

Advertising is Everywhere: Overview of Key Legal Issues

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Doing business without advertising is like living without smiling. Today, everyone is influenced by advertising and the buzzworthy power of advertising and marketing is undeniable. As David Ogilvy, an advertising legend, once said “What you say in advertising is more important than how you say it”. Content rules the world, and taking all legal, moral and ethical issues into consideration would be the first step towards creating advertising that could change the minds of consumers. Having a list of legal issues at hand can help advertising geniuses to craft legal advertising messages.

GENERAL REQUIREMENTS TO ADVERTISING

The main requirements of advertising are stipulated in the Law of Ukraine No. 2657-XII *On Information of 2 October 1992*, Law of Ukraine No. 270/96-BP *On Advertising of 3 July 1996*, Law of Ukraine No. 2210-III *On Protection against Unfair Competition of 11 January 2001*, Law of Ukraine No. 1023-XII *On Consumer Rights Protection of 12 May 1991*. Generally binding principles for advertising include advertising legality, accuracy and authenticity, and the use of forms and means that are not harmful to advertising consumers. Unfair advertising, which may appear in the form of dissemination of misleading information or use of improper comparisons with other goods produced by other manufacturers, is prohi-

bited. Neither shall advertisements contain any information or images that contradict generally recognized rules of ethics, morality or humanity.

Advertising of alcoholic beverages and tobacco products, marks for goods and services, other objects of intellectual property rights under which beverages and tobacco products are produced; advertising of weapons; advertising of services connected with attracting money; advertising of employment services; advertising of securities and the stock market; advertising of construction objects are regulated by special legislative acts.

It is worth noting that provisions on unfair advertising are binding for advertising of all products/services. Overstepping the boundaries set by competition law can lead to serious consequences. Fines for unfair competition can come up to 5% of annual income from the sales revenue of the whole group of companies to which the violator belongs. Such heavy fines can result in the termination of business activity or even bankruptcy.

ADVERTISING OF PHARMACEUTICALS

Almost thirty percent of the total number of advertisements on Ukrainian television is advertising of pharmaceuticals and medical products. The volume of pharmaceuticals advertising on private channels is over seventy percent. This is evidenced by the results of constant monitoring of TV pro-

grams by the National Council on Television and Radio Broadcasting. According to the Ministry of Health of Ukraine, in 2017 Ukrainians spent UAH 70 billion on pharmaceuticals (in 2016 the sale of pharmaceuticals reached UAH 50.6 billion), and fifty percent of them have no proven clinical efficacy. Such advertising induces consumers to self-treatment, which is extremely dangerous.

REQUIREMENTS FOR PHARMACEUTICALS LABELING

The advertising of pharmaceuticals is permitted, provided that pharmaceuticals are sold without a doctor’s prescription and not included in the list of pharmaceuticals prohibited for advertising by the Ministry of Health of Ukraine. Labeling requirements are clearly stipulated by Ukrainian legislation.

In accordance with Law of Ukraine No. 123/96-BP *On Medicinal Products of 4 April 1996*, labeling and packaging of a medicinal product must contain the following information: the name of the medicinal product; the name and address of the manufacturer; registration number; serial number; methods of application; dose of the active substance in each unit and their number in the package; expiry date; storage conditions; warnings.

The following is also indicated in Braille (relief-dotted font for writing and reading for people with visual impairment) on the outer packaging of medicinal products: name of the medicinal product; dose of the active substance; form of dosage.

TYPICAL VIOLATIONS

The AMCU, as the controlling state body, annually defines priority areas of work, including control over observance of the legislative requirements on economic competition protection in the pharmaceutical industry.

In practice, the most widespread violations in promotional materials on the production of medical products are the use of assurances by consumers, in particular, on “drug safety”, “drug efficacy”, “the best quality of advertised medicinal product”, “superiority over other medicines”, etc. It is necessary to exclude such advertising words and/or advertising statements as: “best”, “first”,

DLF ATTORNEYS-AT-LAW

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Our core customers are SMEs from various fields. We offer them tailor-made and economically viable solutions. We are also a reli-

able business partner for a number of listed corporations and their subsidiaries in Ukraine. We represent our clients in a wide range of industries: IT, engineering, agriculture, life sciences and healthcare, renewable energy, foodstuffs, pharmaceuticals and chemicals, management consulting as well as home appliances.

