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Unfairness in advertising: Doctrinal analysis of the US and Uzbekistan's legal standard

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Abstract

This article analyzes concepts and doctrines on unfairness standard in Uzbekistan and the USA. The article shows that Uzbek Advertising law determines unfairness as the main conducts that might cause deception. However, unfairness is an independent category, which cannot be seen as a way of deception. Most interestingly, Uzbek law puts unfairness into the deception standard, which makes its enforcement complicated. Moreover, the State Program on Development Strategy of Uzbekistan in 2017-2021 determines the special task to deal with counterfeit merchandise, which intends to prevent unfair competition and to protect manufacturer and consumer rights. On the other hand, the US antitrust law introduced the legal concept of misleading advertising under unfair methods of competition and deceptive practices in commerce. This article analyzes the US traditional and modern standards of unfairness in advertising. The article concludes that Uzbek legislature should clarify the borders of unfair advertising to distinguish this type of advertisement from deceptive commercials.

Keywords: Unfairness, advertising, legal standards, regulation, policy, deception, competitors, consumers, public interest

Introduction

Unfairness: As broad but less well-defined concept

Some advertisements creates unfair advantages for its distributor and can influence consumers by affecting their purchasing decision, the government has to regulate such advertising by setting legal standards concerning unfairness. Generally, this type of advertising creates an unfair advantage in the marketplace. Unfairness is the main principle beyond the more strict boundary of deception, that is unfairness comes from a variety of vaguely defined inequities including immoral, unethical, oppressive or unscrupulous conduct. Unfairness is a much less well-defined concept, which is capable of covering various activities within different theories, and it is also a unique measurement method. Thus, unfairness standard aims to preserve potentially less protected consumers. Deception is a part of unfairness; however, the unfairness standard does not apply to deception because deception and unfairness are discrete forms of regulation. The primary distinction between these two categories is that deception focuses on likely injury, whereas unfairness requires actual and completed harm. In particular, unfair claims address injury, rather than the message conveyed. Behavioral evidence in unfair cases will more appropriately concern consumer actions resulting from a claim, rather than consumer understanding or belief of the claim.

Renewal of traditional approach on unfairness in the USA

Traditional standard of Unfairness

According to the traditional FTC standard for determining of "Unfairness", the "unfair" practice is broader than that over "deceptive" practices. In the other words, anything that is deceptive can also be considered unfair, but unfair practices need not necessarily be deceptive. For instance, in the early 1930's, some candy manufacturers in the USA used lottery-like sales devices. When consumer put his money to this machine he received quantity of candy depended on chance, not his money. While the advertising clearly disclosed the nature of devices, the FTC found it unfair and the US Supreme Court agreed with the FTC decision, because such devices exploited consumers, particularly children, who were unable to protect themselves^[1].

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As confirmed by case law, the FTC's policy stated that three factors will be considered in determining whether a practice is "unfair": (1) Whether the practice offends public policy by violating established concept of unfairness; (2) Whether the practice is immoral, unethical, oppressive, or unscrupulous; (3) Whether there is substantial injury to consumer or business ^[2].

Reemergence of Unfairness Standard

Later, with the FTC Act amendments in 1994, the "Unfairness Standard" was reemerged for FTC's policy ^[3]. The amendments defined the FTC's "Unfairness" authority wider than previous Policy Statement. The amendments prohibit the FTC from starting a rule making proceeding without first making a determination that particular unfair or deceptive practices are commonly based either on existing cease and desist order or on other evidence describing a widespread pattern of unfair or deceptive practices ^[4]. In this regard, the Congress removed the limitation in use of unfairness theory as a basis rule in advertising, and included the scope of public policy aspects of unfairness. Accordingly, the law states that "in determining whether an act or practice is unfair, the FTC may consider established public policy as evidence to be considered with all other evidences." ^[5] However, it cautions that "such public policy considerations may not serve a primary basis for such determination" ^[6]. Thus, according to the current law, the unfairness means any business practices that causes or likely to cause substantial injury to consumer which is not reasonable avoidable by consumers themselves and not outweighed by countervailing benefits to consumer or to competition ^[7].

