16th September 2022 regarding the signposting of advertising by influencers on social media (Wyrok SA w Warszawie z 21.12.2006...). In the recommendations, it was stated that self-promotion and commercial messages intended to promote a brand were also advertising. It was defined in detail how advertising should be signposted. This labelling of advertising was to be legible, visible, as well as clear and understandable for recipients. The recommendations also stated that influencers cannot be used by entrepreneurs and advertising agencies for surreptitious advertising activities, acts of unfair competition, advertisements contrary to generally applicable laws, advertising that misleads consumers, or the use of other unfair market practices. Every entity that undertakes cooperation with an influencer should require from them clear signposting of material created as a result of their cooperation, and the influencer should ensure that this is signposted on every occasion. It should be noted that clear signposting is

that which is understandable for the average content recipient and is displayed in a prominent place. The signposting should not be on a single occasion, poorly visible or hidden among other labelling. It is also recommended that hashtags be used, such as #advertisingcooperation, #advertising, #advertisingmaterial, #sponsoredmaterial, #sponsoredpost, yet labels such as #ad or #promo may not be understood by the majority of recipients, and may therefore mislead consumers. Information about cooperation should be indicated in the material created, and the entity with which the creator cooperated in its creation should be identified.

However, the recommendations do not constitute generally applicable law, and are only recommendations addressed to entrepreneurs, advertising agencies and influencers. As noted by Kubiak and Chodyna (2022), failure to comply with them does not constitute a violation of the law, but it should be taken into account that the recommendations indicate the way in which the President of the ACACP will interpret the currently applicable law, and as a consequence in the case of which advertising practices an accusation should be expected of employing practices violating the collective interests of consumers. What is more, every case of surreptitious advertising on social media should be analysed individually. The activity of the ACACP in combatting hidden advertising should be assessed positively. The transparency of the regulations contained in the recommendations is beneficial not only for entrepreneurs and influencers, who learn how to correctly signpost advertising material, but also for the recipients, who will be aware of what to expect and what they can demand from the creators. The recommendations rightly contain a reminder of the legal consequences that incorrect labelling of advertising may entail.

5. Civil Liability of Entrepreneurs for Committing an Act of Unfair Competition through the Use of Surreptitious Advertising

The use of unfair market practices or acts of unfair competition, and therefore also hidden advertising, is prohibited by the Act both from the perspective of public and private law. The consequence of committing an act of surreptitious advertising is above all civil liability. On the basis of the Act on combatting unfair competition, this liability concerns relations between enterprises (B2B), and on the basis of the Act on combatting unfair market practices between the entrepreneur and the consumer (B2C). Additionally, the use of surreptitious advertising can be considered a practice that violates the collective interests of consumers in the understanding of the Act on competition and consumer protection. Article 24 of the Act prohibits such practices, including: violating the obligation to provide consumers with reliable, truthful and full information, and unfair market practices or acts of unfair competition. Violating the prohibition on surreptitious advertising may also, in addition to civil liability, give rise to administrative and criminal liability. Nevertheless, in article 25 of the ACACP it is noted that commencing proceedings on the basis of public law does not exclude the possibility of consumers or entrepreneurs seeking protection through private law.

Actively recognised in cases regarding the committing of a surreptitious advertising transgression, on the basis of the Act on combatting unfair competition, can be either an entrepreneur whose interests have been threatened or violated, or to a limited extent a national or regional organisation whose statutory aim is the protection of the interests of entrepreneurs. Consumers meanwhile, as indicated earlier, are only protected indirectly on the basis of this Act, through ensuring fair competition on the market. However, the legislator broadened the scope of entities that may be liable for committing an act of unfair competition in the field of advertising, in comparison to committing the remaining acts of unfair competition. This is because according to article 17 of the ACUC, an Act of unfair competition in the understanding of article 16 of the Act can also be committed by an advertising agency or other entrepreneur that prepared the unfair advertising. Therefore, this means that there will be passive recognition not only of the entrepreneur that violated or threatened the interests of another entrepreneur, but also the advertising agency that prepared the advertisement. The justification for such a solution is the assumption that entrepreneurs often contract the creation of advertising

