

Self-regulation of Advertising – Controversial Impacts of Ethical Codes

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Abstract

Self-regulation of advertising constitutes a part of broader concept of corporate social responsibility. A voluntary assumption of obligations in areas where the legal regulation is very complex and establishes a number of non-voluntary obligations is a feature which can lead to controversial social consequences. In their theoretical analysis, the authors address the basic relations of the legal regulation and self-regulation of advertising based on codes of conduct. They define the possible benefits and risks associated with self-regulation of advertising. In doing so they try to make legal regulation and self-regulation overlap. This critical viewpoint provides for a theoretical prediction of ways of misusing self-regulation of advertising, in particular with respect to a strategic protection against illegal advertising practices. Based on a specific advertisement by Jogobella-Zott transmitted in the Czech Republic in 2007 the authors point out at a suspicious procedure of an arbiter of self-regulation while evaluating a possibly misleading advertisement. Subsequently, they extend their analysis to discuss the binding force of rules included in codes of conduct and the possibility of enforcing these before a law court.

Key words: self-regulation, advertising, codes of conduct, law, corporate social responsibility

JEL Code: JEL Code, JEL Code, JEL Code (2 – 3)

Introduction

“Corporations are not responsible for all the world’s problems, nor do they have the resources to solve them all. . . . [but], a well-run business . . . can have a greater impact on social good than any other institution or philanthropic organization.” (Porter & Kramer, 2006).

“Corporate codes of conduct are self-imposed, self-regulated, and voluntary, and therefore lack a definitive enforcement mechanism. There is no separate standard for deep-

pocketed mega-corporations, even if a sense of morality tells us there ought to be.“ (Revak, 2012).

The significance of self-regulation in terms of its advantages and disadvantages has been widely discussed in scholarship (Zimmermann, 2008; Gavin, Greenwood & Schapper, 2012). Self-regulation of advertising is a specific field which concerns limiting one of the key tools for obtaining profits and a business success (Boddewyn, 1985). It is a very sensitive area of regulation, where an effort to achieve even stricter rules and more responsible conduct seems less trustworthy for the above reasons. Different writings point out at the failure of self-regulating advertisement in specific fields and with respect to specific objectives (Zetterquist, Mulinary, 2013). In particular, the regulation of internet advertising is challenging lately. Neither competition (law suits initiated by competitors) nor the supervisory activities of administrative authorities seem to display a sufficient capacity to place advertisers at risks of sanctions (Grmelova, 2012). The diversity of internet advertisement includes various atypical forms. Some essential legal issues have not received established responses as yet (Gongol, 2013). Self-regulation of advertising can thus offer a suitable solution in particular since another systemic solution is missing.

An important feature of Corporate Social Responsibility – ideologies as patterns or frameworks of ideas (Ghoshal, 2005), which constitute a basis for far-reaching impacts on societies and societal institutions, can be implemented in the field of advertising in a limited way only. Often, they can be at variance with the natural objectives of advertising, i.e. promotion of sales of goods and services. Ideology in the field of advertising and long term advertising strategies thus need to be amended, abandoned, or selectively chosen to keep advertisement effective. This ideological “filtration“ decreases the trustworthiness of motivation, on the basis of which it was created.

However, we need not approach the issues of significance, benefits and risks of self-regulation of advertising only on the basis of empirical evidence, experience and retrospective analysis. Also, a theoretical analysis can display interesting results and inputs. An analysis of a general potential of self-regulation of advertising can be made with respect to some social goals, in particular the legal regulation of advertising. This concerns a minimum necessary regulation having paradoxically minimalist dimensions nowadays.

1 Self-regulation of advertising and its impacts: common regulation,¹ up-regulation, down-regulation

Both the European Union and other developed countries have introduced a very wide scope of application of legal regulation with respect to advertisement. In this context, it is justified to ask, what the possible social benefits of self-regulation of advertising may be. It is usually advocated by private law holders of codes of conduct² (“arbiters of self-regulation“). A theoretical analysis of this question will be based on overlapping the rules of legal regulation and self-regulation.

