

Advertising & Marketing 2021

Contributing firm
Frankfurt Kurnit Klein & Selz, PC



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between February and March 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021
No photocopying without a CLA licence.
First published 2004
Eighth edition
ISBN 978-1-83862-619-8

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Advertising & Marketing 2021

Contributing firm

Frankfurt Kurnit Klein & Selz, PC

Lexology Getting The Deal Through is delighted to publish the eighth edition of *Advertising & Marketing*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Germany and Turkey.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Frankfurt Kurnit Klein & Selz, PC, for its continued assistance with this volume.



London
March 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2021
For further information please contact editorial@gettingthedealthrough.com

Contents

Introduction	3	India	37
Frankfurt Kurnit Klein & Selz, PC		Safir R Anand and Swati Sharma	
Austria	4	Anand and Anand	
Georg Huber, Stefan Kofler and Fabian Bösch		Japan	46
Greiter Pegger Kofler & Partners		Chie Kasahara	
Brazil	11	Atsumi & Sakai	
Luiz Werneck and Talita Sabatini Garcia		Switzerland	53
Inglez, Werneck, Ramos, Cury & Françolin Advogados		Sylvia Anthamatten	
Germany	20	Walder Wyss	
Beatrice Brunn and Stefan Engels		Turkey	60
DLA Piper		Bentley Yaffe, Sila Sayli, Mina Yanik and Bengisu Incikli	
Hong Kong	28	CETINKAYA	
Angus Forsyth		United States	69
Angus Forsyth & Co		Terri Seligman and Jordyn Eisenpress	
		Frankfurt Kurnit Klein & Selz PC	

Introduction

Frankfurt Kurnit Klein & Selz, PC

Advertising may be virtually any communication that impacts on consumers' impressions about a marketer's products or services, or even policies and practices. Traditional media did not have much difficulty distinguishing editorial content from the paid insertions that were authored by an advertiser, but now the integration of brand messages into the content stream is exploding. Today, virtually all content creators, including trusted news sources, are creating content supported in a variety of ways by advertisers. Public relations and corporate communications that were earlier viewed as 'editorial' material, now must be reviewed in terms of the stricter tests imposed on advertising. Press releases, letters to newspapers and content that is placed or even made available in the stream of digital media may be deemed to be advertising. Digital media afford an instant opportunity to move from editorial to purchase, perhaps with a revenue share for the content provider, and this too may cause the content to be viewed as advertising.

Truth in advertising is largely a matter of the techniques that salespeople have always used to overcome consumers' tendency to doubt the seller's claims. Grandiose claims couched in extraordinary superlatives, incapable of any kind of verification and not addressing any specific or absolute characteristic of the product are still mere 'puffery'. They get the consumer's attention, but they are just 'hot air'. They are not likely to convince the consumer to purchase the product on any basis that the consumer cannot evaluate. Truth becomes an issue when apparent, objective or independent evidence that supports the advertiser's claims, particularly those that the consumer cannot independently assess, provides the consumer with a reason to purchase.

However, when a brand makes an actual, objectively provable claim about its product or service, at least where it is likely to influence consumers' purchasing decisions, the brand is likely to be held to a burden of having proof of whatever is communicated, at least to the audience to whom the content is directed. If there is some aspect of the advertising that serves to enhance the credibility of the advertiser or some message that serves to overcome consumers' natural tendency to discount the claims because they are made by the seller of the product, the net communication must be subjected to review. Any factual claim that enhances the credibility of the message or the messenger must be true and be substantiated by appropriate proof.

A product demonstration or test of product performance permits the consumer to rely upon his or her own eyes. A consumer stating his or her own personal experience with the product provides 'independent,

unbiased' verification of the seller's claims. Expert testimony and scientific explanations from professors or doctors make extraordinary claims believable. Reliable reports of many satisfied customers similarly provide a substitute for having to take the seller's word for the truth of his or her claims. And finally, a money-back guarantee suggests that performance is measurable and real. In short, facts, demonstrations, tests, endorsements, surveys, guarantees and other means to overcome consumers' natural cynicism about claims made by advertisers and enhance the credibility of the advertiser's message must be supported by hard data and controlled proof.

It is not a question of what was intended. Advertising is judged based on what is communicated and understood by the consumer. Thus, we must define the relevant consumers who are likely to be influenced by the advertising in making purchasing decisions. This raises the question of what these consumers understand before seeing the advertising and what they take away from the advertising. Regulators may view the communication from the perspective of the reasonable consumer to whom the advertising is directed acting reasonably in the circumstances. Or they may seek to protect the 'village idiot': 'the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyse but are governed by appearances and general impressions' (*Aronberg v Federal Trade Commission*, 132 F.2d 165 (7th Cir 1942)). Thus, regulators may allow for a portion of the audience being confused, but in most jurisdictions, advertising must meet the test with respect to any substantial portion of the audience.

In the digital world in which the current generation has grown up, the consumer is likely to become more sophisticated and experienced in perceiving communications and discerning what is authentic and unbiased. The content that is now being created and displayed on the World Wide Web is sponsored, supported, encouraged and disseminated by advertisers in new ways and with new technologies. Advertisers' greatest asset is the brand equity of a trusted brand. A misstep in communications that tarnishes that brand or damages the brand's relationship with consumers can be catastrophic. In a global ecosystem, a misstep in one part of the world can reverberate worldwide. Attorneys responsible for guiding advertisers on compliance with best practices and avoiding liability face an increasingly difficult task as different jurisdictions must be considered in reviewing global communications and training communications professionals to understand the universal principles that we call 'truth in advertising'.

