

# Advertising & Marketing

*Contributing editor*  
**Rick Kurnit**



**2018**

GETTING THE  
DEAL THROUGH 

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*Contributing editor*

**Rick Kurnit**

**Frankfurt Kurnit Klein & Selz, PC**

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## CONTENTS

|   |           |  |           |
|---|-----------|--|-----------|
| <b>Introduction</b>   | <b>5</b>  | <b>India</b>   | <b>46</b> |
| Rick Kurnit<br>Frankfurt Kurnit Klein & Selz, PC  |           | Safir Anand and Swati Sharma<br>Anand and Anand  |           |
| <b>Austria</b>  | <b>6</b>  | <b>Ireland</b>   | <b>53</b> |
| Georg Huber and Stefan Kofler<br>Greiter Pegger Kofler & Partners, Attorneys-at-Law           |           | Conor Griffin, Duncan Grehan and Éadaoin McLoughlin<br>Duncan Grehan & Partners Solicitors |           |
| <b>Brazil</b>   | <b>11</b> | <b>Japan</b>   | <b>60</b> |
| Luiz Werneck and Talita Sabatini Garcia<br>Inglez, Werneck, Ramos, Cury & Françolin Advogados |           | Chie Kasahara<br>Atsumi & Sakai  |           |
| <b>Canada</b>   | <b>16</b> | <b>Russia</b>  | <b>65</b> |
| Catherine Bate and Kelly Harris<br>Miller Thomson LLP   |           | Ilya Goryachev<br>Gorodissky & Partners  |           |
| <b>Colombia</b>   | <b>22</b> | <b>Sweden</b>  | <b>70</b> |
| Juan Carlos Uribe and Sandra Ávila<br>Triana, Uribe & Michelsen                               |           | Katarina Lindgren and Filip Åhsberger<br>Advokatfirman Fylgia                              |           |
| <b>France</b>   | <b>28</b> | <b>United Kingdom</b>  | <b>76</b> |
| Michel Béjot and Caroline Bouvier<br>Bernard-Hertz-Béjot                                      |           | Susan Barty and Poonam Majithia<br>CMS   |           |
| <b>Germany</b>  | <b>34</b> | <b>United States</b>   | <b>82</b> |
| Stefan Engels and Beatrice Brunn<br>DLA Piper UK LLP  |           | Rick Kurnit and Hannah Taylor<br>Frankfurt Kurnit Klein & Selz, PC                         |           |
| <b>Hong Kong</b>  | <b>39</b> |  |           |
| Angus Forsyth<br>Angus Forsyth & Co   |           |  |           |

# Preface

## Advertising & Marketing 2018

Fifth edition

**Getting the Deal Through** is delighted to publish the fifth edition of *Advertising & Marketing*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Hong Kong and Russia.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Rick Kurnit of Frankfurt Kurnit Klein & Selz, PC, for his continued assistance with this volume.

GETTING THE  
DEAL THROUGH 

London  
April 2018

# Colombia

Juan Carlos Uribe and Sandra Ávila

Triana, Uribe & Michelsen

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## Legislation and regulation

### 1 What are the principal statutes regulating advertising generally?

The main statute governing advertisements is Law 1480 of 2011 (the Consumer Protection Statute), which overruled Decree 3466 of 1982 in most parts; however, Decree 3466 still applies for what the Consumer Protection Statute does not cover. The Consumer Protection Statute introduced guidelines regarding accuracy and truthfulness of advertisements, which are mandatory. It expressly forbids misleading advertising, and includes a provision by means of which the media in which the advertisement is published or broadcast may be jointly liable if fraud or gross negligence is proven.

Unique Circular No. 10 of the Superintendence of Industry and Commerce (SIC) regulates all matters pertaining to the SIC, including consumer protection.

Certain behaviours involving advertising may be deemed as unfair competition under Law 260 of 1996 (the Unfair Competition Law), for example, misleading comparative advertising and certain conducts related to ambush marketing.

The Self-Regulatory Code on Advertising, amended on 16 October 2013, regulates advertising from an ethical perspective.

There are other bodies of legislation to regulate specific products or services but only those mentioned above have a general scope.