Distinction between Unfairness and Deception

The distinction between "unfair" and "deceptive" was explained in *International Harvester Co. Case* ^[8]. In this case, International Harvester sold gasoline-powered tractors, but did not warn consumers of a potential safety problem associated with its product. The problem might occur on fuel-geysering when removing the fuel cap, exposing the consumer to a stream of gas and vapor. Despite the fact that there were simple procedures that the consumer could use to avoid the problem, consumers were neither warned nor told how to avoid the problem. The administrative law judge found the omission of such warning information in advertising both unfair and deceptive. The FTC affirmed the decision with respect to unfairness but reversed the judge's decision concerning deception. The commission held that no affirmative misrepresentation occurred. As reasons it stated that the tractors were reasonably fit for their intended purpose, no gross safety hazard existed, and no deceptive activity took place in this case. The Director of the Bureau of Consumer Protection Carol T. Crawford, in his comments on this case, states that if the FTC affirm the deception it would have expanded the law of deception virtually beyond limits, presumably by requiring advertisers to include the warning of safety hazards, however they may be remote ^[9]. However, under the unfairness standard, the FTC held International Harvester responsible. According to the definition of unfairness, the Commission found that (1) the injury was serious (death and severe body injury), (2) the cost to International Harvester to warn against or prevent injury was insignificant and did not offset the cost of injuries, and (3) the injury was reasonable avoidable had consumer received information to understand the risks ^[10].

Unfairness doctrine: beyond the improper advertising in Uzbekistan

In Uzbekistan, the establishment of legal term unfair competition leads to clarification of unfair advertising as a legal concept. For instance, the law on Mechanism of Operation of Securities Market (Securities Market Mechanism law, 1996) defined unfair advertising in security market. According to the Art.29 of law, an advertisement is unfair if it intends (1) to state incorrect (false) information about securities and other transactions related with securities; (2) to mislead or confuse the participants of securities market; (3) to indicate the future benefits from securities and trends of their increasing rates; (4) to disclose existed or assumptive deficiencies of other participants of securities market.

Development of Advertising law (2010-up to now) began with the approval of Measures Plan on Further Development and Efficiency of Legal Acts on Competition Preservation, Consumer Right's Protection and Advertising (2010) by Government. One of the main directions of the Measures Plan was to prevent unfair advertising and to strengthen consumers' rights protection in collaboration with non-governmental organizations. Thereby, with the purpose of elimination of unfair advertising cases and designing legal framework for identification of hidden advertising, the Competition Committee was bound to elaborate on and approve the Regulation on Procedure of Determining Subliminal (Hidden) Advertising.

In 2010, the Government adopted Measures Plan on Further Development and Efficiency of Legal Acts on Competition Preservation, Consumer Right's Protection and Advertising. Again, one of the main direction of the Measures Plan was collaboration between state bodies and non-governmental organizations to prevent unfair advertising and to strengthen consumers' rights protection.

The analysis of improper advertising shows that the legal definition covers unfair advertising as well. Although legislative body classifies unfair advertising as a type of misleading advertising, indeed the definition of unfairness is broader than deception. The broader usage of the legal concept of "unfairness" justified it as a doctrine. For instance, in Uzbekistan, "fairness" is used as a principle for realization of civil rights in Civil law, as a presumption for protection of entrepreneurs in Business law, and as an evaluative criterion of behaviors in Administrative law and Criminal law. Various usages of term "fairness" in several law fields do not separate it as a deferent category, conversely, fairness, as a unique doctrine, does not lose its core meaning. The fairness doctrine actually provides the law fields with the essential principles, whereas the other legal concepts do not have such function. Thus, unfairness doctrine has a broader usage than deception concept.

"Fairness" doctrine has been mainly developed in Private law and, therefore, it has a legislative basis in the Civil code of Uzbekistan. Article 9 of the Civil code determines "fairness" as a principle for behavior of participants in civil law relations. According to this principle, a person should behave fairly in order to realize his or her civil rights and must not violate the rights and legally protected interests of the other person ^[11]. Thereby, fairness means actual honesty of person in his or her behavior ^[12]. The concept encompasses not only legal sense, but also moral and spiritual perception which is the ground for business (corporate) ethics in economic activity ^[13]. Accordingly, in

Advertising law "fairness" should be considered as a principle for advertiser's behavior, which must take into account the consumer rights and interests in order to provide honesty in competition.