to specialised agencies. In consequence, liability can be borne not only by the entrepreneur who is advertising, but also by others (Nowińska, 2022). However, in jurisprudence it is controversial whether there must be a competitive relationship between entrepreneurs acting as plaintiffs and defendants. Over the years, three separate views have been shaped with regard to this example. Without going into detail, it should be noted that according to the first of these, an act of unfair competition can occur between entrepreneurs who are not in direct competition with one another. The second view states that it is not necessary for a competitive relationship to exist, however it does allow for certain exceptions from this principle. The last and currently most prevalent view assumes that there must be a competitive relationship between the entrepreneurs (Koralewski, 2022).

It should be emphasised that in the understanding of the ACUC, entrepreneurs are also natural persons, legal persons and organisational units without legal personality that conduct paid activity, even incidentally, or which participate professionally in economic activity. A wronged entrepreneur can therefore seek protection through the common courts using the compensation indicated in article 18 of the ACUC, which are either financial or non-financial. According to this provision, if an act of unfair competition is proven, an entitled person can demand: the ceasing or elimination of the effects of the prohibited activity; the submitting of single or multiple declarations of suitable content and in suitable form; compensation for the damage caused or the surrendering on general terms of unwarranted benefits obtained; awarding of an appropriate sum of money to a specific social cause related to supporting Polish culture or protection of national heritage. Here, the author would like to point out that consumers whose interests have been threatened or violated by surreptitious advertising are also entitled to similar civil compensation on the basis of article 12 paragraph 1 of the ACUMP.

In the context of the individual compensation that entrepreneurs can seek with regard to the committing of an act of hidden advertising, it is worth highlighting the demand to cease the prohibited activity. In the literature it is indicated that, as a negatory claim, this action is in practice the most important means for combatting unfair competition (Kępiński, 2014, pp. 589-590). This is because an entrepreneur wronged by surreptitious advertising can demand its cessation. This demand includes two types of claim: the person actively recognised can also demand cessation of the emission of the surreptitious advertising, as well as demand that activities including hidden advertising are not undertaken in the future. As noted by Szwaja and Tischner, the plaintiff should in demanding a lawsuit specify precisely which activities they are seeking to have ceased in the ruling (2009, pp. 47-48). As an example, in the context of surreptitious advertising on social media as discussed above, the demand should specify that incorrectly labelled advertising be removed, or that it be correctly signposted. It is also appropriate from the perspective of committing the act of surreptitious advertising to demand a submission of single or multiple declarations of suitable content and in a suitable form. As noted by Kępiński (2014, p. 596), such compensation, as a particular means of negating the effects of the violation, and as awarded by the ruling of the court, should fulfil an educational, informational and compensatory function, but cannot constitute repression. The aim of this demand is to make a public correction to the prevailing public opinion or the opinions of certain groups about the goods or services, or about the entrepreneur. Publishing a declaration with suitable content and in suitable form is particularly important for the wronged entrepreneur, as it allows consumers to be informed about the committing of an act of surreptitious advertising by the competing entrepreneur. A declaration in which an entrepreneur admits to an act of unfair competition may also lead to undermining the trust of consumers in the entrepreneur's products. The Supreme Court expressed a similar opinion, adding that such declarations usually appear in the mass media at the expense of the infringer (Wyrok SN z 29.10.2020...). This form of compensation relieves consumers of the false belief that a message about a given good or service was objective information, which is highly important from the perspective of ensuring both fair competition on the market and the protection of consumers.

The literature indicates that acts of unfair competition are illegal, and unlike prohibited acts, harm or the threat of causing harm are not a necessary element. To assign the perpetrator liability for committing an act of surreptitious advertising, a sufficient condition is its illegality (Nowińska, 2022). However,

the burden of proof in the case of committing an act of unfair competition in the field of surreptitious advertising has been regulated somewhat differently from the principle of *ei incumbit probatio qui dicit non qui negat* in article 6 of the CC. According to article 18a of the ACUC, the burden of proof as to the truthfulness of the messages included in the advertising rests on the person who is accused of an act of unfair competition related to misleading. This exception should be strictly interpreted, and therefore the burden of proof regarding the existence of hidden advertising will rest on the defendant. However, as noted by the Court of Appeal in Warsaw, the plaintiff shall bear the burden of demonstrating the circumstances that constitute the factual basis for a lawsuit in accordance with the general rule provided for in article 6 of the CC (Wyrok SN z 29.10.2020...).

