

The Polarizing Concept of Sexist Advertising in the Context of the Law against Unfair Competition

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KOTÁSEK, J.: The Polarizing Concept of Sexist Advertising in the Context of Unfair Competition Law. *Právní obzor*, 108, 2025, special issue, pp. 82–96. <https://doi.org/10.31577/pravnyobzor.specialissue.2025.04>

The Polarizing Concept of Sexist Advertising in the Context of Unfair Competition.

This article offers a critical examination of the legal classification of so-called sexist advertising within the framework of unfair competition law, construed broadly to encompass the regulation of unfair commercial practices under the Czech Consumer Protection Act. Drawing on definitions articulated in soft-law mechanisms and self-regulatory initiatives; the author analyzes the development of the concept of sexist advertising and its interpretation in recent Czech case law. The study aims to integrate these conceptual frameworks into the legal architecture governing unfair competition and unfair commercial practices. Emphasis is placed on the regulatory tension between the objectives of competition law and the prohibition of discriminatory advertising. The author evaluates the potential for addressing such advertising through the general clause prohibiting „infringements of public law with competition implications”. The article concludes that a reflexive and principled approach – rooted in the regulatory purposes of competition law – provides a coherent solution. Such an approach prevents the incorporation of inconsistent axiological standards into the application of unfair competition provisions, thereby safeguarding legal certainty and doctrinal consistency.

Key words: *sexist advertising, gender discrimination, unfair competition, self-regulation, unfair commercial practices, consumer protection.*

Introduction

Advertising persistently pushes the boundaries of frequency, form, and content, often provoking calls from both the public and professionals for regulatory intervention. Such calls frequently take the form of proposals advocating the introduction of special rules governing advertising of sensitive commodities or targeting special consumer groups, such as children. In other instances, demands are directed at public authorities to invoke existing, more general legal safeguards (such as broad statutory clauses) to restrain problematic advertising practices.

Only few topics are more controversial than so-called sexism in advertising. This socially sensitive and polarizing issue has gradually migrated from academic debates within the social sciences and humanities into the legal domain. In the Czech Republic and Slovakia, efforts to restrict sexist advertising have been driven primarily by widely publicized campaigns of non-profit organizations¹, and to a lesser extent by instruments

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¹ For the Czech Republic, the activities of the NESEHNUTÍ non-governmental organization have been of particular significance, cf. HAVLÍKOVÁ, P. *Pohled na sexistickou reklamu v kontextu deseti let zkušenosti*

of industry self-regulation². Notably, the activities of NGOs such as NESEHNUTÍ in the Czech Republic have played a particularly prominent role. By contrast, self-regulatory bodies (such as the Czech and Slovak Advertising Councils) have demonstrated differing levels of engagement, with the Slovak Council adopting a more proactive stance, as evidenced by both its decisions and the subsequent reactions of the administrative courts.

After initial hesitation and delay³, administrative authorities and courts in both the Czech Republic and Slovakia have ultimately acknowledged the legitimacy of censuring sexist advertising, at least in certain cases. This gradual recognition has been reflected in recent judicial developments, including important rulings delivered by the Supreme Administrative Courts in both jurisdictions.

This paper seeks to examine the notion of sexist advertising from the perspective of unfair competition regulation, with particular attention paid to both statutory frameworks and self-regulatory mechanisms.

1. Sexism in advertising

The term “sexist advertising” is not formally defined in Czech or Slovak legislation and does not constitute a legally recognized concept. In prohibiting such advertising, public authorities instead rely on broadly worded regulatory provisions, particularly those contained within the respective Acts on the Regulation of Advertising (most notably, provisions prohibiting conflicts with good morals⁴) rather than on explicit legislative proscriptions⁵.

s udělením anticeny Sexistické prasátečko. [View of Sexist Advertising in the Context of Ten Years of Experience with the Sexist Piggy Award] in HAVLÍKOVÁ, P., KVASNICOVÁ, J. Sexistická reklama. [Sexist advertising] Brno: NESEHNUTÍ, 2020, p. 44 an.

² The practice of the Czech Advertising Council (see the Arbitration Committee decision database at <https://www.rpr.cz/kauzy/>) demonstrates a generally cautious approach to banning advertising motifs on grounds of sexism. For instance, in the BIOS case (Ref. No. 061/2021/STÍŽ), the Arbitration Committee adopted a rather liberal interpretation regarding the permissibility of purportedly sexist elements in advertising. By contrast, the Slovak Advertising Council has taken a more proactive stance in this area. For further details, refer to L. Zlocha, *Právna regulácia sexizmu v reklame – základné východiská* [Legal Regulation of Sexism in Advertising – Basic Starting Points], *Právny obzor*, 2023, No. 2, p. 100, including references therein to specific decisions. Notably, the decision-making practice of the Slovak Advertising Council has also been reflected in judicial proceedings, as evidenced in the reasoning of the judgment of the Slovak Supreme Administrative Court of 28 April 2023 (File No. 5 Stk/5/2022).

