
Is comparative advertising lawful in Spain?



Through comparative advertising the advertiser makes known its advantage over the competition. However, unlike in the United States, European culture has been reticent about this type of advertising. In particular, comparative advertising in Spain is lawful as long as it compares measurable and provable elements.

The Unfair Competition Act 29/2009 (hereinafter, **“the Act”**) gives credence to the constitutional entronement as a key to economic, political, and social order. Moreover, the Act is equipped with the necessary actions and procedural instruments to ensure its operability. Thus, as the Explanatory Memorandum of the Act itself indicates in section III, the Law of Unfair Competition is no longer conceived as a system primarily aimed at resolving conflicts between competitors but rather as an instrument for ordering and controlling conduct in the market.

When speaking of "unfair competition", we are referring to a commercial competition in the market where the activity of all companies involved takes place. It defines the limits of business conduct of all kinds in order to maintain a balance in the market by combining free enterprise, free competition, the common interest of consumers and the public interest. It is unethical when good faith is violated in this competitive market or when a company acts in violation of the basic principles of respect regarding the rights of others. Hence, "unfair

competition", considered in its first definition, plays only between the competing entities in the market¹.

For instance, if a company makes comparisons and discredits on a certain product, which is manufactured by a competitor, and these statements are true, then the present case would have no place in the Spanish legal system. We would be facing a situation of free market competition where a competitor has developed a better product which, although it may cause damage to the rest of the competitors, cannot be qualified as unfair competition². However, if such statements are proven to be false, then we would indeed be talking about comparative and unfair advertising, in accordance with Articles 5 (b) and 10 of the Act³.



To define comparative advertising, a reference must be made to misleading advertising. The jurisprudence of the Spanish Court of Appeals⁴ define misleading advertising as an advertising

¹ Supreme Court, Civil Chamber nº 1, ruling number 714/2003 (July 14th, 2003). Appeal number 2003/4634.

² Article 38 of the Spanish Constitution proclaims the freedom of businesses within the framework of the market economy. Although every citizen is recognized as having the right to exercise an economic or business activity, this right is not absolute or unlimited. These limitations are illicit competition, the infringement of industrial property rights and unfair competition and unfair advertising.

³ These articles relate to the unlawful advertising, acts of deception and comparative advertising.

⁴ Málaga Court of Appeal ruling number 261/2019 (April 12th, 2019). Appeal number 1456/2017; La Rioja Court of Appeal ruling number 201/2015 (July 31st, 2015) Appeal number 308/2014, etc.

that in any way induces or may induce its addressees to error, and may affect their economic behavior, or harm or be capable of harming a competitor. It is also misleading advertising when the omission of fundamental data of goods, activities, or services, leads the addressees into error. Therefore, if you are thinking of suing a competitor by way of misleading advertising, there will be no choice but to effectively prove these requirements, otherwise the lawsuit will not be upheld by the Spanish Courts.

As Bustamante Alsina⁵ says, "*Information is false when it is misleading, feigned or simulated to give the facts a different appearance from reality*". A clear example of this is when an advertisement claims a car has certain special qualities in its engine, when in reality this is a falsehood. In these cases, determining the statement to be false is sufficient for the misleading advertising to be set.

According to the Spanish Civil Procedure Act, in the judicial proceedings on unfair competition and on unlawful advertising, "*the defendant shall bear the burden of proof of the accuracy and truthfulness of the statements made and the material data that the advertising expresses*." (article 217.4). This rule of reversal regarding the burden of proof means that it will always be the advertiser who must prove the truthfulness of the information disseminated in the advertising. However, in civil proceedings is better to proof everything we can, even if the law does not oblige us to do so.

In addition, as aforementioned, Article 10 of the Unfair Competition Act regulates the acts of comparison and sets the requirements that must meet in order to be qualified as unfair. However, before going into the details, we should make sure that we are indeed dealing with a comparison scenario.

On one hand, the act must consist of a comparison. In other words, it is necessary that both items are being compared, meaning that it is not possible to consider a comparison if only the features of a single product are exposed.

On the other hand, the comparison must be public, meaning it must have external repercussions. The purpose of this unfair conduct is to address the public of consumers and try to influence their market decisions by comparing the advantages and disadvantages of certain products or services.

The comparison must be between trademarks and not between classes of products unless the way in which the product is made shows the company or the trademark to which it is referring.

⁵ BUSTAMANTE ALSINA, Jorge, "*Responsabilidad civil de los órganos de prensa por informaciones inexactas*" LL, 1989-B-287, quoted by ZANNONI, Eduardo A. y BISCARO, Beatriz R. Responsabilidad de los medios de prensa.

Meaning there must be an allusion to the competitor, either explicitly (mentioning the trademark) or implicitly (so that for the consumer, to whom products are addressed, knows what company the ad is referring to).

In this sense, we can mention the well-known case of the Spanish Supreme Court⁶: COCA-COLA and PEPSI-COLA. The case consisted of an advertisement which displayed the performance of a rap singer who during a concert in front of a large audience, consumed a refreshing drink PEPSI-COLA. At a certain moment, a random voice announces the change of the drink he is consuming "*for another cola*". At that moment, the singer drinks from a white glass. The glass did not have any kind of distinctive or reference, and out of the blue the singer changes abruptly the rhythm of his performance, abandoning the exciting rap music and starting to sing a melodic song before the bewilderment of the audience, until one of the listeners throws him a bottle of PEPSI. The singer tests its contents and returns to rap performance, ending with the phrase: "Pepsi is what I had today".



In view of such advertisement, COCA-COLA sued PEPSI for unfair comparative advertising. According to Coca-Cola version, it was evident that its Company was being implicitly alluded to and therefore, the content was denigrating. However, the Judge considered that there was no room for "comparison" in this case, since there was no reference, neither explicit or

⁶ Supreme Court of Justice (February 24th 1997). Ruling number 126/1997 Appeal number 1328/1993.

implicit, to Coca-Cola. Thus, Coca-Cola could not be attributed the status of victim when there were "other cola drinks" in the market.

Therefore, to be within the scope of this article, it is necessary to refer explicitly or implicitly to one or more competitors. If there is no such comparison, the conduct cannot be prosecuted under Article 10. Furthermore, as stated before, public comparison, including comparative advertising, through an explicit or implicit reference to a competitor is permitted if it meets the specific requirements set out in case-law, such as that the goods or services compared must have the same purpose or satisfy the same needs, among others.

With all this said, it is clear that the purpose of comparative advertising is to be able to place the name of a product or service in the mind of the consumer while establishing a prominent positioning of that brand over the rivals. This has the potential to be extremely effective, but care must be exercised to ensure that it is carried out in accordance with the law, that is why LA GUARD Law firm remains at your disposal regarding any legal questions that may arise in this matter.