Austria

Georg Huber, Stefan Kofler and Fabian Bösch

Greiter Pegger Kofler & Partners

LEGISLATION AND REGULATION

Legal framework

1 | What are the principal statutes regulating advertising generally?

The main source of advertising law in Austria is the Federal Law Against Unfair Competition (UWG). It includes three main types of prohibited advertising practices:

- unfair commercial practices (section 1 UWG);
- aggressive commercial practices (section 1a UWG); and
- misleading commercial practices (section 2 UWG).

Some further, more specific clauses of prohibited practices exist, such as the disparagement of an enterprise, the misuse of designations of an enterprise, the bribery of employees or agents, or the disclosure of business or trade secrets.

In its annex, the UWG contains a 'blacklist' of concrete commercial practices, which are prohibited in all circumstances.

Several former specialised acts and provisions dealing with, for example, promotional gifts, price discounts or clearance sales were repealed. These areas now fall under the UWG.

Case law also gives consideration to other, more specific laws when interpreting the UWG clauses, such as trade regulations, labelling laws and regional planning laws.

Regulators

2 | Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

According to the Federal Constitutional Law, for advertising matters, the Federation has powers of legislation and execution. Thus, the Austrian parliament is responsible for issuing advertising laws and the federal government can enact ordinances whenever such ordinances are provided for by law. There is no concurrent jurisdiction in Austria.

Civil claims in advertising law are enforced by the courts; the main competent courts are the Commercial Court in Vienna and the regional courts outside Vienna.

Fines imposed by the district administrative authority shall punish administrative offences set forth in the laws.

Regulators' powers

3 | What powers do the regulators have?

The courts can impose damages and cease-and-desist orders, including a right to elimination of unlawful conditions. In the case of the disparagement of an enterprise, there is a right to retraction and the publication

of the retraction. In some cases, the publication of a sentence or the rendering of accounts to the claimant may also be ordered.

In serious cases, the courts and authorities can impose monetary penalties as well as prison sentences.

Regulators' priorities

4 | What are the current major concerns of regulators?

A current issue is advertising on internet platforms that offer illegal services (eg, music downloads that violate copyright). Advertising on such platforms is not only unethical but may also constitute a breach of the UWG. In this matter, a process of establishing self-regulation has been launched, and the Advertising Council has already denounced such advertising practices.

At present, Austrian civil procedure law does not provide for a class action like in the US and other countries. There is an 'Austrian class action', which means that each injured party needs to assign its claims to a person for collection (eg, a consumer protection organisation or process financier). This person then sues by accumulating all claims.

The laws to fight online hate speech and incitement have been tightened, and media coverage around this topic has significantly increased. For example, in the case of severe violations of personality rights in electronic media, the victim can now apply for an immediate court order to cease and desist, which is issued solely based on the victim's statement and without hearing the alleged perpetrator.

Industry codes

5 | Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

In Austria, self-regulation is only of minor (though growing) importance.

The advertising industry, however, founded the Advertising Council, which established the Advertising Industry Ethics Code, which is available in German and English on the Advertising Council's website. This Code is to be followed by the advertising industry as an instrument of self-regulation. It guarantees, in particular, that a sense of decency is respected in advertising. The Advertising Council has no power to impose sanctions on advertisers. However, the decisions of the Advertising Council may be published to inform the media and the public that a certain practice offends the rules of decency or, in less severe cases, that a certain topic should be handled with greater sensitivity in future advertisements.

The Advertising Council has published guidelines for advertisers ('Dos and Don'ts in Advertising'), including best practices, as well as examples of both good and bad advertising. These guidelines can also be found on the Advertising Council's website. They are currently available in German and English.

Further, advertisers can apply for the ethical seal of the Advertising Council. This seal is granted to advertisers who commit themselves to and comply with the Advertising Industry Ethics Code.

Authorisation

6 | Must advertisers register or obtain a licence?

Advertisers (companies who want to advertise their products or services) do not have to register or obtain a licence.

Advertising agencies (companies who provide advertising services for others) are considered 'free trades', which do not fall under the regulated trades according to the Austrian Trade, Commerce and Industry Regulation Act. However, before starting business they have to register with the competent district administration authority.

Clearance

7 | May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

The regulators have not installed an advisory board. There is, however, the possibility of consulting associations or institutions such as the Advertising Council.

Advertisers do not need clearance before publication or broadcasting.

PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)

Challenging competitors advertising

8 | What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?

Competitors may bring both principal actions on the merits and an application for preliminary injunctions.

An order to cease and desist is available in both avenues. All other remedies are available only in the principal action on the merits.

On the one hand, preliminary injunctions have the advantage of quick relief through (only) establishing prima facie evidence. On the other hand, if the preliminary injunction is ordered but the court finally dismisses the claim in the principal actions, the defendant can claim damages for not having been allowed to advertise while the preliminary injunction was in place.