³ Analysis of decisions of the Czech Advertising Council by BARTÁKOVÁ, E., HAVLÍKOVÁ, P. *Kvantitativní a kvalitativní analýza posuzovaná sexistické reklamy krajskými živnostenskými úřady* [Quantitative and Qualitative Analysis Assessed by Sexist Advertising by Regional Trade Licensing Offices] in HAVLÍKOVÁ, P., KVASNICOVÁ, J. *Sexistická reklama. [Sexist advertising] Brno: NESEHNUTÍ, 2020, p. 118.*

⁴ Cf. Section 2 (3) of the Czech Act No. 40/1995 Coll., (the Act on the Regulation of Advertising), or Section 3 (1) (c) and Section 3 (1) of the Act on the Regulation of Advertising. 5 of the Slovak Act No. 147/2001 Coll., (the Advertising Act). On the genesis in general, cf. especially ZLOCHA, L. *Právna regulácia sexizmu v reklame – základné východiská. [Legal Regulation of Sexism in Advertising – Basic Starting Points]. Právny Obzor*, 2023, No. 2, p. 106; VOZÁR, J. *Reklama a právo. [Advertising and Law] Bratislava, Veda, 1997, pp. 94 and 95; VOZÁR, J. Zákon o regulácii reklamy [Act on the Regulation of Advertising] Bratislava: Wolters Kluwer SK, 2021.*

⁵ From the current case law see the above-mentioned judgment of the Czech Supreme Administrative Court or the decision of the Slovak Supreme Administrative Court of 31 May 2024, file no. 2 Stk 18/2022 (more on both decisions below).

Defining sexist advertising poses considerable challenges. Although derived from the English term “sexism,” which might suggest an undue emphasis on human sexuality in marketing communications (e.g., through lascivious, lewd, obscene, or pornographic motifs), the concept is in fact much broader. Sexist advertising is generally understood as advertising that disadvantages individuals based on gender. This encompasses a wide array of manifestations: from the use of sexual motifs to communications characterized by “direct hatred of any gender or prejudice against men or women”⁶. Crucially, the presence of sexually explicit elements is not essential to the qualification of advertising as sexist⁷.

This broader interpretation aligns with the approach taken in the Methodological Information of the Czech Ministry of Industry and Trade (2015)⁸, issued to harmonize the divergent enforcement practices among regional trade licensing offices under Section 2(3) of the Advertising Regulation Act. The methodology enumerates criteria significant for identifying sexist advertising, treating it as an instance of advertising that either discriminates or diminishes human dignity.

Within this framework, sexist advertising is conceptualized as unequal treatment on the basis of gender – a form of discrimination manifesting in advertising by, for example, humiliating, ridiculing, or disparaging women (and less commonly men) through sexual objectification or stereotyping. According to the methodology’s creators, supervisory authorities should be attentive to specific attributes of advertising messages, including: the use of the human body, depiction of body parts, sexually colored elements, and stereotypical portrayals. Stereotypical depiction is defined as the attribution of certain characteristics, qualities, or roles to persons based on gender, whereby such persons are evaluated according to generalized ideas about the behavior and traits of members of special groups.

The Regional Court in Brno adopted a notably broad approach in its landmark decision concerning the pawnshop INDEX BOHEMIA⁹, holding that an advertisement

⁶ KVASNICOVÁ, J. *Sexismus v reklamě jako diskriminace a nekalá soutěž*. [Sexism in Advertising as Discrimination and Unfair Competition] *Soukromé právo* 2021, vol. IX, no. 6, pp. 19-26.

⁷ HAVLÍKOVÁ, P. *Právo versus sexismus: metodický pohled na sexistické reklamy Sexistická reklama*. [Law versus sexism: a methodical view of sexist advertisements] Brno: Nesehnutí, 2018, p. 24. In Slovakia, cf. conclusions in KRŠKOVÁ, M., PÁNIKOVÁ, N. *Sexistické reklamy na Slovensku alebo čo má spoločné sťahovanie, prášková lakovňa a bankové služby*. [Sexist Advertisements in Slovakia or What Moving, Powder Coating Plant and Banking Services Have in Common], Slovak National Centre for Human Rights. Bratislava, 2016, p. 11 an. [PDF document], available from https://www.snspl.sk/wp-content/uploads/Sexisticke_reklamy_na_Slovensku_2016.pdf. [online]. [cit. 2024-11-12].

⁸ Ministry of Industry and Trade. Methodological Information No. 12/2015, on the recognition of sexism in advertising, of 1 December 2015, file no. MPO 58486/2015 [pdf document]. Prague: Ministry of Industry and Trade, 2015 [cit. 2025-01-28]. Available from: <https://www.mpo.cz/assets/dokumenty/55757/63940/656321/priloha001.pdf> (hereinafter referred to as the “Methodology”).

⁹ Judgment of the Regional Court in Brno of 4 June 2019, Ref. No. 29 A 222/2016-44. The Regional Authority of the South Moravian Region imposed a fine of CZK 50,000 on INDEX ČECHY s.r.o., reasoning that as the advertiser and advertising processor, the company had breached conditions of the Advertising Regulation Act (Section 2(3)). The company disseminated leaflet advertisements promoting a pawnshop that included photographs of an almost naked female body, wholly unrelated to the goods offered. This conduct was

depicting a girl dressed only in underwear alongside pawned goods infringes statutory law¹⁰. The court found that such imagery fulfills the criteria of sexism “as one of the manifestations of discrimination on the basis of sex, comprising unequal treatment on those grounds.” This was further evidenced, according to the judgment, by the “sexual objectification through the depiction of the naked body.” The Regional Court thus anchored its reasoning in the fundamental principles of equality and human dignity.

