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in 19 jurisdictions worldwide

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Advertising & Marketing 2014**Contributing editor:****Rick Kurnit****Frankfurt Kurnit Klein & Selz, PC**

Getting the Deal Through is delighted to publish the first edition of *Advertising & Marketing*, a new volume in our series of annual reports, which provide international analysis in key areas of law and policy.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 19 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are always referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

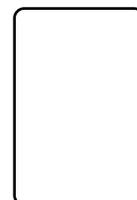
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Legislation and regulation

1 What are the principal statutes regulating advertising generally?

The legal basis for the provision of advertisement regulation is set forth by the 1988 Brazilian Constitution, which determines that the law will provide for special rules on the advertising of products and services that may offer health and environmental risks, such as tobacco, alcohol and medicines (section 220, paragraph 3, II, and paragraph 4).

The general rule of the 1988 Constitution, which came up as a result of the re-democratisation process after the military regime, is freedom of speech, so any regulations or restrictions to the contrary are of exceptional character and must be interpreted accordingly.

Only the Federal Union can legislate on advertising in abstract (section 22, XXIX of the Constitution), thus any state law to the contrary is unconstitutional and void. Nevertheless, state and municipal authorities can enforce the federal legislation (Consumer Protection Code, section 55, paragraph 1).

Major statutes regarding the regulation of advertising are the Consumer Protection Code (Law No. 8.078/90), the Civil Code (Law No. 10.406/02), the Promotional Contests Act (Law No. 5.768/71), the Advertiser Profession Act (Law No. 4.680/65) and the Intellectual Property Acts (Laws No. 9.279/96 and 9.610/98).

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?

Advertising Regulation is done above all by the National Council of Advertisement Self Regulation (CONAR), a non-governmental entity to which nearly all the market players have subscribed and whose rules they follow.

Also, on behalf of consumer protection, each Brazilian state may establish its own consumer defence authority, which will be entitled to watch for deceptive or abusive advertising.

Finally, some sectors of the economy have their own specific regulatory agencies, which may dispose advertising rules. In the case of the tobacco and the pharmaceutical industries, for instance, it is the National Agency of Sanitary Vigilance, which enforces the law and may issue complementary rules and understandings of the law. Normally, the tobacco industry defies these regulations in courts.

3 What powers do the regulators have?

No control prior to publication or divulgation is made.

Regulators can suspend a commercial and order the infringer to publish a new one, with the scope of clarifying to consumers any misleading information from the previous one (Consumer Code, section 60).

4 What are the current major concerns of regulators?

There are frequent and long-lasting debates on themes such as advertising targeted at children and even more limitations on the tobacco industry.

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

The Advertiser Profession Act expressly commands the application of the Advertisement Professionals Ethic Code (section 17), which was compiled in 1957 during the first Brazilian Advertisement Congress.

In addition, the CONAR has a traditional self-regulation code, first issued in 1978, which is widely applied by the industry.

Non-compliance may subject the infringers to administrative procedures, both in the CONAR or in consumer authorities, which will set a penalty as to the extension of any direct or implied damages and the violation background. Judicial procedures may also be sought, either directly or to challenge an administrative decision.

6 Must advertisers register or obtain a licence?

Yes, in order to work advertisers must register as such with the Ministry of Labour, by providing civil identification documents in general and a publicity diploma from an officially recognised school. Nevertheless, implementing provisions of this were never enacted and a specific organ responsible for registration and supervision (like those that exist for attorneys and physicians) was not created; so it is not uncommon to find non-registered advertisers.

7 May advertisers seek advisory opinions from the regulator?

Must certain advertising receive clearance before publication or broadcast?

There is no prior control, even for advisory opinions.

Private enforcement

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

The most secure and traditional avenue for challenging competitors' advertising is filing a judicial claim on the grounds of unfair competition, also requiring loss and damages in addition to the suspension of the advertisement. In this option the plaintiff must frame its complaint within intellectual property infringement.

Filing a complaint to the CONAR, which may be broader and admit ethics-related claims, is also effective and may result in the body's recommendation that the media companies suspend the challenged advertisement, which is commonly accepted. Damages, however, cannot be sought in the CONAR.

- 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?

