

An Analysis of False Advertising Enforcement

Abstract

Keyword(s): false advertising, Fair Trade Law, concurrence, Consumer Protection Act

In addition to the Fair Trade Law (FTL), stipulations regarding false advertising also exist in the regulations of other competent authorities. Currently, the Fair Trade Commission (TFTC) and competent authorities are coordinating their jurisdiction over false advertising in accordance with the principle of "special laws prevailing over ordinary laws." For example, advertisements claiming products as having medical effects are subject to the jurisdiction of Ministry of Health and Welfare, instead of TFTC. However, whether a specific advertisement is subject to special laws is sometimes controversial. Furthermore, the concurrent application of FTL and competent regulations raises problems because the substantial standards and procedural stipulations regarding false advertising thereof are different. How TFTC and competent authorities should coordinate and cooperate with each other is a significant question.

This research intends to clarify the TFTC and competent authorities' enforcement strategies, specific measures and efficacy of false advertising regulations. This research will also analyze the cases concerning the enforcement of false advertising by TFTC and competent authorities, attempting to provide suggestions on how to prompt TFTC and other competent authorities to coordinate and cooperate in a more efficient and effective way.

The research results can be summarized as follows:

1. The standard for determine false advertising

With regard to the determination of false advertising, the court held that it should be determined by considering the overall expression and messages conveyed by the advertisement. With regard to whether it involves false, exaggerated or misleading matters, the Ministry of Health and Welfare has issued guidelines to list the content of the advertisement as "no evidence, or the evidence is not enough to support it" as a matter of being identified as involving false, exaggerated or misleading matters, and this provision places the burden of proof on the advertiser, and if sufficient evidence cannot be provided, the competent authority may simply determine that it involves false, exaggerated or misleading matters. In addition, the competent authorities' announcements of

various examples of false advertising under the Pharmaceutical Affairs Act and the Medical Care Act will also help improve the efficiency of law enforcement.

2. The jurisdiction among TFTC and competent authorities

TFTC should only initiate investigation in cases which have significant adverse impact on competition, so that it will not be overwhelmed by a large number of trivial consumer complaint cases. In addition, under the circumstance of rapid changes in advertising methods, it is necessary to reexamine other individual regulations on false advertising to see if those regulations are capable of addressing emerging new advertising patterns. It will be more appropriate to revise the regulations in other specific fields than to revise the general laws for the regulation of false advertising (such as the FTL and the Consumer Protection Act).

3. Consumer Protection

This study argues that in addition to requiring businesses to fully disclose information to consumers, the promotion of consumer education is also indispensable. In order to effectively promote consumer education, this study argues that efforts should be made to encourage private enterprises to participate in consumer education. When planning consumer education, it is desirable to consider the concept of behavioral economics.

Based on the above research results, this study summarizes the following suggestions:

1. Immediately feasible recommendations

(a) Adjust the definition of advertising under the FTL

As mentioned above, the vast majority of other individual regulations on false advertising other than the FTL only regulate "advertising" and do not contain "in any other way make it known to the public." However, the concepts of "advertising" in Article 21, paragraph 1 and paragraph 5 of the FTL are inconsistent in current practice. If the competent authorities of other individual regulations define "advertising" in accordance with Article 21, paragraph 1 of the FTL, the concept of advertising may be unable to cover situations where false information is provided to specific persons through social media, or provided to media reports.

Therefore, this study suggests that the TFTC may consider reviewing the definition of "advertising" under Article 21 of the FTL to resolve the inconsistencies in the concepts in the same Article.

(b) Compilation of examples of false advertising for industries involved in major cases

Based on the experience of the Ministry of Health and Welfare , one of the ways to ensure the efficiency of their law enforcement is to sort out and summarize clear examples and phrases for law enforcement reference. This study suggests that the TFTC may try to compile more concrete examples, common patterns, or phrases which may constitute false advertising for industries involved in major cases. It can effectively help businesses to comply with the relevant laws and regulations.

(c) Encourage private enterprises to make efforts in consumer education

This study suggests that administrative agencies may not necessarily take full responsibility for consumer education on their own, but can promote initiatives to list the effectiveness of consumer protection as an indicator of corporate social responsibility, and seek to actively encourage private enterprises to participate in consumer education.

(d) Introduce the concept of behavioral economics into consumer education

In view of the fact that behavioral economics is often used in modern marketing practices, this study suggests that the concept of behavioral economics should be taken into account when planning consumer education.

2. Long-term recommendations

(a) The shift in the burden of proof

The TFTC may amend the FTL to clearly stipulate that under certain circumstances (such as those who actively claim to have specific effects and efficacy in the advertisements of their goods or services), the TFTC may, if they deem it necessary, require the parties to prove that it is true in respect of the specific effects claimed by their advertisements. If the relevant evidence is not presented within the statutory period, the advertisement shall be deemed as false advertising.

(b) Coordinate with other competent authorities to increase the normative density of false advertising in individual fields

The TFTC may try to coordinate with other competent authorities to increase the density of norms in individual areas on false advertising (including mandatory legal norms and non -mandatory industry self-regulatory norms).

(c) Coordinate the review and amendment of the amount of penalties for false advertising in other individual regulations

This study suggests that the Executive Yuan should actively review the relevant laws, and actively promote the amendment of the amount of fines imposed on false advertising in other individual regulations.