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Time of Request: Monday, November 08, 2010 00:33:11 EST

Client ID/Project Name:

Number of Lines: 117

Job Number: 1862:251844938

Research Information

Service: Terms and Connectors Search

Print Request: Current Document: 1

Source: Doing Business in Spain

Search Terms: § 10.01 Advertising



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Doing Business in Spain

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CHAPTER 10 Advertising and Trade Practices

1-10 Doing Business in Spain § 10.01

§ 10.01 Advertising

[1] Regulation

Advertising in Spain is regulated by law 34/1988 of November 11. This legislation is the result of Spain's obligation to harmonize its legislation with Community provisions, fundamentally Article 4 *et seq.* of EEC Directive 84/450 concerning deceptive advertising. Law 34/1988 has been amended by Law 29/2009 of December 30, that has introduced into Spanish Law Directives 2005/29/CE and 2006/114/CE.

According to the law, advertising is understood to be all types of communication made by public or private, legal or physical persons in the exercise of a commercial, industrial, craft, or professional activity for the purposes of indirectly or directly promoting the contracting of goods, real property, services or rights, and obligations.

Given the special characteristics of radio and television, advertising is regulated, apart from law 34/1988, in the resolution of January 22, 2001 of the General Directorate of Media, in law 25/1994 of July 12, based on EEC Directive 89/552, and in law 22/1999 of June 7, which is based on EEC Directive 97/36. This regulation contains specific norms for the protection of children (such as the advertising of toys and the appearance of children in advertisements). It also contains special norms concerning the advertising of such items as alcoholic beverages, medicine and health products, housing, and motor vehicles.

[2] Unlawful Advertising

The following will be considered unlawful publicity:

(a) Publicity which attacks the dignity of the person or harms the rights and values recognized in the Constitution, especially those referring to Articles 14, 18 and 20, Section 4. This includes advertisements that present women in a degrading or discriminatory form, by way of using their body or part of it as a mere object detached from the promoted product, or their image associated with stereotyped conduct that infringes regulations contributing to gender violence.

(b) Publicity addressed to minors that incite them to purchase goods or services, exploiting their lack of experience or credulity, or in which they appear persuading parents to purchase. Children cannot unjustifiably appear in dangerous situations. Publicity cannot lead to error about the products'

characteristics and safety or necessary capacity and aptitudes of children.

(c) Subliminal advertising. n1

(d) Advertising which violates norms regulating advertisements of certain products, goods, activities, or services. n2

(e) Deceptive advertising, unfair advertising and aggressive advertising, that will be considered unfair competition acts according to Law on Unfair Competition.

[3] Types of Advertising Contracts

Advertising contracts will be governed by the General Advertising Law, n3 and where it is not applicable by the general rules of law. n4

The specific sector rules should also be taken into consideration.

Clauses exonerating, imputing or limiting liability to third parties which the parties may incur as a consequence of the publicity are not permitted in advertising contracts.

Any clause which directly or indirectly guarantees economic performance or commercial results or provides for liability based on these claims will be considered null.

[a] Advertising Contract

This is a contract whereby a sponsor hires an advertising agency, for consideration, to create and prepare or program an advertising campaign.

If the agency unjustly fails to carry out the services agreed to or does them outside of the established period, the sponsor may terminate the contract, demand the return of that paid and request indemnification for damages.

The termination of the contract will not affect the rights of the agency for the advertising carried out before non-performance.

[b] Broadcast Advertising Contract

This is a contract whereby in exchange for a fixed consideration set by pre-established tariffs a media entity is obliged, on behalf of the sponsor or agency, to permit units of time or space available to be used for advertising purposes and to perform the necessary technical activity to obtain the advertising result.

When the media does not broadcast the advertisement, the sponsor or the agency may choose between demanding subsequent broadcast under the same conditions agreed to or terminating the contract and having returned the money paid for advertisements not broadcast, except for cases of force majeure. In either case damages that occur must be indemnified by the media entity.

If the failure to broadcast could be imputed to the sponsor or the agency, the party responsible will be obliged to indemnify the media entity and satisfy wholly the price, except where said entity has totally or partially used the contracted time or space for other publicity.

[c] Advertising Creation Contract

This is a contract whereby in exchange for consideration a legal or physical person is obliged on behalf of a sponsor or agency to come up with and develop an advertising campaign project, a part of the same, or any other advertising element.