In subsequent review proceedings, the Supreme Administrative Court¹¹ partially diverged in its reasoning (though not in ultimate outcome) by grounding its conclusions more prominently in the concept of morality, addressing issues of obscenity and pornography¹². Nevertheless, the court did not depart from the classification of sexist advertising as a form of discriminatory conduct or advertising that diminishes human dignity based on gender, i.e., conduct conflicting with good morals as defined by Section 2(3) of the Advertising Regulation Act. Both courts recognized that whether the individual portrayed participated voluntarily is irrelevant, given the inalienable nature of the right to human dignity. The jurisprudence of the Slovak Supreme Administrative Court parallels this approach, likewise, relying on general corrective clauses in the Advertising Act – such as prohibitions on advertising contrary to good morals and ban on objectification of the naked human body¹³.

deemed discriminatory against women and degrading to human dignity. The advertisement was distributed broadly via leaflets, non-selectively to the public including children. The Regional Authority’s decision was subsequently upheld by the Ministry of Industry and Trade.

¹⁰ The Regional Court found that the depiction of the woman in the disputed advertisement contravened the requirement of respect for human dignity, as the half-naked female body was used solely as an accessory or decoration intended to attract attention. This approach reduces the woman to a mere object and fosters the notion that such perception and treatment of people is acceptable. The advertisement was also deemed discriminatory, as it portrayed the woman in a disadvantaged role. According to the court, this depiction reinforces “stereotypical ideas about women and places them in the degrading position of a sexual object”.

¹¹ Judgment of the Supreme Administrative Court of 31 March 2021, file no. 8 As 202/2019.

¹² KVASNICOVÁ, J. *Právo na reklamu bez sexismu. Konflikt svobody projevu a rovnosti při regulaci sexistické reklamy* [The right to advertising without sexism. The conflict between freedom of speech and equality in the regulation of sexist advertising] Thesis. Brno: Masaryk University, Faculty of Law. 2024, p. 124.

¹³ Cf. judgment of the Slovak Supreme Administrative Court of 28 April 2023, file no. 5 Stk/5/2022 and judgment of the same court of 31 May 2024, file no. 2 Stk 18/2022. In the first case, the SAC assessed an advertisement for a pawnshop using the depiction of a naked woman and concluded that “in the case in question, the depiction of a woman, model, was made in a way that clearly shifted her into the role of a sexual attraction, not only with regard to the way she was depicted (naked to the waist, or with one breast exposed, in a provocative position), but also taking into account its addition to such elements that made sexism present (a provocative look, a cut-off white men’s collar with a black tie), thereby highlighting/drawing the addressee’s attention to nudity and thus introducing into the advertisement under consideration by the legislator an inadmissible way of presenting the nakedness of the human body in an outrageous way”. In the second of the cited decisions (2 Stk 18/2022), the court concluded that advertising (using photomontages of a half-naked model with an anchor in her lap) is contrary to good morals: “When assessing the contradiction of good morals, the Court of Cassation is aware that the view of this concept, as well as the permissible degree of depiction of nudity, is changing. It is therefore necessary to assess each advertisement through the lens of the given period. In this context, however, it is necessary to draw attention to the fact that even according to literature, advertising should not present a person as a thing, a commodity without freedom, will and feelings.”

The indeterminate nature of the concept of sexist advertising will undoubtedly remain subject to continuing debate and progressive refinement or modification¹⁴. Yet, the foregoing outline demonstrates that common notions of “sexist advertising” only partially correspond to its interpretation in legal doctrine and practice. The prospect of more detailed or radical legislative regulation is uncertain; proposals for such measures – for instance, within competition law¹⁵ – have faced significant resistance, as illustrated by the emphatic rejection in Germany¹⁶.

Accordingly, it appears likely that regulatory authorities and the judiciary will continue to rely on general corrective clauses, with legal developments driven by evolving social attitudes and public opinion. The discourse on advertising content incompatible with human dignity remains active and the Czech courts’ jurisprudence has also attracted critical scrutiny in literature¹⁷. The notion that competition law should address gender stereotypes in advertising is met with considerable opposition^{18, 19}. It is important to note that existing Czech and Slovak case law predominantly concerns advertisements employing female nudity, which allows relatively straightforward legal qualification under current general clauses. A nuanced assessment of advertisements that avoid nudity but employ traditional gender roles and stereotypes (an area which remains largely unexplored) will present a significant challenge.

The subsequent analysis will address the legal classification of so-called sexist advertising under current unfair competition legislation, construed broadly to include the regulation of unfair commercial practices. For these purposes, the discussion proceeds from the concept of sexist advertising as articulated in soft law (notably, the Methodological Information of the Ministry of Industry and Trade) and, in part, the relevant judicial reasoning.

¹⁴ Cf. ZLOCHA, L. *Právna regulácia sexizmu v reklame – základné východiská* [Legal Regulation of Sexism in Advertising – Basic Starting Points] *Právny obzor*, 2023, No. 22023, No. 2, p. 99 an.

¹⁵ More on this in Section II.

¹⁶ More in GOMILLE, Ch. „*Sex sells*“ *und der lautere Wettbewerb*. *Zeitschrift für Rechtspolitik (ZRP)*, 2016, Nr. 5, 2016, p. 134.