### 2 Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

The bodies primarily responsible for issuing advertising regulations are the Congress of Colombia, the government (the Ministry of Commerce and the Health Ministry) and the SIC. Those primarily responsible for enforcing rules on advertising are the SIC and the Health Authority.

The Self-Regulatory Code on Advertising, issued by a conglomerate of advertising companies, regulates advertising from an ethical perspective.

Currently, there are no guidelines or case law providing orientation on how concurrent jurisdiction among regulators with responsibility for advertising shall be managed.

### 3 What powers do the regulators have?

The regulating authorities have general direction of the economy; hence, they have the power to intervene in the production, distribution, use and consumption of goods, and in public and private services. Thus, they may limit the scope of activities, distribute liabilities, impose requisites and, in general, regulate commercial activities.

The authorities enforcing rules on advertising have the possibility to initiate judicial and administrative investigations, and may impose the penalties provided in the Consumer Protection Statute, as discussed in question 11.

### 4 What are the current major concerns of regulators?

The major concerns of regulators are with regard to the kind of advertisement (such as deceptive advertisements for 'miracle products' and false statements) and the goods to be advertised.

The following restrictions apply to the advertising of certain goods:

- pharmaceutical goods – depending on the medication, it may require prior authorisation;
- alcoholic beverages are subject to restrictions on advertising hours and types of advertisement, and special conditions to carry out the advertisement, such as the inclusion of mandatory phrases;
- tobacco cannot be advertised (Law 1335 of 2009); and
- infant formula cannot be subject to promotions or rebates.

### 5 Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

The only industry code of practice is the self-regulation system that comprises different professional associations gathered in a commission called the National Commission for Self-Regulation Advertisement (CONARP). This entity is in charge of developing and issuing the ethics code for advertisement activities. The code is called the Colombian Advertising Code of Ethics and applies to members or subscribers and their employees, contractors or suppliers of advertising services.

The Colombian Advertising Code of Practice entitles CONARP to make judgments against an advertiser based on ethical considerations. Based on the Colombian Advertising Code of Practice, CONARP can admonish privately or publicly those responsible for advertising that violates an ethical standard and inform the competent public authorities when the advertisement under review breaches Colombian law.

### 6 Must advertisers register or obtain a licence?

No, advertisers are not required to register or obtain a licence.

### 7 May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

Yes, advertisers may seek advisory opinions from the regulator. Nonetheless, such opinions are not binding and cannot be applied to general matters.

Certain advertising requires clearance before publication or broadcast, such as energy drinks, over-the-counter drugs, over-the-counter herbal medicines, over-the-counter homeopathic drugs, dietary supplements, medical devices and biomedical equipment in categories IIA, IIB and III.

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## Private enforcement (litigation and administrative procedures)

### 8 What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?

There are two prejudicial claim options: a cease-and-desist letter and a mediation hearing. The advantage of a cease-and-desist letter is that it is interparty, which means that it is not expensive. The timing is also determined by the parties. A disadvantage, however, is that not all counterparties take cease-and-desist letters seriously.

A mediation hearing is also interparty, but takes place before a mediation institution. Given the institutionalised nature of this proceeding, it has good results. It is not expensive and it is a quick process. It is a requirement for judicial proceedings in which no precautionary measures are requested; hence, even if the disagreement is not solved

in the mediation hearing, the steps for initiating a judicial proceeding have already been taken.

Another avenue for challenging advertising is an administrative proceeding before the SIC based upon the Consumer Protection Statute and the Unique Circular No. 10. An advantage of this is that the authority will take all measures in order to secure a proper decision. However, this process usually takes a very long time. The complainant is not part of the proceeding. It might also generate retaliation from the competitor.

There is also the possibility of a judicial proceeding before the SIC based upon the Consumer Protection Statute and the Unique Circular No. 10. Its purpose is to compensate any damage caused by an advertisement infringement; however, to do this, damage has to be proven by an advertisement infringement.

An administrative proceeding before the Health Authority may also be taken. An advantage of this is that it is a highly specialised authority, but this, of course, means that it is limited to addressing health requirements.

