

Vilau &amp; Mitel

# The rise of Romania's regulatory regime

A boom in advertising over the past 10 years is reflected in the development of related legislation. However, there is limited case law from the courts in this field due to the significant enforcement powers of regulatory bodies

The Romanian advertising market has developed impressively over the last 10 years. During this time, all the major players in the advertising business have established or consolidated their presence in the jurisdiction, which has led to notable growth in the variety and quality of advertising. Total advertising expenditures were estimated at €593 million in 2008, 65% (€383 million) of which was spent on television commercials, according to one estimate (the *Media Fact Book 2008*).

## Advertising legislation

Advertising legislation has kept pace with this boom. The first regulation to come into force was the Romanian Law on Advertising (Law 148/2000), which followed the principles adopted by the EU Comparative Advertising Directive (97/55/EC), amending Directive 84/450/EEC.

Other national laws that regulate advertising, include:

- Law 158/2008 on misleading and comparative advertising, which amended the Law on Advertising and at the same time implemented in its entirety the EU Misleading and Comparative Advertising Directive (2006/114/EC); and
- The Law on Audiovisuals (504/2002) and the National Audiovisual Council's decisions regulating audiovisual content, amended by the Government Emergency Ordinance (181/2008) – the first national law to implement the EU Television Without Frontiers Directive (89/552/EEC).

## General advertising rules

The Romanian Law on Advertising defines 'advertising' as the making of a representation in any form in connection with a trade, business, craft or profession to promote the supply of goods or services, including

immovable property, rights and obligations.

When conducting advertising activities, one should be able to prove that any stated assertions, indications or presentations are accurate. Since advertisers are required to provide supporting documentation to the relevant authorities (the National Agency for Consumer Protection, the Ministry of Economy and Finance, the Ministry of Health or the National Audiovisual Council).

The assertions, indications or presentations made by a company are deemed to be inexact if the documents requested by the authorities are not provided within seven days (from the day of request) or if they are considered insufficient.

According to the Law on Advertising, advertising is subject to self-regulation by relevant professional organizations. Any party is entitled to bring a complaint against an advertisement to the attention of a professional self-regulation organization or the relevant authority (the National Agency for Consumer Protection when consumers' safety is concerned, the Ministry of Economy and Finance for general advertising complaints or the National Audiovisual Council for television commercials).

## Misleading advertising

Advertising is considered to be misleading if it deceives, or is likely to deceive, the persons to whom it is addressed or reaches and which, by reason of its deceptive nature, is likely to affect the economic behaviour of those persons, or which, for those reasons, injures or is likely to injure a competitor.

The Law on Advertising and Law 158/2008 on misleading and comparative advertising expressly prohibit misleading and, in certain circumstances, comparative advertising. Failure to comply with the rules can lead to significant fines and other remedies.

In determining whether the advertising is

misleading all aspects should be taken into account, especially those concerning: the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses or the results to be expected from their use, quantity, specification, geographical or commercial origin, or the results and material features of tests or checks carried out on the goods or services; the price or manner in which the price is calculated, and the conditions on which the goods are supplied or services provided; and the nature, attributes and rights of the advertiser, such as their identity, assets, qualifications, ownership of industrial, commercial or IP rights and awards.

The National Audiovisual Council (regulator of the audiovisual sector in Romania) is heavily involved in combating misleading advertising, especially when it comes to consumer protection issues and is generally against advertising that makes false or exaggerated claims.

## Comparative advertising

'Comparative advertising' is defined as any advertising which explicitly or by implication identifies a competitor, or goods or services offered by a competitor. It is allowed by Romanian law under specific conditions. These are that the advertisement:

- must not be misleading according to the definition given earlier in this article, or according to the EU Unfair Commercial Practices Directive (2005/29/EC);
- must compare goods or services that meet the same needs or are intended for the same purpose;
- must objectively compare one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
- must not discredit or denigrate

trademarks, trade names, other distinctive signs, goods, services, activities or a competitor's status;

- in the case of products with a designation of origin, must relate to products with the same designation;
- must not take unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor, or of the designation of origin of competing products;
- must not present goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name; and
- must not create confusion among traders, between the advertiser and a competitor or between the advertiser's trademarks, trade names, other distinguishing marks, goods or services and those of a competitor.

#### Regulatory and self-regulatory bodies

The National Audiovisual Council is the most active Romanian regulatory body, having investigated over 1,500 complaints of misleading advertising and over 79 comparative advertising complaints between 2006 and 2009.

The Romanian Advertising Council is a professional, non-governmental, non-profit organization; it has 48 members, mainly multinational companies, advertising and media agencies, and advertising industry-related organizations recognized by the National Audiovisual Council. Since 2003, the two councils have cooperated on advertising-related complaints. They have received about 50 complaints from companies, institutions or consumers in that time.

The Romanian Advertising Council takes decisions under the Code of Advertising Practice developed by its members. The code is based on the International Advertising Practice Code and implements the ethical rules that must be followed by anyone involved in advertising-related activities or any other forms of commercial communication.

#### Liability in advertising

The Romanian Law on Advertising establishes a joint liability between the advertising agency, the broadcasting entity and the advertiser. Failure to prove the accuracy of the assertions, statements or indications contained in the advertising might lead to a fine of between lei 6,000 and lei 60,000 (€1,403-€14,026) while non-compliance of advertising with the rules governing misleading or comparative advertising might lead to a fine of up to lei 30,000 (€7,013).



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Ionut Lupsa coordinates the IP, IT and copyright practice group at Vilaumitel. He is a member of the Bucharest Bar Association and is qualified as a trademark attorney. Over the past 11 years his practice has focused mainly on intellectual property, information technology, e-commerce, dispute resolution and litigation. He has been involved in numerous cases before Romanian courts.

#### Consumer protection and unfair competition issues

Pursuant to the Government Ordinance on Consumer Protection (21/1992), consumers have the right to be informed in a complete, correct and precise manner of the essential characteristics of advertised products. The ordinance prohibits statements and indications of any kind which are not compliant with the parameters of the products and which cannot be proved. This obligation to inform the consumer may not be breached on grounds of professional or trade secrets.

Based on the provisions of the Romanian Unfair Competition Law (11/1991) as amended in 2001, it follows that it might be possible to combine the provisions of the Romanian Law on Advertising with those regulating unfair competition where false allegations about a product are made in order to strengthen its position on the market to the detriment of competitors.

This occurred in the 2005 case of two insurance brokers involved in a dispute over the advertising of services relating to automobiles (*BTWC v Asibrok* (Case 30697/3/2005 (4504/2005))). The Bucharest Tribunal took the view that Asibrok's publication of advertising similar to that used by BTWC did not amount to unfair competition, since on the one hand it did not involve false allegations and on the other it did not cause disadvantage to a competitor.

#### Strength of regulation

Although advertisers are always pushing the limits of the law, there is little Romanian case law on misleading or comparative advertising because most cases resolve without the details being made public. Some cases, even when registered as complaints with the Competition Council do not result in a judgment. Nevertheless, the National Audiovisual Council has established a solid practice and has issued a number of rulings on misleading and comparative advertising. Few cases end up in court once the council has issued a decision. This indicates the remedies available from the council are sufficient in the majority of cases.

While audiovisual advertising has resulted in a large number of actions, online advertising has not yet generated a similar volume of complaints. There have been cases of comparative advertising (eg, the clash between PEPSI MAX and COKE ZERO in the non-alcoholic beverages sector) but no dispute over comparative or misleading advertising online has reached the courts. In fact, although online advertising is rapidly becoming the main source of brand promotion there is still no case law in connection with online advertising. [WTR](#)