

The Self-Regulating Jury in the Field of Interactive Advertising

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Abstract

[Purpose] Electronic advertising and commercial communications may sometimes violate existing regulations, resulting in unlawful advertising. To address this issue, Spain created an Advertising Jury to resolve disputes in this area.

[Methodology/Approach/Design] The Spanish and European regulations will be analyzed in terms of regulation and self-regulation mechanisms. Self-regulation instruments are a suitable complement to current legal regulations.

[Findings] Self-regulation mechanisms can be triggered by Autocontrol's Advertising Jury when an instance of advertising has violated one or more rules of the relevant code of ethics. This organisation is a recognised moral authority in the field and an extrajudicial mechanism for settling disputes concerning interactive advertising. Although it normally adjudicates cases in which the parties have already voluntarily committed to complying with its decisions, it also adjudicates cases involving third parties or non-member companies.

[Practical Implications] Self-regulatory initiatives in the field of interactive advertising exist at both the European Union (EU) and national levels. One such initiative implemented at a national level stands out as a positive example for others: Spain's Autocontrol.

[Originality/Value] The purpose of self-regulation is to try and bridge the gap between the law's minimum requirements and the maximum level of ethical behaviour for online advertising. This should not be achieved through coercion but through the free and voluntary dedication of those involved.

Keywords: Self-Regulation. Unlawful. Internet. Freedom of Expression. Advertising.

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INTRODUCTION

Advertising is a feature of modern society that has increased in social and economic importance (CARO ALMELA, 2007) and will presumably continue to do so in the future. It is an activity that plays a very important role. Advertising is disseminated through various communication channels, but one stands out from the rest – the Internet.

While it would be desirable, and appropriate, to have strict control over all online advertising, this is not currently feasible. In any case, the Internet should self-regulate in order to raise the overall level of accountability of the industry as a whole and to better protect consumers and/or users. The purpose of self-regulation is to try and bridge the gap between the law's minimum requirements and the maximum level of ethical behaviour for online advertising. This should not be achieved through coercion, of course, but through the free and voluntary dedication of those involved (PRESAS MATA, 2018). Ethics is an essential requirement for honest (GÓMEZ NIETO, 2016) online advertising (PRESTON, 2010) that respects (FERNÁNDEZ SOUTO & VALDERRAMA SANTOMÉ, 2000) human dignity.

Self-regulatory initiatives in the field of interactive advertising exist at both the European Union (EU) and national levels. One such initiative implemented at a national level stands out as a positive example for others. We are referring to Spain's Association for the Self-Regulation of Commercial Communication (Autocontrol), which has instituted several codes of conduct. There are two mechanisms for verifying compliance with these codes of conduct (FERNÁNDEZ CARBALLO-CALERO, 2015). One is an ex-ante control mechanism managed by Autocontrol's Technical Office, known as copy advice. This mechanism helps Internet advertising campaigns avoid violating legal and ethical rules (VILAJOANA-ALEJANDRE & ROM-RODRÍGUEZ, 2017). The other is an ex-post control mechanism that is applied once it has been determined that the advertising likely violates one or more rules of the applicable code of ethics. This mechanism is managed by Autocontrol's Advertising Jury (AUTOCONTROL, 2021b) and ensues after Autocontrol first attempts to mediate the matter. This prestigious oversight board is a recognised moral authority in the field and settles out-of-court disputes concerning interactive advertising (AUTOCONTROL, 2021a). Although it normally adjudicates cases in which the parties have already voluntarily committed to complying with its decisions, it also adjudicates cases involving third parties or non-member companies. This may lead to questions about whether such decisions are an expression of the constitutional right to freedom of speech, or whether they represent a clear act of unfair competition.

GENERAL CONSIDERATIONS REGARDING THE CURRENT RELEVANCE OF THE VIRTUAL PROMOTION OF GOODS AND/OR SERVICES

Information is not the only element in advertising, nor is it the most important element even today. Persuasion is the most important element (WRIGHT, 1980). The element of persuasion imbues advertising with connotations of aggressiveness, given that most business competition today takes the form of advertising (SPANG, 2005). The persuasive purpose of advertising that typically assumes the formal modality of advertising messages undermines the objectivity that is characteristic of information (RAMOS FERNÁNDEZ, 2003), although the predominance of one or the other dimension depends on the specific advertising expression.

One of the most significant business manifestations of information and communication technologies is virtual advertising. To make virtual advertising more effective and efficient, new techniques have been implemented to capture the viewers' full attention (PUENTE DOMÍNGUEZ, 2019) and are characterised by their low cost, speed, and ability to reach a large number of users (ORE & SPOSATO, 2021).

Any company striving to survive in competitive global markets must adopt and use new technologies to permanently adapt to sales trends and have capabilities for designing electronic marketing strategies. The need for businesses to retain customers and strengthen customer relationships means that they are always looking for ways to directly reach individual consumers and personalise their product offerings. This constitutes a new type of sales in which businesses establish continuous and direct customer relationships, wherever these customers may be.

One of the most interesting aspects of consumer contracts is the pre-contract period, i.e., all those activities between the parties that occur before there is mutual consent to finalise the contract. During this pre-contract period, consumers and/or users usually become aware of the basic characteristics of the good and/or service of interest by virtue of advertising received through both traditional and virtual channels.

EXTRAJUDICIAL SETTLEMENT OF ONLINE ADVERTISING DISPUTES BETWEEN SERVICE PROVIDERS AND CONSUMERS/USERS

Advertising disseminated on the Internet at times leads to certain conflicts between information service providers and the potential recipients of this

advertising. These conflicts are settled in courts of law or through extrajudicial settlement mechanisms established for this purpose.

Relevance of the Instrument in Question as a Potential Regulatory Body

Since the dawn of humanity, conflicts¹ between humans have always existed. Laws serve to settle these disputes and provide an appropriate resolution mechanism for the parties involved. In this sense, the science of law is the science of resolving disputes. These disputes are pathological legal phenomena, and law is the science or art of curing them.

Recently, the resolution of intersubjective conflicts seems to be primarily reserved for government judicial entities. However, governments are increasingly recognising alternative channels to the courts (BÖRZEL & RISSE, 2010), which should be viewed as mechanisms for resolving disputes pertaining to individual freedoms. Therefore, individuals have various options for addressing their own interests and needs. In any case, we must stress the peaceful and non-confrontational coexistence of both instruments. Channels such as alternative dispute resolution (ADR) or online dispute resolution (ODR) should not be viewed as formulas for opposing or contravening courts of law. The collaboration of the courts is essential for achieving the intended protection.

