

Advertisements directed at children*

The Hungarian Competition Authority (GVH) has recently noted that it is common practice in several markets to target children with advertisements. Although advertising to children is not prohibited in itself, in some cases it may be considered unlawful.¹

In this guidance document, the GVH aims to assist undertakings to abide by the law when they are designing and publishing their commercial communications. In addition to increasing awareness among the relevant group of consumers, the guidance document aims to help shape future market practice.

The information provided in this guidance document should not be considered as amounting to either legal advice in any particular case or as the legal opinion of the GVH. Rather, it contains recommendations formulated at the date of its publication, in accordance with the provisions of Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices.

I. Why is it necessary to deal with these matters?

1. While children and minors benefit from a complex system of legal protection² when it comes to advertising practices, this guidance document only focuses on the consumer protection aspects of the general protection provided for in the UCPA³.
2. The UCPA provides for two types of special protection for children as a specific group of consumers; firstly, it protects children as a target group and, secondly, Annex I. of the act sets out a list of commercial practices that are considered unlawful in all circumstances.

* The original language of this guidance document is Hungarian; consequently, the English version shall only be considered as a reference document. In case of discrepancies, the Hungarian version shall prevail.

¹ The GVH established an infringement in the following cases: VJ/123/2009., VJ/124/2009., VJ/22/2013., VJ/6/2019., VJ/8/2019. The decisions of the GVH are available on the website of the GVH www.gvh.hu.

² Several laws ensure the protection of children, such as the restrictions set out in Article 24 of Act CLXXXV of 2010 on Media Services and Mass Media and the prohibitions set out in Act XLVIII of 2008 on Essential Conditions of and Certain Limitations to Business Advertising Activity

³ Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices

3. This guidance document only concerns the criteria that may be used to assess infringements referred to in point 28 of Annex I. of the UCPA (so-called 'black list'). In accordance with this black list, advertising practices containing **a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them are considered as aggressive commercial practices.**
4. In January 2015 the GVH published the results of its survey⁴ on advertisements targeting children. The survey revealed that children under the age of 12 spend on average 2.5 hours a day in front of the TV on weekdays; within this 53% of children spend at least 1-2 hours, while a further 23% spend up to 3 hours or more. On weekends the hours spent watching TV are much higher; children spend on average 4 hours in front of TV screens; 29% of them spend 1-2 hours, while 57% of them spend 3 hours or more.
5. The survey also pointed out that according to the respondents:
 - children are highly susceptible to advertisements displayed during commercial breaks (over 80%),
 - advertisements (and indirectly advertisers) take advantage of children's passion for collecting,
 - the images presented in advertisements influence the general worldview of children,
 - children are unable to critically view the advertisements aimed at them.
6. The respondents of the survey, namely parents raising children under the age of 12, expressed strong concerns that advertisements create unnecessary demands in their children (67%).
7. Children are also affected by exposure to background TV (as background noise), since the stimuli coming from the device affects them in the same way if they are in the room.⁵
8. Children's exposure to advertising is also prevalent in the online space – as revealed by a study published by the European Commission in 2016. The Commission found that children encounter such sophisticated and non-transparent marketing techniques when they are using online games, mobile apps and social media that they are unaware that they are in fact advertisements. These typically include embedded or contextual

⁴ The survey was conducted by TÁRKI Social Research Institute at the request of the GVH. The research report is available online: http://www.gvh.hu/akadalymentes/data/cms1030533/TARKI_tanulmany_gyerekes_kutatas.pdf

⁵ National Media and Infocommunications Authority (NMHH)/Kinga LÁSZLÓ – Gábor PUHL: Children in front of the TV – Parents about their children's TV viewing habits, Source: http://nmhh.hu/dokumentum/165306/kutatasi_eredmenyek.pdf [Date accessed: 08.01.2020.].

advertisements, which also raise the question of the legitimate use of children's personal data. The results of behavioural experiments found that these unperceived online marketing practices have a significant effect on children's behaviour (e.g. requirement to pay more in order to continue and/or accelerate game play).⁶

9. Although registration on many social media platforms (e.g. YouTube, Instagram) is age-restricted, it is well known that children consume their content either through their own or their parents devices. According to research conducted on behalf of the National Media and Infocommunications Authority (NMHH) by Psyma Hungary Kft., 71% of 11-12 year-olds already own a mobile phone and, generally, this is also the age group (between the ages of 11 and 12), when a large number of children first register on a social media site.⁷

II. Who and what are targeted by this guidance document?

10. Commercial practice:

The term commercial practice is defined by law. It covers any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers.

11. Advertisement:

Any communication, information or method of representation which aims at promoting the sale or use of a product, or in connection with this objective, at popularising the name, brand or activity of an undertaking, or at making goods or brands of goods better known.

12. Minor:

Although age delimitation for children and minors is not uniform in the respective Hungarian legislation,⁸ for the purpose of this guidance document children below the

⁶ Study on the impact of marketing through social media, online games and mobile applications on children's behaviour, Source: https://ec.europa.eu/info/publications/study-impact-marketing-through-social-media-online-games-and-mobile-applications-childrens-behaviour_en [Date accessed: 08.01.2020.].

