



Advertising legal requirements (practical overview)

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Advertising is a socioeconomic phenomenon whose uniqueness is marked by the continuous development of techniques and methods to share advertising information with consumers. Companies are always moving forward, creating new approaches how to produce advertising. This requires advertisers to be guided by law enforcement practices.

This alert does not presume to analyze the entire scope of legal requirements and constraints that cover advertising, but it is intended to provide a brief practical overview of the main legal restrictions for advertising.

DEFINITIONS AND REGULATIONS

The main law regulating legal relations within the scope of advertising activity is Federal Law No. 38-FZ "On advertising" dated March 13th, 2006 (hereinafter the Law "On advertising"). Article 3 of this Law contains 4 mandatory clauses that pertain to advertising:

- 1) Advertising is always **information**;
- 2) Advertising is geared toward an unspecified number of **individuals**;
- 3) The aim of advertising is to generate attention for the product being advertised and to generate/maintain interest in that product;
- 4) Advertising is intended to drive and promote the advertised object on the market.

In the absence of one of the features mentioned above, the information should not be considered advertising in accordance with the Law "On advertising". Thus, advertising should be segregated from other marketing tools in order to correctly determine the applicable legal requirements and restrictions. Article 2 in the Law "On advertising" removes the following marketing instruments from the scope of the advertising regulation:

- Signboards that are deployed at the place of the advertiser's business activity;
- Information deployed on pack regarding the packaged product or its manufacturer/seller;
- Any visual elements placed on the product;
- Product placement.

For example, product placement does not contain the mandatory components in advertising like information about the product (service), because no consumer properties are declared. The main characteristic of product placement is organic integration into the piece of art or product of science. Otherwise, as soon as product placement is accompanied with direct information about the product (service), it needs to be compliant with the requirements and restrictions contained in the Law "On advertising".

The basic legal advertising requirements are contained in article 5 of the Law "On advertising". Advertising should be fair and authentic, regardless of the type of object being advertised.

Advertising, with an aim to being fair, should meet the following restrictions according to Article 5 (2) of the Law "On advertising":

- Advertising does not contain incorrect comparisons with other goods (services) available on the market;
- Advertising is not to damage the dignity and business reputation of third parties;
- Advertising is not an act of unfair competition in accordance with antimonopoly legislation;
- Advertising is not surrogate advertising¹ of products (services) that are forbidden/restricted from being advertised.

¹ Surrogate advertising is a form of advertising that is used to promote products in the disguise of another product.

Authenticity in advertising (Article 5 (3) of the Law "On advertising") is provided by the fact advertising should not contain unverified information. The advertiser is fully responsible for the authenticity of the information regarding its own business activity, and for information related to competitors' products and business activity.

Apart from the basic requirements, the legislation contains a set of special requirements with respect to separate categories of products (services) such as alcohol products, medicines, medical devices and medical services, biologically active supplements, financial services, securities, alternative dispute resolution activity, services involving signing leasing contracts, betting activities, and games based on risk. For example, advertising of alcoholic products should not be addressed to minors, and advertising of medicines should not express any individual's gratitude.

BRIEF PRACTICAL OVERVIEW

Herein we briefly overview the main advertising requirements by analyzing several practical decisions issued by the regulatory authorities.

1) Incorrect comparisons in advertising

Advertising should not contain incorrect comparisons with other products (services) available on the market, according to Article 5 of the Law "On advertising". The results of the dispute between a big Russian kvass² manufacturer and the Federal Antimonopoly Service (hereinafter the FAS³) illustrates this requirement⁴.