For the purpose of the analysis we shall consider the legal regulation of advertising as generally well known and constant. The scope of obligations of traders constitutes the contents of the law in force. These obligations are non-voluntary and they are generally enforced by law courts and/or administrative bodies. They can be enforced even against the will of the traders who face the risk of sanctions if they transmit illegal advertising.

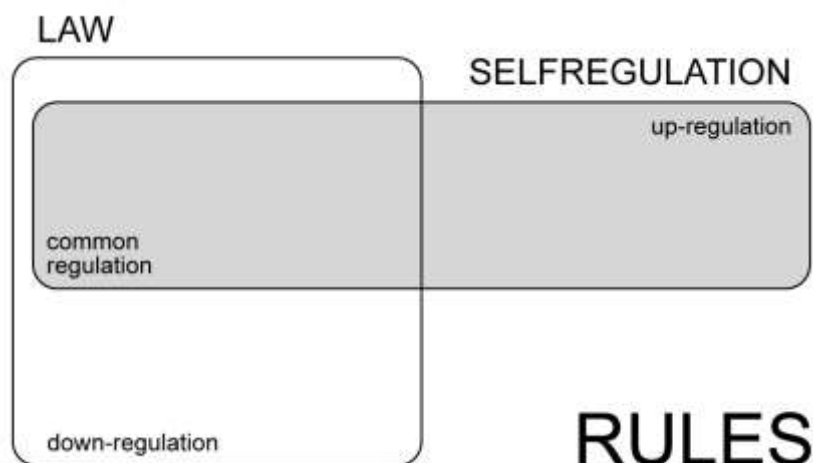
We also consider self-regulation as a set of different rules governing advertising. These rules are adopted by obliged entities on a voluntary basis. If these codes of conduct are not internal in their nature, they are generally adopted by subscribing to a code of conduct. The rules of self-regulation invade three areas (see Fig.1).

- The field of common regulation. This includes acts which are illegal and at the same time prohibited by the rules of the code of conduct.
- The field of extensive self-regulation (up-regulation) including acts which are legal, however, they are prohibited by the code of conduct. This would constitute an added value to self-regulation.
- The field of insufficient regulation (down-regulation) encompassing acts which are illegal, however not prohibited by the codes of conduct. This would create a decreased value of self-regulation.

Fig. 1: Mutual relations of legal regulation and self-regulation of advertising

¹ The term “co-regulation“ was coined by Alan Fogel, who defined it as “a social process by which individuals dynamically alter their actions with respect to the ongoing and anticipated actions of their partners“ (Fogel, 1993).

² Sometimes referred to less precisely as Ethical codes of conduct in the field of advertising



1.1 Common regulation, significance and risks

The enforcement of rules of common regulation by means of self-regulation displays a quantitative dimension only. It means enforcing law by an extra-legal way. Self-regulation practiced in this field extends the volume of the total inspected advertising which would be much lower otherwise. This theoretical conclusion, however, is based on some prerequisites which may not apply in practice. The possible benefits of self-regulation can be adversely influenced, reduced or even reversed by the following factors:

The importance of self-regulation is diminished if the practice of self-regulation results in a reduction of advertisement reviewed by law course or administrative authorities. The practice of self-regulation associated with public promotion may be an effective means of deviating from justified complains by the public. Complaints concerning illegal advertising which would otherwise be directed at administrative bodies are subsequently sent to private arbiters of self-regulation. The private arbiters apply the self-regulation rules thus replacing administrative or judicial application of law which would otherwise be more frequent. A rise in the total volume of inspected advertising may not necessarily correspond to the volume of advertising inspected by means of self-regulation.

Common regulation reaches its objectives only if the arbiter of self-regulation effectively enforces the legal rules designated by it. This, however, is not always the case. Codes of conduct in the field of advertising can contain a universal rule saying that whatever breaches the code of conduct breaches the law in force as well. Nevertheless, without a full application of all rules of legal regulation this rule only displays a declaratory nature. It may be justified to consider its misleading effects in a number of contexts.