⁷ NMHH/PSYMA HUNGARY Kft.: Research on media usage, consumption and literacy of 7-16 year-old children and their parents, Source: http://nmhh.hu/cikk/197725/Mediahasznalat_mediafogyasztas_mediaerteskutatas_716_eves_gyermekkel_es_s_zuleikkel (Date accessed: 11.02.2020.)

⁸ Pursuant to Article 105 of Act C of 2012 on the Criminal Code, 'juvenile' shall mean any person between the age of twelve and eighteen years. Pursuant to Article 2:10 of Act V of 2013 on the Civil Code, a 'minor' is a person under the age of eighteen. Upon entering marriage, minors shall achieve majority. Pursuant to Article 3 c) of Act XLVIII of

age of fourteen shall be considered as minors.⁹ The GVH notes that young people between the ages of 14 and 18 - due to their vulnerability¹⁰ - also enjoy special protection against unfair commercial practices.

13. Liability:

An undertaking is liable for the publication of any content relating to a product, if it has a direct interest in the sale or promotion of the product associated with the commercial practice in question. In addition, those involved in the planning and/or publication of an unlawful commercial communication, such as advertising or media agencies, may also be held liable.

III. What would be worth considering?

14. When determining whether a certain commercial communication amounts to unfair trading practice and consequently falls within the above-mentioned 'black list', the GVH – taking into account the specific features of the given case – shall take into account the following factors and shall evaluate them jointly.

Does the communication qualify as an advertisement?

15. A communication may be qualified as an advertisement if it is designed to promote the sale of a product or service.

Are minors targeted or reached by the communication tool?

16. While a product or service's target audience and advertising audience may not necessarily be the same, when assessing whether the recipient of a commercial communication is really a minor it is important to consider the product itself, the form and content of the advertising tools used and also the channels of the advertisement.

2008 on Essential Conditions of and Certain Limitations to Business Advertising Activity, 'young person' shall mean persons between the age of fourteen and eighteen years. Pursuant to Article 3 e) of Act XLVIII of 2008 on Essential Conditions of and Certain Limitations to Business Advertising Activity, 'children' shall mean persons under the age of fourteen. For the protection of children and minors, Act CLXXXV of 2010 on Media Services and Mass Media applies the following categories: under the age of 6, 12, 16 and 18. Pursuant to Article 8 (1) of Regulation (EU) 2016/679 of the European Parliament and of the Council (GDPR), where the owner of data has given his/her consent to the processing of his/her personal data for one or more specific purposes, then in relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old.

⁹ Article 3 e) of Act XLVIII of 2008 on Essential Conditions of and Certain Limitations to Business Advertising Activity

¹⁰ Article 4 (2) of Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices

17. When assessing whether an advertisement is really directed at children, namely whether it is capable of attracting the attention of children, the following circumstances are of particular importance.

The nature of the product

18. If the advertised product or service

- is intended for children and typically consumed or used by children,
- is packed primarily with gifts that are attractive to children (e.g. children's toys),
- has such colour, appearance, packaging or graphics that can attract children's attention,
- has a name or title that indicates that it is intended for use by children,

then these factors may indicate that the relevant consumer group is children.

19. In this context, special attention must be paid to the form and content of an advertisement. This shall also apply to prize games in which material prizes or other prizes for children are awarded.

The form and content of the advertisement

20. In terms of the visual and auditory elements of an advertisement, the following, in particular, shall be considered when determining the intended recipient:

- whether the visual or acoustic elements of the advertisement reflects children's lives or childhood,
- whether the advertisement contains children and/or children's voices,
- whether the advertisement contains well-known cartoon characters or qualities/features resembling such characters,
- whether the advertisement contains predominantly or exclusively animated elements,
- whether the background music of the advertisement is likely to attract children's attention,
- whether playfulness is typical to the dynamics of the advertisement, and to the appearance of the products or subtitles,
- whether the promoted product is presented and emphasised in such a manner so as to amuse and/or attract the attention of children (e.g. 'flashing, spinning'),
- whether the narration is in the voice of a fairy tale character or in that of a child,
- whether the advertisement contains drawings with colourful, vivid visual elements,
- whether the style of the narrator is pleasant and the tone of communication is direct, such as 'hello children', contains simple messages, and uses words or expressions that reflect the vocabulary of children (e.g. 'wow', 'coolest toys').

The channel of the advertisement

21. In addition to the design of an advertisement, the circumstances in which the advertisement is published must also be assessed. In this regard, not only are the place and the time of the publication relevant, but also the other methods that are used to reach children and grab their attention.

a. TV advertisement

22. It is likely to be established that the attention of children has been attracted, if

- an advertisement is published on a thematic children's channel,
- an advertisement is published on a family television channel at a time and during a programme that children can notice it,
- animated films or cartoons were on air when an advertisement was broadcast.

b. Press advertisement

23. In the case of periodicals and daily newspapers, among others, the following shall be taken into consideration:

- the definition of the target group of the press product,
- the nature of the content contained in the press product (e.g. whether it contains puzzles, playful tasks for children or content of interest to them),
- the inclusion of children's product launches, children's booklets, and/or souvenirs that may attract the attention of children,
- the context in which the ad is displayed (e.g. part of, or perceptible in, child-directed content),
- the way in which the press product is disseminated (e.g. around playgrounds, kindergartens, schools).¹¹

c. Online advertisement

24. When assessing whether the attention of children has been attracted, among others, the following shall be considered:

- whether the advertisement is targeted specifically at a younger audience (such as through TikTok, Snapchat) or
- in online games (applications),

¹¹ With regard to this, Article 8 (4) of Act XLVIII of 2008 on Essential Conditions of and Certain Limitations to Business Advertising Activity contains special provisions.

