

SPAIN



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| 1. Legislation: | Advertising Code of Conduct |
| Topic: | Violation of the rule for legality and the principle of truthfulness |
| When: | February 2004 |
| Who: | ADVERTISING SELF-REGULATION ASSOCIATION |
| Where: | SPAIN |
| What Happened: | <p>The company Colgate-Palmolive, S.A. ("Colgate") broadcasted the following TV advertisement:</p> <p><i>"The advertisement starts with the picture of a restaurant kitchen where various cooks and their assistants realize hectic activities all of them going around the Chief cook. A male voice says:</i></p> <p><i>"This is not a good place for teeth sensible to heat pain..." while it may be observed how the Chief cook takes a little sip from a hot dish and reacts with a painful grimace. Consequently, the voice says: "...and to the cold..."</i></p> <p><i>Meanwhile the Chief cook tastes a cold dish which provokes again a painful reaction on his face, while he covers his mouth with his hand and the voice says: "...unless you have a secret." The new Colgate with potassium citrate combines the insurmountable relief for sensible teeth with the complete care of Colgate accompanied with strong fresh flavour". Afterwards on the screen appears the tooth paste "Colgate Sensitive" which surrounds a tooth and consequently a tooth brush, as well as the image of a package of the advertised product. The advertising continues with the image of the Chief cook who tastes the food without pain while the voice says: "With "Colgate Sensitive" I feel no more pain. I have fresh breath and white, healthy teeth. The Chief cook stays by some fellow diners and the voice which accompanies the images says: "it is a pleasure to use it every day". The advertisement ends showing the container of the product, while the voice says: "New Colgate Sensitive, you would like to use it every day".</i></p> <p>A complaint was made against this advertisement by the company Glaxo Smithkline Consumer Healthcare, S.A. ("Glaxo"), classifying it as misleading and fraudulent for the consumer and requesting its cessation.</p> <p>According to Glaxo the end user could assume that the tooth paste is some sort of painkiller, which is not the case since it cannot eradicate any teeth pain. However the message "<i>insurmountable relief</i>" induces the public that there is no any other product capable of relieving teeth pain and this is a clear case of fraudulent advertising of an "excluding" type. Therefore, Art. 2 and 14 of the Advertising Code of Conduct have been violated.</p> <p>In its contestation Colgate stated that the advertising does not violate any relevant regulations or norms in the advertising area since it only deals with pain reduction. Additionally Colgate states that the <i>potassium citrate</i> indeed reduces the pain and leads to its progressive eradication.</p> <p><i>The Jury partially approved the claim stating that an average consumer would</i></p> |

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| | <p><i>reasonably understand that there was no violation of Art. 14 of the Advertising Code of Conduct (principle of truthfulness) made by Colgate, however there was a violation of Art. 2 (rule of legality), because it is forbidden that any advertising, which attributes preventive or specific therapeutic effects, which are not supported by sufficient proof in this respect. According to the Jury the statement "With "Colgate Sensitive" I feel no more pain..." is a clear allegation that the product is a painkiller which eliminates pain and this does not correspond to the truth.</i></p> <p>Colgate challenged this decision. It alleged that the sentence "...I feel no more pain..." is frequently used by other tooth paste fabricants without the attributing of any therapeutic qualities to the respective products.</p> <p>The appeal was rejected. The Jury reiterated that the elimination of the pain is a characteristic of a determined type of medicines (the analgesics). On the other hand, from the phrase "With "Colgate Sensitive" I feel no more pain..." the average rational consumer may draw a conclusion that the product eliminates the pain, which violates Art. 2 of the Advertising Code of Conduct.</p> |
| Comments: | A clear distinction between statements attributing pain ease characteristics to tooth pastes and statements insisting that the tooth paste is a painkiller (<i>i.e.</i> a medicine) must be always made. |