6. Conclusion

The prevalence of advertising and its development on social media has resulted in its traditional forms losing their power of persuasion. Entrepreneurs have begun to make use of hidden advertising in order to promote their products or services among a larger number of recipients, many of whom are unaware that they are being presented with subjective messages and not neutral information. The problem of surreptitious advertising is particularly important from the perspective of social media, on which there is often a blurring of the borders between objective information and advertising content. These unfair practices not only harm consumers, but also competition. In the Polish legal system, surreptitious advertising is currently assessed on the basis of two legal Acts: as an act of unfair competition in relations between entrepreneurs on the basis of the Act on combatting unfair competition, and as an unfair market practice between entrepreneurs and consumers on the basis of the Act on combatting unfair market practices. It should be emphasised that existing provisions are used for the new problems of surreptitious advertising on social media. However, both the EU and Polish legislators are continually making attempts to more precisely regulate advertising on the internet. These efforts are expressed, among others, in the recommendations of the President of the ACACP regarding the signposting of advertising content by influencers on social media, as well as in Directive 2005/29/WE on unfair market practices. On the basis of these provisions, entrepreneurs were required to fulfil many informational obligations aimed at preventing the committing of acts of surreptitious advertising by entrepreneurs, advertising agencies and influencers. Growing legal problems related to advertising on the Internet and the interdisciplinary nature of the concept make it difficult to create a uniform definition of advertising for common use. This in turn creates further difficulties in developing a definition for surreptitious advertising, as well as determining its scope. In the formulation of any accusation of unfair competition regarding surreptitious advertising, in each case it must be decided whether a given activity undertaken by an entrepreneur has the hallmarks of advertising.

Entrepreneurs who violate the ban on surreptitious advertising may face civil, administrative and criminal liability, and proceedings for this Act can take place both on the basis of private law, as well as public law. Interpretive doubts may also be raised by the similar catalogues of compensation in the ACUC and ACUMP. Lack of a comprehensive legislation regulating the combatting of unfair market practices that is applicable to all participants in the economy should be assessed negatively, as multiplying regulations in this regard deepens the uncertainty in Polish law related to combatting unfair competition, in which there are already many concepts and general clauses that result in interpretive doubts.

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Kryptoreklama jako czyn nieuczciwej konkurencji

Streszczenie: Artykuł ma na celu zaprezentowanie problematyki kryptoreklamy na tle przepisów ustawy o zwalczaniu nieuczciwej konkurencji. W pracy przedstawiono analizę zagadnień związanych z reklamą, kryptoreklamą oraz czynem nieuczciwej konkurencji. Następnie scharakteryzowano kryptoreklamę jako czyn nieuczciwej konkurencji. Skupiono się również na problematyce kryptoreklamy w mediach społecznościowych. Opisano odpowiedzialność cywilną przedsiębiorcy za popełnienie czynu nieuczciwej konkurencji w zakresie kryptoreklamy. Wskazano na problemy ze stworzeniem jednolitej definicji reklamy. W wyniku przeprowadzonej analizy negatywnie oceniono brak kompleksowego aktu prawnego regulującego zwalczanie nieuczciwych praktyk rynkowych. Niniejszy artykuł opiera się w głównej mierze na ustawie o zwalczaniu nieuczciwej konkurencji, a także na polskich i unijnych aktach prawnych, orzeczeniach sądowych, literaturze naukowej i rekomendacjach stworzonych przez rządowe oraz pozarządowe organizacje.

Słowa kluczowe: kryptoreklama, czyn nieuczciwej konkurencji, reklama, nieuczciwa konkurencja