An advertiser distributed outdoor advertising of kvass that contained a comparison between its own brand and competitors' brands based on the products' countries of origin. The visual part of the advertorial was drawn as a kind of top list, where

the advertiser's brand was placed on top. In addition, the advertiser's product and country of its origin (which was Russia) were underscored by using italics. The specific nature of advertorial's visual concept helped form the impression on consumers that the advertised product was superior to its competitors' due to fact it was produced locally. The consumers' perception was enhanced by the fact that the advertorial was distributed in time when the FIFA World Cup was running, with the local national team participating, and the advertorial contained direct links to the global event with a soccer ball image and the claim "Which team are you playing for?". Arousing patriotic sentiments due to the national team's participation formed the consumers' perception that the advertised product was superior to others because of its local status.

The main outcome occurring from the reviewed case is that any comparison should be based on objective criteria. The country of the product's origin could not be treated as an objective criterion. Moreover, direct links to "big" events and visual elements have crucial meaning in assessing advertising from a legal standpoint.

The main outcomes that came about are following:

- Any comparison without mentioning the objective criteria will be considered as a violation of the Law "On advertising" in the form of an incorrect comparison;
- Consumers' perception has key significance in assessing advertising from a legal standpoint.

2) Misleading the consumer in advertising

It is prohibited to distribute advertising that does not contain a significant part of information related to product being advertised if the meaning of the information is misrepresented, and misleads consumers. This

² Kvass is a traditional Russian non-alcoholic drink.

³ The Federal Antimonopoly Service (the FAS) is the state body regulating advertising legal relations.

⁴ The FAS decision dated February 13th, 2015 in case No. 3-5-41/00-08-14.

case will further illustrate the requirement. An airline shared outdoor advertising where it used the tag "Flights to Moscow for 999 rubles". The claim was accompanied by a disclaimer "with the exception of additional charges". The regulator assessed the Airline's website information and documents provided by the advertiser, and concluded that the final price for the flight exceeded the price declared in the advertising because it consisted of a rate in the amount of 999 rubles plus additional charges. The accompanying disclaimer was assessed as unreadable due to its small size. The FAS concluded that part of the significant information was absent and this, in turn, misled consumers. Thus, the advertiser was compelled to pay administrative fines and cancel the advertising.

The main outcomes derived from the case are the following:

- Advertising should contain all significant information about the products (services);
- A disclaimer is not a tool to change the meaning of the main claim, or to correct it;
- Advertising information is automatically treated as misleading by regulatory authorities in case the accompanying disclaimers are not visible, or are barely readable.

3) Ethical aspects of advertising

According to article 5 (6) of the Law "On advertising", it is not allowed to use swear words, any offensive images, comparisons and statements with respect to gender, race, nationality, occupation, social class, language, official state symbols (flags, coats-of-arms, and anthems), religious symbols, or cultural heritage property.

At first glance, this restriction seems to be obvious. Incidentally, the regulatory authorities can sometimes discover aspects

that are deemed unethical, even if they are not always that obvious.

A global FMCG company aiming to promote its antidandruff shampoo launched a corresponding regional advertising campaign using the Russian flag. The flag was deployed closely to the advertising claim "Mission goodbye, dandruff". The FAS treated the advertiser's activity as potentially discrediting the Russian flag due to the fact that the flag was placed near the word "dandruff"⁵. By the way, the advertiser succeeded in proving that no offenses with respect to the national flag were committed. The company conducted sociological consumer research to find out if consumers saw anything offensive aimed toward the flag. The company's legal department was deeply involved in solving this issue.

As follows from the case, consumers did not see anything that offended the national flag, and the case was closed in favor of the advertiser. However, this case is the evidence that officials pay close attention to the way national symbols are used in advertising, and even the lawful usage of symbols may lead to administrative fines and reputational damages.

4) Minors in advertising

Article 6 of the Law "On advertising" contains a set of restrictions that is geared toward protecting minors. It is not allowed to do the following:

- To discredit parents and/or teachers;
- To provoke minors to convince their parents or other individuals to buy the advertised product;
- To create a distorted impression that the advertised product is available for families with any level of income;
- To create an impression that ownership of the advertised product will place a

⁵ The FAS order dated 17 January 2017 on case No. 3-5-37/00-08-16.

minor in a preferential position compared with that minor's peers;

- To show minors in dangerous situations;
- To purposely decrease the level of knowledge that is required in order to use the advertised product;
- To form an inferiority complex in minors.