Finally, there is a judicial proceeding before a judge (either a civil circuit judge or the SIC as a jurisdictional authority) based upon unfair competition law. This is the only option in which the complainant is part of the proceeding and can claim damages. If the defendant is found guilty, it must proceed with a corrective advertisement. This type of proceeding, however, is expensive.

### **9 How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?**

Nowadays consumers are actively using the Consumer Protection Statute to enforce their rights and may autonomously challenge advertising on the grounds of its infringement of the Statute. Most actions are against commercial offers printed in adverts that consumers consider misleading, with supermarkets bearing the majority of the lawsuits. Consumer associations may also bring actions against market agents. Some example grounds for these actions to be brought are as follows.

An administrative proceeding may be brought before the SIC on the grounds that the advertisement in question does not comply with the legal requirements because it is deceiving, incomplete or unclear.

A judicial proceeding may be brought before the SIC on the grounds that a consumer suffers damage from an advertisement that does not comply with legal requirements because it was deceiving, incomplete or unclear.

An administrative proceeding may be brought before the Health Authority on the grounds that the advertisement in question does not fulfil the legal health requirements.

A judicial proceeding may be brought by a competitor before either a civil circuit judge or the SIC as a jurisdictional authority on the grounds of unfair competition.

### **10 Which party bears the burden of proof?**

The burden of proof depends on the proceeding, as follows:

- in a prejudicial claim, it is on the complainant;
- in an administrative proceeding before the SIC, it is on the respondent;
- in a judicial proceeding before the SIC (based upon the Consumer Protection Statute), it is on the complainant regarding damages, and on the respondent regarding the fulfilment of the legal requirements;
- in an administrative proceeding before the Health Authority, it is on the respondent; and
- in a judicial proceeding before a judge (either a civil circuit judge or the SIC as a jurisdictional authority) (based upon unfair competition law), the burden of proof is on the complainant regarding damages and the unfair act, and the respondent regarding the fulfilment of the legal requirements.

### **11 What remedies may the courts or other adjudicators grant?**

In an administrative proceeding before the SIC, the penalties provided in the Consumer Protection Statute are as follows:

- fines of up to 2,000 minimum legal monthly wages in force at the time of the imposition of the sanction;
- temporary closure of the party's business establishment for up to 180 days;

- in cases of recidivism and depending on the wrongdoing, closure of the establishment or final order of removal of a website portal on the internet or media used in electronic commerce;
- temporary or permanent prohibition on producing, distributing or offering certain products to the public;
- the destruction of a particular product that is detrimental to the health and safety of consumers; and
- successive fines of up to 1,000 minimum legal monthly wages, for failure to comply with the SIC's orders.

A judicial proceeding before the SIC (based upon the Consumer Protection Statute) may result in the charging of compensation for damages that have been proven by the complainant.

An administrative proceeding before the Health Authority may result in the offending party being forbidden to advertise or market an infringing good.

A judicial proceeding before a judge (either a civil circuit judge or the SIC as a jurisdictional authority) (based upon unfair competition law) may result in the offending party having to pay compensation for damages that have been proven by the complainant and proceed with a corrective advertisement.

### **12 How long do proceedings normally take from start to conclusion?**

The length of both administrative and judicial proceedings before the SIC (based upon the Consumer Protection Statute) depends exclusively on the SIC; it could be as short as three months or as long as three years.

Administrative proceedings before the Health Authority depend exclusively on the Health Authority; they take approximately three to four years.

Judicial proceedings before a judge (either a civil circuit judge or the SIC as a jurisdictional authority) (based upon unfair competition law) take approximately one to two years.

### **13 How much do such proceedings typically cost? Are costs and legal fees recoverable?**

Administrative and judicial proceedings before the SIC (based upon the Consumer Protection Statute) and administrative proceedings before the Health Authority do not involve any official fees, so the cost depends on the attorneys' fees, which are not recoverable.

A judicial proceeding before a judge (based upon unfair competition law) could cost from US\$40,000 to US\$100,000, including official fees, expenses and attorneys' fees. Not all of the legal fees may be recoverable; this is for the judge to determine.