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| 2. Legislation: | Advertising Code of Conduct |
| Topic: | Discriminatory advertising |
| When: | May 2004 |
| Who: | ADVERTISING SELF-REGULATION ASSOCIATION |
| Where: | SPAIN |
| What Happened: | <p>Recently the company Compañía Coca Cola de España S.A. ("Coca Cola") broadcasted the following TV advertisement for the promotion of its Fanta products:</p> <p><i>"The next trip should be in a sunny place, shouldn't it guys?"</i> <i>Says one of the boys sit by a fire near a beach while there is a bad weather surrounding them.</i> <i>"What if we go and do some camping?" Offers the protagonist.</i> <i>In this very moment we see how he moves sharply and he appears dressed in a boy scoutish manner. The boy offers:</i> <i>"Come on, guys, let us sing a song!" and he starts singing a song:</i> <i>"An arrow in a camp..." following the melody by clapping his hands in front of the rest of the astonished guys. One of his friends raises a can of Fanta and passes it to the protagonist. While drinking it, the boy moves convulsively until he turns up again into the old personage. He falls down on the sand and looks with puzzlement the Fanta can. On the screen appear different pictures of a dessert and data about the promotion, which appears in the bottom. A voice says: "This year, with Fanta, go to an oasis in the middle of the dessert". The advertisement ends with a phrase in English, stating: "And remember, no Fanta, no way".</i></p> <p>A complaint was made against this advertisement by the Federation of Spanish Scouts ("The Federation") classifying it as misleading and consequently fraudulent for the end user. The Federation considers that the advertisement in question may adversely affect the numerous members of the multiple Spanish Boy Scout Associations. Therefore the Federation requests the advertisement cessation and respective public apology.</p> |

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| | <p>In its contestation in writing Coca Cola pointed out that in its complaint the plaintiff does not indicate which provision of the Advertising Code of Conduct was in fact violated. According to Coca Cola the young protagonist transforms himself into an amusing “personage” who plans to go camping in the summertime, which was an experience shared by many Spanish children, not necessarily in boy scouts’ camps. Besides, the defendant insists that such a funny transformation was typical for many comedies. As of the special effects’ side, it introduces the protagonist in an unreal and magic scene like an oasis, which is precisely the announced prize of the Fanta promotion.</p> <p><i>Upon a detailed analysis of the advertisement described, the Jury of the Spanish Advertising Self-Regulation Association rejected the complaint.</i></p> <p>The Jury understood upon hearing it, that although the Federation did not expressly cite any rule on ethics, it seems that Rule 10 of the Advertising Code of Conduct is taken into consideration (discriminatory advertising), which states:</p> <p><i>Advertising must avoid endorsing discrimination based upon race, nationality, religion, sex or sexual orientation. Advertising must respect human dignity.</i></p> <p>However, according to the Jury, the interpretation of the advertisement made by the average consumer would not relate it to the boy scout’s discrimination or to any violation of their human dignity. Hence the perception transmitted to the consumer is an attempt to encourage him/her to participate in the promotional prize draw consisting in an unusual vacation in desired exotic places.</p> <p>When there is a clear humoristic and exaggerated manner of representation of certain advertisement situations, no offence or any discrimination is intended. The average rational consumer would not interpret the advertisement as a discrimination or violation of the scout’s human dignity.</p> |
| Comments: | The reference to well known topics (the characteristics of certain states, professions, etc.) is, in principle, a lawful instrument, which is frequently used by the advertising industry. |

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| 3. Legislation: | Advertising Code of Conduct |
| Topic: | Violation of the rule for legality |
| When: | May 2003 |
| Who: | ADVERTISING SELF-REGULATION ASSOCIATION |
| Where: | SPAIN |
| What Happened: | <p>The company DANONE, S.A. (“DANONE”) named one of its products “Mousse de Yoghourt”, indicating it in its labeling, packing, a TV advertisement and on its own web site. There was as well an indication in small characters informing that the product is a “lacteal desert”.</p> <p>In its complaint the company Grupo Leche Pascual, S.A. (“Leche Pascual”) alleged that the product “Mousse de Yoghourt” (“the product”) was not indeed a yoghurt. In fact it did not contain yoghurt since according to the legal definition stated in Royal Decree 179/2003 it is only considered as yoghurt a product which contains two specific types of living bacteria (<i>lactobacillus bulgaricus</i> and <i>Streptococcus thermophilus</i>) in certain types of milks. Therefore the plaintiff considered DANONE’s product as lacteal desert and insisted that</p> |

using the “Yoghourt” denomination was illegal. Secondly, cited use could mislead consumers in respect to the real identity, qualities, composition and manner of preparation of the yoghurt.

