

[ES] National Commission for Markets and Competition sanctions Atresmedia and Mediaset

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The national regulator CNMC (National Commission for Markets and Competition) sanctioned the companies Atresmedia and Mediaset for violations of the General Act on Audiovisual Communication (*Ley General de Comunicación Audiovisual*, LGCA). The former has been sanctioned for covert advertising and the latter for non-anticipated changes in its scheduled programming.

With regard to the Atresmedia sanction, the applicable legislation defines covert advertising in Article 2.32 of LGCA as “the verbal or visual, direct or indirect, presentation of goods, services, name, brand, or activities of a merchandise manufacturer or of a service provider on TV shows, different from the location of the product, in which the presentation has, intentionally by the service provider of the audiovisual communication, an advertising interest and may induce the public to a mistake regarding the nature of said presentation.”

The facts: on 2 January 2020, five Atresmedia programmes included several covert commercial communications for the “Three Wise Men’s” cakes commercialised by *El Corte Inglés*. The said cakes are popular in Spain since they contain figurines that are said to bring good luck to whoever finds them in their portion. The covert advertising consisted in stating that, instead of the figurines, these cakes could contain annual subscriptions to Atresplayer Premium (Atresmedia) and that the said cakes were sold at *El Corte Inglés* stores.

The ruling: the CNMC considered that (i) the advertising purpose was clear and that there was a continuous infringement that obeyed a pre-established plan to advertise the cakes and the company *El Corte Inglés*; (ii) this may be considered as a direct inducement to buy the said cakes in *El Corte Inglés*; (iii) it may not be considered as self promotion by Atresplayer Premium, since it advertised the brand *El Corte Inglés*; (iv) the term “TV Commercial” was not displayed on the TV screen; and (v) it misled audiences since the advertising was masqueraded under the guise of informative content.

The sanction: having regard to these factors, to the duration of the covert advertising (199 seconds in total) and to the average audience of the programmes, the CNMC considered this a serious offence, and sanctioned Atresmedia to pay EUR 183 220.

As to the sanction for Mediaset, the applicable legislation states that according to the terms of Article 6.2 of the LGCA, the service provider shall announce its programming at least 3 days in advance and it must be made available to the public by way of a electronic programme guide with free content which can be found on the Internet, on one of the service provider's web pages. Changes are only permitted if they are the result of events beyond the service provider's control, or due to unexpected events of an informative interest or of live programming.

The facts: on 10 May 2020, Mediaset published its programming grid for 13 May 2020. According to this grid, the reality show *Supervivientes: Última Hora* was scheduled for 10 p.m. on 13 May 2020.

On 12 May 2020, in one of television network Cuatro's programmes, Mediaset changed the programming on 13 May 2020, substituting the programme *Supervivientes: Última Hora* for the programme *Supervivientes: Especial Última Hora*, which was 50 minutes longer than the substituted programme. Moreover, the announcement did not follow the last-minute modifications warning mechanisms on the Internet.

Mediaset stated that the change was due to unexpected events of informative interest related to one of the participants of the reality show who had been accused of fraud. Mediaset decided to inform him of these facts in order to allow him to challenge the facts or to abandon the reality show and return to Spain.

The ruling: despite this, the CNMC understood that: (i) the change in the programming did not respect the three days' prior notice obligation; (ii) the event causing the change in the programming was not beyond the service provider's control and could not be considered as an unexpected event of informative interest either; (iii) the participant's defence against the alleged fraud may not be at the expense of the audience's right to transparent audiovisual communication; (iv) the new programme was longer than initially scheduled; (v) the broadcasting of the special programme coincided with the premiere of the Atresmedia show *Pasapalabra*, which could suggest that the real intention was to schedule the special programme in order to counteract interest for the premiere of the competing channel.

The sanction: for these reasons, the CNMC considered this a minor offence and sanctioned Mediaset to pay EUR 49 000.

Both rulings by the CNMC are subject to appeal before the Audiencia Nacional (High National Court), and it remains to be seen whether Atresmedia and/or Mediaset appeal the rulings.

Resolución de la CNMC SNC/DTSA/016/20/ATRESMEDIA

https://www.cnmc.es/sites/default/files/3316072_6.pdf

CNMC Decision SNC/DTSA/016/20/ATRESMEDIA

Resolución del CNMC SNC/DTSA/049/20

https://www.cnmc.es/sites/default/files/3316089_2.pdf

CNMC Decision SNC/DTSA/049/20