The Spanish legal system today, by virtue of the Spanish Constitution (SC), guarantees the freedom of its citizens (SC Article 1.1) and the effective protection of their rights. SC Article 117.3 imbues the government with the authority exercised by its courts and tribunals. This gives the government a monopoly over judging and executing judicial decisions, although nothing prevents individuals from resolving their own disputes or entrusting their resolution to a third party.

Numerous disputes between consumers or users and businesses can and frequently do arise as a result of interactive advertising, just as they do with product and service promotion in the physical world. These disputes can be resolved through various means, the most important of which are judicial and extrajudicial mechanisms, including the procedure established by the Advertising Jury (KATSH & RIFKIN, 2001; KAUFMANN-KOHLER & SCHULTZ, 2004; ESTRELA & CORREIA LOUREIRO, 2013).

¹ Conflict arises due to confrontation, as different parties seek to achieve conflicting goals, defend contradictory values, pursue divergent interests or competitively pursue the same goal. It is an aspect present in the origination of any agreement of wills. When an agreement is balanced and there is full willingness to comply, the potential for conflict is remote. But conflict may arise as soon as there is a change in circumstances that makes compliance too burdensome. When the agreement lacks full willingness to comply and has some aspects that have been forced or lack balance in execution, the affected party will seize any viable opportunity to breach the agreement. If the contract is markedly unequal, it will have a precarious existence. The more aggrieved party will default at the first opportunity.

The best way to avoid conflict is through prevention. To this end, we believe that it is certainly useful for information service providers to abide by legal requirements and other complementary quality criteria in their Internet-based promotional activities. Such quality criteria should be enforceable by the accompanying contract, where appropriate, and should enhance the relevant legal regulations.

In short, although all information service providers operating on the Internet are obliged to comply with the law, not all do so. Thus, it is relatively common for disputes to arise between consumers/users and businesses. To avoid such situations that obviously undermine the rights of the weaker contracting party, the European Community (LEMA DEVESA, 2018)² and national³ legislators encourage businesses to adhere to self-regulation mechanisms in the field of advertising. In addition to enabling full compliance with prevailing legislation, these mechanisms allow businesses to provide additional benefits (BODDEWYN, 1985; RAMOS FERNÁNDEZ, 2001) to consumers and/or users that go beyond minimum legal requirements, which instils a greater sense of confidence.

Of great benefit to the consumer is that verification of compliance with legal and contractual rules is carried out by an impartial third party. For the entities that manage self-regulation systems in the field of advertising, this is the extrajudicial mechanism established in the code of conduct (LÓPEZ JIMÉNEZ, DITTMAR & VARGAS PORTILLO, 2021b). Both elements represent the constituent assumptions of any self-regulation system.

Interactive advertising codes of conduct contain a set of good professional practices with requirements that exceed the legal regulations in force⁴ and have been approved specifically for the advertising industry to protect consumer/user rights and interests. To this end, these codes of conduct refer to general advertising principles; the need for advertising and advertiser identification; the obligation to comply with regulations in many areas; information on various issues pertaining to access to certain services, and the contracting of the goods and/or services being promoted; full protection of the privacy of the potential recipient; special

² See Directive 84/450/EEC of 10 September 1984 on misleading advertising, as amended by Directive 97/55/EEC of 6 October 1997; Directive 2000/31 of 8 June 2000 on certain legal aspects of electronic commerce in the internal market, which provides for appropriate mechanisms to promote self-regulation.

³ In Spain, examples include the General Advertising Law 34/1988 of 11 November 1988; the Regulation of Retail Trade Law 7/1996 of 15 January 1996; Information Services and Electronic Commerce Law 34/2002 of 11 July 2002; and Law 29/2009 of 30 December 2009, which amends the legal regime on unfair competition and advertising to improve consumer and user protection.

⁴ Codes of conduct imply the imposition of a higher level of third-party protection than provided by prevailing legal regulations.

provisions regarding advertising disseminated in certain media (such as forums, news channels, and chats) to avoid surreptitious advertising that violates the principles of authenticity and advertising sponsorship (FERNÁNDEZ-CAMACHO, 2020) and measures to protect minors (LÓPEZ JIMÉNEZ, DITTMAR & VARGAS PORTILLO, 2021a). One of the rightful areas of focus of these codes of conduct is educating (DE LERMA GALÁN, 2018) and training consumers/users⁵ in the matters they regulate⁶. For example, users are often unaware of the potential problems associated with the use of their personal data and of the available tools to remedy these problems. As rightly established in codes of conduct, it is appropriate to launch information campaigns⁷ regarding consumer rights in advertising, especially the use of personal data, whether provided voluntarily or collected automatically. There is a clear lack of information (GÓMEZ CASTALLO, 2001) for consumers in the field of interactive advertising, an issue that should be addressed by requiring service providers to improve the transparency of certain practices.

The following advantages of adhering to a good practices document in the virtual advertising field, usually, a code of conduct, include incentives for the development of standards that ensure high levels of rectitude in advertising; speed, compared to the process for complying with legislated rules; specificity regarding a specific media and cultural environment, which is particularly relevant on the Internet; flexibility for accommodating changes in public opinion and advertising technology and methodology (MARSDEN, 2008; AGUILAR RUIZ, 2011); adaptable procedures developed by advertising experts; prevention of violations, especially if mechanisms exist for assessing advertising before it is disseminated (usually called copy advice) (MUELA-MOLINA & PERELLÓ OLIVER, 2014); shorter timeframes and lower costs for developing extrajudicial procedures to address advertising violations; and opportune sanctions through the timely publication of resolutions and withdrawal of advertising. Benefits for consumers include advertising self-discipline mechanisms that facilitate access to

⁵ The right to consumer education and training is included in the 1972 OECD report on consumer protection policy in the member states, in the Consumer Protection Charter drawn up by the Council of Europe in 1973, and in the 1975 EEC Preliminary Programme for a Consumer Protection and Information Policy. The essential aim of consumer education and training should be to enable consumers to acquire self-awareness of the consumer phenomenon, its social significance, and its relevance in other areas. It will also have an impact at the point of purchase of the product or use of the service.

⁶ The suggestive elements of codes of conduct in this respect was reviewed by Guido Alpa, *Introduzione al diritto del consumatori* (Laterza, 2006) 28.

⁷ Consumer information should be eminently educational. Indeed, it must be realised that an informed consumer who knows his or her rights and can recognise possible infringements will have more opportunities for taking advantage of the benefits offered by the Internet.

certain dispute resolution bodies through a simple and free complaint system, which enables disciplining of advertisers that violate consumer rights (REICH, 1992)⁸. Furthermore, the important educational and informative value of self-regulation should not be overlooked (GÓMEZ SEGADE, 1980; DE MIGUEL ASENSIO, 2005; PERELLÓ OLIVER, MUELA MOLINA & HORMIGOS RUIZ, 2016).