In addition, competitors are free to report certain advertising practices to the district administrative authority if such practices are subject to penalties according to the law.

Public challenges

9 | How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

Apart from competitors, a suit for a cease-and-desist order may also be filed by associations, independently of whether the offender is a member of this association, to promote the economic interests of entrepreneurs. Among these are the Federal Chamber of Labour, the Federal Economic Chamber, the Presidential Conference of the Austrian Chambers of Agriculture, the Austrian Trade Union Federation, the Federal Competition Authority and the Association for Consumer Information.

Burden of proof

10 | Which party bears the burden of proof?

The plaintiff must prove that the defendant undertook the advertising in question. The defendant must prove that its advertising statements are true. In the proceedings for the preliminary injunction it is sufficient for the plaintiff to substantiate the claim on prima facie evidence.

Remedies

11 | What remedies may the courts or other adjudicators grant?

Courts mainly impose damage payments and cease-and-desist orders. In the case of disparagement of an enterprise, there is a right to retraction and publication of the retraction. In some cases, the publication of a sentence or the rendering of accounts to the claimant may also be ordered.

In serious cases, courts and authorities can also impose penalties (ie, fees and prison sentences).

Length of proceedings

12 | How long do proceedings normally take from start to conclusion?

The duration of a process strongly depends on the complexity of the matter, on the required number of hearings for taking evidence and on whether or not proceedings for preliminary injunctions are necessary (these normally take two or three weeks, when an injunction is not appealed against).

An average cease-and-desist claim takes approximately one to two years from making the claim until judgment by the court of first instance. The decision about an application for a preliminary injunction takes another one to three months.

Cost of proceedings

13 | How much do such proceedings typically cost? Are costs and legal fees recoverable?

Under Austrian law, the value in dispute is the basis for the calculation of lawyers' fees and court costs. Lawyers' fees are also affected by the number and type of pleadings prepared, the number and duration of hearings and whether there are appeals.

Since claims to cease and desist and for publication do not seek payment of money, they must be valued by plaintiffs. If the valuation is disputed by the defendant, the value in dispute is determined by the court. The valuation must be made in accordance with the interest actually claimed.

For proceedings at first instance, costs are usually between €5,000 and €10,000.

The losing party must reimburse the prevailing party for the lawyers' fees and court costs necessary for the pursuit of the prevailing party's rights.

Appeals

14 | What appeals are available from the decision of a court or other adjudicating body?

Judgments by the court of first instance can be challenged at the competent court of appeal, which is one of the four Higher Regional Courts of Appeal. They are located in Vienna (covering Vienna, Lower Austria and Burgenland), Graz (covering Styria and Carinthia), Linz (covering Upper Austria and Salzburg) and Innsbruck (covering Tyrol and Vorarlberg).

Judgments of an arbitration tribunal can only be challenged in cases of heavily defective proceedings.

MISLEADING ADVERTISING

Editorial and advertising

15 | How is editorial content differentiated from advertising?

According to section 26 of the Media Act, announcements and recommendations as well as other features and reports for whose publication a payment is received must be identified in periodically published media as 'advertisement', 'paid insertion' or 'advertising', unless the design or arrangement excludes any doubts that publication has been made in return for payment.

Advertising that requires substantiation

16 | How does your law distinguish between 'puffery' and advertising claims that require support?

Puffery is exaggerated advertising that cannot be taken seriously or literally by the public. It is therefore not regarded as misleading. Also, purely subjective value judgements, such as 'Austria's best coffee', are allowed.

By contrast, the advertising statement that 'probate proceedings without a lawyer is like an appendectomy without a surgeon' implies the verifiable fact that probate proceedings, as a rule, require the assistance of a lawyer. As this is not the case, such advertising is considered misleading.

If doubts remain as to whether a statement is to be taken seriously, it is considered serious.

Rules on misleading advertising

17 | What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

An advertising claim is misleading if it causes confusion among a significant section of the target public. According to recent case law, a section of more than 25 per cent is always considered significant (sometimes even less).

In general, every misleading statement as to the quality and characteristics of goods is prohibited if it causes the customer to buy a product that he or she would not have bought otherwise. Misleading statements, in general, cannot be justified by the rights to freedom of speech and opinion because these rights are only of minor importance in the case of merely commercial interests.

Omissions, incomplete statements, footnotes and disclaimers (eg, which restrict or put into perspective an accentuated advertising claim) are only unlawful if they are likely to mislead the public. It depends on the overall impression of the respective advert.

Footnotes and disclaimers are considered misleading if they cannot easily be seen by the public (eg, if the font size of the footnote or disclaimer is considerably smaller than that of the rest of the advertisement).

Substantiating advertising claims

18 | Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

Before publishing the advertisement to its target group, an advertiser does not have to prove the statement it makes in its advertisement. Proof has to be provided in court proceedings only.

The necessary standard of proof is high probability based on the principle of free consideration of evidence by court.

Survey results

19 | Are there specific requirements for advertising claims based on the results of surveys?

Advertising claims based on the results of surveys are generally permitted. Survey results must be accurate and not misleading. For example, it would be misleading in a competition among newspapers to compare the number of readers, implying that all newspapers are included in the study, if one significant competitor is not. Further, survey results must be current as of the time of their publication.

