

Advertising of alcoholic beverages in the Autonomous City of Buenos Aires

By Marcelo E. Gallo

In an article recently published in Abogados.com.ar¹ I mentioned certain requirements and limitations imposed by the National Law Fighting Alcoholism (*Ley Nacional de Lucha Contra el Alcoholismo*) and the Ethics Codes applicable to the industry and the advertising of alcoholic beverages

I saved that for another time – this one – the discussion of the requirements and additional restrictions in force in the Autonomous City of Buenos Aires.

The current regulation of the alcoholic beverages advertising of the City was enacted by means of Act 5708, that includes the advertising broadcasted by the different media, with the sole - and unexplainable - exception of the audio advertising (for example, in radio).

The Act came into force on February 1st, 2017 and the advertising hired thereafter to be broadcasted in the Autonomous City of Buenos Aires (“CABA”) must conform to its regulations.

The modifications set forth by Act 5708 to the regulations on the alcoholic beverages advertising in force up to then in CABA are analyzed below.

Prohibition of alcoholic beverages advertising in the “public road”

Section 4th of the Act sets forth the general principle; it forbids the advertising of alcoholic beverages in the public road of the City.²

The first paragraph of section 4th of Annex I of decree 44/17, that regulates the Act, defines advertising in the public road with certain broadness, since it typifies as such every way of communication, recommendation or commercial action with the purpose of promoting the consumption of alcoholic beverages that may be perceived in or from the public space.

As contradictory as it may seem, then, in CABA, advertising “in the public road” is not only the advertising located in it.

¹ “Advertising of alcoholic beverages. Limitations imposed by Act 24,788 and by the Ethic Codes of the Industry”, published in the Newsletter of Abogados.com.ar dated July 22, 2020.

² Section 4th reads as follows: “**Every advertising of alcoholic beverages** through any type of advertisement in the public road within the area of the Autonomous City of Buenos Aires is forbidden.”

Because the definition of Annex I includes, for example, the advertising made inside the shops when it may be perceived “from” the public space and the advertising made in the shop windows. Also, of course, the advertising contained in chairs, parasols and awnings, even if they are not in the public road, when they may be seen from it.

Exceptions to the prohibition of alcoholic beverages advertising in the “public road”

Section 5th of Act 5708 provides, as an exception to the prohibition mentioned above arising from its section 4th, that the advertising of alcoholic beverages in the public road of CABA, through any type of advertising, may be made only when:

→ It shows only the trademark or logotype of the beverage.³

→ It includes one (1) of the nine (9) health messages, listed in the regulation⁴, and said health message occupies at least seventy-five percent (75%) of the area of the advertising space.⁵

The third paragraph of section 5th of Annex I of decree 44/17 particularly regulates the advertising in the public road with signs that show animated sequences, videos or films. For these cases:

(i) It defines as an “advertising space”, the time used for the publication of the advertisement (the ad duration).

³ The first paragraph of section 5th of Annex I of decree 44/17 defines as “trademark or logotype”: (i) Those registered as such. (ii) The image of the product and (iii) Any other sign identifying the advertised product. The trademark or logotype may be displayed in the advertising in the public road in a static, dynamic or animated form.

⁴ Said nine (9) health messages are the following (i) "Heavy-drinking is harmful to health"; (ii) "Don't drink alcohol during pregnancy "; (iii) "Don't drink and drive "; (iv) "Drink-driving kills "; (v) "Heavy-drinking causes liver cirrhosis"; (vi) "Heavy-drinking causes heart diseases"; (vii) "Heavy-drinking shortens life"; (viii) "Heavy-drinking predisposes unprotected sex "; and (ix) "Heavy-drinking favors violence and gender-based violence."

⁵ (i) Within 75% of the area of advertising space must be written, in a readable and leading way, the text of any health message set forth in section 5th of Act 5708, it must occupy at least 50% of said space (In other words, 37,5% of the total area of the ad) (Section 5th of Annex I of decree 44/17).

(ii) Since the health legend of Act 5708 must occupy half of said 75%, nothing prevents including in said 75% the legends “DRINKING IN MODERATION. ALCOHOL SALE IS FORBIDDEN TO ANYONE UNDER 18 YEARS OLD”. The space occupied by these last legends is additional to 37,5% that must be occupied by the health message of Act 5708 (Section 5th of Annex I of decree 44/17).

(iii) It allows to include images as the background of health messages, provided that said images do not contradict the sense thereof.

- (ii) It provides that 75% of the total duration of the ad must be used to spread “the health message”, in a readable, prominent and proportionate way, within a rectangle of white background with black letters.⁶

Prohibition of advertising, promotion, sponsorship or financing in cultural, sports and educational activities

Section 6th of Act 5708, forbids advertising, promotion, sponsorship or financing for trademarks of alcoholic beverages regarding cultural, sports and educational activities with open and free access.

Said prohibition comprises every type of advertising. Not only advertising in the public road.

By way of exception, advertising, promotion, sponsorship or financing for trademarks of alcoholic beverages regarding cultural, sports and educational activities in the Autonomous City of Buenos Aires is allowed only when:

→ Said activities - cultural, sports or educational activities – are not for free or

→ While they are for free, they have no “open access”.⁷

Allowed advertising. Requirements

⁶ The paragraph does not expressly provide the space to be occupied by the health message. It is limited to establishing that it must be written in a “readable, prominent and proportional manner”. To minimize the risk of accusations, it seems advisable to observe also in the case of the rule of 75% of the total area of the advertising ad set forth for the rest of advertising in the public road.

