

New Law of Transparency, Prevention and Combat of Improper Practices in Advertising Contracting: Impacts and Challenges for Companies.

On June 3rd, 2021, the Decree promulgating the Law of Transparency, Prevention and Combat of Improper Practices in Advertising Contracting was published on the Federal Official Gazette. Such recently created law has the purpose of regulating the objectives provided in article 28 of the Political Constitution of the United States of Mexico and promoting transparency in the advertising market, as well as preventing and combating improper trade practices that constitute an unfair advantage for certain people against the advertisers and, finally, against consumers.

In general terms, this new law intends to impose limits and sanction anti-competitive trade practices arising from the negligent use of advertising media in Mexico, obligating Advertisers, Media and Advertising Agencies, as well as the Media in general to the compliance thereof. The law is applicable to all the acts, contracts, agreements, procedures or any other similar instrument.

Considerations

There are severe inconsistencies in this Law which may cause de jure and de facto affectations against the obligated entities, considering the imposition of new requirements thereto.

In respect to advertisers, the Law obligates them to execute written mandate contracts with the advertising agencies, ensuring that such contracts provide the remuneration conditions of the agency. In this regard, it should be noted that advertisers may only remunerate agencies for services rendered which are provided for in the contract, otherwise they might incur in non-compliance of the law that may be subject to sanctions; furthermore, the law obligates advertisers to request that the invoice for the purchase of advertising spaces is issued by the media to the advertiser, even though the agency is the entity that is effectively contracting and paying for such spaces, thus obligating the advertiser to obtain information on the financial relationships of the agency or the trade group to which it belongs with the media that the advertiser intends to contract.

On the other hand, advertising agencies are the entities sustaining the greatest regulatory impact. The law prohibits agencies to buy advertising spaces on their own name for their subsequent reselling to advertisers; additionally, they may not receive any remuneration, commission or benefit in kind from any media for the rendering of services to the advertisers.

Likewise, the new law provides that, in case that services are rendered to advertisers, the agency may not provide services simultaneously to the media, in which case the services provided to the media should be rendered by a different entity belonging to the same trade group as the advertising agency.

In respect to digital advertising, the law provides that in case that agencies purchase programmatic digital advertising on account of an advertiser, they shall inform the media, as soon as practicable, the identity of such advertiser and deliver, within one month following the broadcasting of the advertising spaces, the information provided by article 7 of such Law.

Finally, the law also imposes certain additional obligations to the media, such as the prohibition of transferring to the advertising agencies the discounts granted by the media to the agencies, which discounts shall be integrally transferred to the advertiser. The law also obligates the media to furnish additional information besides the invoice information to the advertising agency, such as:

- (i) broadcasting date and places of the advertiser's contents,
- (ii) description of broadcasted advertising spaces,
- (iii) formats used for such broadcasting, and
- (iv) unit prices of the purchased advertising spaces, including, as the case may be, the amounts of the discounts granted by the media.

Legal Impact

By imposing a new specialized regime of obligations on advertising matters, we find that there are considerable inconsistencies in the law which will necessarily have tax and corporate impacts. For example, it is noted that, upon the law's entry into force, an additional aspect to be considered in the audits of these companies shall be the verification that advertising spaces are only purchased by contract, avoiding any reselling, subcontracting, payments in kind, and also avoiding the rendering of simultaneous services and receiving commissions from the media to the advertising agencies.

Moreover, in respect to the issuance of invoices between the media and the advertiser, even when the contracting is performed by an advertising agency, we believe that this new obligation may have adverse tax effects on the agencies, as they would be receiving unverifiable revenue, eliminating their possibility to deduce the expenses incurred for the services contracted by them for the rendering of their services.

On the other hand, in respect to corporate matters, advertising agencies shall have a subsidiary or affiliate company to be able to provide services to advertisers and the media simultaneously; otherwise, they might face economic sanctions of up to the equivalent to four per cent of the revenue of the advertising agency.

Finally, we anticipate the creation of control and compliance mechanisms to be applied to advertising matters, as the law imposes regulatory requirements which non-compliance would involve the imposition of considerable sanctions, especially for advertising agencies and the media.

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