Comparisons with competitors

20 | What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

Comparative advertising in which goods or services of one company are compared with those of a competitor is generally permissible (also identifying the competitor by name). Such comparative advertising, though, must not violate the requirement of objectivity. It must not be misleading, disparaging, aggressive, obscene or against public morality.

Attention must be focused on whether the products compared are actually comparable. It is not sufficient to simply indicate that one's own product or service in general is better than that or those of competitors. All decisive circumstances and reasons must be given, allowing the public to make an objective decision. For example, comparison of one's own price for a certain product with the higher price of a competitor for a higher quality product is not permitted.

Comparisons of different systems, even without identifying a competitor by name, may offend public morals if they denounce a whole group of companies or a whole profession in an unnecessarily disrespectful and aggressive way.

Mere value judgements (eg, one newspaper is 'better' than another) that are unverifiable must not be part of comparative advertising.

Test and study results

21 | Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

In general, there is no hierarchy regarding different types of proof. Judges are free in their consideration and evaluation of evidence.

Advertisements describing a product as superior on the basis of tests must take into consideration the usual margin of deviation of such tests. Further, superiority must be continuous (not just statistical outliers) and considerable.

Demonstrating performance

22 | Are there special rules for advertising depicting or demonstrating product performance?

There are no special rules for depicting or demonstrating product performance. The general provisions apply (eg, it must not be misleading or aggressive). It must neither discriminate in terms of gender, sexual preference, ethnicity, race or religion nor encourage or trivialise alcohol or violence.

Third-party endorsements

23 | Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief or experience?

To use third-party statements in advertising, permission by the third party is required.

Some professional codes of conduct provide for particular advertising restrictions. For example, doctors must not make testimonials or otherwise advertise for medical products.

The adherence to a code of practice, if true, may be advertised. The attainment of a quality mark, if validly conceded, may be advertised as well. However, the claim that an enterprise (including its commercial practices) or a product has been approved, endorsed or authorised by a public or private body when it has not, or making such a claim without complying with the terms of the approval, endorsement or authorisation, is prohibited.

Guarantees

24 | Are there special rules for advertising guarantees?

There are no special rules for advertising that the seller offers special guarantees for the product.

Environmental impact

25 | Are there special rules for claims about a product's impact on the environment?

On the one hand, environmental claims are only permitted if such claims can be convincingly proven to be truthful and not misleading. On the other hand, there is no obligation to present data on all possible environmental effects of a certain procedure that has been claimed to be friendly to the environment, as this would make such advertising practically impossible. The expression 'environment-friendly', may, as a rule, be used if the use of the advertised product has a less negative effect on the environment than other comparable products. It is not necessary for the product to have no effect on the environment at all, as consumers do not normally expect this.

Free and special price claims

26 | Are there special rules for describing something as free or a free trial or for special price or savings claims?

Pricing claims, above all, must be true and not be misleading. For example, advertising a 'factory price' is misleading if shop overheads form part of the price.

Regarding products that are offered to consumers, according to the Federal Act on Price Marking, prices shall be marked so that any normally attentive observer is able to read and identify them easily. Price lists for services shall be put up at a clearly visible location on the business premises. They may alternatively be laid out on the business premises or made available for inspection by the customer. The prices shall be marked in Austrian currency (euros) and be inclusive of VAT and all other taxes and charges (gross prices).

For special offers, it must be made clear that the special price concerns one single item only. The special offer must be in stock in sufficient quantities to meet normal, anticipated demand in consideration of the given circumstances. The simple addition 'while stocks last' does not release the seller from this obligation.

Regarding special prices, the source of the higher initial price must be indicated as consumers generally expect the advertiser to compare with his or her own (previous) regularly charged prices. If it is not clear to which price an offer refers, the price more favourable to the consumer should be used. A practice is misleading within the meaning of section 2 of the Federal Law Against Unfair Competition if services are misleadingly described as 'free of charge', while they are not free of charge but are subject to a payment obligation (eg, as is only apparent from the terms and conditions).

New and improved

27 | Are there special rules for claiming a product is new or improved?

Claiming a product is new or improved must again be true and not misleading. Expressions that indicate a product's newness or 'up-to-dateness' cannot be sustained for too long because otherwise consumers erroneously assume that the innovation is still recent.

For products that are subject to frequent technical and fashionable changes, the above-mentioned period is shorter than for other, less 'dynamic' products.

Claims of origin

28 | Are there special rules for claiming where a product is made (such as country of origin)?

The EU Regulation No. 1151/2012 on quality schemes for agricultural products and foodstuffs regulates the protection of designations of origin and geographical indications of agricultural products and foodstuffs, which, owing to their geographical origin, have verifiable characteristics and qualities. This means that certain geographical names are reserved for certain agricultural products and foodstuffs. There are also other EU Regulations with regard to the protection of geographical indications for spirit drinks.

Furthermore, the incorrect reference to the geographical origin of a product is also inadmissible, based on the Federal Law Against Unfair Competition, where it is capable of influencing a significant proportion of the customers when considering the choice of product.

PROHIBITED AND CONTROLLED ADVERTISING

Prohibited products and services

29 | What products and services may not be advertised?

Products whose sale and possession is prohibited under criminal law must not be advertised.