Regarding adherence to a particular system of advertising self-regulation, the supervisory body represents a competitive advantage for certain enterprises in that it leads to greater consumer/user confidence (PONTE, 2002; EDELSTEIN, 2003). Indeed, consumers and/or users must know that in the event of a dispute, they can turn to an independent and impartial extrajudicial mechanism to which the company has voluntarily adhered. To ensure that codes of conduct do not sit on shelves collecting dust, an oversight body must be empowered to verify compliance and, if necessary, impose appropriate sanctions for code violations (BERLEUR, 2002). Otherwise, these codes of conduct are reduced to mere declarations of intent or ineffective propaganda tools (VARGAS PORTILLO, 2020).

The terms “self-regulation” and “sanction” might seem difficult to reconcile, as the former is largely associated with voluntary activity and private autonomy, and the latter is usually associated with the public domain due to its markedly coercive nature. However, this is not the case, as the disciplinary sanctions are private in origin and traditionally articulated as a natural complement to the capacity for normative self-regulation that every organisation possesses (LÓPEZ JIMÉNEZ, VARGAS PORTILLO & DITTMAR, 2020)⁹.

In other words, businesses need to be able to provide consumers and/or users with tools to avoid or resolve disputes that may arise in digital advertising, especially if they are cross-border initiatives (SEWART & MATTHEWS, 2002; WAHAB, 2004). For this reason, consumer tools for registering complaints, many of which are implemented through codes of conduct, should be encouraged. Simple, quick, and inexpensive tools are the only ways of compelling consumers to bear the risk of non-compliance or deficient compliance by a business.

⁸ The control mechanisms established by self-disciplinary systems are normally limited to advertising broadcast at a national level and are less effective for cross-border advertising. However, as we shall see, sometimes there is a certain degree of cooperation between national systems.

⁹ Authors like Ian Harden and Norman Lewis, *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson, 1996), have denounced the serious breakdown of the principle of separation of powers observed when self-regulatory bodies encompass both regulatory production and interpretation powers as well as supervisory and sanctioning powers.

Without detracting from the competitive advantage enjoyed by businesses that choose to adhere to a code of conduct, adherence to the good practices presented in these documents means that a business is obligated to accept the favourable or unfavourable decisions of an extrajudicial dispute resolution body. In fact, if a business refuses to comply with such a decision, it could be expelled from the self-regulation system and suffer the corresponding consequences of negative publicity and loss of credibility.

Composition

There is debate regarding the entities that should make up the supervisory body, as its impartiality may be questioned depending on its composition.

Certain supervisory bodies only incorporate entities actively involved in the field of advertising. Self-regulation in this field is a self-determining system for the advertising industry¹⁰. Three industry actors must agree on the minimum standards of conduct: advertisers that pay the advertising costs, agencies that produce the advertising content, and the channels or media that disseminate the advertising content.

Thus, the members of these bodies, especially in the area of virtual promotion, are very diverse businesses with consumer representation that, although limited, should be viewed positively. In other cases, the supervisory body will be made up of business, consumer, and government representatives.

Although Internet advertising is subject to its own legal regulations, the existing regimes seem insufficient and inadequate. In fact, although hetero-regulation should establish a minimum level of regulation, it is not as effective as it should be (LLAGUNO & HERNÁNDEZ RUIZ, 2009). Indeed, because of external control, there is now a certain hyper-regulation of commercial communication due to the plurality of legislators, approaches¹¹, interests¹², and controls¹³.

¹⁰ Self-regulation, according to Ross Cranston, *Consumers and the Law* (2nd edition, Weidenfeld & Nicolson, 1984), originated in the merchant guilds of the Middle Ages that conceived the need to approve codes of conduct in order to strengthen the guild's position vis-à-vis the outside world. The modern conception of current self-regulation systems comes from the Anglo-Saxon legal system.

¹¹ In this sense, regulation of advertising should be viewed from three perspectives: general regulation; medium-based regulation; and product-based regulation.

¹² The objectives of advertising-related regulations vary widely and include the safeguarding of economic competition, consumer protection, etc. It should be noted that it can be difficult to determine the specific interest that an advertising-related regulation will protect.

¹³ If a potentially unlawful advertisement is disseminated, it may be subject to administrative, civil or criminal penalties.

Structure

The functions of the control body vary according to its particular structure. The aim is to incorporate the advantages inherent to judicial systems and avoid their disadvantages. For the purposes of this study, the main objective of the control bodies is agility and speed in the extrajudicial resolution of online disputes. In any case, their decisions must be reasoned and based on the approved reference documents that have been accepted by the service providers participating in the advertising self-discipline system. Supervisory bodies can adopt different structures, but three main types can be identified:

- (1) Single supervisory body – It has full decision-making capacity, and any disputes it considers are resolved in a single phase. The most significant advantage of this structure is its inherent speed, and its most visible disadvantage is no higher-level entity is available to review decisions rendered.
- (2) Dual supervisory body – This body is not as speedy as the single supervisory body because it consists of two phases. The first phase involves a dispute investigation and then the rendering of a decision on adjudicated cases. The second phase involves reviewing the decisions rendered in the first phase. An example of a dual body is the Advertising Jury, which resolves disputes in the field of interactive advertising.
- (3) Tripartite supervisory body. In addition to the two phases of dual supervisory bodies, there is a third phase that exists outside the self-regulation system itself and involves acting on cases of non-compliance by the sanctioned party with the decision rendered (MARSDEN, 2011). This structure could be considered a co-regulatory system (ROTFELD, 1992; PATIÑO, 2007; PROSSER, 2008; FEENSTRA, 2019). Any type of activity by public entities to compel compliance with sanctions imposed by a self-regulation system supposes very close collaboration between private and public entities (SENDEN, 2005; HYMAN, 2009; GINOSAR, 2014).

The Need to Observe Certain General Principles: Council Resolution of 25 May 2000

Recourse to extrajudicial dispute resolution processes can in no case result in the erosion of consumer rights. As the European Commission stated in Recommendation 98/257/EC of 30 March 1998, the objective of an extrajudicial process cannot be to replace the judicial system¹⁴; therefore, an extrajudicial

¹⁴ In this regard, it is important to consider that the right to effective judicial protection and the right to an impartial judge are fundamental rights guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. It is also worth noting Article 6 of

process can only deprive consumers of their right to access the judicial system if these consumers explicitly accept this, in full knowledge of the facts and after the dispute has begun.