¹⁷ See the critical remark by Vojtěch Šimíček regarding the above-mentioned judgment of the Supreme Administrative Court, ŠIMÍČEK, V. *Právo svobodně podnikat a nezadatelnost lidské důstojnosti* [The Right to Freely Conduct Business and the Inalienability of Human Dignity] in ŠIMÍČEK, V. *Právo svobodně podnikat*. [The Right to Freely Conduct Business] Prague: Linde 2023, p. 62: “*This case illustrates just how arbitrarily – even capriciously – the concept of human dignity may be interpreted. Ultimately, administrative bodies and courts serve as the definitive arbiters of taste, authoritatively determining which phenomena are deemed socially acceptable. (...) I attach no importance to whether the goods or services offered are substantively linked to the advertising photograph, and consider such arguments entirely unfounded. (...) Shocking and provocative advertisements are likewise permissible, and if the visualization of advertising were genuinely required to have a direct relationship to the product offered, I fear the advertising industry could hardly endure. Advertising (...) unquestionably encompasses emotion, efforts to attract attention, provocation, and irrationality.*”

¹⁸ Discussions were sparked by the ban on advertising for the electric VW Golf by the British self-regulatory entity Advertising Standard Authority (ASA) in 2019, cf. e.g. (ed.) Philadelphia and VW ads banned for gender stereotyping, in *BBC* [online]. 2019-08-14 [cit. 2025-02-01]. Available at: <https://www.bbc.com/news/business-49332640>.

¹⁹ Cf. e.g. Report of the European Parliament, Combating sexist stereotypes in the media, Committee on Equal Opportunities for Women and men, Parliamentary Assembly Doc. 12267, of 26 May 2010.

2. Lack of explicit legal regulation of sexist advertising in unfair competition law (Czech Republic and Slovakia)

Current Czech and Slovak unfair competition legislation does not explicitly address sexist advertising. The recodification of Czech private law (specifically Section 2986 of the Civil Code) may create false expectations among the general public due to its provisions on intrusive harassment. However, these provisions concern only the methods by which advertising is delivered to recipients who do not wish to receive it, or who are impeded in refusing it; the actual content of the advertisement is not the focus of this norm. It is thus entirely possible to “persistently harass” consumers with advertisements containing entirely lawful content²⁰, and vice versa.

Other statutory examples of unfair competition found in Czech and Slovak law – such as misleading advertising, risk of confusion, or exploitation of reputation – do not bear a substantive connection to sexist advertising. Thus, categorizing sexist advertising as unfair competition is theoretically possible only under the general clause, and its assessment consequently falls under so-called judicial factual pattern (unnamed factual basis established by case law).²¹

The regulation of unfair competition does not exhaust all forms of unfair practices in commercial relations; additional provisions may be found within Czech and Slovak consumer protection statutes, particularly those concerning unfair commercial practices²²

²⁰ The legislation (Section 2980 of the Civil Code) conceives intrusive harassment as “*the communication of information about a competitor; goods or services, as well as the offer of goods or services using a telephone, fax machine, e-mail or similar means, although the recipient clearly does not want such activity, or the communication of an advertisement in which the originator conceals or conceals information from which he can be identified and does not state the advertisement, where the recipient may order the cessation of advertising at no extra cost*”. However, the reasons why the addressee “clearly does not want advertising” or the reasons that lead the addressee to stop advertising are irrelevant. The addressee may be bothered by the content or form of the advertisement, or both – but for reasonable reasons, the legislator does not address these motives at all. The rejection of annoying advertising interfering with the addressee’s sphere is always legitimate without any binding content assumptions. Advertising that is problematic in terms of content (e.g. advertising working with explicit erotic motifs disseminated in a community that perceives these motives with disgust) may “harass” its addressees depending on individual circumstances, but it is not intrusive harassment in the sense of the relevant merits of the case.

²¹ The same applies to Slovak legislation, where the solution will have to be sought within the provisions of the general clause of unfair competition (cf. Section 44 (1) of the Slovak Commercial Code). VOŽÁR, J. in OVEČKOVÁ, O. et al. *Obchodný zákonník. Komentár*. [Commercial Law. Commentary] 2nd edition. Bratislava, Wolters Kluwer SK, 2022, p. 305.

²² Unfortunately, the Czech (and Slovak) legislator did not take advantage of the extraordinary opportunity offered to it in connection with the recodification and did not combine the legal regulation of unfair competition with the regulation of unfair business practices, as we know, for example, in German or Austrian law. Unfair commercial practices are thus still part of the regulation in the Consumer Protection Act and, at least formally, stand separately from the regulation of unfair competition. Czech and Slovak competition law is thus in the state in which German law was twenty years ago. The reasons are rather of a formal nature: the separation of the two regulations (unfair competition and unfair commercial practices) is not driven by any substantive intention and the reason is probably only in the administrative division of competences within the European Commission (for more details, see PATĚK, D. *Právo proti nekalé soutěži*. [Law against unfair competition] Prague: Wolters Kluwer ČR, 2020, p. 28.

²³. These provisions originate from the transposition of the European Unfair Commercial Practices Directive²⁴. While the reach of consumer protection law is narrower than the general law on unfair competition, compliance with its requirements ultimately supports the cultivation of fair market relations and promotes broader standards of fairness.

Importantly, neither the directive nor related national laws seek to shield consumers from every unfair practice. Their scope is restricted to those practices that negatively affect consumer economic behavior – namely, those that impair decision-making freedom or its quality²⁵. Regulations specific to taste, decency, or professional standards are beyond the directive’s harmonizing intent²⁶.