Our team is multilingual and led by two partners, Igor Dykunsky, LL.M. and Andriy Navrotskiy, LL.M. Most of our lawyers graduated from Ukrainian law universities and successfully

continued their studies abroad, particularly in England and Germany. Our experts are held in high esteem in professional circles thanks to their expertise on special features of doing business in Ukraine.

Our attorneys not only understand the needs of clients, but also their business philosophy and the specific needs of their respective business models.

We have a close working relationship with various business associations in Ukraine. We also come recommended by a number of foreign embassies operating in Ukraine.

“most effective”, “which has advantages over others”. The use of such advertising words or allegations is inadmissible without proper documentary confirmation by the advertiser (an independent study may be verified) of each of these words or allegations.

For example, the AMCU imposed a heavy fine of UAH one million on one of the world’s 20 top pharmaceutical companies for unfair advertising of cough medicine. According to the Antimonopoly Committee, consumers had the impression that the cough medicine cures respiratory infections. In fact, it only softens the symptoms of a cold and is used to prompt coughing. Such advertising contained confusing information for consumers, failing to bring about the clinical efficacy of a medicinal product for a large number of consumers.

TOBACCO AND ALCOHOL ADVERTISING

The following requirements to alcohol and tobacco advertising should be taken into account:

- advertising of tobacco, trademarks and other IP rights related to tobacco are completely prohibited on TV and radio, in scientific, popular scientific, educational, public-political, literary and artistic publications, etc.

- advertising of alcohol, trademarks and other IP rights related to alcohol are prohibited on TV and radio from 6 a.m. to 11 p.m., on the first and last pages of newspapers, on the covers of magazines and other publications, in all publications for children and young people, on the outer and inner surfaces of public transport and the underground; means of outdoor advertising, etc.

- it is also prohibited: to use images of persons who are under 18 in tobacco and alcohol advertisements; advertisement cannot form the idea that smoking or drinking is an important factor in achieving success in sports, social, sexual or other areas of life.

Alcohol and tobacco advertisements must contain special health warnings. Health warnings must fill at least 15% of the space of an advertisement and the text of the warning should be black, while the background color of the warning should be white.

WIDESPREAD ADVERTISING VIOLATIONS

Creative advertising could convince people to spend more money. However, violations of the law could wipe out all the achievements of a company in one second. In order to create an advertisement that would be legal, ethical and moral, it should comply with a lot of legislative requirements.

Special attention should be paid to the following:

- if the promotional material contains any information about the conduct of a promotional campaign, competition, such advertising must contain information (titles, corresponding announcements, etc.) about the timing and place of these events and indicate the information source where the terms and conditions of the promotional campaign are to be specified;

- indication of the value of goods (works, services) in promotional materials in UAH and in the equivalent to foreign currency or in foreign currency is not allowed and is considered a violation;

- the placement of advertising with the image of an individual without the prior written consent of individuals. Before creating an advertisement, the advertiser has to obtain written consent from each individual whose image is used in promotional material;

- the placement of a trademark, belonging to the third party. To use a third-party trademark, you must obtain at least written permission from the copyright holder of such a trademark so as to be able to place it in the advertiser’s promotional material;

- the use of stolen photographs (images of objects, vegetables, design, etc.) in

advertising materials without proper permission for such use. You need permission in each case to use each photo;

- indication of the wrong place of a product’s manufacture or a product’s characteristics that are not true;

- the use of images of children consuming or using products intended exclusively for adults;

- it is prohibited to place information about a medicinal product promoting the emergence or development of a fear of becoming ill or worsening health due to the non-use of the medicinal product being advertised; affirmations regarding the possibility of carrying out independent diagnosis and treatment;

- the language of advertisements should be Ukrainian, etc.

LEGISLATIVE IMPROVEMENTS

Currently, the Ministry of Health of Ukraine is suggesting the making of amendments to current Ukrainian legislation on advertising. Namely, new restrictions in the content of advertising in accordance with EU directives. In particular, there is a ban on links to advertising the diagnosis of a disease or appointment of treatment via the phone or Internet, the prohibition of information that medicines are intended exclusively for the treatment of children. In addition, the content of an advertisement must comply with the instructions for the use of the medicinal product in question. The main purpose of legislative improvements is to control the observance of consumer rights and to strengthen state control over the content and quality of advertising of pharmaceuticals.

Advertising has conquered the world. Marketing specialists are extremely high in demand because advertising is a big part of sales. But the lawyer’s role in assessing all legal risks is therefore difficult to overestimate. Heavy fines could hurt the company’s business and reputation. Therefore, all aspects need to be taken into consideration.