Common regulation reaches its objectives only if the arbiter of self-regulation abides by the law in force and uses its interpretation in line with the established case-law. A sovereign and arbitrary interpretation of rules in the field of common regulations constitutes a negative phenomenon. If the arbiter of self-regulation interprets its rules in a restrictive way with respect to the interpretation of law, it causes, in effect, the legal regulation to diminish. By pursuing such an activity, the arbiter creates a secondary field of down-regulation, due to restrictive interpretation of legal regulation. These facts cannot be subsequently inferred from the wording of the codes of conduct.

The total increase in the volume of inspected advertisement may be significantly depreciated by decreasing the risk of sanctions for traders. The risk of applying law by judicial or administrative course may be much higher for traders on a case by case basis than the risk traders face in a specific regime of self-regulation. The effectiveness of sanctions within self-regulations represents a very important value. It influences directly the importance of a specific regime of self-regulation. In terms of sanctions, a situation is neutral in the event that traders face a very similar sanction for the same advertisement both, in the regime of self-regulation as well as when following the course of administrative or judicial application of law. By analogy, we may distinguish regimes of self-regulation as those pursuing stricter sanctions, more mild sanctions or insignificant sanctions.³

1.2 Up-regulation, significance and risks

The significance of rules of extensive self-regulation of advertising seems unambiguous. Obligated entities limit themselves on a voluntary basis more than what would correspond to their legal obligations. However, even in this field controversial situations may arise. The rules of self-regulation may easily create a misleading impression of a much higher added value than self-regulation really offers. It is essential to note that the public may perceive extensive self-regulation of advertising differently with respect to the reality in two ways.

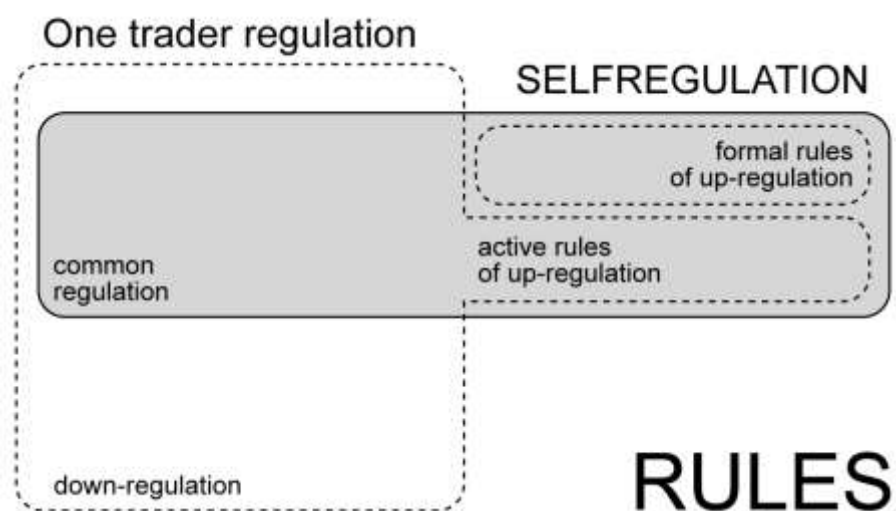
The public perceives the added value of extensive self-regulation as a value of the entire set of these rules included in the code of conduct. A voluntary obligation to abide by extensive self-regulation may, however, not pose a higher limitation to advertising in case of some traders. We can imagine, e.g. a code of conduct governing extensively the advertisement

³ The regime of self-regulation of advertising pursued in the Czech Republic by the Czech Advertising Standards Council represents is very mild in terms of sanctions. This arbiter of self-regulation does not impose any material sanctions, it limits itself to publishing its findings of conformity or lack of conformity with the Codes of conduct in the field of advertising. Only if the advertisement is still being shown, may this arbiter enforce its premature withdrawal by the obliged entities.

of direct-marketing. A yogurt trader can abide by such a code of conduct. Since yogurts are not sold through direct marketing, this extensive self-regulation concerns the trader formally only, since it does not affect its business practices. The trader can thus publicly declare its higher social responsibility – an obligation of a stricter code of conduct. The declaration of a higher social responsibility, however, has no real impact in this case (see Fig.2).