Spirits must not be advertised in radio and TV spots or in audiovisual media. Further, for alcohol advertising, certain other restrictions apply.

Tobacco advertising is generally prohibited. An exception is advertising by tobacconists in and around their tobacco shop. This exception is in addition to several restrictions.

Prohibited advertising methods

30 | Are certain advertising methods prohibited?

In general, aggressive advertising is prohibited.

Advertisements may not exert psychological pressure on consumers to buy. Advertisements are prohibited if they place customers under pressure to agree to purchase merely to escape these pressures.

Addressing persons in front of shops, even if not done in a nasty or presumptuous way, is not allowed. The mere distribution of advertising material in public is generally allowed.

Advertising via unsolicited phone calls ('cold calling') to private persons is generally prohibited. Advertising by post is generally allowed unless the addressee declared otherwise.

The use of a snowball sales system is prohibited. A snowball sales system is an arrangement whereby the customer is promised delivery of a good or performance of a service against a remuneration to be performed unconditionally if the customer, by means of the orders or vouchers handed over to him or her, finds for the enterprise of the promising party another purchaser who enters into the same contractual relationship with such enterprise.

Lay advertising, which involves the referral of relatives, friends and acquaintances to receive premiums or other benefits, is considered

against good morals and therefore prohibited. Moreover, advertisers must not use subliminal messages.

Protection of minors

31 | What are the rules for advertising as regards minors and their protection?

The inclusion of a direct exhortation to children in an advertisement to buy advertised products or to persuade their parents or other adults to buy advertised products for them is prohibited. However, an indirect invitation to a purchase by showing the benefits and pleasures connected with a product is allowed, even if aimed at children.

Although not unlawful, the Advertising Council has found it inappropriate to place adverts for brothels and similar establishments near schools, nursery schools or residential areas.

Credit and financial products

32 | Are there special rules for advertising credit or financial products?

For advertising credit or financial products, the general rules apply. In addition, advertisers must provide customers with all relevant and necessary information to enable the customer to make a well-founded decision.

If advertising for loans contains figures, these have to be clearly, accurately and noticeably illustrated by an example containing all relevant loan information such as the effective interest rate, total loan sum and loan period.

In the case of securities and investments, adverts are only permissible after complying with the potential obligation to publish a prospectus. Further, adverts must refer to the existence and accessibility of such prospectus.

Relevant legislation includes the Capital Market Act and the Consumer Credit Act.

Therapeutic goods and services

33 | Are there special rules for claims made about therapeutic goods and services?

Pharmaceuticals and medical devices advertising must:

- not be directed at minors;
- not include prescription medicine (except when directed at professionals);
- not include other (non-prescription) medicine that is not clearly identifiable as such;
- not include homeopathic medicine (except when directed at professionals);
- not make an untrue claim that something is a medical (healing) product;
- not claim superiority or comparability with other medical products;
- not claim that a doctor's medical treatment is redundant;
- not hide potential side effects; and
- not feature on teleshopping.

Although not unlawful, the Advertising Council found it inappropriate to promote a pharmaceutical for dyspepsia by showing a woman who secretly adds such pharmaceutical to her husband's and daughter's drinks. The Advertising Council considered it against good morals and social responsibility to promote administering medicine to others without them knowing.

Food and health

34 | Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

In Austria, Regulation (EC) No. 1924/2006 on nutrition and health claims made on foods is applicable. Health claims must be approved by the European Commission, which set up a list of already approved claims in Regulation (EU) No. 432/2012. Applications for approval of a claim can be sent to the Federal Ministry of Health.

In general, 'well-being' claims are only allowed when supported by an approved statement.

Advertisements must not state or imply that a balanced or varied diet cannot provide appropriate quantities of nutrients in general. Individuals should not be encouraged to swap a healthy diet for supplementation, and without well-established proof, no marketing communication may suggest that a widespread vitamin or mineral deficiency exists.

Advertisements for foods must not claim to treat clinical vitamin or mineral deficiency. Advertisements must not promote excessive consumption of a product. The advertised product must contain a significant quantity of the 'healthy' substance that will produce the claimed nutritional or physiological effect.

For baby food, the strict limitations of the Regulation on Infant and Follow-On Formula by the Austrian Ministry of Health must be obeyed.

Alcohol

35 | What are the rules for advertising alcoholic beverages?

Spirits must not be advertised in radio and TV spots or in audiovisual media.

Further, for alcohol advertising, the following restrictions apply. Adverts must not:

- be directed at minors;
- depict minors consuming alcohol;
- claim therapeutic, tranquilising or conflict-resolution effects;
- promote excessive consumption of alcohol;
- make a connection between alcohol and improved physical or mental performance, or more social and sexual success; or
- display a high alcohol level as something positive.

Further to this, the Austrian Brewers Association as well as the Austrian Spirits Industry have established self-regulatory codes for their advertising practices.

For instance, the Advertising Council publicly denounced a party flyer saying that they had 'alcohol police' testing their party guests and that 'whoever is sober, must drink'. The Advertising Council found this advert to violate the principles of not encouraging excessive consumption of alcohol and of socially responsible advertising towards minors.

Tobacco

36 | What are the rules for advertising tobacco products?