A review of the various European initiatives reveals that two main ADR types have been legislated in the EC. One type, regulated by Recommendation 98/257/EC, seeks to resolve conflicts through the active intervention of a person who proposes or imposes a solution. The other type, regulated by Recommendation 2001/310/EC of 4 April 2001, seeks to resolve conflicts by bringing the parties together to arrive at a mutually agreed solution.

Disputes arising from the commercial practices of businesses adhering to codes of conduct also fall within the scope of Law 7/2017 of 2 November. Although Directive 2013/11/EU of the European Union Parliament and Council of 21 May 2013 makes no reference to extrajudicial dispute resolution systems for advertising-related complaints, they are included in the scope of Article 37.4 of Spain's Unfair Competition Law 3/1991 of 10 January 1991 and subject to the same EC regulations. If these extrajudicial resolution systems were not included, they would remain unregulated and there would be no mechanism for notifying the EC of advertising-related complaints. Thus, extrajudicial dispute resolution systems, whether related to sales and service contractual obligations or non-compliance with codes of conduct on unfair competition and alternative advertising, are subject to the same legal regime, without any distinction.

There are two aspects of Article 37.4 of Spain's Unfair Competition Law (*Ley de Competencia Desleal – LCD*) that are very relevant to this study. First, a control body must be established (BODDEWYN, 1989) in the self-regulation system for it to be truly self-regulating. Second, the control body must be independent (FERNANDO MAGARZO, 2008).

In the law, independence is a prerequisite for the self-regulation system to function in an extrajudicial dispute resolution capacity. It should be independent of the body's members and of the body itself. A list of the criteria for abstention and recusal should be established to ensure independence and should adhere to the requirements in EC Recommendations 98/257/EC of 30 March 1998 and 2001/310/EC of 4 April 2001. These EC Recommendations establish the principles applicable to extrajudicial bodies for the consensual resolution of consumer disputes when a code of conduct governing the business-consumer relationship exists.

The legislation demands that self-regulation systems must meet the requirements of EC law, and as such, the EC must be notified of these systems in accordance with the EU's Council Resolution of 25 May 2000 pertaining to the

the European Convention on Human Rights of 4 November 1950, ratified by Spain per its directive of 26 September 1979.

EC network of national bodies for extrajudicial settlement of consumer disputes or any equivalent function (known as the EEJ-Net). This Resolution seems to require that enforcement bodies must be integrated into the EEJ-Net. Integration implies full compliance with the principles established in EC Recommendation 98/257/EC (FERNÁNDEZ CARBALLO-CALERO, 2015) of 30 March 1998 on the principles applicable to extrajudicial consumer dispute resolution bodies concerning independence, transparency, adversarial procedures, effectiveness, legality, freedom of choice and the right of representation, as supplemented by EC Recommendation 2001/310/EC of 4 April 2001. The scope of this Recommendation includes the principles of impartiality, transparency, effectiveness, and fairness.

The independence of the decision-making body shall be established in a way that guarantees its impartiality. When individuals are making dispute resolution decisions, independence shall be guaranteed by implementing the following measures: the designated individual shall have the ability, experience, and competence, particularly in legal matters, required for the function; the duration of the designated individual's term in office must be long enough to guarantee independence of action, and this individual may not be dismissed without just cause; and where the designated individual is appointed or remunerated by a professional association or business, that individual cannot have worked for that association or any of its members, or for the business concerned, for three years prior to assuming the role. Where a group of individuals is making dispute resolution decisions, the independence of this group may be guaranteed by equal representation of consumers and professionals or by complying with the criteria presented above¹⁵.

Regarding the principle of transparency, necessary measures must be taken (HARKER, 2003) to ensure that transparency is built into the process (HARKER & HARKER, 2002)¹⁶. There are two main types of transparency measures. First is the free and timely release of information regarding the dispute resolution process to anyone who requests it. Second is the publication of an annual report by the appropriate body about decisions rendered in order to facilitate evaluations of the results obtained and determine the types of disputes that have arisen.

The adversarial process (*audi alteram partem* from the Latin “listen to the other side”) means that the dispute resolution process should allow any interested party to present its perspective to the appropriate institution and to be fully

¹⁵ The more heterogeneous and proportional the composition of the supervisory body, the greater is the independence and impartiality of its decisions.

¹⁶ Lack of transparency may impair the rights of the disputing parties and raise overall concerns about extra-judicial dispute resolution procedures.

informed of the other party's positions and facts, as well as, where appropriate, of any expert statements.

The effectiveness of the dispute resolution process shall be ensured by implementing certain guarantees. First, the consumer should have direct access to the process without needing a legal representative. Second, the process should be free of charge or have only moderate costs. Third, relatively short deadlines should be established between the submission of the complaint and the rendering of a decision. Fourth, the decision-making body must be given an active role, enabling it to consider all the elements useful for the settlement of the dispute.

The principle of legality means that any decision rendered by the decision-making body cannot have the effect of depriving the consumer of protections guaranteed by the mandatory provisions of the laws of the country in which the body is established. Furthermore, in cases of cross-border disputes, the decision may not deprive the consumer of protections guaranteed by the mandatory provisions of the laws of the Member State in which the consumer habitually resides, as provided for in Article 5 of the Rome Convention of 19 June 1980 on laws applicable to contractual obligations. Any decision shall be justified and communicated in writing or another appropriate form to the interested parties as soon as possible.

The principle of freedom means that the decision is binding for the parties only if they have been informed in advance and have explicitly accepted this commitment. A consumer's adherence to an extrajudicial process may not be the result of a commitment made before the dispute arose, where such a commitment has the effect of depriving the consumer of the right to have recourse to a court of law with jurisdiction over such disputes.

Last, the principle of representation means that the process may not deprive the parties of the right to be represented or supported by a third party at all stages of the proceedings.

A high level of consumer protection can be achieved through the principles established in the abovementioned EC Recommendations and as presented in Article 169 of the Treaty on the Functioning of the European Union (TFEU) (ex Article 153 TEC).

In Spain, these principles and provisions are fulfilled by Autocontrol's Advertising Jury (MEDINA & AN, 2012).

Finally, it should be noted that extrajudicial entities can make fair decisions based on legal provisions as well as on codes of conduct. The resolutions made by the self-regulatory systems do not imply a lower level of protection than those that could be issued by the courts of justice. It should be noted that legitimate codes of conduct will include not only the legal regulations themselves but also

additional elements that extend the minimum rights conferred by law on the weaker contracting party.

RELEVANT INTERNATIONAL INITIATIVES

The international non-governmental organisations that have developed self-regulating mechanisms in the field of advertising are very diverse¹⁷.