The public perceives the rules of extensive self-regulation in such a way corresponding to its linguistic and logical competence. Nevertheless, it is the arbiter who coins the contents of the rules of self-regulation. These are private rules of a private entity. The arbiter is generally entitled to attach its own meaning to these rules, no matter how they are perceived by others. Hence, it is very easy to draft apparently highly effective and very strict rules which subsequently receive a very restrictive interpretation by an arbiter. The scope of up-regulation may thus be significantly smaller than that perceived by the public when reading the rules of the code of conduct.

Fig. 2: The scope of active rules of regulation



1.3 Down-regulation, significance and risks

Any field of down-regulation of advertising degrades self-regulation of advertising due to its insufficiency. A direct consequence of down-regulating advertisement consists in a practice of its arbiters who may find clearly illegal advertisement compliant with the codes of conduct. Down-regulation of advertisement thus provides protection to specific fields of illegal advertising. Its risks are very transparent and can be easily inferred. Rather than dealing with

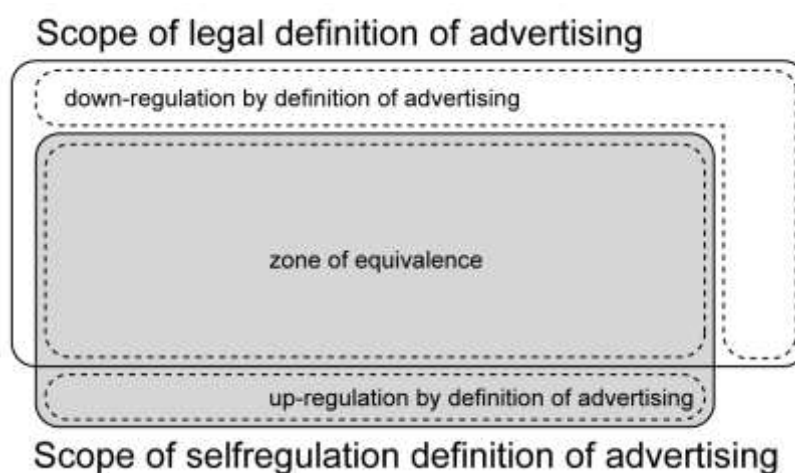
the specific social risks of down-regulation of advertising, it is more interesting to address the mechanisms which can cause it.

The scope of application of all rules governing advertising is based on the very definition of advertising. If advertising is defined in self-regulation differently and more restrictively than the legal definition of advertisement, this results in the occurrence of down-regulation. Where law perceives the existence of advertisement, this is not the case of a specific code of conduct. Therefore, such advertisement is not covered in the regime of self-regulation. The very implementation of the definition of advertising in codes of conduct bears a significant risk leading to down-regulation. The definition of advertising in EU law is so complex (Vavrečka, 2011), that achieving a perfect match between the legal definition and that contained in codes of conduct is very unlikely. The same procedure may, however, also result in the creation of up-regulation of advertising (see Fig. 3).

The second mechanism which may result in down-regulation consists in an insufficient scope of application of rules included in a code of conduct as a whole (see Fig. 1).

The third mechanism is an arbitrary down-regulation of advertising brought about by the practise of the arbiter of self-regulation who attaches a restrictive interpretation to rules which are identical to legal regulation.

Fig. 3: An incomplete material overlapping of regimes of legal regulation and self-regulation of advertising caused by a different definition of “advertising“



2. Legally binding character of self-regulation rules of advertising and their judicial interpretation

Are the voluntary rules of self-regulation of advertising enforceable against obliged entities by judicial or administrative course? This question can be given a general reply. Where a voluntary obligation has been adopted in such a way which establishes legal regulation between an obliged entity and a third party, such an obligation can be basically enforced before law courts. The enforcement based on administrative proceedings is limited. It is only possible where the enforcement of an obligation bears a general public interest or the breach of such obligation contravenes public policy rules.