### **14 What appeals are available from the decision of a court or other adjudicating body?**

In administrative proceedings before the SIC or before the Health Authority, there can be two appeals, which have to be filed at the same time before the authority who issues the decision. The first one, which is a reconsideration appeal, would be resolved by the authority who initially issued the decision, and the second appeal would be resolved by the hierarchical and functional superior of the officer who initially issued the decision.

Regarding judicial proceedings before the SIC, the decision can be appealed before the functional superior of the officer who initially issued the decision (in this case, the tribunal of the civil jurisdiction).

In a judicial proceeding before a judge (either a civil circuit judge or the SIC as a jurisdictional authority), the decision can be appealed before the functional superior of the officer who initially issued the decision.

## **Misleading advertising**

### **15 How is editorial content differentiated from advertising?**

According to a recently issued document drafted by the SIC, editorial content is treated as an equivalent of advertising. Hence, all Consumer Protection rules apply.



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**16 How does your law distinguish between ‘puffery’ and advertising claims that require support?**

‘Puffery’ is understood as subjective assertions, or unbelievable statements, that no consumer would take to be true, such as the claim that a product contains ‘the spark of life’ (Coca-Cola).

Any claim that refers to an actual characteristic of the good or service would be an objective assertion and would therefore require substantiation.

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**17 What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?**

Misleading advertising is forbidden. The advertiser will be responsible for any damages caused by misleading advertising. The media will be jointly liable only if gross negligence is observed. Where the advertised good does not meet the objective conditions claimed in the advertisement, without prejudice to administrative sanctions that may apply, the advertiser must compensate the consumer for damages.

All relevant information must be disclosed and must be clear, truthful, adequate, timely, verifiable, understandable, accurate and suitable for the products that are offered.

Disclaimers and footnotes are permissible as long as they are clear and visible.

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**18 Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?**

An advertiser should have proof of the claims it makes in advertising before publishing, as objective assertions require substantiation. The SIC usually requires third-party scientific studies to substantiate claims.

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**19 Are there specific requirements for advertising claims based on the results of surveys?**

The results cannot be manipulated, the sample has to be representative and the questionnaire should not include leading questions.

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**20 What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?**

Comparison should be upon objective facts and upon goods or services of the same nature and category. No incorrect or false statements should be asserted, neither should true statements be omitted.

The technical and legal criteria for comparative commercial advertising include the following: the comparison should be between goods, services or establishments meeting the same needs or intended for the same purpose; and the comparison must relate to objective or verifiable characteristics.

It is permissible to identify a competitor by name.

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**21 Do claims suggesting tests and studies prove a product’s superiority require higher or special degrees or types of proof?**

If a manufacturer claims the existence of a test or study, the claim should be substantiated. The manufacturer must have said test or study in its archives and it can be required by the competent authority to provide it.

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**22 Are there special rules for advertising depicting or demonstrating product performance?**

The depiction or demonstration must be clear. The consumer must be informed of the conditions in which the demonstration has been carried out with regard to time, quantity and use, among other things.

If part of the demonstration requires a comparison or is made by means of a comparison, the kind of product it has been compared to must be duly established.

If the comparison is against a competitor, the goods have to belong to the same category, which means that the goods or services must satisfy the same necessities; the comparison must refer to objective or verifiable characteristics; the comparison must therefore be made between one or more relevant, verifiable and representative features

thereof; and the advertising shall indicate the characteristics of the compared products and services, without being misleading.

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**23 Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief, or experience?**

The advertiser must have each testifier’s release and authorisation to use its name in association with the brand. The testifier’s claims or opinions can be jointly and severally liable if advertising rules are breached.

It has to be clear whether the testimony is an endorsement, an independent opinion, a belief or an experience.

Advertisers must keep information and documentation on advertising for at least three years from the date of its latest publication, so that it can be made available to the SIC if required.

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**24 Are there special rules for advertising guarantees?**

There are no special requirements for advertising guarantees, other than being in Spanish, but there are certain products with special rules concerning the information provided regarding the guarantees at the time of purchase, such as used vehicles for private use sold in commercial establishments, batteries, home appliances and tickets (for shows, sports or any other event).

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**25 Are there special rules for claims about a product’s impact on the environment?**

The risks the good entails must be clarified and a warning must be included. The product must contain instructions concerning its use, storage and final disposal. This information should be legible, clear, understandable, sufficient and in Spanish. Moreover, the instructions must be indelible, and it should remain for the approximate time of use.

