

## Legal framework of food advertising

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The purpose of this work is to give a brief overview of the legal framework applicable in the Argentine Republic to the advertising of food supplies in general.

I will not mention here the Ethics Codes applicable to the food industry or to certain branches thereof or to the advertiser or to special regulations set forth not for everyone but for certain food supplies, like, for example, alcoholic beverages.

The advertising of food is regulated both by general rules, that must be observed in every advertising of products and services, and by special regulations, applicable only to food supplies.

### General regulations

Among the general rules that regulate advertising of food supplies I will refer first to the Civil and Commercial Code of the Nation, that forbids misleading advertising, comparative advertising, when it is deceptive, abusive, discriminatory and the advertising that leads consumer to behave in a harmful or dangerous way for his/her health or safety.<sup>1</sup>

**Misleading advertising** is forbidden also by other general regulations.

Act 17.011, included the Paris Convention for the protection of Industrial Property into the Argentine legal system.<sup>2</sup> Section 10 bis of the Paris Convention, in its subsections 2) and 3), sets forth that the following must be mainly forbidden, as regards what is concerned with here:

1° Any act of such a nature that it causes confusion, through whatsoever means, with the establishment, products or the industrial or commercial activity of a competitor... 3° Instructions or allegations which use, in the course of trade, mislead the public on the nature, manufacturing procedure, characteristics, suitability for use or number of goods.

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<sup>1</sup> Said prohibition appears in its section 1101, that qualifies the following as "forbidden advertising":

- a) when it contains instructions that are false or mislead or may mislead consumer, when they refer to essential elements of the product or service.
- b) when it compares goods or services of such a nature that they mislead consumer.
- c) when it is abusive, discriminatory or leads consumer to behave in a harmful or dangerous way for his/her health or safety.

<sup>2</sup> Since March 20, 1883, at the time of the inclusion, with the reviews of Brussels dated December 14, 1900, of Washington dated June 2, 1911, of The Hague dated November 6, 1925, of London dated June 2, 1934 and of Lisbon dated October 31, 1958.

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Decree 274/2019, of Fair Commercial Practices, forbids any kind of presentation, of publicity or advertising which through inaccuracies or concealments may mislead, deceive or confuse.<sup>3</sup>

Subsection a) of section 10 of decree 274/2019 sets forth, in turn, that to mislead on the existence or nature, manufacturing or distribution procedure, main characteristics, purity, mixture, suitability for use, quality, quantity, price, sale or purchase conditions, availability, results that may be expected from their use and, in general, on the characteristics, benefits or conditions corresponding to the goods and services are considered unfair competition acts.

Subsection b) of said section 10 forbids to mislead with respect to the business origin of the activity, the establishment of its own goods or services, so that it is considered that the same have an origin other than the corresponding one.

Subsection h) provides for another way of deception; the imitation of goods and services or business initiatives when they may generate confusion as regards the origin of the goods or services or involves an improper use of third parties' good standing or efforts.

Subsection i), forbids acts of denigration when they are based on false statements.<sup>4</sup>

Section 4<sup>th</sup> of Act 24,240<sup>5</sup>, of Consumer Defense, that sets forth the duty of information of the providers of goods and services, could be used in addition by the Enforcement Authorities to restrain misleading advertising.

The Civil and Commercial Code of the Nation<sup>6</sup>, as I mentioned before, forbids **comparative advertising** when the comparison misleads consumer.

Comparative advertising is the advertising that explicitly or implicitly refers to a competitor or its trademark or to the products or services offered by it<sup>7</sup> and to be considered legal it must comply with certain requirements.<sup>8</sup>

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<sup>3</sup> With respect to the characteristics or properties, nature, origin, quality, purity, mixture, quantity, use, price, commercialization conditions or production techniques of personal property, real property or services.

<sup>4</sup> l) Denigration acts: "To lessen the image, credit, fame, prestige or good standing of another competitor, unless the statements are accurate, relevant and true." In the same sense, paragraph 2<sup>nd</sup> of subsection 3) of section 10 of the Paris Convention forbids "2<sup>nd</sup> False statements, in the course of trade, tending to discredit the establishment, products or the industrial or commercial activity of a competitor;"

<sup>5</sup> Information. The supplier is obligated to supply to consumer in a certain, clear and detailed manner everything related to the essential characteristics of the goods and services provided by it and its commercialization conditions."

<sup>6</sup> In subsection b) of its section 1101.

<sup>7</sup> As defined in section 15, first paragraph, of decree 274/2019.

<sup>8</sup> a) It shall not mislead, deceit or confuse as regards the advertiser and a competitor or regarding the goods of the advertiser and those of any competitor.