The first sub question consists in the enforceability of codes of conduct against obliged entities by a judicial course directly by an arbiter of self-regulation. If the subscription to a code of conduct meets the formal requirements of a contract concluded by and between an obliged entity and an arbiter of self-regulation, the arbiter may enforce the implementation of contractual duties in a civil law dispute. It is questionable, however, whether in such a case a court should be called upon to provide an independent interpretation of the rules of code of conduct to precise their breach? In this context, the authors attach a key importance to the wording of the obligation. If the obliged entities took up a contractual obligation to follow the decision of an arbiter, then the court should not be called upon to provide an independent interpretation of the code of conduct. If the obliged entities agreed to follow the code of conduct without an obligation to abide by the decision of an arbiter, a law court should review independently whether the findings of an arbiter as to the breach of the code of conduct are substantively correct. An arbiter is not entitled to assess its subjective interpretation of a code of conduct, where obliged entities understand its wording differently in a foreseeable and fair way.

The second sub question is the enforceability of codes of conduct against obliged entities before law courts by affected consumers and competitors. This possibility is viable only if the obligation of the trader may be understood as an obligation with respect to a consumer. A simple adherence to a code of conduct and a subsequent "tacit" following of its rules by an obliged entity does not have these legal effects. However, the setting becomes different if the trader uses its obligation in a way which can influence the decision taken by the consumer as to his or her purchase. These are usually cases where a trader presents its voluntary adherence to a code of conduct as an advantage of its offer.

Consumers exposed to the influence of such a commercial communication fairly perceive such an obligation on the part of the trader as an obligation in their favour. They understand the wording of the obligation as that corresponding to the trader's communication.

Consumers do not perceive the significance of the interpretation of such an obligation by an arbiter of self-regulation in practice since they are not aware of such an interpretation. It would be clearly disproportionate to require such knowledge from an average consumer. In case of a public communication of a voluntary obligation of a specific conduct a court will always assess the contents of the obligation independently in such a way as to achieve a fair result for an average consumer. A different opinion by an arbiter of self-regulation with respect to the interpretation of its own private rules cannot be given preference before a law court in this case.

The enforceability of rules of self-regulation by administrative course *ex officio* has not been subjected to sufficient discussion as yet. Czech administrative authorities have not interpreted rules of self-regulation so far. Where administrative authorities are notified of a possible breach of rules of legal regulation or self-regulation of advertising, they apply only legal rules. To apply rules of self-regulation they sometimes forward the case to the arbiters of self-regulation. Such a procedure, however, may not always be legal. It is illegal where the breached rule of a code of conduct was part of an obligation communicated by the trader as a business advantage. Consumer protection – including in the field of the regulation of advertising – is a field where a clear public interest exists.⁴ The case-law of the Court of Justice of the EU even considers the protection of consumer part of the EU public policy (Stehlík, 2012). Hence, where a trader fails to meet its voluntary obligation which is made with respect to a consumer, administrative authorities have an *ex officio* obligation to take legal steps with respect to the breach of such a legal obligation by a trader.

Issues concerning the enforceability of voluntary ethical rules before law courts have already been reflected directly in legislation. For instance, directive 2005/29/EC⁵ considers the following commercial practice misleading with respect to the consumer in all instances: “*Claiming to be a signatory to a code of conduct when the trader is not.*”⁶ These facts show, that both voluntary ethical obligations and any other obligations of trader may, under certain circumstances, become legally binding for traders. In practice, however, we may face an incorrect opinion stating that the rules included in codes of conduct are exclusively voluntary and they can be enforced before an arbiter only.

⁴ Administrative Court in Warsaw, Poland, 27. March 2014, Case VI SA/Wa 3080/13, *Samorząd Aptekarski vs. Główny Inspektor Farmaceutyczny*

⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, „Unfair Commercial Practices Directive“

⁶ *Ibidem*. Annex I, pt. 1.