Tobacco advertising is generally prohibited. An exception is advertising by tobacconists in and around their tobacco shop. This exception is limited by the following restrictions:

- at least 10 per cent of advertising space must be reserved for health warnings;
- there must be no advertising of cigarettes without a filter;
- there must be no belittlement of the negative effects of smoking;
- advertising must not be directed at those under 30 years of age;
- cartoons must not be used; and
- there must be no discount sales or distribution of free packages.

Gambling

37 | Are there special rules for advertising gambling?

In Austria, there is a government gambling monopoly, and the number of gambling licences, exclusively issued by the Austrian Ministry of Finance, is very limited.

According to the Gambling Act, advertisers for gambling must adhere to a certain level of responsibility. This adherence, however, is not subject to claims by competitors under the Federal Law Against Unfair Competition but only to public supervision.

Foreign casinos in the European Economic Area may only advertise their casinos upon prior permission by the Austrian Ministry of Finance.

Lotteries

38 | What are the rules for advertising lotteries?

Lotteries fall under the Gambling Act.

Promotional contests

39 | What are the requirements for advertising and offering promotional contests?

Promotional contests, which consumers can participate in without additional (hidden) costs, are generally allowed, even if participation requires the purchase of a product. However, as soon as additional costs occur (exceeding the usual price of the product), the contest is considered a 'promotional game', which may fall under the Gambling Act and therefore be subject to restrictions.

Indirect marketing

40 | Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

Sponsorship of programmes must not interfere with the editorial content or directly call for the purchase of a service or product of the sponsoring party. Sponsored programmes have to be made recognisable as such. News and other programmes with political content may not be sponsored.

In general, product placement in broadcast media is prohibited. However, there are numerous exceptions to that prohibition. It is allowed if the provided products are free of charge, and it is generally allowed in films, TV series, sport programmes and in 'lightweight entertainment' programmes.

Where product placement is allowed, it must indicate the product placement before and after the programme and must not:

- interfere with the editorial content;
- directly call for the purchase of a service or product; or
- display the placed product too dominantly.

Other advertising rules

41 | Briefly give details of any other notable special advertising regimes.

Special provisions apply to certain freelance professions such as lawyers, doctors, veterinarians, midwives and morticians. In general, these professions are limited to reserved forms of advertising (eg, no puffery).

Advertisements of the services of plastic and cosmetic surgeons are permitted, but they are subject to the strict limitations of the Doctors Act, the Act on the Performance of Cosmetic Treatment and Surgery and the articles of association of the Austrian Medical Chamber.

According to the Coat of Arms Act, the use of the Federal Coat of Arms and the Flag of the Republic of Austria is permissible, unless such

use could harm the reputation of the Republic of Austria or cause the misleading impression of public authority of the user.

Similar provisions apply to the coats of arms of the nine Austrian federal states and the Austrian municipalities. Sometimes, the use of such coats of arms is even subject to notifications or permissions by the concerned federal state or the concerned municipality.

SOCIAL MEDIA

Regulation

42 | Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?

In general, it must be assessed whether an advertisement falls under the Audiovisual Media Services Act and is thus subject to the restriction on commercial communication. In order to fall under this regulation it is required that the service is provided under 'the editorial responsibility of the media service provider' and that the principal purpose of such service is to 'inform, entertain or educate'. It is the characteristic of such services that they are 'television-like'. As an example, advertising on a video channel on YouTube was not qualified as an Audiovisual Media Service (ECJ C132-17).

According to the E-Commerce Act, an internet advertiser must ensure that the advertisement is identifiable as such and that the enterprise 'behind' the advertised product or service is also identifiable.

According to the Telecommunications Act, the sending of emails or text messages for the purpose of direct advertising is prohibited without the recipient's explicit consent. This prohibition also applies to social media users as recipients of advertising messages.

If the operator of a social media page on which statements by third parties are published becomes aware that such statements are illegal or contain illegal (advertising) content, the operator has the obligation to immediately (without undue delay) remove these statements. If the operator is negligent in complying with this duty, the operator may be held responsible for such statements. According to present case law, a delay of one week in reacting in relation to an entry in an online guest-book as well as a delay of three days for an entry in an online forum are considered as undue delays. However, a delay of one or two days regarding a Facebook post is considered 'just in time'.

A disclosure saying that the operator does not assume responsibility for third-party statements is not sufficient.

43 | Have there been notable instances of advertisers being criticised for their use of social media?

Facebook in particular has been heavily criticised for its terms of use, which are often accepted by the users without reading them and that grant Facebook the right to 'use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. You understand that we may not always identify paid services and communications as such'.

This does not comply with Austrian advertising (eg, adverts have to be marked as such) and data protection regulations (eg, no valid consent by customer for data use).

44 | Are there regulations governing privacy concerns when using social media?

The use of a social media user's personal data must comply with general data protection provisions. The use of data for advertising or marketing purposes may, in some cases (especially if advertisements relate to third-party products or services or if processing comes close

to profiling), require the data subject's explicit consent. The principle of informational self-determination determines that the data subject has to be aware of the exact facts that he or she is giving consent to. Further, the data subject's consent shall be given freely without any form of constraint. A valid consent requires the data subject's exact knowledge in advance about what data is collected for what purpose. A generic description of the recipients of the data is not sufficient.