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The Civil and Commercial Code of the Nation forbids, as I have already said, **abusive advertising**,<sup>9</sup> which is not defined by it. In Argentina it has been considered that abusive advertising mainly violates the consumer's right to fair and equitable treatment, guaranteed by section 42 of the National Constitution, section 8 bis of the Consumer Defense Act, sections 1097 and 1098 of the Civil and Commercial Code of the Nation<sup>10</sup> and the set of rights, principles and values acknowledged by the National Constitution and international treaties of human rights having constitutional status pursuant to section 75, subsection 22 of the National Constitution.

Likewise, the Civil and Commercial Code of the Nation forbids **discriminatory advertising**,<sup>11</sup> which is not defined by it. Discriminatory advertising is forbidden also by subsection i) of section 81 of Act 26,522, of Audiovisual Communication Services.<sup>12</sup>

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b) It shall compare goods that satisfy the same needs or have the same purpose. Comparison must be made objectively, between one or more essential, relevant, representative and verifiable characteristics of said goods and services, among which the price may be included.

c) The purpose of advertising must be to inform the public on the advantages of the advertised goods.

d) Advertising must neither discredit nor denigrate the intellectual and industrial property rights or circumstances of any competitor.

e) Advertising shall not improperly obtain an advantage from the good standing of any competitor's trademark.

f) It shall not present either a good as an imitation or replica of a good with a protected trademark or a tradename.

g) In the event of goods protected by a designation of origin, geographical indication or specific denomination, comparison may be made only with other goods of the same denomination.

<sup>9</sup> In subsection c) of section 1101.

<sup>10</sup> Section 1097.- Fair treatment. The suppliers must guarantee customer service conditions and fair treatment to consumers and users. The person's dignity must be respected in accordance with the general criteria arising from human rights treaties. Suppliers must refrain from performing behaviors that place consumers in embarrassing, humiliating or intimidating situations.

Section 1098.- Equitable and non-discriminatory treatment. Suppliers must give to consumers an equitable and non-discriminatory treatment. No differences may be set based on guidelines contrary to the constitutional guaranty of equality, especially, the nationality of consumers.

<sup>11</sup> In subsection c) of section 1101.

<sup>12</sup> Which sets forth that: "i) Advertisements shall not imply discriminations of race, ethnicity, gender, sexual orientation, ideology, socio-economic or nationality issues, among others; they shall not impair human dignity, they shall not offend moral or religious beliefs...". Mentioning section 81, subsection i) of Act 26,522, the federal Civil and Commercial justice issued in October 2018, a precautionary measure that ordered the suspension of the advertising campaign of Burger King called Redheads, pointing out in the judgment that: "On the other hand, section 81 of Act 26,522, that regulates the broadcasting of advertising, sets forth in its subsection i, that advertisements shall not imply discriminations of race, ethnicity, gender, sexual orientation, ideology, socio-economic or nationality issues, among others, they shall not impair human dignity, they shall not offend moral or religious beliefs, they shall not lead to behaviors that damage environment or physical and moral health of children and adolescents. In the case, the content of the mentioned advertising is contrary to the provision contained in the regulation, since it sets the grounds of the offered promotion in the physical features of persons and relates it to mockery situations that turn the petition mentioned in the pleadings reasonable." (CIVIL AND COMERCIAL FEDERAL COURT N° 4, October 9, 2018, in the case captioned "Arregger, Matías Daniel v. Fast Food Sudamericana S.A., Action for the Protection of Constitutional Guarantees").

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The Act of Integral Protection to Prevent, Punish and Eradicate Violence against Women in the Environments where they Develop their Interpersonal Relations, N° 26.485, forbids, as regards the female gender, discriminatory advertising. The regulation considers as indirect violence every conduct, action, omission, disposal, criterion or discriminatory practice that put the woman at a disadvantage with respect to the man.

In its section 5th it defines as symbolic violence the ones which, through stereotyped patterns, messages, values, icons or signs transmit and reproduce domination, inequality and discrimination in social relations, naturalizing the woman's subordination in society.<sup>13</sup>

Act 26,485 understands by "Media violence against women", the publication or broadcasting of stereotyped messages and images through any mass media, which directly or indirectly promotes the exploitation of women or their images, insults, defames, discriminates, dishonors, humiliates or threatens the dignity of women, as well as the use of women, adolescents and girls in pornographic messages and images, legitimizing inequality of treatment or constructs sociocultural patterns reproducing inequality or generating violence against women."

Finally, the Civil and Commercial Code of the Nation forbids,<sup>14</sup> the **advertising that leads consumer to behave in a harmful or dangerous way for his/her health or safety**. Along the same lines, the Audiovisual Communication Services Act<sup>15</sup>, sets forth that advertising must not lead to harmful behaviors for environment or physical and moral health of children and adolescents.