The International Chamber of Commerce (ICC) is the primary example of an organisation that has developed self-regulating mechanisms and is the most influential private organisation that has developed standards of behaviour in advertising and marketing that are widely accepted by the international business community. These standards for self-regulation consist of codes of conduct and guidelines. Although the ICC has not established an international system of self-regulation, it has developed a catalogue of good practices that have significantly influenced the development of various national codes of conduct for advertising self-regulation.

The following are the most noteworthy documents produced by the ICC: the 1937 Code of Ethics in Advertising (AZNAR GÓMEZ, 2000)¹⁸; the 1955 Code of Legal Practices in Advertising¹⁹; the 1997 ICC International Code of Advertising Practice, applicable to advertising for the promotion of any form of goods and/or services and by any means; the 1991 ICC International Code of Environmental Advertising; the 1998 ICC Guidelines on Advertising and Marketing on the Internet; the ICC International Code of Direct Marketing²⁰; and the 1992 International Code on Sponsorship, last updated in 2003.

Another international association that promotes advertising self-regulation is the International Advertising Association (IAA). It acts as an information exchange mechanism for best practices in advertising and assists its national chapters in developing self-regulation systems. There are other international associations that, while promoting self-regulation, have had only limited success in standardising national self-regulation systems; an example is the World Federation of Advertisers.

¹⁷ The first code of conduct for advertising was issued by the Association of Advertising Clubs of America in 1911, in the United States. These documents are updated over time as societal changes occur, to address potential problems that could arise from new advertising techniques and content.

¹⁸ It was designed to promote advertising self-regulation at an international level. This code of conduct has been updated numerous times and is still in force. Moreover, it represents an immediate precursor of numerous self-regulation initiatives in the advertising field.

¹⁹ This self-regulatory document deals with unfair and comparative advertising, misleading advertising and protections for consumers and competitors pertaining to advertising.

²⁰ Consideration should also be given to the 1987 International Code of Sales Promotion and the 1999 International Code of Direct Selling.

Regarding activity specific to the field of electronic advertising, the work of the Global Business Dialogue on Electronic Commerce (GBDE) is noteworthy. This is an international initiative that brings together the main businesses operating in this sector and aims to develop recommendations to influence national legislation and business standards. Of interest to this study are the GBDE's 1999 recommendations on commercial communications.

THE ADVERTISING JURY

In addition to the ex-ante review function, certain self-regulation systems provide an ex-post review of disputes about potential code of conduct violations (LÓPEZ JIMÉNEZ, DITTMAR & VARGAS PORTILLO, 2021c). The latter review is conducted by the supervisory body after the advertising campaign in question has been broadcasted and will determine if it violated one or more ethics rules in the applicable code of conduct. If a violation is identified, the supervisory body recommends that the advertiser withdraw or modify the advertising. There is usually no objection to a supervisory body's decision when it rules against a member institution, but the same cannot be said when it rules against non-member third parties. One of the most exemplary extrajudicial systems listed by the European Commission for alternative consumer dispute resolution mechanisms is Autocontrol's Advertising Jury.

Concept and Inherent Characteristics

The model in Europe for extrajudicial dispute resolution bodies in the field of interactive advertising is Autocontrol's Advertising Jury, the first private entity to be accredited by the Spanish government as an ADR body.

The Advertising Jury belongs to an association called Autocontrol but is fully independent. Autocontrol was constituted in 1995 (MEDINA & AN, 2012) and is the successor organisation of Autocontrol de la Publicidad S.A., which was created in 1977. Among advertisers, agencies, and media organisations, Autocontrol's membership includes more than 70% of Spain's advertising industry.

Autocontrol was the first Spanish private entity to be incorporated into the European Commission's European Extrajudicial Network (EEJ-Net), due to the Advertising Jury's function as an extrajudicial dispute resolution body that fulfills all of the requirements and principles of independence, transparency, efficiency, legality, adversarial procedures, freedom of choice and the right to consumer representation established in EC Recommendation 98/257/EC of 30 March, on the principles applicable to bodies responsible for the extrajudicial settlement of consumer disputes.

Article 47 of the Autocontrol statutes and Article 3 of the Advertising Jury's regulations establish the following organisational structure for the Jury: one president, between three and six vice presidents, and between nine and 20 members of indisputable impartiality. Note that the use of the word "indisputable" is intentional as great emphasis is placed on impartiality; none of the Jury members can have any relationship whatsoever with the member companies.

The Jury only intervenes when a dispute has arisen and acts in accordance with a regulated procedure based on the principles of equality of the parties, the right to file claims, and the right to defend (FEENSTRA & GONZÁLEZ ESTEBAN, 2019). Although the Jury is indeed administratively dependent on Autocontrol, it is not an arm of that organisation. The Jury is made up of experts²¹ in different fields such as law, economics, advertising, communication, and sociology that is of increasing relevance. Despite its recent creation, the advertising self-regulation system created by Autocontrol has become the preferred mechanism for resolving disputes in Spain, even more so than the courts of law.

We can confidently state that the Advertising Jury is the main actor in Spain's new system for advertising self-regulation. The Jury is defined in Article 22 of Autocontrol's statutes as a specialised body focused on deontological ethics in advertising, endowed with absolute functional autonomy and independence, and composed of independent individuals.

It only deals with commercial advertising, thereby excluding political, institutional, and religious advertising. Furthermore, according to Article 13.2 of the Jury's regulations, it addresses advertising disseminated in Spain in the last 12 months as well as cross-border advertising (Article 12.3 of the Jury's regulations) that has been disseminated abroad and censured by a national self-regulation body that is part of the European Advertising Standards Alliance (EASA), if there are indications that the advertising in question will be disseminated in Spain (Article 12.4 of the Jury's regulations). Furthermore, in accordance with Article 13.4 of the Jury's regulations, resolved complaints regarding commercial communication or complaints that are being addressed through another legal or administrative process will not be accepted by the Jury²².

The norms applied by the Advertising Jury are not legal norms. If they were, the Jury could be seen as encroaching on a judicial function that corresponds exclusively to judges and courts of law, in accordance with EC Article 117.

²¹ Jury members include former advertising agency executives, former media executives, and people who have held public office in the field of consumer affairs.

²² The filing of a lawsuit in a court of law pertaining to an advertising issue being heard by the Advertising Jury will cause the immediate suspension of the Jury's proceedings on the matter.

Dispute resolution in the field of interactive advertising shall be based on the 1996 (general) code of conduct in advertising as last amended in June 2019 as well as on the sectorial code in question. The rules contained in the sectorial code are to be regarded as deontological or ethical, without prejudice to the fact that they sometimes contain, in addition to the applicable regulations, enhanced rights for potential consumers and/or users. Self-regulatory instruments establish the observance of legal rules as a minimum standard of ethical behavior (BODDEWYN, 1992), allowing the Jury to sanction non-compliance with the law²³ as behaviour that violates advertising ethics.