3. Disguising illegal advertising by arbiters of self-regulation

Some more controversial social impacts of the practice of individual arbiters of self regulation can be identified. These include an effort to impede a public knowledge that an advertisement which fails to meet the rules of the code of conduct is an illegal advertisement at the same time. If an arbiter's award fails to determine whether legal regulations have been breached or not, it protects the obliged entities in a certain way. A non-ethical and an illegal conduct still represent a certain "difference in quality". If an arbiter publicly expresses its belief that an advertisement is illegal both competitors and consumers may be motivated to file an administrative complain or to initiate a law suit. Disguising the illegal character of advertisement may proceed by different ways. We can distinguish them into four groups:

Issuing negative arbitral awards on purpose. An award finding that an advertisement is compliant with the rules of the code of conduct would suggest that advertisement is not illegal. Since the lay public is not able to determine the area of down-regulation, a negative arbitration award creates the impression that advertisement is legal.

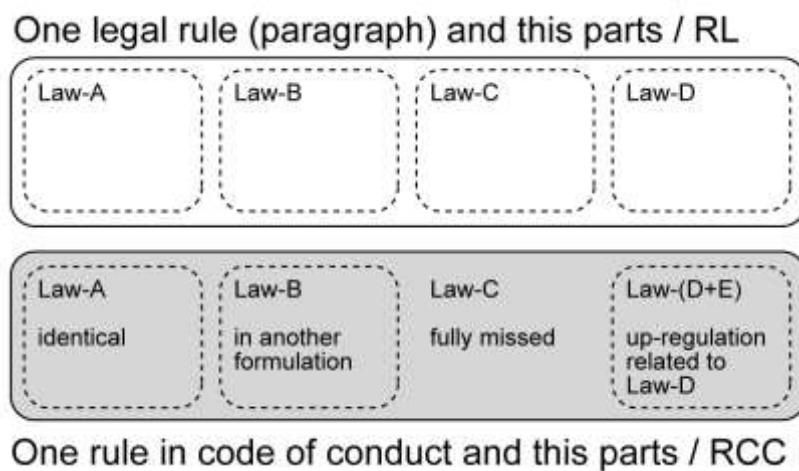
Refusing to issue an arbitration award. In some cases the arbiter may refuse to issue an arbitration award for various reasons. However, it appears little legitimate to refuse to issue an arbitration award only due to an incomprehensible and unclear argumentation of the complainant. This reason is applied by analogy to law suits, where law foresees the possibility to decline an application due to an "incomprehensible petition". Such an argumentation of an arbiter, however, appears controversial. Civil proceedings are limited to the proposals made by the applicant. Hence, the court may only decide on the proposals of the applicant. If such a proposal is incomprehensible, the court declines the application. In the field of self-regulation, the principle of limiting the procedure to the proposals of a party should not be applied at all. An arbiter of self-regulation cannot find advertisement compliant with a code of conduct because the complainant failed to determine the rule which as clearly breached by the advertisement concerned. The arbiter of self-regulation should not limit itself to the arguments of the complainant. If an arbiter of self-regulation decides on an advertisement in dispute, it should apply all (regardless of the content of the complaint) all the rules of its code of conduct and to assess the advertisement. A possible incomprehensibility of the complaint should not impede the arbiter to proceed in this way. A refusal to issue an arbitration award on account of an incomprehensible complaint seems illegitimate.⁷

⁷ In 2008 the Czech Advertising Standards Council refused to deal with a complained handed by the Association of Czech Consumers concerning both a printed and an internet advertisement for a medicine called Cialis. The complainant claimed that there is no independent editor's work, but a disguised advertisement by a

Another method consists in using a different wording of rules having a similar content. Legal rules of regulation may thus be rephrased and included in different passages of a code of conduct. Such a code of conduct does not allow for identifying whether a certain rule of the code of conduct is (in the arbiter's opinion) at the same time illegal (see Fig.4).

An interesting technique is including double rules of self-regulation in codes of conduct. In principle, legal rules or rules almost identical to legal rules are taken over. Their breach found by an arbiter of self-regulation would strongly infer an illegal advertisement. Therefore, the code of conduct houses another rule, worded in a very different way, which can easily accommodate the conduct. The arbitration award then does not say that the obliged entity breached both rules, but only the second rule, the wording of which is different. By not stating the breach of a rule similar to the legal rule, the public is diverted from finding this out. This method may be partly inspired by the fear of an arbiter of self-regulation to make a clear statement on the incompliance of the examined advertisement with legal regulations.