### Special regulations

The special regulations that regulate advertising of food supplies in the Argentine Republic are basically contained in Resolution 4980/2005 issued by the National Administration of Drugs, Foods and Medical Devices (ANMAT) and in the Argentine Food Code.

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<sup>13</sup> Due to an advertisement of the beer "Brahma Lime", briefly broadcasted in January 2020, that caused fierce criticism in social networks and that Cervecería y Maltería Quilmes S.A.I.C.A. y G., after an unconvincing defense, decided almost immediately to stop broadcasting it, apologizing the public, the Ministry of Women, Genders and Diversity of the Nation, talked precisely of "symbolic violence". The ad may be interpreted, as it was interpreted in the blog of "Women that were not magazine covers" (<http://www.mujeresquenofuerontapa.com/la-cerveza-nos-gusta-a-todos/>) as using "... the old resource of making us feel as silly girls to sell us things... And it continues, it is not enough to just say that you are silly and do not know how to have fun by drinking colored juices, and not beer. It is not enough to appear as a girl that is not a woman "yet", who does not know what she likes, but that in order to "convince you" that you must "like what everybody else likes" you are forced, pushed and obligated to go through the rite of passage to "taste" a product that "when you taste it you like it"..."

<sup>14</sup> In subsection c) of section 1101.

<sup>15</sup> In subsection i) of section 81 of Act 26,522.

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Next, I will mention briefly the regulations of Annexes I and III of Resolution ANMAT 4980/2005, that forbid misleading, stealth<sup>16</sup>, unfair<sup>17</sup>, indirect,<sup>18</sup> subliminal,<sup>19</sup> abusive (that causes fear or anxiety) and comparative advertising, when it misleads or denigrates.

Pursuant to said Resolution, **advertising of food supplies must:**

- Be directed towards the proper consumption of the product, presenting its properties objectively without tricks or misunderstandings, offering truthful, precise and clear information.
- Include the retail product description and the trade name of the product.
- Be made in Spanish.<sup>20</sup>
- Include completely the features, directions for use and/or product advisory, if they are subject to advertising.

And **it must not:**

- Advertise products not authorized by the competent health authority.
- Advertise a product or a modification of an existing one in the market as a "new one", two (2) years after the date it started to be commercialized to the public.<sup>21</sup>

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<sup>16</sup> Defined by Resolution 4980/2005 issued by the National Administration of Drugs, Foods and Medical Devices (ANMAT) as the one that hides the advertising nature of an information, presenting it as part of the drafting of the media, in a way that the public considers the information as objective and impartial when in fact it is commercial advertising.

<sup>17</sup> Is one which tries to cause discredit, denigration or disparagement, it tries to induce people to confusion between different products or trademarks, it unjustifiably mentions or compares other companies abusively and it is not supported by essential, related and objectively provable characteristics.

<sup>18</sup> Defined by Resolution ANMAT 4980/2005 as such which, without mentioning the products, uses trademarks, symbols or other distinctive features of such products or of companies which main or known activities include their production or commercialization.

<sup>19</sup> Defined by Resolution 4980 as such which uses subliminal techniques to relay messages below the threshold of conscious perception or analogous ones to act on the recipient public and force it to carry out certain acts or behaviors, without being consciously perceived.

<sup>20</sup> However, common use words or phrases may be used, even in another language and images that clearly define with everyday terms the use of the product or other qualities to favor the comprehension of the public in general.

<sup>21</sup> In the case of changes in products that are already in the market the novelty must be specified and completely informed.

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- Include messages such as: "approved or recommended by experts" "proven in clinical trials" or similar ones unless the company has scientific studies or clinical trials made in renowned research or evaluation centers.<sup>22</sup>
- Include phrases that involve the national, provincial or international authority.<sup>23</sup>
- Include texts that are expressly forbidden in the Argentine Food Code.
- Modify the labels approved as regards uses and specific properties of the product.
- Promote that the consumption of the food supply constitutes a health guarantee.
- Measure the degree of reduction of risk of diseases through the consumption of the product.

**It must not include either, phrases or messages that:**

- a) Attribute to the product therapeutic actions and/or properties or suggest that the food supply is a medicinal product or mention that a food supply diagnoses, cures, calms, mitigates, soothes, prevents or protects from a certain disease.<sup>24</sup>
- b) Directly or indirectly mention, a pathological or abnormal condition.<sup>25</sup>
- c) Recommend its consumption for stimulating or health improvement action reasons or for the prevention of diseases or for healing actions.<sup>26</sup>
- d) Provoke fear, anxiety, suggesting that the health of a person will be affected if he/she does not use the product.