On 25 May 2018, the EU General Data Protection Regulation (Regulation (EU) 2016/679) and the Austrian Data Protection Amendment Act entered into application. Generally speaking, this strengthened the individual data subject's (defensive and information) rights and provides for stricter penalties for the data processing companies ('controllers').

UPDATE AND TRENDS

Recent developments

45 | Are there any emerging trends or hot topics in your jurisdiction?

New regulations governing the use of cookies has been a hot topic for many years. Recently, the EU member states finally agreed on a draft for the ePrivacy Regulation, which was originally intended to be adopted together with the GDPR in 2016.

Of course, the draft ePrivacy Regulation still needs to be coordinated with the requests of the European institutions, so its entering into force is not yet imminent.

Coronavirus

46 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The following legislation specific to our practice area has been implemented:

- the Law on preliminary measures against the spread of covid-19;
- the Law on the formation of a covid-19 anti-crisis trust;
- the digitalisation of state services (online court hearings, online applications, online prescriptions, etc);
- regulations on measures against the spread of covid-19;
- regulations on compensation of entrepreneurs for such measures:
 - turnover compensation;
 - tax relief;
 - short-time work; and
 - loan support; and
- amendment of several other laws and decrees.

Clients can seek advice on the websites of the Austrian Health Ministry and the Austrian Finance Ministry as well as consult lawyers or, for questions regarding financial aid, tax consultants.



Georg Huber

georg.huber@lawfirm.at

Stefan Kofler

stefan.kofler@lawfirm.at

Fabian Bösch

fabian.boesch@lawfirm.at

Maria-Theresien-Strasse 24
6020 Innsbruck
Austria
Tel: +43 512 57 1811
Fax: +43 512 58 4925
office@lawfirm.at
www.lawfirm.at

Brazil

Luiz Werneck and Talita Sabatini Garcia

Inglez, Werneck, Ramos, Cury & Françolin Advogados

LEGISLATION AND REGULATION

Legal framework

1 | What are the principal statutes regulating advertising generally?

The principal statutes regulating advertising in Brazil are:

- the Brazilian Federal Constitution;
- the Consumer Protection Code (Federal Law No. 8,078/90);
- the Statute of the Children and Adolescents (Federal Law No. 8,069/90);
- the Brazilian Advertising Self-Regulation Code;
- Federal Law No. 5768/71;
- Decree No. 70,951/1972;
- Federal Law No. 5,768/71 and Decree No. 70,951/1972 regulate commercial promotions and sweepstakes; and
- National Health Surveillance Agency resolutions.

Regulators

2 | Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

The bodies responsible for issuing advertising regulations in Brazil are the National Advertising Self-Regulation Council (CONAR) and the government itself, represented by the House of Representatives and the Senate.

CONAR is a self-regulatory agency formed by the associations that represent the advertisers, broadcasters, advertising agencies and other professionals that participate in advertising. CONAR has limited authority and must base its decisions only on its code.

Some consumer protection agencies, as well as public prosecutors, also have the authority to enforce the advertising rules through an administrative or judicial procedure.

The judiciary is the ultimate body responsible for enforcing the advertising rules. Although other bodies have the authority to enforce these rules, the judiciary has broader authority and can, therefore, review the others bodies' decisions and apply penalties such as fines and injunctions.

Regulators' powers

3 | What powers do the regulators have?

As the CONAR is a self-regulatory agency, it does not have the authority to impose fines or determine the payment of any indemnification. Based on the CBAP, CONAR's penalties are:

- a warning;
- a recommendation to modify or correct the advertisement;
- a recommendation to broadcasters to suspend the disclosure of the advertisement; and

- a public notice announcing to the broadcasters CONAR's position with regard to the advertiser, the agency and the media for non-compliance, with the steps and measures determined by the entity.

Any dispute regarding advertising may be submitted to the judiciary. Even decisions issued by CONAR may be challenged before the judiciary. Only the judiciary can determine the payment of indemnification and fines, as well as review, and even revoke, CONAR's decisions.

Regulators' priorities

4 | What are the current major concerns of regulators?

The current main concerns of the Brazilian regulators are:

- abusive and misleading advertising;
- the impact of social media influencers on society, especially with regard to channels and social media targeted at children;
- advertising aimed at children or carried out by children;
- the impact of advertising on childhood obesity;
- comparative advertising; and
- the advertising of medication and alcoholic beverages.

Industry codes

5 | Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

The Brazilian Advertising Self-Regulation Code and the applicable legislation have specific regulations for different categories of product or people, such as:

- advertising campaigns for alcoholic beverages:
 - cannot explore sexuality;
 - must use actors who appear to be more than 25 years old; and
 - cannot contain scenes or images of actors ingesting the alcoholic beverage;
- influencers should properly disclose that the content of their posts is sponsored;
- children's advertising should not induce the consumption of the advertised product or exploit the child's innocence;
- automakers' advertising must comply with the National Transit Code and, for example, cannot contain high-speed scenes or manoeuvres that are not in accordance with the traffic rules;
- medication advertising is very limited and must comply with the rules established by the National Health Surveillance Agency;
- tobacco advertising is virtually banned; and
- comparative advertisements must have the benefit of the consumer as their main purpose.

Non-compliance with regulations may result in the suspension of advertising by CONAR and the application of fines and penalties by the consumer protection agencies, as well as by judicial claims filed by interested parties.