The pleadings of the disputing parties and the decisions of the Advertising Jury may refer to previous Jury decisions to support their respective cases or reasoning. Except when justified, the Jury does not usually deviate from earlier decisions. This is similar in cases adjudicated by a court of law, especially the Supreme Court. This practice also conforms to the requirements of legal certitude, the principle of equality, and the prohibition of arbitrariness.

The Advertising Jury's technical authority and the impartiality it has demonstrated in decisions made by jurists of recognised prestige and experts with proven reputations in the sector have generated a high degree of credibility and trust since its inception throughout the advertising industry, government, and society in general. When cases adjudicated by the Advertising Jury have been subsequently litigated in the Spanish courts, the resulting legal judgements have substantially aligned with the Jury's previous decisions. This clearly demonstrates how the Jury has established a solid canon that transcends the domain of self-regulation and influences the Spanish judicial system.

Ex-Ante Review for Members and Third Parties

There are two mechanisms for verifying compliance with good practice documents, typically codes of conduct. These are the voluntary ex-ante review, which is an advisory service (often called copy advice) conducted before the event, and the mandatory ex-post review conducted by a control body such as the Advertising Jury.

Copy advice is a voluntary, confidential (unless contraindicated), and normally non-binding advisory service on the legal and ethical correctness of an advertising campaign or project before it is publicly disseminated. It can be requested by the advertiser, the advertising agency, or the broadcasting medium.

²³ According to the Advertising Jury, there are three criteria for interpreting the principle of legality. The first is a simple and elementary reading of the legal norm. Second, when the complexity of the case requires a legal interpretation, existing case law is used. Third, when the complexity of the case requires a legal interpretation and there is no applicable case law, the Jury must conduct a deep and sincere deontological position that guarantees a solution to the dispute.

These advisory services are usually provided by technical offices that are independent of the juries that resolve disputes. The only entity in Spain that provides such a service is Autocontrol's Technical Office. This office is staffed by jurists and advertising professionals who assess whether a specific advertisement complies with the code of conduct's regulatory and ethical standards. If found to be non-compliant, the issue must be resolved by means of a negative copy. This review is not another dispute resolution mechanism but provides a useful tool for preventing disputes from happening. In other words, it has a preventive function. In light of the very practical utility of this type of review, LCD Article 37.4 states that codes of conduct "may include, inter alia, individual or collective measures of ex-ante self-regulation of advertising content."

There is also a transnational copy advice system. EASA, an organisation that comprises all of Europe's (and some from other regions) self-regulation systems²⁴, has set up an online system for resolving cross-border copy advice. This transnational system allows members of a country's advertising self-regulation system (such as Spain's Autocontrol) to request copy advice when planning an advertising campaign in another member country to ensure that it complies with the legislation and advertising codes of conduct of that country.

Cross-Border Claims Handling Mechanisms

When a complaint about interactive advertising does not fall within the territorial scope of a national self-regulation system, it is transferred through Autocontrol's Confianza Online tool to EASA, which then processes the complaint through its cross-border complaint system (SHUIBHNE, 2006; HORVATH, VILAFRANCO & CALKINS, 2009; SEMOVA, 2016)²⁵. The main objective of this mechanism is to facilitate the transfer of cross-border advertising complaints to the self-regulation body of the country in which the media outlet is established, which will then adjudicate the case. The EASA mechanism is more than a simple cross-border complaint-handling system; it is a framework for cooperation between national self-regulation systems (EASA, 2010). This cooperation is enabled by a commitment by the leaders of these self-regulation systems to refer complaints submitted in their territory to the appropriate body for adjudication.

²⁴ Other supranational advertising bodies in addition to EASA include the *European Advertising Tripartite* (EAT), based in Brussels; the *International Advertising Association* (IAA), based in New York; and the *Inter-American Society for the Freedom of Commercial Speech* (SILEC).

²⁵ See also, Nina Dethloff, *Europäisierung des Wettbewerbsrechts: Einfluss des europäischen Rechts auf das Sach- und Kollisionsrecht des unlauteren Wettbewerbs* (Mohr Siebeck, 2001) 38.

Participation in a coordination mechanism such as EASA does not necessarily mean that one national self-regulation body has to accept the assessments and decisions made by another national self-regulation body. However, given that EASA supports the EC criterion of mutual recognition (PERELLÓ OLIVER & MUELA MOLINA, 2017), it likely favours the idea that national self-regulation bodies should accept the assessments and decisions made by other national bodies, even if their codes of conduct are not identical.

The Main Procedure of a National Self-Regulation System

In this section, we will examine procedures used by Autocontrol's Advertising Jury, with a focus on two specific aspects - active and passive legitimisation. Regarding the latter, we will analyse judgements against third parties outside the system and the problems that this raises.

Active Legitimation

According to Article 12.2 of the Jury's regulations, "[the] procedure shall be initiated by request or complaint from any person having a legitimate interest in a particular commercial communication. It may also be initiated *ex officio*²⁶, when the circumstances so require, by the governing bodies of the Association." Therefore, a complaint may be lodged by any interested party, be it a public entity or a private one such as an individual consumer, a company, a business association, or a consumer association. It can be inferred that membership in or compliance with Autocontrol is not a prerequisite for filing a complaint²⁷. The procedure is free of charge for consumers, consumer associations, government bodies, and Autocontrol members. However, it is not free for entities that are not members of Autocontrol.

The rule cited above implies that a claimant must have a "legitimate interest" in the advertising in question. In other words, there must be some connection with the advertising so that any decision on the matter has some effect on the claimant.

²⁶ Article 36 of the Jury's regulations considers the scenario in which cases are transferred to the Jury for *ex officio* adjudication at the request of a government office.

²⁷ Some codes of conduct require the complaint to be presented first to a self-regulation jury before resorting to judicial or other public proceedings. This requirement is found in the code of self-regulation of food advertising aimed at minors, obesity prevention and health; the code of advertising self-regulation of the Spanish Federation of Spirits (FEBE); and the Spanish code of good practices for the promotion of medicines and pharmaceutical industry interaction with health care professionals.

Passive Legitimation

Although Article 16 of the Jury's regulations refers to "party or parties complained against," complaints addressed by the Jury are normally directed at a single advertiser. Advertising agencies and media owners who have broadcast the advertisement would not be considered parties to the complaint.