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**26 Are there special rules for describing something as free and for pricing or savings claims?**

If the price is advertised, it must be disclosed in Colombian pesos and must include taxes and additional charges. It must also be supported in terms of quantity and validity.

The basic rule for ‘free’ product advertising is that it has to be true: the goods must be 100 per cent free. In the event of a promotion in which a free item is attached to the purchased good, the total and usual cost must be exactly the same and should not be increased by any means.

The advertising must include the complete requirements that make the offer applicable, including any conditions of time, mode or place. It must make reference to the quantity of the goods subject to the special offer.

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**27 Are there special rules for claiming a product is new or improved?**

There are no special rules for claiming a product is new or improved. The claims are allowed as long as all information provided to the consumer follows the general guidelines.

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**Prohibited and controlled advertising**


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**28 What products and services may not be advertised?**

The advertising of tobacco and its derivatives, and of toy guns is prohibited.

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**29 Are certain advertising methods prohibited?**

All advertising is guided by the general rules. Consequently, if not expressly prohibited, advertising methods are permitted as long as they fulfil the minimum requirements of the general rules. Visual outdoor advertising, however, is subject to several rules about size and location in order to avoid visual pollution.

Spam mail is prohibited based on the Personal Data Protection Statute.

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**30 What are the rules for advertising as regards minors and their protection?**

The Decree 975 of 2014 regulates the way advertisements must be presented to minors. All information and advertising aimed at children and adolescents should be respectful of their levels of mental

development, intellectual maturity and understanding. Consequently, advertisements directed at minors must avoid using images, text, visual or auditory expressions or representations that do not correspond to the reality of the product in relation to its performance or features.

Any information or advertising in which the operation or use of a product is featured, is forbidden from:

- representing children or adolescents of a different age to that required to assemble parts or operate the product;
- exaggerating the true size, nature, durability or uses of a product;
- failing to disclose that batteries or accessories shown in the advert are not included in the product package, but sold separately;
- failing to disclose that the functioning of a product requires batteries or a complementary element;
- failing to inform the child or adolescent of the price of the service and that parental permission is required before calling or sending a message in cases where the consumer must make calls or send text messages or multimedia that come at a cost to the consumer to acquire a product;
- containing images or information of a sexual, violent or discriminatory nature, or encouraging conduct contrary to good morals and good commercial practices;
- containing images of or related to the use of drugs or alcoholic beverages, unless it is a prevention campaign;
- using images, text, visual or auditory expressions or representations suggesting to the child or adolescent that he or she will be socially rejected or be less accepted by a group if he or she does not purchase the product;
- asserting or implying that consumption of a food or drink replaces one of the three main meals (breakfast, lunch or dinner); and
- using qualitative expressions, diminutives or adjectives regarding the price of the product.

There have been several attempts to prohibit or limit, by means of a bill, the advertising of sweetened food and drinks, especially to minors. Currently a draft bill is in place, in this regard.

### 31 Are there special rules for advertising credit or financial products?

Chapter I, Title III, Part I of the Basic Legal Circular of the Financial Superintendence regulates the advertisement of credit or financial products. The text and images used in advertising campaigns of credit or financial products must observe the following conditions:

- when advertising includes financial, accounting or statistical information, advertisers should only use historical figures, except those that by their nature are variable;
- advertising messages cannot be contrary to commercial good faith;
- advertisements should always state that the entity is supervised by the Financial Superintendence; and
- the corporate name of the entity or its acronym should be used in the advertising as it appears in its by-laws, always accompanied by the generic name of the entity (bank, financial corporation, financing, stock brokerage, securities firm, insurance company, etc).

### 32 Are there special rules for claims made about therapeutic goods and services?

Advertising of medicines and phytotherapeutic products sold without a prescription must:

- provide guidance concerning the proper use of the medicine or phytotherapy product;
- be objective and true regarding the product's properties;
- use Spanish to indicate the uses of the product, in clear language that does not create confusion for consumers;
- avoid technical terms, unless they have become common expressions;
- ensure that advertising the benefits of the drug or phytotherapy product is not contrary to the promotion of healthy habits;
- use visible, legible and high-contrast letters (eg, bold font that is larger than the rest of the words in the legend) in audiovisual and print media;
- use clear and unhurried messages in radio advertisements; and
- not use mechanisms to attract the attention of children or encourage underage consumption.