In civil law theory, "fairness" doctrine has a broad meaning. For instance, Uzbek scholar Ayubhon Muhammadiyev pointed out that "fairness" doctrine effective as "principle", "presumption" and "evaluative criterion" of behavior in civil law ^[14]. "Fairness", as a principle, means that person who realizes his or her civil rights must not harm the other person. According to "fairness" presumption, the person be presumed "fair" until unfairness in his or her behavior is proved. As an evaluative criterion, "fairness" serves as a main criterion to assess an abuse in person's behavior while having civil rights. Theoretically, "fairness" doctrine indicates to take care of the rights and interests of other participants in appropriate way, conversely, the absence of this kind of care is considered as unfairness ^[15]. Thereby, "fairness" doctrine serves to fill gaps and loopholes in law, and to prevent the shortcomings in enforcement ^[16]. Accordingly, "unfairness" in Advertising law should be described as an absence of appropriate measures with regard to consumer rights or an abuse of the power by an advertiser.

Although legal concept of "unfairness" in Competition law came from the basis of "fairness" doctrine, the concept is more specific than it was in Civil law. Generally, any conduct which tends to injure the competitor or consumer and to restrict free competition can be considered as unfair ^[17]. However, fairness (unfairness) is defined as "a method of competition" in Competition law. Theoretically, "fairness" in competition is the usage of legally permitted, universally recognized and humanitarian methods in economic rivalry ^[18]. Accordingly, "unfairness" means the usage of prohibited and inhuman methods in competition ^[19]. Therefore, "unfairness" is contrary to the essence of "honesty" in business and "truthfulness" among participants of market ^[20]. As an indicator of market, "fairness" is evaluated as competitive condition of civilized market economy and "unfairness" as an indicator of "wild" economy ^[21]. In this way, Competition law theory defines "unfairness" as a method of competition with the negative consequences.

To understand "unfairness" concept in competition, this research analyzes the legal definition of "unfair competition". Legislature of Uzbekistan defined "unfair competition" in Article 4 of the Competition law (2012). In accordance with Article, "unfair competition" is the action of business entity or the groups of persons directed on gaining advantages in the economic activity which contradicts the legislation or customs of business turnover, and can cause losses to other business entities or discredit their business reputation ^[22]. The Competition law determines three legal elements to evaluate the action to be unfair.

First, any action directed on gaining advantages in economic (business) activity is considered to be unfair. Some Uzbek scholars stated that "the action directed on gaining advantages" should be conducted in active way in order to find it unfair and passive actions should not be taken into account here ^[23]. In our opinion, it does not matter whether it is an active or a passive action, the main symptom here is the action directed to gain any advantage from competition. This preliminary character is unfairness in competition,

however it is not sufficient to evaluate "unfair competition" ^[24].

Second, the action should contradict legislative acts or customs of business turnover in order to consider it as unfair competition. The action might not be contrary to legislative acts, but it can contradict with customs of business turnover. In accordance with the Civil Code of Uzbekistan, customs of business turnover shall be deemed to be a rule of behavior which has been formed and applied in many domains of entrepreneurial activity and is not provided by legislation irrespective of whether it has been fixed in any document (Article 6) ^[25]. Otherwise stated, customs of business turnover are business practices that are not provided by legislative acts. There are several points for legal significance of the "customs of business turnover" to evaluate the action as unfair competition appropriately. First of all, the customs of business turnover can serve as a legal source to assess unfairness in competition, if legislative acts do not include the legal criteria for evaluation. Secondly, the customs of business turnover cannot be used when it contradicts legislative acts. Thirdly, the customs of business turnover specifies the standards of fairness (honesty) in competition ^[26].