The paragraph does not refer to the inclusion of the legends “DRINKING IN MODERATION. ALCOHOL SALE IS FORBIDDEN TO ANYONE UNDER 18 YEARS OLD”. In my opinion the decisions – in general – according to the second paragraph, mentioned above, in the sense that nothing prevents to include in said 75% said legends, apply.

When the decree provides that in the ads to be broadcasted with the above-mentioned technologies the health message shall be written within a rectangle of white background in black letters, it does not clarify if images may be included as a background, provided that they do not contradict the sense thereof, as it is authorized for the rest of the advertising in the public road.

⁷ It is not clear what should be understood as “open access”. The expression would not mention gratuity, expressly mentioned in section 6th of the Act, but – I believe – it refers to the participation in the activities to anyone under 18 years old. The regulatory decree says nothing about section 6th, therefore the interpretation of “open access” referred to by the Act will imply a certain degree of risk for advertisers, when they decide to advertise in cultural, sports or educational activities that are for free.

Section 7th of Act 5708 obligates to include, in the advertising of the sale of alcoholic beverages not forbidden by it, any of the “health messages” mentioned above, within a rectangle of white background, in black letters, occupying at least twenty percent (20%) of the total area of the ad.⁸

The regulation expressly includes advertising in points of sale (pursuant to the law, “... made in establishments that have been authorized for their sale and consumption”).

Due to the fact that section 7th is referred to non-forbidden advertising, in my opinion it would include also display advertising (other than the one made in the public road, already regulated by sections 4th and 5th), TV advertising, cinema advertising, etc., exclusively broadcasted in the Autonomous City of Buenos Aires – and not also in other jurisdiction/s of the country - and inclusive it could be considered applicable to the merchandising elements delivered in the Autonomous City of Buenos Aires.

It would exclude radio and other sound media, since the regulation imposes the inclusion of a sign in the ad and neither it, nor its regulatory decree specify the obligation to make oral mentions.

Advertising of alcoholic beverages exempted from the compliance with the Act of CABA 5708

The second paragraph of section 4th of Annex I of decree 44/17 exempts the following advertising from the compliance with the provisions of Act 5708:

- (i) The advertising developed within the framework of section 3rd of Act 26.870⁹, declaring wine as a “National Beverage”.

⁸ The regulation of section 7th makes clear that within the space of 20% of the total area of the ad for the health message the legends “DRINKING IN MODERATION. ALCOHOL SALE IS FORBIDDEN TO ANYONE UNDER 18 YEARS OLD” shall be included also.

⁹ Section 3rd of Act 26.870 mentioned above provides the following: SECTION 3RD— The Ministry of Agriculture, Livestock and Fishing shall promote the manufacturing and execution of an action plan with the following goals:

- a. To spread the cultural features that imply the production, manufacturing and consumption of the Argentine wine and its traditions;
 - b. To promote the image and isologotype of the Argentine wine in every type of official events within the country and abroad;
 - c. To establish that the isologotype of the Argentine wine, national beverage or its equivalent text be included in the label of the wine of national production. The Ministry of Agriculture, Livestock and Fishing, through the National Institute of Vitiviniculture (INV) shall set forth the criteria and conditions for the use of the isologotype or its equivalent text;
 - d. To promote the development of regional economies as from actions related to services activities related to the wine sector;
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- (ii) Advertising which purpose is to promote tasting events, gastronomic events or fairs, regional or patronal feasts.
- (iii) Every activity seeking the promotion and spreading of the cultural features associated to the production, manufacturing and consumption of regional products and their traditions.

The exclusions mentioned in items (ii) and (iii), above, comprise not only wine, but all alcoholic beverages.

Advertising of alcoholic beverages in official media of CABA

Finally, the law forbids to the official media of the Autonomous City of Buenos Aires, in its section 8th, the broadcasting of alcoholic beverages advertising.

Section 8th of Annex of decree 44/17 provides – however – that the exception set forth in the second paragraph of section 4th of the regulation, discussed in the preceding item, applies to the official media of the City; consequently, said media may broadcast the advertising mentioned therein.

Penalties for the violation of Act 5708

The maximum amount of the fines set forth in Act 5708 for the violation of its regulations amounts to one hundred thousand (100.000) “Fixed Units” (at present, with a delay in the adjustment of the value of the Fixed Units of more than one year, said maximum amount is equivalent to AR\$2,140,000, -), that shall be calculated on every campaign and calendar month, clarifying that no fines may be imposed if, adding all the fines imposed on the same campaign, in the same calendar month, they exceed the maximum amount set for the fine.

The discussed Act has proven effective in what I understand has been its main purpose, i.e. to strongly limit – I would almost say, to eradicate – from the public road of the City of Buenos Aires the advertising of alcoholic beverages.

Buenos Aires, July 27, 2020.

- e. To ensure the presence of Argentine wine in official events of the diplomatic and consular corps;
 - f. To promote studies and organizations tending to the definition of the different wine regions and sub regions of each province.
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