Advertising creations may enjoy industrial or intellectual property rights when they meet the requirements set by law. Notwithstanding the above paragraph, the exploitation rights of advertising creations are presumed to be, except when agreed to otherwise, assigned exclusively to the sponsor or agency by virtue of the advertisement creation contract and for the purposes provided for therein.

[d] Sponsorship Contract

This is a contract whereby the sponsored party, in exchange for economic aid for the carrying out of its activities, (sports, charitable, cultural, scientific, or any other type), is obliged to collaborate with the advertising of the sponsor.

The sponsorship contract will be governed by the rules covering broadcast advertising contracts when applicable.

[4] Advertising Auto-Regulation in Spain

The "Asociacion para la Autorregulacion de la Comunicacion Comercial" (the Association for Autocontrol of Commercial Communications, hereinafter "Autocontrol") was set up in 1995 (before then called "Asociacion de Autocontrol de la Publicidad"). It is a private organization, and member of the European Standards Alliance (EASA). Its objectives are to ensure that the legal and auto-regulatory provisions that regulate advertising as a form of commercial communication are adhered to, and to regulate both the form and content of advertising in all media. The basic characteristics of "Autocontrol" are the same as those of any auto-regulatory organization, membership is voluntary. The essential feature of "Autocontrol" is the obligation of its members to comply with a series of ethical norms. Specific rules have been formulated for certain sectors. For instance, there is an ethical standard for the advertisement of alcoholic drinks, and there are rules for publicity affecting pharmaceutical products. One of the aims of "Autocontrol," among other activities, is to draft advertising codes of conduct, both general codes and codes in relation to particular sectors. "Autocontrol" has drafted has two main Codes, which cover commercial communications of all products/services in all media: General Code of Advertising Practice (1996, last update in 2002) and Code on interactive advertising and e-commerce B2C: Confianza Online Code (2003; last update in 2005). "Autocontrol" has created a Jury of Publicity that is in charge of the proceedings initiated for non-compliance with the codes and norms of conduct approved by "Autocontrol." This jury is also in charge of drafting preliminary codes of publicity ethics and other norms, to issue technical reports regarding publicity issues, and to act as arbitrator for publicity matters in arbitration proceedings.

[5] Special Norms

Royal Decree 1416/1994 of June 25 concerning advertising of medicines for human use differentiates between advertising of prescription medicines destined to private individuals and persons authorized to prescribe or dispense medicines. Advertising to the public of the following medicines is not permitted: those that may only be dispensed with a prescription, those that contain psychoactive or narcotic drugs and those that form part of pharmaceutical service of the National Health System. On the other hand, reference in advertising destined to the public of the following therapeutic capabilities is prohibited: tuberculosis, sexually transmitted diseases, other serious infectious diseases, cancer, chronic insomnia, diabetes, and other metabolic illnesses.

Royal Decree 1907/1996 of August 2, provides that the health authorities and other competent bodies as provided for in the General Health Law, specific provisions and the Royal Decree will control commercial advertising and promotion of products, materials, substances energies, or methods that are announced or presented as useful for diagnosis, prevention or treatment of diseases or psychological development, states, restoration, correction, or modification of

bodily functions, or other alleged health objectives so that they meet criteria of truth with regard to health and to limit that which may prejudice it.

As mentioned previously, there are also certain sector specific norms regarding publicity for alcohol, toys, or cosmetics, among others.

FOOTNOTES:

(n1)Footnote 1. For purposes of this law, subliminal advertising is that which may act upon the receiving public without them being conscious of its reception through techniques that produce stimulus of intensities that border detection by the senses. (Article 4 of the law).

(n2)Footnote 2. The advertising of sanitary materials or products and those that are subject to sanitary technical regulations as well as those products, goods, activities, and services that have the potential for creating risks to the health and safety of persons or their patrimony, or advertisements concerning games of chance will be regulated by special norms or subject to a system of authorization when the protection of the values and rights constitutionally recognized so requires.

Advertising of drinks with an alcoholic content superior to 20 degrees on television is prohibited. Advertising for alcoholic drinks in those places where its sale or consumption is prohibited is not permitted (Article 5, numbers 1 and 5 of the General Advertising Law).

(n3)Footnote 3. Title III, Articles 7 through 22 of the Law 34/1988 of November 11.

(n4)Footnote 4. *See* Ch. 5 of this work.