The application of "customs of business turnover" has become a controversial issue these days. Some Uzbek scholars stated that customs of business turnover and its requirements are vague and scattered, also they are not well-known and recognizable for entrepreneurs and enforcement body, therefore can be interpreted in different ways ^[27]. The above-mentioned statement cannot be reasonable because of following facts. First, the institution of "customs of business turnover" has been developing, and therefore legislature specified it as an additional legal source, not a sole requirement for fair competition. Second, the application of "customs of business turnover" in certain market does not depend on knowledge of participants or their intention to use it in practice. Currently, it is difficult to consider some sort of set of positive rules of conduct as business practices, which is prevailed as the result of a long and universal application in some entrepreneurship and recognized by participants. Meanwhile, the availability of business practices in relevant sectors of economy is determined by the opinion of the Chambers of Commerce and Industry of Uzbekistan ^[28]. Third, the categories of "fairness" and "honesty", mentioned in the legal definition of "unfair competition", have an evaluative character which extends the evidentiary basis as the additional criterion for assessment of unfairness in competition and gives a chance to prevent various forms of unfair competition.

Lastly, the action which can cause losses to other business entities or discredit their business reputation is considered to be "unfair" in competition. Apart from two elements of conduct requirement mentioned above, the third element is the harm requirement of "unfair competition". In the harm requirement, legislative body used the word of possibility "can", because any hazard of potential damages for business or reputation of competitor is sufficient to find the action as "unfair competition".

As a method of competition, "unfairness" is performed with two purposes. First, competitor behaves unfairly planned not to take off the market, because it cannot compete with other competitors in equal conditions ^[29]. In this case, unfair competitor attempts to mislead consumers about the nature, specification, methods and place of manufacturing, quality

and other substantial matters of the product in order to keep a good business reputation. Second, competitor intends to push other competitors out of the market and to get more benefits, even if it is able to compete with other competitors^[30]. In this event, competitor carries out unfair action such as dissemination of false or inaccurate information, which can cause losses and discredit business reputation of other competitors. Two cases mentioned above are considered to be misleading advertising by virtue of legislative act. Thus, misleading advertising is the most dangerous type of unfair competition, which involves both aims of "unfairness" in competition.

Advertising law (1998) determines "unfair advertising" as a type of improper advertising. This classification comes from the legal definition of improper advertising which includes also unfairness (Article 13). The authors of the Commentary on the Advertising law specified unfair advertising as a result of "violation of requirements for comparative advertising"^[31]. They stated that the main criterion for comparison in advertisement should be fair. According to the authors, "fairness" in advertising can be described as complying with the requirements mentioned in the law, to respect the interests of other competitors, to refrain any unlawful actions that cause material or moral damages^[32]. In the definition, "to comply with the other requirements mentioned in the law" means to follow the requirements of comparative advertising. In particular, Article 15 of the Advertising law permits comparative advertising if it (1) makes comparison of material, substantial and reliable qualities of product in an objective and fair way, (2) does not mislead or tend to mislead, (3) does not make confusion on identity of advertiser and competitor or does not create a likelihood of confusion on intellectual property objects of product, (4) does not discredit the business reputation of competitor. Although the requirements set the concepts of fairness, objectivity, deception and likelihood confusion as criteria for evaluation of comparative advertising, the core criterion here is fairness and other concepts can be viewed as additional criteria. The reason for that, as Uzbek scholars justified, is the usage of unfair methods in advertising through exploiting an advantage over consumers' inexperience in purpose to discredit the opponent party^[33]. Thus, Advertising law specifies fairness as a main criterion for evaluation of unlawful advertising and unfair advertising as the result of violation of comparative advertising.

Conclusion

A novelty in the current Uzbek Competition law is unfair advertising, which describes an act of unfair competition in accordance with competition law. The logical purpose of the legislature here is to prohibit unfair advertising. However, the main criterion of determining unfair advertising is not conceptually accurate. Particularly, the legislature defines unfair competition as advertising which misleads consumers about the nature, method and place, quality, quantity and other properties of advertised product. Moreover, Uzbek Advertising law made a confusing legal framework for deception by adding to it an unfairness standard. This framework makes difficult to understand advertising law provisions. Consequently, this complicated framework causes ambiguity and miscomprehension in practice. Furthermore, the legal requirements for unfair advertising oblige the Antimonopoly Committee to prove not only the fact of conducting unfair advertising, but also the possibility

of harm which makes its enforcement complicated. Therefore, that Uzbek legislature should clarify the borders of unfair advertising to distinguish this type of advertisement from deceptive commercials.

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