

Chapter 38

Online Advertising in Relation to Medicinal Products and Health Related Services: Data and Consumer Protection Issues

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ABSTRACT

This study examines special issues of online advertising in relation to medicinal products and health related services. It demonstrates that the marketing of medicinal products over the internet puts consumers at a number of risks related to both their privacy and their health. It endeavours to answer the question whether the existing EU legislation can efficiently protect the individual, who may be induced to disclose his/her health related information to and be involved in transactions with entities of questionable origin for the purchase of medicinal products online.

INTRODUCTION

Industrialization and mass production, which have long characterized international economy, as well as the rapid growth of the services sector in our days, have tipped the balance between supply and demand. As a consequence, firms today need to act in ways that would increase demand for their products as much as possible. With this in mind,

firms utilize marketing strategies, specifically merchandising (using the product itself), pricing and display, including the proper communications policy (Kloss, 2003). In view of the above distinctions, advertising is among the communication policies of a firm.

Interactivity, the application of digital technology and multimedia – including the absence of all space and time restrictions (Mantzoufas, 2007) – increased the popularity of the internet. Although

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initially used for communication, research and military purposes (Mayer, 1996; Argyropoulos, 2001), the internet evolved into an excellent trading platform. Today cyberspace hosts a kind of commercial activity which, notwithstanding differences, truly reflects the conventional way of doing business. What is more, the internet has evolved into a powerful marketing tool.

In their efforts to maximize profits and sustain themselves in the market, firms often utilize unfair advertising practices, e.g. passing off or trademark infringement, trade/competitor libel, misleading advertising, unsolicited commercial communication, etc.

This study examines special issues of online advertising in relation to medicinal products and health related services. It outlines the development of the pharmaceutical industry in the light of rising competition as more and more players joined the industry. To be able to cope with the competition, pharmaceutical firms utilize various marketing/advertising means which fail to stand the scrutiny of law. This study shows that the internet is fertile ground for unfair commercial practices, and in this light the key question it endeavours to answer is whether existing EU laws can ensure the protection of consumers against data theft and health risks. Indeed, while surfing the internet, a user may inadvertently disclose his/her medical record to subsequently receive via e-mail solicitations for health-related transactions, or advertisements, by questionable providers.

BACKGROUND: ONLINE ADVERTISING OF MEDICINAL PRODUCTS AND SERVICES

Advertising on the Internet

According to the terminology introduced in Directive 2000/31/EC with respect to E-commerce, online advertising is a form of “commercial communication”. Under article 2, section f,

“commercial communication” means any “*form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organization or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.*” It is clearly stated that domain names or electronic-mail addresses of a company, organization or person do not constitute commercial communication; the same applies to communications relating to goods, services or image of the company without financial consideration. The above definition aims on the one hand to distinguish among commercial, private and political modes of communication, while on the other hand it is broad enough to bring under the regulatory scope of the Directive all forms of electronic marketing (banners, frames, linking, web sponsoring, power shopping, virtual malls, online auctions, email marketing, etc.) (Marinos, 2002).

For the purposes of this study the advertising of products and services on the internet is distinguished as direct and indirect, depending on whether the advertisement reaches the user or the user ‘bumps into’ it. In their indirect version, electronic ads can be found on the web pages of producers and/or providers of various products/services. In fact, in bibliography commercial web sites are often considered as a form of advertisement. This attitude in Germany was heavily criticized mainly on the grounds of the proportional implementation of the separation rule (Trennungsgebot) in German law on unfair competition. This rule dictates that any advertisement must be clearly distinct from the rest of the content of the publication or of the Radio-TV broadcast, with a view to avoid misleading the consumers (Heyms & Pries, 2002; Lettl, 2004). The solution came from the EU Directive on e-commerce where in article 6 it provides that the commercial communication shall be clearly identifiable as such. Therefore, it is rather awkward to consider such web pages as advertisements in themselves, but rather as platforms upon which

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