The directive’s preamble (Article 7) makes clear that legal requirements concerning taste and decency are intentionally not harmonized, as these matters vary widely among Member States. Thus, Member States retain discretion to prohibit certain commercial practices on these grounds even when such practices do not restrict consumer choice.

The regulation’s aim is not to introduce comprehensive “taste censorship”. (“Geschmackszensur”). Tasteless or indecent advertising that does not impact consumer decision-making falls outside the scope of harmonization²⁷. Patěk has observed that the assessment of business conduct (especially advertising) inevitably intersects with the role of religion, or more precisely, the strength of the position of churches or, conversely, the strength of the successes of minority support movements (...) will strongly predetermine the general perspective on controversial phenomena in advertising such as sexism, the acceptability of nudity in general, the use of stereotypes in advertising, and the trivialization of authorities or religious faith²⁸.

Analysis of foreign case law, particularly German jurisprudence²⁹ (influential in Czech doctrine), suggests an approach based principally on the constitutional protection of human dignity when prohibiting sexist advertising. Nevertheless, as indicated above, only certain categories of advertising labeled “sexist” are encompassed within this doctrine.

Prevailing opinion in Germany cautions against automatically conflating the goals of competition law with socially or politically motivated regulatory aims – such as the elimination of sexual discrimination or the pursuit of gender equality³⁰. Reflecting this

²³ In the Czech Republic, this is Act No. 634/1992 Coll., the Consumer Protection Act; in Slovakia, the Directive was transposed by Act No. 108/2024 Coll., the Consumer Protection Act.

²⁴ Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.

²⁵ Cf. Article 1 of the Directive: “The purpose of this Directive is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States relating to unfair commercial practices that harm the economic interests of consumers.”

²⁶ PATĚK, D. *Právo proti nekalé soutěži* [Law against unfair competition], p. s31.

²⁷ HASSELBIATT, G.N. in GLOY, W., LOSCHEIDER, M., ERDMANN, M. *Wettbewerbsrecht*, 4th. ed. Munich: C. H. Beck, 2010, § 4 no. 1 UWG), Marg. Ref. 74-75.

²⁸ PATĚK, D. *Právo proti nekalé soutěži* [Law against unfair competition] p. 33.

²⁹ The German legislation transposes the Unfair Commercial Practices Directive into national laws on unfair competition and therefore does not know the dualism of Czech or Slovak legislation.

³⁰ Cf. e.g. MICKLITZ, H. *Münchener Kommentar zum Lauterkeitsrecht*, 2nd edition, Munich: C. H. Beck, 2014, marg. ref. no. 123-127.

philosophy, a proposal to introduce explicit provisions concerning sexist advertising into the German Unfair Competition Act (UWG) was unsuccessful, receiving neither political support nor doctrinal acceptance³¹.

German courts have generally addressed problematic advertising through constitutional law, especially Article 1(1) of the Basic Law, protecting human dignity. A notable example is the “Busengrapscher und Schlüpfenstürmer”³² judgment, in which the Federal Supreme Court (BGH) found an alcoholic beverage label depicting lascivious sexual contact to be unfair. The decisive legal rationale stemmed from an impermissible objectification³³ under constitutional principles. The BGH stated, among other things, that the interference with human rights was caused by the fact that the labels create the impression that a man is able to make a woman „more sexually compliant” thanks to an alcoholic beverage, and that the consumption of the drink can be a tool for breaking down a woman’s mental and physical inhibitions and a means of satisfying a man’s sexual needs. This conclusion also faces criticism from liberal commentators³⁴.

This article will henceforth examine whether skepticism toward qualifying sexist advertising as unfair competition is justified under Czech law. Given the consistent regulation across Czech and Slovak jurisdictions, the resulting conclusions are also pertinent for Slovak legal doctrine.

3. Regulatory objectives of unfair competition law³⁵

The regulation of unfair competition in Czech and Slovak law is not concerned with the existence of competition per se, but rather with ensuring its quality. Its fundamental objective is the elimination of unfair practices within competitive relations and the prevention of competitors acquiring an unjust advantage through the erosion of competition morals³⁶. The law thus seeks to reinforce the principle of fairness in

³¹ See GOMILLE, Ch. „Sex sells“ und der lautere Wettbewerb. Zeitschrift für Rechtspolitik (ZRP), 2016, Nr. 5, 2016, p. 134.

³² Judgment of the BGH dated 18.05.1995, file no. I ZR 91/93, available e.g. <https://research.wolterskluwer-online.de/document/ad6fb493-a9a7-4e57-a039-01dda6f289de>

³³ STENDER-VORWACHS, J. Frau und Mann in der Werbung – rechtlich betrachtet, in HOLTZ-BACHA, Ch. (ed.) *Stereotype? Frauen und Männer in der Werbung*, 2nd edition. Berlin: Springer Verlag. 2011, p. 44. 978-3-531-18083-0. See also HILTI, R. in HENNING-BODEWIG, H. a col. *Lauterkeitsrecht und Acquis Acquis Communautaire*. Berlin: Springer Verlag. 2009, p. 135.

³⁴ Cf. SCHERER, I. in FEZER, K.-H., BÜSCHER, W., OBERGFELL, I. *Lauterkeitsrecht – Kommentar zum Gesetz gegen den unlauteren Wettbewerb (UWG)*. 3rd edition. Annex to § 4, Marg. Ref. 4, available from: beck-online.de.