### 33 Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

Food advertising must meet the following requirements:

- it must comply with sanitary standards;
- it must fulfil the conditions in which the sanitary registration was granted;
- it must ensure that information does not mislead consumers by statements or omissions;
- the information contained in the advertising should not be contrary to the promotion of healthy habits;
- there should not be claims regarding medicinal, preventive, curative, nutritional or special properties that could lead to misperceptions about its true nature, origin, composition or quality;
- it must clearly indicate the natural or synthetic origin of the basic raw materials used in food processing; and
- the advertisement cannot suggest that the food alone fills the nutritional requirements of the individual or imply that the product has properties that replace a balanced diet or provide all nutrients.

As mentioned in question 30, a draft bill regarding the advertising of sweetened food and drinks, especially to minors, is in place.

### 34 What are the rules for advertising alcoholic beverages?

The advertising and marketing of alcohol has been regulated in Colombia for the past 30 years, aiming to protect minors and prevent the consumption of alcoholic beverages, by means of warnings and restrictions within the advertisements and limitations of how and when to advertise said goods. To that end, all advertising and marketing of alcohol has to include the following mandatory phrases:

- 'the sale of alcoholic beverages to minors is forbidden' (Law 124 of 1994); and
- 'excessive consumption of alcoholic beverages is harmful to health' (Law 30 of 1986).

Further, all commercial establishments selling alcoholic beverages must display these mandatory phrases in a visible place.

Since 2012, advertising of alcoholic beverages no longer requires prior authorisation by the Health Authority. Nonetheless, the Health Authority is still in charge of controlling the advertising of alcoholic beverages. The following rules must be implemented:

- the label must include the alcohol content of the beverage and shall not include expressions, phrases or images suggesting medicinal or nutritional properties;
- the phrase 'the sale of alcoholic beverages to minors is forbidden' must occupy at least 10 per cent of the area of the label, located on the front face, with easily readable size and typeface, contrasting with the background on which it is printed; and
- the location of the mandatory phrases must be horizontal and be read in the same way.

Moreover, the mandatory phrases must be part of every advertisement. Indeed, the statement of the mandatory phrases should be clear, understandable, visible and legible. In audio broadcast, they should be delivered at the same speed as the rest of the advertising piece.

Additionally, all advertising and marketing of alcohol must comply with the following rules (Decree 1686 of 2012):

- the use of phrases, words, signs or emblems as any graphical representation that can cause confusion, deception or doubt to the consumer about the true nature, origin, composition or quality of the goods, is forbidden;
- it is forbidden to use qualifying terms suggesting qualities or properties that alcoholic beverages do not possess;
- it is forbidden to refer to alcoholic beverages as having medicinal, preventive, curative, nutritive, therapeutic or wellness and health-producing properties;
- the advertising should respect cultural values and differences of race, sex and religion. It should not violate the principles of ethics or use themes, images, symbols or figures deemed offensive, harmful or humiliating;
- the advertising should not include images of people who are, or appear to be, underage (under 18);
- the advertising should not include pregnant women; and
- the advertising should not suggest that the consumption of alcoholic beverages is essential for business, academic, sporting or social success.



### Update and trends

Concerning ambush marketing, and with the relevance of sporting events, there are two decisions worth mentioning.

The first case was a trademark infringement action and an unfair competition action initiated by the Colombian Football Federation (the Federation) against Telmex Telecomunicaciones SA ESP, Comcel SA and Telmex Colombia SA, owing to their use of the Federation's logo and the publication of an advertisement supporting the Colombian football team at the World Cup qualifiers for Brazil 2014, when these companies were not official sponsors of the Colombian football team.