From this, we can conclude that the Jury's decisions can be addressed to both member companies and non-member third parties²⁸. Although the latter could be somewhat paradoxical, because these third parties never consented to observe the ethical rules included in the code of conduct, a third party may decide to voluntarily accept the Jury's jurisdiction. As we shall see further on, even if there is explicit opposition by a third party, this does not prevent the Jury from issuing a non-binding opinion on the deontological correctness of the advertising campaign submitted for its assessment. The Jury's decisions are binding on affected parties, both members and non-member third parties, that have explicitly or voluntarily accepted the authority of the Advertising Jury.

Decisions pertaining to Member Companies

It is normal practice for the self-regulation system to issue rulings on the endeavours of companies that have voluntarily and explicitly expressed their desire to participate in the system as members. In fact, the number of rulings concerning third parties is significantly lower than those concerning member companies. However, some instances of rulings in the field of interactive advertising against non-member entities do exist. These decisions are always based on the codes of conduct established by the self-regulation system for interactive advertising.

The Advertising Jury will intervene when mediation by Autocontrol between member companies has been unsuccessful. The mediation process is an optional conflict resolution mechanism that precedes Jury intervention, in which the Jury secretary acts as an independent third-party mediator that tries to bring the disputing parties together by negotiating mutually acceptable positions. Most of the differences between parties in the field of interactive advertising are usually resolved by mediation, with a relatively smaller percentage of cases requiring the intervention of the Advertising Jury.

Decisions pertaining to Non-Member Companies or Third Parties

As discussed above, participation in self-regulation systems must always be voluntary for information service providers, and it is never acceptable for the

²⁸ The Jury's decisions are also binding on companies that, although not members of Autocontrol, adhere to sectoral codes of conduct established by certain organisations but whose application and dispute resolution has been entrusted to the Jury.

self-regulating entity to unilaterally demand compliance with the code of conduct from a non-member business. In other words, when a business has not agreed to adhere to a self-regulation system and its corresponding code of ethics, the self-regulating entity cannot demand compliance because there is no basis for doing so. Codes of conduct must be regarded as lacking an essential element inherent to legal regulations, which is universal applicability.

However, the Advertising Jury may find itself ruling on disputes involving companies that are not members of the self-regulation system. Despite the voluntary nature of the system, which can only be statutorily binding on member organisations, its moral strength for members and non-members of the Advertising Jury's decisions is undeniable.

If a non-member third party refuses to submit to the Jury's authority, the Jury will not render a decision²⁹. However, the plaintiff can still ask the Jury for a non-binding opinion on the non-member third party's advertising. This assessment is issued as a written opinion that articulates its deontological point of view and that is in no way binding for non-member companies.

Considering that the code of conduct on which the Jury bases its opinion incorporates existing legal regulations and numerous ethical considerations, this opinion would not be inconsistent with the norms applied by the judicial system when adjudicating controversial cases of interactive advertising. In any case, it is worth repeating that the opinion is not binding, and the affected service provider is always free to accept its recommendations or not.

Additionally, the Jury or governing bodies of the Association may decide to forward this non-binding opinion to the authorities, as provided for in Article 30 of the Jury's regulations.

Balancing Freedom of Speech and Unfair Competition

Publication of a ruling by an online advertising self-regulation system against a third party not associated with the system could be considered an act that constitutes unfair competition, specifically, defamation (LARA GONZÁLEZ, 2007). LCD Article 2 limits its scope of application to competitive marketplace activity. Before examining whether or not the publication of such a ruling constitutes defamation, we must first analyse the LCD's scope of application.

Rulings against non-member service providers cannot be considered acts of unfair competition if the self-regulation body was not pursuing a competitive purpose by publishing the ruling. The LCD would not apply in this case because the conditions of Article 2 have not been met. Therefore, to establish whether the publication of such a ruling is unlawful, Article 1902 of the Spanish Civil Code

²⁹ A decision is only rendered when the complaint is directed against a member or non-member who has accepted the Advertising Jury's jurisdiction.

should be applied to determine if any harm caused can be claimed under that article.

As we will see further on, if the self-regulation body has a competitive purpose, then the publication of such a ruling may be considered an act of unfair competition. However, if the self-regulation body has no competitive purpose but the publication of its ruling has harmed the name or reputation of the non-member service provider, then damages may be claimed under Article 1902 of the Spanish Civil Code.

If the ruling publication contains accurate, true, and relevant statements, then the outcomes of applying either the LCD or Civil Code will likely not be very different or considered unlawful. However, if the ruling publication contains personal insinuations, both the LCD and the Civil Code could consider this unlawful.

The key to determining whether we are dealing with an act of unfair competition under LCD Article 2 depends on whether or not the ruling publication had a competitive purpose in the marketplace. According to LCD Article 2.2, competitive purpose is presumed when the context of an action demonstrates that it objectively promotes or publicises the perpetrator's services or those of a third party in the marketplace.

Thus, an action that extends beyond the purely private domain of the perpetrator, the effectiveness of which is not limited to the internal domain of the perpetrator's organisation or that is not intended to enable other externally significant conduct, such as preparatory activity, should be considered to have been carried out in the marketplace. External significance must be understood as the impact of the activity on the marketplace. In principle, it is irrelevant whether the activity has a commercial purpose or not because the key issue is the potential attack on the competition. The LCD's concept of a marketplace seems to be more economic than legal, as it states "marketplace activity should be understood as any activity that actually or potentially affects economic relationships and decision-making by economic agents."

A competitive purpose is any activity that in itself, or in the context of the case, is aimed at influencing the market structure or competitive positions of the marketplace operators, whether their own or that of a third party. This concept includes all marketplace operators, such as natural or legal persons, a group of economic operators, and an entire sector or segment of the economy, whether on the supply or demand side and/or their activity to influence the formation and development of economic relationships in the marketplace. This element is closely related to the one above because the marketplace activity must have the capacity to influence the relationships and structure of the marketplace by transcending the private domain of the perpetrator. Competitive purpose implies

the actual execution of the activity in the marketplace exchange of goods and services (SPOSATO, 2021). There is no requirement for the competitive purpose to be exclusive.

The presence of competitive purpose in an activity/conduct depends on the consequences that it produces or may produce in the marketplace. In other words, it depends on the effects it has or may develop on the operators' positions and the formation and development of economic relationships in the marketplace to which those operators are a party as participants in the marketplace. Competitive purpose must be assumed in any activity aimed at changing those positions or influencing the formation or development of those relationships. Thus, the assessment of the competitive purpose of an activity must begin with the identification of the relevant market, a task that is also needed to gain a proper understanding of the pertinent facts. Therefore, a reasonable and basic forecast must be made of the likely evolution of the relevant market and the market's existing relationships.

Although the LCD presents it as an autonomous element, competitive purpose is closely linked to external transcendence, as competitive purpose is derived from marketplace activity, a fact that further delineates the objective element of the competitive activity.