Whenever damages are caused to the collectiveness of consumers, to the environment or to the economic order, a civil class action may be filed by the public prosecutors or by any public association whose statutory proposals regard the defence of any of those matters (Law No. 7.347/85). The decision of this civil action will bind everyone, unless the decision is to dismiss the action on the grounds of lack of proof, in which case anyone can file an individual complaint. Regardless of the civil action, individual consumers or a group of them are entitled to file their own lawsuits, but the favourable decision of the civil action will not benefit them unless they timely adhere to it (Consumer Code, section 104, consumers have a 30-day term to require the suspension of their individual complaints, after becoming aware of the existence of a civil class action, in order to benefit from its result).

Filing complaints to the CONAR, on the other hand, is open to any individuals, as well as to authorities, associations and advertisers.

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

In consumer actions on the grounds of misleading or abusive advertising, the advertiser bears the burden of proof (Consumer Code, section 38).

In indemnification actions arising out of unfair competition claims, the general rule through which each party ought to prove its own allegations applies (Civil Procedure Code, section 333).

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

As the result of a judgment the CONAR may:

- reprimand the infringer;
- recommend the media vehicles suspend the advertisement;
- recommend its modification fit ethical standards; and
- publicise the CONAR's decision to the general public in case of non-compliance with the decision.

Courts of justice, on the other hand, may enforce the law by ordering the suspension of the advertisement, including as part of an interim injunction relief, and establish an indemnification for the calculated damages.

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

CONAR judgments take from two to six months on average. In the ordinary courts, depending on the state, proceedings last approximately five years.

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

Complaints with the CONAR are free of charge for consumers. Advertisers must be members of the CONAR in order to file a complaint, which involves making contributions to it. Attorneys' fees are usually in the range of 12,000 reais.

In judicial actions, court costs vary depending on the amount claimed as indemnification and the state where the case is brought. Normally it is fixed at a 2 per cent rate on the value of the action. Costs and legal fees can be partially recovered from the defeated party, depending on the judge's decision on this. Attorneys' fees are not paid by the defeated party and they may vary a lot depending on the attorney: a typical amount would be in the range of 60,000 reais.

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

One can appeal CONAR decisions to the CONAR's review instances. None of these decisions are, however, legally enforceable, hence parties must comply voluntarily. Moreover, a CONAR decision may be challenged by the defeated party in the courts, though this is not common.

Lawsuits before the courts allow the ordinary appeals from the Civil Procedure Code, such as regular appeals (for review of both factual and legal issues), interlocutory appeals (for non-final provisional decisions) and special appeals (to discuss legal issues only).

Misleading advertising

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

Section 36 of the Consumer Code stipulates that all advertising must be clear enough as to allow the consumer to easily and quickly recognise it as publicity. Therefore, media vehicles must identify and distinguish content from advertisement. Nevertheless, despite this general principle, practices such as product placement in TV soap operas are common.

Section 30 of the CONAR Code indicates that paid reports or articles must be identified as such.

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

Traditional civil law doctrine distinguishes between *dolus bonus* and *dolus malus*. In general terms, according to this doctrine, a deal can only be null and void on grounds of *dolus* if the information provided is plausible and likely to deceive and mislead the average person. This would be a case of *dolus malus*, in which the average person cannot perceive the deception of the other party who is in bad faith.

The practice of puffery, on the other hand, corresponds to the *dolus bonus* concept, in which a seller, for instance, only exaggerates the quality and the characteristics of the product in order to convince the customer to buy it. No ordinary consumer is expected to believe these exaggerations, which are purely a marketing strategy.

Whereas the traditional civil law authors still acknowledge and accept the *dolus bonus* doctrine, most of the modern consumer rights authors deny its application as regards mass consumption relations in light of the stricter Consumer Code rules.

Depending on the concrete case, decisions may vary on whether they recognise *dolus bonus* or not. The CONAR usually upholds puffery ads, while courts may disapprove of them depending on their consequences in the case under analysis.

- 17** What are the general rules regarding misleading advertising?

Must all material information be disclosed? Are disclaimers and footnotes permissible?

Misleading advertising, understood as any kind of advertisement that contains false information about the product or service, either entirely or partially and also by omitting relevant information, and that is able to deceive the consumer, is forbidden and constitutes a crime (section 67 of the Consumer Code). Section 36 of the Consumer Code establishes that the producer of the advertised goods shall make all factual and technical information used to create the advertisement available to the public.

Disclaimers are mandatory to clarify any restrictions on the offer. Footnotes are commonly used by the industry, but courts usually disregard them in order to protect the consumer whenever they are virtually impossible to read, such as text that is too small on a flyer or that moves too fast on the TV to be read.