- whether characters that are popular or attractive to children are used,
 - whether bright colours, cartoon-like graphics are used,
 - whether the game through which the ad is displayed involves activities that entertain or develop children,
 - whether, in the case of a game, it can be downloaded and subscribed to by anyone without age restrictions,
 - whether, in the case of an application, it recommends a game to children,
- whether the online advertisement appears on social media channels or pages that promote popular content among children (e.g. a YouTube channel featuring animated videos or video games, the profile of a popular child or young influencer),
 - whether the advertisement is targeted according to age, search terms, or channels of interest to children.

d. Other tools

25. In addition to the communication tools specifically mentioned above, the present guidance document is applicable to a number of other communication tools that may be used by advertisers (e.g. DM letters, leaflets, product packaging).

An advertising undertaking's definition of its target group is not binding on the Hungarian Competition Authority, which shall assess, on a case-by-case basis and taking into consideration the aforementioned, whether or not an advertisement is directed at children.

Does an advertisement contain a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them?

26. In other words, is it possible to identify content that is (1) a call/an invitation and refers to (2) the purchase of the product? The advertising channels used are also important in this respect, in particular the impact of the different – but possibly complementary roles played by the visual, spoken and written messages used across various advertising channels and advertising tools – should be taken into account in their entirety and should not be considered in isolation in the form of a single statement or piece of content. It should be noted that a direct call is not limited to the inclusion of an explicit 'buy it' statement in an advertisement, but also includes all content that motivates children to acquire the advertised goods. This can be achieved, for example, by highlighting a particular feature of a product or of a service that is primarily relevant to a child (and not to the parent). To be more precise, this can take the form of highlighting a

gift, a discount, or other benefit associated with an item that can only be acquired after the given product has been purchased (e.g. *'try it yourself'*, *'make the most of the bottle'*, *'draw and light'*).

27. There is a strong desire to comply in childhood, especially among children under the age of 14. Consequently, advertising messages that suggest that a child needs the advertised product, either because of some claimed benefits of consumption or because purchasing the product will bring about special benefits for the child (e.g. *'upgrade to Superstar'*, *'become a member'*), or because a child may feel disadvantaged if he/she does not obtain it, may have the same effect as an explicit call to *'buy it'*.
28. It is well-known that children have an instinctive passion for collecting and possessing. This makes them particularly vulnerable to communications that, for example, suggest that the purchasing of a particular product – and thus the receiving of a gift associated to the product– will complete a collection (e.g. *'collect all'*, *'get it all'*). Additionally, there are phrases and terms (such as *'look now'*, *'limited edition'*, *'search ... on sale'*) that refer to the limited availability of the product over time, thus encouraging the child to acquire it immediately. Such advertising messages can be particularly suggestive to children.
29. An advertisement may not only contain a direct exhortation to a child to purchase the advertised product, but may in fact contain a message aimed at directly encouraging the child to persuade his/her parent (or another adult) to purchase the product. This is the so-called *'pester power'* (or the *'nag factor'*).

The existence of a contractual relationship is not a precondition for the establishment of the facts of the case under the law. In this way, it is also irrelevant that, as a result of a call, the child or adult purchases the advertised goods or registers in a prize game. An infringement can also be established if the child is not able to lawfully enter into a contract for the advertised goods. Furthermore, the law only requires that an advertisement directly calls a child to purchase (use), but at the same time does not require that the advertised product be purchased directly by a child.

IV. How can you ensure compliance?

30. Advertisers, and the agencies assisting them, should take into account legal requirements in addition to marketing communications aspects when formulating and publishing marketing communications.

31. It may be useful for advertisers (including the agencies assisting them, professional intermediaries) to develop such control systems, procedures, and programmes that enable them to screen, filter out and prevent the publication of potentially unlawful communications, and which also enable them to appropriately intervene and promptly address potential infringements. Within this framework, when planning marketing communications it is advisable to seek the opinion of a person or organisation that has appropriate knowledge of the legal requirements in this area, and to also pay attention to the law enforcement practice of the GVH.
32. When choosing the targeting methods for different forms of online advertising, it is worth considering whether the advertisements in question will reach children. As a result, it is recommended to avoid the use of keywords, content, and phrases that are typically used by channels dedicated to children and that are of particular interest to children.
33. Advertisers should also consider whether it is absolutely necessary to involve children in advertising activities. In the case of online platforms, due to age restrictions, it is especially important to consider the inclusion of children.

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