A major mobile phone operator distributed advertising that exploited the image of young schoolchildren. One child addressed the following statement to his parents: "Mom, Dad, buy me this tablet". The regulatory authorities assessed the controversial advertorial in terms of its relevance to minors' advertising legal restrictions, and stated that the advertiser violated the requirement not to provoke minors to convince parents to buy the advertised product. The FAS considered the minor's acts demonstrated in the advertising as the kind of behavioral model suggested by the advertiser⁶.

5) Healthcare professionals in advertising

One rather common violation in the sphere of advertising is exploiting the healthcare professional (hereinafter the HCP) image that is prohibited in Paragraph 4 of Article 5 (5) of the Law "On advertising".

A service center distributed printed advertising materials where the image of HCP was used in the context containing the claim "You could improve immunity of your vehicle in our service center". The FAS treated the advertising as non-compliant with the Law "On advertising," and not only the court of original jurisdiction, but also the higher courts supported the conclusion reached by the FAS⁷. The advertiser argued that the person showed was not HCP. However, his argument was not well-received either by the courts or the FAS, because the white coat showed therein creates a

solid association with HCP on the part of consumers.

Any words and phrases used that could potentially create consumers' associations with HCP should be treated as exploiting the image of healthcare professionals. For example, the regulatory authorities could consider statements like "recommended by medical society", "tested by dermatologists", "supported by pharmaceutical associations" as exploiting the image of HCP.

RECOMMENDATIONS

1) Establish advertising compliance in your company

Advertising compliance is an integral part of the company's compliance system that is called upon to mitigate the legal risks related for advertising production. Advertising compliance can be an organic part of antitrust compliance that has already been set up, or it could become an independent institution geared toward compliance. While establishing advertising compliance, companies should pay increased attention to the three following components:

- Creating a regular training schedule that is mandatory for employees responsible for marketing and advertising activity;
- Creating a policy related to networking with regulators in the sphere of advertising (the FAS);
- Creating a system of internal policies that regulates the principles and approaches to the advertising and marketing activity performed by the company.

2) Conducting sociological research

The FAS usually assesses advertising from the consumers' standpoint that holds key significance to assessing advertising for its compliance with legal requirements. Socio-

⁶ The FAS order dated 28 November 2014 on case No. 4-14.3-806/00-08-14.

⁷ The territorial FAS decision dated April 25th, 2016 in case No. ТГ04-03/2015-242P; The decision of the Arbitrary court of the Republic dated December 5th, 2016 in case No. A71-10324/2016.

logical researches (e.g. surveys) evidently show how consumers perceive advertising and visual information. Sociology will help advertisers to mitigate or avoid the risk of misleading consumers. It is recommended to involve legal departments in elaborating the questions.

3) Try to avoid bulky disclaimers

Advertisers usually use big and bulky disclaimers that aim to provide consumers with additional information regarding the product (services), or with information that is mandatory due to legislative requirements. Frequently, shared disclaimers are hardly perceived at all by consumers due to the small size of the used letters that makes disclaimers unreadable. This automatically lets the FAS qualify the advertising informa-

tion as nonvisible. Moreover, it is important to note that the disclaimer is not a tool to change the meaning of the main claim, or an instrument to correct it. Thus, advertisers should assess the visibility and perceptibility of disclaimers with increased attention, taking into account that no parameters with respect to disclaimers are stipulated in actual legislation.

4) Be guided by law enforcement practice

As mentioned above, advertising is a dynamically, continuously developing phenomenon that is only slightly regulated by the Law "On advertising". One of the most important legal sources is the practice of considering advertising cases reviewed by the FAS and the courts.

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