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?

According to the CONAR Code, section 27, section 1, the advertisers and publicity agencies must always be capable of proving its allegations whenever requested to. Hence, no unfounded claims are supposed to be advertised. No standards of proof are predefined.

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

According to the CONAR Code, section 27, paragraph 7, the advertisement must clearly display the source of the survey, which shall be reliable. No partial, unclear or misleading use of the results of a survey or of scientific data is allowed.

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

Section 32 of the CONAR Code establishes the principles with which comparative advertisement must comply. Firstly, the comparison must always aim for a clarification for the benefit of the consumer, and not just with the intention of vilifying the competitor's trademark or reputation. The comparison itself must always be of objective criteria and never of subjective, psychological or emotional criteria. The advertiser must be capable of proving the truthfulness of the comparison. The comparison must not cause confusion between the compared products and must not imply unfair competition, as regulated by the Industrial Property Act.

In addition to these general principles, other specific rules are that:

- the comparison must be made between products manufactured in the same year, except if used to demonstrate the evolution of a product, which shall be made clear; and
- if the comparison is made between products of different price ratings, this should be clear in the advertisement.

Competitors can be named in a comparison, though this is not a common practice in Brazilian advertising.

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

No specific kinds of proof are required, or higher or special degrees of proof, but the advertisers and publicity agencies must always be capable of proving their allegations whenever requested (see question 18).

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

No, but the general principle of not inducing the dangerous use of the advertised product must be adhered to.

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

Section 27, paragraph 9 of the CONAR Code establishes that testimonials must be personal and always true. Advertisers must also be capable of proving the accuracy and truthfulness of the testimonial employed whenever requested. Civil law obliges the prior authorisation of the endorser.

24 Are there special rules for advertising guarantees?

No, as long as they correspond to the truth. Otherwise, it may be interpreted as misleading advertisement. Moreover, the courts will

consider any promises made in advertising as binding, despite what the actual sales contract says.

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

No, but advertisers must always inform consumers about the possible danger and the negative impact their products may cause to the environment, in addition to the fact that positive claims about benefits to the environment must always be truthful (CONAR Code, section 36).

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

No, as long as they correspond to true gifts, savings and discounts. Otherwise, it may be interpreted as misleading advertisement.

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

No, as long as such claims are truthful. Otherwise, they may be interpreted as misleading advertisement.

Prohibited and controlled advertising

28 What products and services may not be advertised?

Firearms, munitions and explosives cannot be advertised, except within specialised magazines (section 33, II, Law No. 10.826/03 – the Disarming Statute). Non-compliance carries a 100,000–300,000 reais fine.

Medicines and methods to induce abortion are also forbidden (section 20 of Decree-Law No. 3.688/41).

Medicines that cannot be bought without medical prescription cannot be advertised, except within specialised magazines targeted at physicians, chemists and pharmaceuticals (section 58, paragraph 1 of Law No. 6.360/76). Other medicines must be previously authorised by the Ministry of Health.

29 Are certain advertising methods prohibited?

Some proposals have been introduced in the National Congress to expressly forbid product placement, spam e-mails, subliminal messages, etc, but none of them has become law yet.

On the other hand, advertisements that explore superstitions and fears are expressly prohibited (Consumer Code, section 37, paragraph 2).

These methods can also be interpreted in a concrete case to violate the general principles of the Consumer Code.

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

It is prohibited to advertise and announce any film, theatre play or show without establishing the age rating for it (section 253 of Law No. 8.069/90 – the Child and Teenager Statute). Products forbidden to those under 18, such as alcohol, pornography and tobacco cannot be advertised to the public, nor include children or teenagers (sections 78–79 of Law No. 8.069/90).

At the beginning of April 2014, the National Council on Children and Teenagers' Rights issued a new resolution on advertising to children (Resolution No. 163/2014). This new resolution put severe restrictions on the industry, making it virtually impossible to advertise anything to children. Since it is not a law, only a resolution, it will be probably challenged in courts if the Council tries to enforce it on the reluctant industry. The resolution forbids, for instance, the use of cartoons, action figures, dolls, childish language, childish songs and collectable prizes in advertisements. Since it is so

recent, we do not know how the industry or the government will react to these restrictions.