Fig. 4: A different wording of rules of legal regulation and self-regulation of advertisement.



4. The case of Jogobella-Zott

In 2007 an important arbiter of self-regulation in the Czech Republic, the Czech Advertising Standards Council (CASC) received a complaint on TV advertisement of yogurts bearing the name Jogobella produced by ZOTT in which the complainant claimed that she „was concerned by the advertisement of *Jogobella yogurts since she is convinced of a breach of*

pharmaceutical company Elli-Lilly. The Czech Advertising Standards Council refused to issue an arbitration award due to an incomprehensibility of the complaint. File No. 048/2008/STÍŽ. (2008, August 8). Retrieved, from <http://www.rpr.cz/cz/kauzy.php?rok=2008>

*law due to misleading advertisement. The advertisement maintains that the fruits in the yogurt are fresh and at the same time it states that it contains the daily dose of fruits ...*⁸ This consumer complaint was clearly directed against misleading advertisement, the confirmation of which by an arbitration award would strongly point at an illegal advertisement. In the justification of its decision, the CASC referred to the corresponding articles of its code of conduct, in particular the ethical code of conduct of CASC: *Its Chapter I, Art. 3.2 states that advertisement has to be fair, honest and true, Chapter II, Art. 2.1 prohibits disseminating misleading data on an own product and finally Chapter III, Art. 1.1 excludes a state that would cause consumers to attach a disproportional higher value to products than they really have.*⁹

The Czech Advertising Standards Council issued a positive arbitral award in which it says that the advertisement is contrary to the rules of the Ethical code of conduct. However, the justification deleted the breach of two articles of this code. The Czech Advertising Standards Council chose and stated a single article, which it found was particularly breached. It found that the claim stated on the yogurt saying that *it contains the daily dose of fruits is misleading. It contains a health and a nutritional claim which has not been defined anywhere. This breaches the provisions of Chapter III, Art. 1.1. on excluding claims on a disproportional higher value than that corresponding to the reality.*¹⁰

Consequently, the arbitral award does not state explicitly that the advertisement of Jogobella yogurts was misleading. It may seem logical to claim that if a disproportional higher value is attached to a product compared to the reality, this is identical to a misleading advertisement. However, in strict terms of law, such a conclusion is not clear and we cannot draw it.

Conclusion

Self-regulation of advertisement enables reaching three significant social objectives. It provides for the enforcement of law in force also by extrajudicial means thus contributing to a bigger volume of inspected advertising when compared to the volume revised by law courts only. It also provides for a stricter regulation of advertisement which may be suitable for some areas. It also enables to regulate conduct which is not considered advertisement from a

⁸ See the arbitration award. File No. 035/2007/STÍŽ. (2007, June 5). Retrieved, from <http://www.rpr.cz/cz/kauzy.php?rok=2007>

⁹ Ibidem.

¹⁰ Ibidem.

strictly legal point of view and hence escapes a legal review. In particular, the so called political and social promotion can be addressed more effectively by means of self-regulation than by the legal regulation currently in force. These positive social effects of self-regulation, however, may be reduced by circumstances and factors, the determination of which seems difficult or impossible for the lay public.

The practice of self-regulation of advertising at times when it is overregulated by law constitutes activities which have a dubious social benefit. Where the full and effective enforcement of law in force seems difficult, the strategy of reinforcing the “unimplemented“, legal regulation seems dubious. It conceals both, higher risks and possible controversial consequences which may be pursued on purpose by some entities.

The authors find the following conditions crucial for determining an objective social importance of codes of conduct: A clear distinction between rules of code of conduct which overlap with legal rules and those which constitute an area of extralegal enforcement of law. A sufficient distinction of up-regulation. A consistent practice of an arbiter of self-regulation in enforcing all the rules of codes of conduct and their foreseeable interpretation. A sufficiently effective sanction regime of self-regulation with respect to sanctions which traders face for identical conduct on the part of judicial and/or administrative bodies. A correct manner of informing the public with respect to illegal conduct which is not covered by the scope of the codes of conduct and subsequently, where self-regulation does not apply.

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