³⁵ This part is a follow-up to the author’s text published in KOTÁSEK, J. Sexistická reklama jako nekalá soutěž. [Sexist Advertising as an Unfair Competition] in HAVLÍKOVÁ, P., KVASNICOVÁ, J. *Sexistická reklama*. [Sexist Advertising] Brno: NESEHNUTÍ, 2020, p. 170 an.

³⁶ ONDREJOVÁ, D., SEHNÁLEK, D. *Vliv práva Evropské unie na českou regulaci nekalé soutěže a nekalých obchodních praktik*. [The Influence of EU Law on the Czech Regulation of Unfair Competition and unfair commercial practices]. Brno: Masaryk University, 2016, [online]. [cit. 2024-11-12]. Available from: <https://munispace.muni.cz/library/catalog/book/920>, p. 18.

competition, safeguarding the interests of both competitors and the recipients of their competitive conduct³⁷.

Section 2976 of the Czech Civil Code addresses unfair competition via a general clause, which is accompanied by an exemplary (non-exhaustive) list of “typical” forms of unfair competition. The Slovak Commercial Code adopts an analogous approach. This regulatory model is characteristic of continental European competition law, and Czech and Slovak law do not depart from these prevailing standards, with one notable exception: unlike some jurisdictions, the regulation of unfair competition remains distinct from the regulation of unfair business practices, which is addressed separately.

Distinctively, Czech and Slovak law do not include an explicit statutory definition of the purpose of unfair competition legislation³⁸, which may lead to ambiguity in resolving conflicts with other areas of regulation³⁹. The boundaries of competition law are inherently shaped by its underlying principles and regulatory purpose. According to Section 2972 of the Czech Civil Code, “whoever participates in competition (a competitor) may not abuse his participation by unfair competition or limit the participation of others in competitive activity, nor in association with others for the purpose of engaging in competition.” The legislation is therefore primarily directed at competitors and the way they engage in competition⁴⁰.

This participation must not be abused by so-called unfair competition. Under Section 2976 of the Civil Code (and Section 44(1) of the Slovak Commercial Code), the threshold is set at conduct occurring within “economic relations” or “conduct in competition,” respectively. As a result, competition law – particularly its private law dimension – operates within a confined scope. Historically, the prohibition of unfair competition focused chiefly on protecting the interests of competitors⁴¹; recognition of the interests of consumers (and increasingly, customers) emerged later.

However, the interests most frequently invoked in opposition to sexist advertising seldom correspond directly with the interests of competitors or consumers; instead, they

³⁷ Cf. also HAJN, P. and ELIÁŠ, K., BEJČEK, J., HAJN, P. et al. *Obchodní právo. Obecná část. Soutěžní právo*. [Commercial Law Course. General part. Competition Law] 5th ed. Prague: C. H. Beck, 2007, p. 295; VOZÁR, J. in OVEČKOVÁ, O. et al. *Commercial Code. Comment.* 2nd edition. Bratislava, Wolters Kluwer SK, 2022, p. 305; VOZÁR, J. *Reklama a právo* [Advertising and Law] Bratislava, Veda, 1997, pp. 215 – 216.

³⁸ For example, the German Unfair Competition Act (UWG) stipulates in § 1 para. 1 as follows: “This Act serves to protect competitors, consumers and other market participants against unfair commercial conduct. At the same time, it protects the public’s interests in undistorted competition”.

³⁹ On a similar axiological problem in the context of the existential regulation of competition, see BEJČEK, J. *Cílové konflikty v soutěžním právu* [Target Conflicts in Competition Law]. *Právník*, 2007, vol. 146, no. 6, p. 663. The author writes, among other things: “When considering competition policy and the conflict with other interests of the state, we inevitably encounter axiological and conceptual difficulties. Does a democratic state in a market economy have (and should it have) any other goals than to ensure that the market mechanism is not disturbed by anyone (including itself), because the optimum is achieved by a decentralized market mechanism?”

⁴⁰ The same applies in the context of Slovak law (cf. Section 41 of the Slovak Commercial Code).

⁴¹ Cf. e.g. the decision of the Supreme Court of 22 October 1932 (“Vážný collection” Nr. 12028), file no. R II 399/322005: “The Act against Unfair Competition should not serve primarily the interests of customers, but the interests of competitors.”

represent broader societal concerns. Unfair competition law is designed to protect specific competitive rights – namely, it addresses distortions within the competitive process by way of objectionable practices that (at least potentially) harm a competitor, a consumer, or competition itself, but do not extend to the protection of society as a whole. Additional interests (such as those of employees, minorities, or other segments of the public) are safeguarded by competition law only incidentally or as a secondary effect.

As such, the pathway to prohibiting sexist advertising via competition law norms (provisions on unfair competition and unfair commercial practices) is largely foreclosed. Most advertisements described as sexist do not have a direct impact on the economic interests of a competitor or customer, nor do they influence the consumer's economic decision-making. Furthermore, a significant subset of sexist advertisements fails to satisfy another criterion of the general clause – a breach of the good morals of competition. For instance, advertisements employing gender stereotypes may be entirely unobjectionable within the framework of competition law, and can only be challenged, if at all, on non-competitive grounds. The same reasoning applies to advertisements that are tasteless or offensive, absent sufficient severity to constitute a violation of the good morals of competition.