The main points of the decision were the following:

- the use of a generic expression and taking advantage of a sporting event as a basis for commercial advertising does not affect public or private interests, because advertising is protected by freedom of speech, especially when there is no use of a third party's trademarks;
- a football match is an event that does not belong to anyone in particular and only its transmission can be subject to protection in accordance with the rules governing the matter, hence, anyone can use common expressions that are public domain, such as 'national

football team', to refer to a sporting event when it is not used as a trademark; and

- the fact that there is a sponsorship involved does not prevent other participants in the trade from advertising with generic expressions that allude to a national feeling as long as they are not announced as official sponsors without being so.

The second case was an unfair competition action initiated by the Federation and Procter & Gamble Colombia Ltda (P&G) against Unilever Andina Colombia Ltda because Unilever used the Colombian team jersey in an advertisement promoting their detergent, when Unilever was not an official sponsor of the Colombian football team. The main point of the decision was: it is forbidden to connect a typical commercial (ie, for profit) activity to a registered trademark – the Federation's logo that is stamped on the official jersey of the national football team – in the specific context, given the recognition that it then raised, since Unilever used it without having paid for the right to commercially exploit such a trademark, and especially since P&G was the Federation's official sponsor for the same line of goods.

The media, in the exercise of autonomy and other rights, must refrain from broadcasting alcohol advertising on television between 7am and 9.30pm. The advertising of alcoholic beverages on television can only be transmitted at the times and with the intensity established below.

For promotional advertising that uses graphic designs or audible or visual characterisation of a company, brand, product or service, without mentioning the attributes of its nature and that is directed exclusively to promote or sponsor a sporting or cultural event, advertising is permitted within a month before the cultural or sporting event between 9.30pm and 5am the following day, and during the transmission of the sporting or cultural event that it promotes or sponsors.

For an implied or indirect advertisement, which uses the product, brand or graphics and audio or visual characterisation of a company or product to promote the use or consumption of goods or services without mentioning their attributes, advertising is permitted between 10pm and 5am the next day.

Direct advertising (in which the product, company, brand or service is identified by a graphic design or audible or visual characterisation, with the express purpose of encouraging or inducing consumption or maintaining their presence) that involves the action of ingesting the drink, is forbidden from being broadcast at any time by television services.

Promotional and implied advertising shall not exceed 60 seconds for every 30 minutes of programming.

Each operator that broadcasts advertisements of alcoholic beverages shall transmit, without cost, an explicit prevention campaign on the risks and effects of its consumption, for half the time spent weekly on advertising alcoholic products.

Programmes whose content is aimed specifically at minors shall not include any advertising regarding alcoholic beverages.

During the broadcast of advertising and marketing of alcohol, the following rules shall apply:

- the advertising may not contain scenes or parts in which the action of ingesting alcoholic beverages is expressed visually or vocally;
- the advertising may not feature models that are, or appear to be, minors or pregnant women;
- the mandatory phrases must be included;
- the advertising of these products shall not associate consumption with success and achievement of personal, sexual, professional, economic or social goals;
- the advertising shall not state or imply that consumption of alcohol is a desirable or valid option to solve problems, or show a negative image of abstinence or moderation;
- the advertising must be truthful and objective;
- the advertising cannot threaten the honour, reputation, privacy of individuals and rights, freedoms and principles that are recognised by the Constitution;
- the advertising may not contain images that by their nature attract the attention of children;
- the advertising cannot claim or imply that alcohol has curative or therapeutic qualities; and

- the advertising may not contain images or messages that relate consumption of alcoholic beverages with driving.

### 35 What are the rules for advertising tobacco products?

The advertising of tobacco is forbidden. Further, the labelling requirements of tobacco products are as follows:

- it is forbidden for the labels or packaging to target minors or be attractive to minors;
- the labels or packaging of these products shall not associate consumption with success and achievement of personal, sexual, professional, economic or social goals; and
- it is forbidden to include false statements as 'light', 'soft', 'mild' or 'low in tar, nicotine and carbon monoxide'.

Labels or packaging must include warning phrases and pictograms issued by the Ministry of Social Protection. They should appear on the main faces, occupying 30 per cent of the area of each face; the text must be in Spanish in a box with a white background and a black border with a Helvetica font of 14 points in black, which will be placed parallel to the bottom of the packaging.

The exhibition of tobacco products in establishments is advertising and is forbidden.