Consequently DANONE presented a contestation were it argued that the complaint was in fact an act of unfair competition as an attempt to disclose certain company’s secrets. DANONE presented a certificate from the “Laboratory of Science and Engineering for the Food Industry” demonstrating that the product indeed contains living bacteria in the amounts required by law and there is no violation of Art. 2 and 14 of the Advertising Code of Conduct.

The Jury of the Spanish Advertising Self-Regulation Association decided not to examine the merits of the case until the issuance of a specific report by the National Consumer Institute related to the real content of yoghurt in the product. The response of the relevant authority was positive not only in respect of the existence of yoghurt, but also in respect to the legally required levels of bacteria. Therefore the Jury rejected Leche Pascual’s complaint.

Among its main arguments were the lack of proof presented by the plaintiff and the obtained scientific report on the matter.

However, cited decision was challenged by Leche Pascual based on the following arguments: **a.** There was a violation of the rule of respect for the legality made by the Jury; **b.** There was a wrong interpretation of the above mentioned scientific report; and **c.** The non application of Art. 12 of the Royal Decree 179/2003 regulating the yoghurt’s quality resulted in violation of the respect for legality rule.

The plaintiff insisted that the product was not satisfying the legal quality requirements and could not use the words “yogur” or “yoghourt” in its commercial designation. It also stated that the name “Mousse de Yoghourt” was not only contradicting the established legal framework, but also misleading consumers concerning the real identity of the product. In fact the product was “lacteal desert” and not yoghurt.

In its contestation in writing DANONE stated that facing the numerous proof presented concerning the existence of a yoghurt component in the product the allegations of the plaintiff seem paradoxical. Moreover, Art. 12 of the Yoghurt Quality Regulations permits the use of the words “yogur” or “yoghourt” as ingredients of other products.

The Jury also enabled the parties to present their opinions on the respective EU legal framework, taking into consideration that an EU norm (contained in Regulation No 1898/87 on the protection of designations used in marketing of milk and milk products), could substantially affect the outcome of the case.

In respect to Regulation No 1898/87, DANONE reiterated that its Art. 3.1 supported the company statement in respect to the legal use of the designation “Mousse de Yoghourt”. On the contrary, Leche Pascual insisted that Regulation No 1898/87 was just *de minimis* type of norm and it only established the simple framework for all EU member states. However they could freely maneuver within the above set limits, since there was no explicit “yoghurt” legal definition within community legislation.

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| | <p><i>Finally, upon analysing the advertisement described and upon taking into consideration the arguments of both parties, the Jury rejected the appeal of Leche Pascual.</i></p> <p>The Jury justified such an approach stating that even if Spanish legal framework did not consider as “natural yoghurt” a product containing additives such as sugar and gelatine, it allowed the use of the “yoghurt” designation in “newly composed products”. In addition the relevant EU regulation also established an exception favorable to the use of the term “yoghurt” for the designation of products whose nature is well known due to their traditional use and/or whenever designations are used to describe certain qualities typical for the product.</p> |
| Comments: | In certain cases the designation of a specific food product may be used to define the name of other newly composed products, but only if the composed product contains it as one of its ingredients. |