Hypothetically, certain sexist advertisements might amount to a threat or violation of the rights of another competitor through unfair competition. In the context of horizontal relationships between competitors, one might argue that a provocative sexist advertisement unfairly attracts consumer attention, drawing customers away from other market actors and exacerbating its impact through media controversy and amplified publicity without any costs⁴². However, this scenario also requires fulfillment of further aspects of the general clause – namely, a breach of competition morals and at least a potential for harm; factors that are highly speculative and would cover only a limited subset of advertising content labeled as sexist.

Moreover, even if all the conditions of the general clause were fulfilled, the question would remain whether affected competitors would actively enforce their rights against the advertiser. Each competitor is responsible for asserting claims for breaches of competition law and must bear any associated litigation risks. Absent such initiative, no dispute over unfair competition caused by sexist advertising will arise. While customers (or consumers in Slovakia) do possess claims for unfair competition against violators^{43 44}, in vertical relationships it is difficult to demonstrate a violation of interests specifically

⁴² At the same time, it cannot be ignored that the marketing effect of so-called sexist advertising is questioned due to the so-called “vampire effect”, where visually attractive content suppresses the informational benefit of advertising (the consumer does not take away information about the product or its manufacturer). For more details, see BAŽANTOVÁ, S., ŠTIKOVÁ, E., NOVÁK, M. GUNINA, M. Erotic appeals in advertising: visual attention and perceived appropriateness, *Media Studies*, Vol. 12, No. 24, 2021.

⁴³ Cf. Section 2988 par. 1 OZ.

⁴⁴ Cf. Section 53 (1) of the Slovak Commercial Code. For more details on the claims under Slovak law, VOZÁR, J. in OVEČKOVÁ, O. et al. *Commercial Code. Comment*. 2nd edition. Bratislava, Wolters Kluwer SK, 2022, p. 355 an.

protected by unfair competition law, especially since the criterion of influence on the consumer's economic decision is generally not met within unfair business practices regulation.

According to the Czech Civil Code, a “legal entity authorized to defend the interests of competitors or customers” may assert certain claims (such as cessation or removal of a defective state) in the relevant proceedings⁴⁵. Yet even here, similar obstacles persist, exacerbated by a pattern of litigation passivity among such entities in the Czech Republic. Unfair competition law ultimately protects only the interests of competitors and customers as market participants and does not extend to the broader public as a universal safeguard. The hypothetical issue remains: in what manner could sexist advertising threaten or violate the rights of customers and undermine legitimate competitive interests – for example, by unfairly influencing consumer purchasing decisions?⁴⁶

4. Sexist advertising as an unspecified factual pattern of unfair competition, classified as a “violation of a public law with competitive effects”

It remains to consider the possibility of an indirect approach that would reprobate sexist advertising as unfair competition “reflexively,” utilizing the judicial concept of a “breach of a public law with a competitive impact”. The requirements of the general clause may be fulfilled when a competitor violates another legal regulation within the context of economic relations and this infraction yields competitively relevant effects – most notably, an advantage over competitors adhering to the law. This is a judicially recognized, though not statutorily regulated, ground for unfair competition, typically classified in the literature as “a breach of a public or private law norm with competitive relevance.” The Czech legal doctrine⁴⁷ and judicial decisions accept this unenumerated example of unfair competition⁴⁸.

Nonetheless, this approach presupposes that sexist advertising is first recognized as a public law offence for instance, under the Advertising Regulation Act (where prohibitions are analogous in both Czech and Slovak contexts), or hypothetically under a future special statute should the legislature explicitly prohibit sexist advertising.

⁴⁵ Similarly, Section 54 para. 1 of the Slovak Commercial Code.

⁴⁶ Again, only hypothetically (considering the low legal activity of these entities in the Czech Republic) can we consider exercising the right to remove sexist advertising by an association of competitors who believe that the controversial advertisement threatens the reputation of the entire industry.

⁴⁷ Cf. HAJN, P. *Community and Czech law against unfair competition*. Brno: Masaryk University, 2010, p. 30; VEČERKOVÁ, E. *Unfair competition and advertising (selected chapters)*. Brno : Masaryk University, 2005, p. 115; ONDREJOVÁ, D. *Unfair competition in the new Civil Code*. Commentary. Prague: C. H. Beck, 2014, p. 57; PÁTĚK, p. 10. MELZER, F. et al. *Civil Code: § 2894-3081*. Prague , 2018 , p. 1154; VOZÁR, J. *Reklama a právo*. [Advertising and Law] Bratislava, Veda, 1997, p. 54; VOZÁR, J. General clause of unfair competition. *Právní obzor*. 1999, No. 4, p. 215.

⁴⁸ See, for example, the judgment of the Supreme Court of 28.06.2016, file no. 23 Cdo 2493/2014; Judgment of 23.05.2017, file no. 23 Cdo 4030/2015, judgment of the Supreme Court of 25.04.2018, file no. 23 Cdo 4554/2017.

Crucially, there must also be evidence that this public law offense is liable to adversely affect the competitive position of actors in the market (competitors and customers alike).

The distinction between direct and reflexive censure lies in the grounds used to establish a violation of good morals. In the scenario of a “breach of a public law norm with a competitive impact,” violation of good morals is presumed by a competitor leverages the offense to secure an unjust advantage in the marketplace. The substantive nature of the delict itself is thus irrelevant from the viewpoint of competition ethics; contradiction to good morals is inherent in the violation of a legal norm that has facilitated (at least potentially) a competitive edge for the transgressor.