### 36 Are there special rules for advertising gambling?

All gambling activities must be pre-approved by the competent authority, which depends on the scope of the gambling activity – either national or regional. Once authorised, the gambling activity has to state such authorisation on each of its tickets and adverts must be approved by the same entity in charge of authorising the gambling activity.

### 37 What are the rules for advertising lotteries?

All lotteries must be pre-approved by the competent authority, which depends on the scope of the lottery – either national or regional. Once authorised, the lottery has to state on each of its tickets such authorisation and the adverts must be approved by the same entity in charge of authorising the gambling activity. At the national level, approvals are granted by the national competent authority, Coljuegos.

### 38 What are the requirements for advertising and offering promotional contests?

There must be clarity in terms of the mode, time and place of the promotion. The terms and conditions of promotions should be easily accessible to consumers.

If the promotion does not involve chance, no authorisation from any regulatory entity is needed; nonetheless, the promotion and terms and conditions must comply with all the requirements of the Consumer Protection Statute, which is the governing law of the promotion. If it is a chance-based promotion, authorisation is needed.

It is important that all advertisement pieces include all the conditions of the promotion (ie, they must include all of the conditions of

time, mode and place of the promotion), as the information provided to the consumer should be complete and clear.

The terms and conditions must be legible (ie, the font size must be large enough to allow the average consumer to read them without having to make an effort). The SIC has emphasised in relation to the 'fine print' that, while there is no requirement for it to be a certain size, the terms and conditions should be a normal and readable size.

The terms and conditions and all of the advertisement must be in Spanish.

#### **39 Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?**

As a mandatory rule for all advertisements, the person, company or entity that is offering the goods or services must be clearly indicated for consumer information. All the general rules apply. Product placement by itself does not have any specific regulations.

#### **40 Briefly give details of any other notable special advertising regimes.**

All advertisements must be in Spanish and comply with the principles of good faith and public order.

### **Social media**

#### **41 Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?**

There are no special rules pertaining to the use of social media for advertising. The general rules of advertising also apply to social media.

Notwithstanding this, the Self-Regulatory Code on Advertising contains a chapter on social media advertising, which indicates that such advertising must respect individuals, groups and associations and should have acceptable standards of commercial behaviour.

In addition, said advertisements should comply with the provisions relating to the Personal Data Protection Statute.

#### **42 Have there been notable instances of advertisers being criticised for their use of social media?**

Not within the context of a judicial proceeding publicly discussed in the press. However, the SIC has issued a legal opinion, concerning marketing through social media, according to which, it clarifies the scope of liability of social networks when they are operated by the users as a selling platform.

The main arguments of the legal opinion concerning social networks are highlighted as follows:

- an advertiser is liable before consumers since the regulation refers to the manufacturer or provider that advertises the goods or services. However, the platform in which the advertisement is promoted would be liable in the case it is possible to demonstrate bad faith or guilt from the social network (in this case), concerning the deceiving advertisement;
- the SIC considered that social networks do not have a commercial interest, but a social one. Hence, it is not possible for a social network to determine or affect a consumer in its decision-making process;
- if social networks act as advertisers, then the Consumer Protection Statute would be applicable to them, not only as a platform in which the advertisement is promoted, but as a manufacturer or provider; and
- when a user commercialises goods or services, only the user would be liable for what is advertised, as social networks cannot respond for the way the accounts are used.

This is not a decision per se, and curiously enough it does not bind the SIC. Nonetheless, it is the latest opinion issued related to social media marketing.

#### **43 Are there regulations governing privacy concerns when using social media?**

Such regulations are mostly within the scope of the Personal Data Protection Statute, in force since July 2013, which introduced a protection system in which personal data holders must be informed of the following:

- who the person or entity responsible for the collection and use of their personal data is;
- what their personal data is going to be used for;
- what they can do if they need to update, correct or remove their personal information from the person's or entity's database;
- what they can do if they need to complain about the way in which their personal data has been used or if the person or entity in charge of collecting or using their personal data has not abided by the terms of the Personal Data Protection Statute;
- their rights as personal data holders; and
- whether they must authorise the use of their personal data in writing or any other way in which there could be evidence of such authorisation.



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