The CONAR Code also provides some important guidelines for advertising to children (section 37). These include that advertising:

- must preserve social values such as honesty, justice, friendship, generosity, etc;
- shall not encourage discrimination against those who cannot afford the advertised goods or associate ownership of the goods with any notion of superiority in relation to children deprived of it;
- shall respect children's inexperience and ingenuousness and must not cause fear or provoke psychological distortions;
- shall not encourage violent behaviour or show children in dangerous situations; and
- must not suggest misbehaviour as a technique to force parents to purchase the advertised goods.

The CONAR Code also forbids product placement or any other form of indirect advertisement targeted at children.

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

Exhibit E of the CONAR Code provides some special rules for financial products such as respect for the confidentiality of investors and the supply of clear information, including how projections and estimates were made, in order to ensure a conscious decision by the client.

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

As observed in question 28, medicines that cannot be bought without medical prescription cannot be advertised, except within specialised magazines. Other medicines must comply with the terms of the authorisation issued by the Ministry of Health.

Exhibit G of the CONAR Code governs advertisement by physicians, dentists, veterinarians, masseuses, hospitals and so on. Among the guidelines, these professionals and entities cannot suggest the ability to cure diseases for which there is no appropriate treatment yet, such as AIDS; they cannot publicise the use of unconventional methods of treatment or diagnosis or claim to be specialised in non-recognised areas; and they cannot offer long-distance diagnosis.

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

Exhibit H of the CONAR Code provides some guidelines for the advertisement of food and beverages. Among these, we highlight the following. Advertisements must always seek to encourage the practice of physical exercise and present the announced product data accurately. They shall avoid encouraging excessive consumption and presenting a product as a replacement for ordinary meals, such as breakfast and lunch. They must avoid associating the product with popularity, good sexual or sporting performance, or pharmaceutical or medical benefits.

Decree 2.018/96, section 16, forbids all kinds of allusion to metabolic or therapeutic effects in the advertising of diet products.

Those products must also comply with the sanitary regulations, as regards their formula, packaging and presentation, which will naturally affect the advertising.

34 What are the rules for advertising alcoholic beverages?

In radio and broadcast television, alcoholic beverages only can be advertised between 9pm and 6am (section 4 of Law No. 9.294/96). Simple announcements of sponsorship of programmes during daytime broadcasting are, however, allowed.

In all media, advertisements must always warn consumers not to overconsume alcohol as well as not to drink alcohol and drive. Bars

and other selling points must also bear signs indicating that the sale of liquor is interdicted to minors under 18.

As regards the content of alcohol advertising, they cannot associate drinking with good sexual performance, with the practice of sports or other healthy activities, or with driving.

35 What are the rules for advertising tobacco products?

Tobacco products advertising is currently limited to the exposure of the products, merchandise displays included, in their sale points, such as cigar shops or any other store that sells them (section 3 of Law No. 9.294/96). Therefore, absolutely no advertisements outside the tobacco shops are permitted.

As a consequence of this general limitation, the law clarifies that tobacco companies cannot sponsor any cultural or sporting activity, cannot make use publicity, such as product placement, cannot advertise on the internet, cannot sell their products by mail, and cannot distribute prizes or samples.

Moreover, as well as the product packaging, tobacco advertisements must include the Ministry of Health warning disclaimers, both in photos and in writing, which covers a large area of the packaging and posters. The disclaimers' lines are a short demonstration of the risks involved in smoking, like developing lung cancer. Beginning on 1 January 2016, the total surface of the warning disclaimers are lawfully determined to increase to more than half of the packaging.

As regards the content of the adverts, the law establishes some directive guidelines, such as: the advertisement shall not associate smoking with good sexual performance, cultural or religious celebrations, children or teenagers, the practice of sports, or relaxation.

36 Are there special rules for advertising gambling?

Professional gambling activity, such as owning a casino, is prohibited in Brazil; therefore no such advertisements are allowed (section 50 of Decree-Law No. 3.688/41). Private gambling is legal, but its debts cannot be enforced before the courts (Civil Code, section 814).

37 What are the rules for advertising lotteries?

Since the lotteries in Brazil are a state monopoly (section 51 of Decree-Law No. 3.688/41), only the state can advertise them. There are no specific rules aimed at them.

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

Promotional contests cannot be rendered without a previous licence by the competent authority (section 1 of Law 5.768/71). The competent authority is either the Economic Monitoring Secretary of the Ministry of Treasury (SEAE) if the contest promoter is a financial entity or the CAIXA (a federally owned state bank) for all the other promoting companies.