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| 4. Legislation | Advertising Code of Conduct |
| Topic: | Violation of the rule for legality |
| When: | January 2004 |
| Who: | ADVERTISING SELF-REGULATION ASSOCIATION |
| Where: | SPAIN |
| What Happened: | <p>Recently the company Compañía Renault España Comercial, S.A. (“Renault”) broadcasted the following TV advertisement:</p> <p><i>The advertisement starts with the picture of a man climbed on a stare fixing a lamp, while in the kitchen a woman is talking on the phone cutting some food and saying: “No, finally we stay.” In that very moment we see how the man fell from the stair onto a crystal table and the how knife stuck into the shoe of the woman. The son, scared by the sound of broken glasses enters the living room and sees how his father stands up and removes some pieces of crystal from his chest. The youth stops in front of the door while a vase falls down onto his head. Consequently we observe the woman entering the living room with the knife still stuck in her leg; the man sitting on the sofa and reading a newspaper while a burning cat walks around. The next scene shows a lady entering in a Renault Scenic who says: “They stay at home as always”. The family inside the car starts dancing and the car moves forward. Back at the house the cat approaches the man and its pants start burning, nevertheless he continues to read calmly. At the end the promoted car circulates through some urban zone.”</i></p> <p>The Association of the Commercial Communication Users (“AUG”) made a compliant against this advertising classifying it as illegal. In its allegation the plaintiff considered that the violent scenes (the burning man and cat and the injured woman) may affect the sensibility of any person and may damage the mental health of youths and children. The plaintiff also stated that there was a clear violation of the Art. 2 of the Advertising Code of Conduct.</p> <p>In its contestation Renault insisted on the fiction, on the unreal and exaggerate nature of the scenes, which contain no blood, pain or any drama. The advertising only opposed a dead plain family to the one who uses Renault Scenic and is active and amusing.</p> <p><i>Upon a detailed analysis of the advertisement described, the Jury of the Spanish Advertising Self-Regulation Association rejected the complaint.</i></p> <p>According to the Jury in the advertisement in question there was no instigation</p> |

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| | to violence but an exaggerated and humoristic “tune” of the scenes. Therefore, cited scenes cannot provoke antisocial, negligent or aggressive behaviour. |
| Comments: | Advertisement which only reproduces violent scenes, but does not incite the public to commit violence is not considered as illegal. |

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| 5. Legislation | Advertising Code of Conduct |
| Topic: | Violation of the rule for legality and the right of honour |
| When: | February 2004 |
| Who: | ADVERTISING SELF-REGULATION ASSOCIATION |
| Where: | SPAIN |
| What Happened: | <p>Recently the company Pullmantur, S.A. (“Pullmantur”) issued a brochure containing an advertisement titled “Pullmantur. Special. Sweethearts.” The brochure describes an offer for a trip with the cruiser “Brisas del Mediterraneo” and represents some pictures of couples. On the second page there was a specification of the conditions of the trip. In the upper left part of the brochure there was a picture of a couple sunbathing on the ship deck.</p> <p>A complaint was made against this advertisement by the photographed couple through The Association of the Comercial Communication Users (“AUG”). The couple insisted that in any moment they were not informed about the pictures which have been taken. The AUG considered that there was a serious violation of Art. 2 and 11 of the Advertising Code of Conduct and of certain constitutional individual rights (particularly the right of honour).</p> <p>In its contestation Pullmantur indicated that since it was not member of the ADVERTISING SELF-REGULATION ASSOCIATION, the decisions of AUTOCONTROL were not binding for it. Therefore it refused to participate in the proceedings of the Jury of the Spanish Advertising Self-Regulation Association.</p> <p>Consequently the Jury clarified that within the scope of its competence entered the solving of any case if there was a legal interest demonstrated by the plaintiffs against any piece of advertisement made by entities which were or were not members of AUTOCONTROL. However, the decisions of the Jury were only binding to the members of the ADVERTISING SELF-REGULATION ASSOCIATION and therefore, for Pullman, its decisions would only have the effect of an opinion.</p> <p>The Jury certified that, given the circumstances, there was a clear case of exploitation of the rights of personal image. Hence, there was a violation of the Art. 11 of the Advertising Code of Conduct, which states that: “Advertising must necessarily respect the right of honour, privacy and personal image”.</p> <p>Finally the claim was approved and the Jury declared illicit the brochure in question due to violation of Art. 2 and 11 of the Advertising Code of Conduct.</p> |
| Comments: | The decisions of the Jury addressed to non members of the ADVERTISING SELF-REGULATION ASSOCIATION are not binding for them. However, they remain as an instrument for rectification of certain type of conducts defending the good name of the advertising industry. |