The existence of a competitive purpose is the legal presumption that the marketplace activity objectively promotes or publicises one's own services or those of a third party. Competitive purpose exists if the activity is objectively able to influence the marketplace structure and processes, either now or in the future. Likewise, the activities of preparing or disseminating advertising or publicity also have a competitive purpose.

The first group of behaviours mentioned above is considered to be unfair practices, as they meet the criteria established in LCD Article 2. Article 3 of the LCD sanctions certain acts of unfair competition, such as the defamation of competitors that, by significantly distorting free competition, affects the public interest. This type of activity could occur in the self-regulation of online advertising. For example, the dispute resolution body could issue a ruling that a non-member service provider violated the code of conduct and then publicise that ruling by making statements motivated by competitive purposes. We have already stated that this practice is unlawful, but two other points must be discussed; first, whether the ruling announcement is accompanied by other opinion statements regarding the strictly private domain of the non-member company; and second, whether the purpose of making these statements of opinion is to defame the competitor.

Regarding the unfair competition practices that harm competing businesses, these defamatory activities fall under LCD Article 9. The self-

regulation system is the offending party that defames a competitor that is not a member of the self-regulation system.

Acts of defamation under LCD Article 9 consist of the dissemination of statements likely to undermine the goodwill and reputation of a third party (information service provider) in the marketplace. However, it should be noted that making statements that, although pejorative, are accurate, true, and relevant (*exceptio veritatis*) does not constitute defamation. This aligns with LCD's social model in that the competitor's individual interest in avoiding defamation is outweighed by the public's need to be informed.

However, LCD Article 9 clarifies that, even if a statement is true, when it refers to a competitor's private, internal affairs and not its commercial activity, it is considered to be unfair when it is defamatory and insulting. Strictly personal statements about an economic operator's private, internal affairs do not influence the business or professional activity of that operator. As their name indicates, statements of a strictly personal nature are considered to belong to the personal, private domain of the third party concerned.

Defamatory statements are considered to be unfair competition when statements about the persons, products, or services of a competitor are intended to harm its reputation in the eyes of consumers. This distinguishes commercial defamation from the offences of libel or slander.

It is unacceptable for a self-regulation system that is supposed to defend the sector in which it operates to undertake any activity that undermines the reputation of a competitor for competitive purposes. Moreover, such behaviour may cause all self-regulation systems to deservedly lose credibility.

The Advertising Jury's intervention is enabled by the right to freedom of speech as recognised in EC Article 20, which protects ideological freedom that encompasses the expression and broadcasting of beliefs and value judgements. In certain cases, some might consider these expressions to be defamatory to the name or reputation of a non-member company. If a court of law determines that defamation has occurred, then damages may be claimed by the injured party under Article 1902 of the Civil Code, which imposes the obligation to compensate any person who, by commission or omission, causes harm to another person through fault or negligence.

Just as any natural or legal person has the right to freely express opinions on matters of public interest, even if the opinion is a reproach or criticism of a third party, that right extends to business associations that represent an industry sector, such as the online advertising industry. Those associations have the right to express opinions on the ethical and deontological correctness of a matter of public interest, such as an online issue affecting consumers and/or users, even if that opinion involves an ethical or deontological reprimand of someone's conduct.

The right to freedom of speech protects the free expression of thoughts, ideas, and opinions, a broad concept that should include beliefs and value judgements. In other words, freedom of speech is the right through which ideological freedom is positively projected – free expression of thoughts and ideas (PEREZ ROYO, 2018). The right to freedom of speech includes criticism of the conduct of others, even when it is unkind and may annoy, disturb or displease the person to whom it is addressed, as this is required by the pluralism, tolerance, and spirit of openness without which there is no democratic society. Such rulings will not be binding on companies that have not committed to abiding by the code of ethics but are allowable by virtue of the fundamental right to freedom of speech.

Online Advertising Cases

Rulings about online advertising against non-member entities have occurred since Autocontrol's inception. These rulings have been based on Autocontrol's Confianza Online code of conduct and on other sectoral codes that directly or indirectly relate to the online advertising topic.

The types of complaints submitted to the Jury include the unsolicited sending of commercial communications via e-mail and text message (SMS and MMS); non-compliance with rules to protect minors (CARAHER, LANDON & DALMENY, 2006); non-compliance with rules on interactive advertising promotions; the exercise of the right to object to the use of personal data, such as newsletter unsubscribe requests; violations of truth in advertising regulations; infringement of intellectual and industrial property rights; and violation of regulations prohibiting discrimination based on race, sex, sexual orientation, religious or political beliefs, or any other personal or social circumstance.

Even if the company does not adhere to the self-regulation system that rules against it, the company can accept the decision by withdrawing, rectifying, or correcting the online advertising that precipitated the complaint. It can also oppose the ruling or just decline to respond. Because the company never committed to the self-regulation system, any response to its decisions is purely voluntary.

Use of the Legal System to Address Cases of Non-Compliance with Jury's Decisions

When a defendant refuses to comply with the Jury's decision to withdraw or rectify a piece of online advertising, the case can be pursued in a court of law. However, legal proceedings of this nature only address the unlawfulness of the advertising in question. In other words, the validity of the Advertising Jury's decision will not be resolved by the court.

A court ruling will never formally confirm an Advertising Jury decision. This is not the objective of the legal proceeding. However, a court can, and often does, concur with the Jury's decision.

When adjudicating a case, the judicial body may not consider the codes of ethics upon which the Jury's decision is based; it may only apply the legal and regulatory rules applicable to the advertising in question.

CONCLUSIONS

Although tight control of all online advertising would be desirable, this is not currently possible. In any case, the Internet itself should employ self-regulating mechanisms to increase the overall level of accountability of the industry as a whole and to better protect consumers and/or users. The purpose of self-regulation is to try and bridge the gap between the law's minimum requirements and the maximum level of ethical behaviour for online advertising. This should not be achieved through coercion but through the free and voluntary dedication of those involved.

Self-regulatory initiatives in the field of interactive advertising exist at both the European Union (EU) and national levels. One such initiative implemented at a national level stands out as a positive example for others. We are referring to Spain's Autocontrol, which has instituted several codes of conduct.

Self-regulation mechanisms can be triggered by Autocontrol's Advertising Jury when an instance of advertising has violated one or more rules of the relevant code of ethics. This prestigious watchdog organisation is a recognised moral authority in the field and an extrajudicial mechanism for settling disputes concerning interactive advertising. Although it normally adjudicates cases in which the parties have already voluntarily committed to complying with its decisions, it also adjudicates cases involving third parties or non-member companies. This may lead to questions about whether such decisions are an expression of the constitutional right to freedom of speech or whether they represent a clear act of unfair competition.

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