In order to receive the licence, the promoter must first submit the contest plan (a short summary of the promoter's intentions, featuring the intended rules of the contest, the intended prizes, duration, etc), the terms of participation, the advertisements' intended designs and artwork, a receipt for the purchase of the prize and other bureaucratic documents for the evaluation of the SEAE or the CAIXA. The proceeding takes from one to two months to be completed. After the end of the contest, the promoter must provide its accounting numbers and pay income taxes for the prizes.

Prior to this authorisation, therefore, no advertisement or promotional contest at all can be carried out.

Notwithstanding the foregoing, the law also comprises the existence of a special category named as 'cultural contests' (section 3, II, of Law 5.768/71). According to the law, such 'cultural contests' do not require prior authorisation, since they are mostly aimed at recreational purposes. Hence, their main goal is not to promote a brand

or sell anything; rather, they are intended only to offer some kind of amusement to the participants, who can win a prize (normally not of significant value).

From the viewpoint of time and costs, thus, to promote a cultural contest is faster and cheaper, in addition to the fact that they are also preferable when the prizes are not substantial ones (a book rather than a trip, for instance). Unlike prior-authorised promotional contests, however, cultural contests are very limited with respect to publicity. As a result, trademarks cannot be widely exposed and participants cannot be obliged to buy anything in order to participate (see question 41).

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

Apart from the general principle that the consumer must always be able to easily and quickly recognise the publicity as such (see question 15), there are no restrictions as regards those matters.

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

Political advertisement is regulated by the Electoral Code (Law No. 4.737/65) and other special laws. As a general rule, political advertisement must be supported by the politicians and parties themselves; being permitted to acquire the resources through donations and the use of the governmental parties fund.

In relation to candidates in election years, as elections are held in October, campaigns are only allowed to begin after 5 July (section 36, Law No. 9.504/97). Parties may, however, advertise their programmes all the time.

Broadcasting and radio have a proper regime. Advertising on these is free to the parties and candidates, each of them having an amount of time proportional to their representation in the National Congress (section 45–49, Law No. 9.096/95). In ordinary years and during electoral campaigns the parties have a special and compulsory schedule on national TV and radio stations. Pay-TV is not included in this order.

In all these advertisements, parties and candidates are entitled to seek the right of reply before the electoral courts if they consider themselves offended by another candidate or they wish to clarify a misleading statement of the other party.

Update and trends

New pieces of legislation are constantly being proposed, so there is an ongoing debate on many issues, mostly related to new restrictions to tobacco, alcohol and child advertising. These questions become more pressing in certain moments and settle down in others, but they never vanish. The latest topics concern the regulation of the internet (see question 43) the new regulation on advertising to children (see question 30), and the proposal for plain packaging for tobacco without any distinguishing features or of the different brands.

Social media

41 Are there any rules particular to your jurisdiction pertaining to using social media for advertising?

The Ministry of the Treasury has very recently issued an ordinance (Portaria MF No. 422/2013) to restrict the use of social media for cultural promotional contests. These contests may only be publicised on social networks, meaning that participation itself in the contest cannot imply the use of a social network. In other words, contests requiring, for instance, the posting of pictures or sentences by participants on Facebook or Twitter are not allowed. Non-cultural contests (thus subject to prior authorisation, as explained in question 38) are not included in this restriction.

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

Recently, the contraceptives brand Prudence released an advertisement on Facebook that, according to some users, encouraged sexual violence against women. After online protests, the advertisement was withdrawn and the company issued an official apology for the campaign.

Another case involved a Nissan advertisement on YouTube. It was actually an extended version of a TV commercial that featured some cartoon ponies. The reference was that competitors' pick-ups did not have horsepower, but were moved instead by pony-based engines, which was portrayed as a sort of curse on drivers. Since the commercial had some colourful cartoons, it was criticised on the grounds of attracting children and associating ponies, which are themselves associated with children, with a curse (at the end of the YouTube video, the cartoon threatens the user to share the video or bear the consequences – that is, to be cursed by the ponies). The case was brought to the CONAR by over 60 consumers, but the CONAR upheld the commercial as it was.

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

On 23 April 2014 President Dilma Rousseff signed into law the Brazilian Internet Statute, whose text had been in discussion since 2012 in the National Congress. The newly approved statute provides the basic rules for using the global network in the country, which include setting forth some privacy guarantees that before were only implied by the general civil law. Although not targeted directly at social media, these guarantees will strength the privacy of users, ensuring the confidentiality of data traffic and limiting the commercial use of their personal data.

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