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<sup>22</sup> From the country or abroad, which must be available upon the requirement of the ANMAT.

<sup>23</sup> Such as: "Advertising authorized by the Health Authority or similar ones.

<sup>24</sup> Only statements of healthy properties may be included. (*Subsection substituted by section 3rd of [Resolution N° 7730/2011](#) issued by the National Administration of Drugs, Foods and Medical Devices (ANMAT) Official Gazette dated 11/18/2011. Effectiveness: as from thirty (30) administrative working days of its publication in the Official Gazette; granting to the companies a term of one hundred and eighty (180) administrative working days as from its effectiveness for its adaptation).*

<sup>25</sup> Only statements of healthy properties may be included. (*Subsection substituted by section 4th of [Resolution N° 7730/2011](#) issued by the National Administration of Drugs, Foods and Medical Devices (ANMAT) Official Gazette dated 11/18/2011. Effectiveness: as from thirty (30) administrative working days of its publication in the Official Gazette; granting to the companies a term of one hundred and eighty (180) administrative working days as from its effectiveness for its adaptation).*

<sup>26</sup> Only statements of healthy properties may be included. (*Subsection substituted by section 5th of [Resolution N° 7730/2011](#) issued by the National Administration of Drugs, Foods and Medical Devices (ANMAT) Official Gazette dated 11/18/2011. Effectiveness: as from thirty (30) administrative working days of its publication in the Official Gazette; granting to the companies a term of one hundred and eighty (180) administrative working days as from its effectiveness for its adaptation).*

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- e) Tend to mask the specific properties of the product.
  - f) Are exclusively or mainly addressed to children under 12 years old, without the advice on an adult.
  - g) Inform that a food supply may be used in replacement of a conventional food or as the only food supply in a diet.
  - h) Modify to any extent the declaration of nutritional properties contained in the approved label.
  - i) Refer to products as “natural” when they are semisynthetic or formulated jointly with synthetic components.<sup>27</sup>
  - j) Are capable, as from a bromatological stand point, to generate a mistake, deception or confusion in consumer.
  - k) Use words, signs, denominations, symbols, emblems, illustrations or other graphic representations that turn said information into false, incorrect and/or insufficient, or that may induce consumer to a mistake, error, confusion or deception.<sup>28</sup>
  - l) State or indicate that a product has an attribute or feature that makes it outstanding compared to another one as from the bromatological standpoint, or that the advertised product is the only possible alternative within the food industry.<sup>29</sup>
- **Comparative messages must not:**
    - a) create confusion with the comparison,
    - b) denigrate or open the other product to ridicule,
    - c) deform the image of other products,
    - d) threaten the good name and reputation of third parties,
    - e) attempt to create rejection towards the competitor’s products or its users.
    - f) mention components not contained in the advertised product,

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<sup>27</sup> For products obtained as from substances of natural origin, the advertisement may mention only "obtained from substances of natural origin" or "with ingredients obtained from substances of natural origin".

<sup>28</sup> As regards the true nature, composition, origin, type, quality, quantity, duration, performance or method of use of the food supply.

<sup>29</sup> By expressing, for example: "the product", "the most elected one ", "the only one", "the most frequently recommended one ", "the best", unless it is supported by reliable and verifiable data, and it must not contain either, expressions that may be deceptive for consumer.

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g) mention possible adverse or collateral effects of components not contained in the advertised product.

- In the advertising of food only the supplementary **nutritional information** (CLAIMs) related to the content of nutrients and/or energy value that contains the product and/or the process of manufacturing authorized in accordance with the Argentine Food Code and the one related to the health claims authorized within the framework of the regulations in force may be included. No reference or mention to abnormal or pathological conditions may be made when it is not provided for in the above said regulations.
- When nutrients are mentioned in connection with the necessary daily intake, the recommended daily intake (RDI) of said nutrients must be informed, as well as the proportion of said RDI contributed by the advertised food, according to the consumption suggested in the label.
- Non-traditional advertising and the Internet advertising must comply in addition with Resolution 4980/2005 and the owners of the products must guarantee that the use of the name, attributes of messages, under said media, are the proper ones.
- Advertising may include, to answer consumers' consultations, a telephone number or Internet page. The information therein available must comply with the regulations of Resolution 4980.

In my opinion, the regulations that I mention in this work set the basic principles which the advertising of food supplies must conform to. But I warn that they are not all the applicable ones. As I mentioned at the beginning of this work, there are other ones, legal and ethical, applicable to certain food supplies or category of food that shall be borne in mind when analyzing the legal feasibility of the specific advertising subject matter of the consultation.

Buenos Aires, September 23, 2020.

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