A key advantage of the reflexive approach is that it preserves the regulatory objectives of competition law. In invoking unfair competition rules, there is no need to forcibly pursue policy aims falling outside its traditional remit – even if such objectives are entirely legitimate from a societal or ethical perspective (e.g., gender equality, fiscal policy, animal welfare, etc.).

What specific claims are available to a competitor whose market position is negatively affected by another’s breach of a public law norm? According to the Civil Code (and Section 53 of the Slovak Commercial Code), any party whose rights have been threatened or infringed by unfair competition may demand that the offender refrain from further unfair competition or restore the status quo. Additionally, recovery of reasonable satisfaction, compensation for damages, and restitution of unjust enrichment may be sought.

The practical enforceability of injunctive and restorative claims remains uncertain. Where disputed advertising is proscribed under public law (for example, on the basis of conflict with good morals), applications for injunctions or removal are often moot, as the advertisement will typically have already been withdrawn. Quantifying and substantiating other claims – such as for damages or unjust enrichment – is also onerous in such cases.

In implementing the unenumerated ground of “breach of a public or private law norm with a competitive impact,” (Rechtsbruch) the critical issue is delineating the scope of “competitive impact.” The German Unfair Competition Act (UWG) offers valuable guidance, having formally regulated the relationship between unfair competition and offenses under other legal norms. Since 2004⁴⁹, Section 3a of the UWG has stipulated: “Unfair conduct is committed by anyone who infringes a provision of a law whose purpose is also to regulate market conduct in the interests of market participants, and such infringement is capable of materially harming the interests of consumers, other market participants or competitors.”

The explanatory memorandum accompanying the UWG’s reform explicitly references the BGH judgment “Elektroarbeiten”⁵⁰, clarifying that the aim of competition law is not to sanction all legal infractions, but only those rules having at least a secondary objective of safeguarding competitive order. The concept has since been formulated even more flexibly. The breached norm must also address, at least secondarily, the regulation

⁴⁹ In the previous provision in Paragraph 4 no. 11 of the UWG, now in Paragraph 3a of the UWG.

⁵⁰ Judgment of the BGH dated 25.04.2002, file no. I ZR 250/00.

of market conduct (typically described as Marktverhaltensregelung⁵¹). It is not essential that the norm's purpose (even ancillary) is to protect competition; it suffices if it prescribes market participants' behavior.

If Czech or Slovak law embraced a similar legal construct ("violation of the law"), the assessment of sexist advertising would be straightforward. Its censure through the Advertising Regulation Act would satisfy the "violation of the law" test. The ban on discriminatory advertising contrary to good morals can be readily understood as the regulation of market behavior, specifically the negative determination of advertising content.

This conclusion does not change even if Czech and Slovak law remain, for now, at the level of judicially recognized grounds (as is presently the case⁵²). Even so, the prohibition in Section 2(3) of the Advertising Regulation Act (and Section 3(1)(c) of the Slovak Advertising Act) pursues – at least secondarily – a competition regulatory objective, with its breach constituting an impact on competitive relations.

5. Conclusion

The classification of so-called sexist advertising within the framework of unfair competition represents a significant axiological challenge for commercial law doctrine. Several factors complicate this issue. The ambiguity and arbitrariness inherent in the concept of sexist advertising – rooted in casuistic self-regulatory codes, educational materials from the non-profit sector, and verbose soft law – negatively influence legal clarity. Moreover, conceptual uncertainty is compounded when the umbrella term "sexist advertising" subsumes content previously considered unproblematic. For instance, advertising that relies on traditional gender stereotypes is prohibited by self-regulatory bodies abroad, yet under Czech and Slovak conditions, such a prohibition would likely be considered an unreasonable interference with entrepreneurial freedom.

An essential difficulty arises from the conflict of objectives and interests between the regulation of unfair competition and the regulation (or prohibition) of sexist advertising. The principal aim of unfair competition law, understood broadly to encompass unfair commercial practices, is to uphold competitive fairness and to protect the freedom and quality of consumers' economic decision-making. In contrast, the regulation of sexist advertising pursues different, primarily non-competitive objectives. Typically, sexist advertising does not infringe the rights of competitors or customers in competitive economic relations.

Accordingly, a solution suggests itself in the form of a reflexive approach: relying on the judicial concept of a "breach of public law norms with a competitive impact," as

⁵¹ The provision of §3a thus follows the existing case law, which required "at least a secondary competition protection function" in the case of the breached regulation (for more details, see HOHLWECK, M. § 3a – Rechtsbruch in BÜSCHER, W. Gesetz gegen den unlauteren Wettbewerb. Commentary. Köln: Carl Heymanns Verlag, 2019, p. 349).

⁵² Similarly in Austrian law, cf. KRAFT, R.M., STEINMAIR, B. UWG, Praxiskommentar. LexisNexis, 2nd edition. 2019, p. 53.

developed by legal doctrine and recognized by case law. Should sexist advertising be qualified as a public law offense (for example, for conflicting with good morals), unfair competition would arise from the defendant's unjust competitive advantage over law-abiding competitors – such as attracting customer attention or benefiting from the public notoriety of the banned conduct. This reflexive method remains consistent with the regulatory objectives of competition law. It ensures that the application of unfair competition provisions will not be encumbered by axiological values or objectives extraneous to the underlying legal framework, even if such values (like gender equality) are inherently legitimate but non-essential from the perspective of competition itself.

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