Authorisation

6 | Must advertisers register or obtain a licence?

Only agencies have an obligation to obtain a licence in Brazil. Advertisers have no obligation in this regard.

Clearance

7 | May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

It is possible to seek the CONAR's opinion before publication. It is also possible to file a procedure to seek judiciary approval before publication; however, these practices are not common in Brazil, owing to the time taken and investment related to them.

PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)

Challenging competitors advertising

8 | What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?

A competitor can challenge advertising through the National Advertising Self-Regulation Council (CONAR) or the judiciary.

Claims at CONAR are faster, less expensive and the competitors, as a rule, must comply with CONAR's decisions. Through this body it is not possible to seek indemnification. Although it is very rare, the losing party may file a claim to review CONAR's decision before the judiciary.

The judiciary route is more time-consuming and costly. Through this body it is possible to seek indemnification and a definitive decision.

Public challenges

9 | How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

Public prosecutors and members of other consumer protection bodies, such as the Protection and Consumer Protection Foundation, may challenge advertising through administrative and judicial procedures.

The procedures are initiated when there is a need to investigate the occurrence of abusive or misleading advertising. If such bodies interpret that the material constitutes misleading or abusive advertising, a criminal action may also be filed against the advertisers.

Consumers may also file a complaint at CONAR at no cost.

Burden of proof

10 | Which party bears the burden of proof?

The burden of proof lies with the advertiser. The advertiser must prove that its advertising campaign is regular and substantiated.

If the lawsuit is filed by a competitor seeking damages or compensation, even though the advertiser has the burden of proof, the competitor pleads the claim has to prove its damages.

Remedies

11 | What remedies may the courts or other adjudicators grant?

The most common remedy granted by the courts or by CONAR is an injunction to immediately suspend the advertising campaign.

Regarding the Brazilian judiciary, it is possible to seek other remedies such as damages or compensation, an injunction to do or not to do

something or an injunction to anticipate the production of evidence. For instance, a company may request an injunction to immediately suspend a comparative campaign that denigrates the company's image, as well as request losses and damages.

There is also the possibility for the judiciary to determine the performance of counter-advertising (to carry out the same investment in media to clarify that the content of the questioned advertising was irregular).

Length of proceedings

12 | How long do proceedings normally take from start to conclusion?

There is no precise time frame for a decision to be granted by CONAR. Based on previous experience, a first decision can be granted by CONAR within one or two months, and, therefore, a final decision can be issued within approximately six months.

Regarding the judiciary, first instance decisions can be granted within one or two years, and a court's final decision can be issued within six to eight years, depending on the complexity of the lawsuit.

Cost of proceedings

13 | How much do such proceedings typically cost? Are costs and legal fees recoverable?

There is no average market value for such proceedings. The costs will depend on the complexity of the case, the need to carry out a procedure to collect evidence, the expenses involved, and so on.

At CONAR proceedings, legal fees are not recoverable. In judiciary proceedings, the party that wins the lawsuit may claim a reimbursement for the expenses and legal fees related to the lawsuit from the other party.

Appeals

14 | What appeals are available from the decision of a court or other adjudicating body?

Both CONAR and the judiciary have three instances to be covered. At CONAR, after the initial decision, there is an ordinary appeal to the appellate chamber and a second appeal (extraordinary appeal) to the plenary if the appellate chamber decision is not unanimous.

For advertising purposes Brazil's court system is divided in federal courts and state courts, depending on the involved party. The second instance courts of appeal are represented by regional federal courts at federal level and by state appellate courts at state level.

Finally, there are two superior circuit courts with different competences to address appeals: the Superior Court of Justice; and the Federal Supreme Court (STF). The last available appeal may be filed against the STF, depending on the circumstances.

MISLEADING ADVERTISING

Editorial and advertising

15 | How is editorial content differentiated from advertising?

Editorial content has a journalistic format, with the sole purpose of transmitting to society a fact, opinion or an event, even if it is the coverage of the launch of a new product. In principle, the editorial is created without the influence of the advertiser.

Advertising is intended to promote a product or service, with the purpose of encouraging consumers to acquire it. If advertisers impact the editorial in any way, as in the case of influencers, it is mandatory to disclose that the editorial content is actually an advertisement.

Advertising that requires substantiation

16 | How does your law distinguish between 'puffery' and advertising claims that require support?

Brazilian laws and regulations on the subject are silent; therefore, there is no basis to distinguish, with precision, puffery from claims that require support.

Among other provisions, the Consumer Protection Code (CDC) endorses the principle of truth in advertising, whose purpose is not to encourage misleading and abusive advertising. According to Brazilian advertising law, this is one of the most important principles to be observed by advertisers.

In addition to the CDC, the Brazilian Advertising Self-Regulation Code (CBAP) established that 'every advertisement must be respectful and comply with the laws of the country; it must also be honest and true'.

In addition, the CDC set forth that claims and comparative claims must have substance, and the advertiser must always provide the evidence when requested.

Based on these premisses, it is possible to state that the content of an advertisement must be based on true data and allegations that can be proved, and its content cannot induce or mislead the consumer regarding the performance or result offered by the product or service.

On the other hand, the National Advertising Self-Regulation Council (CONAR) and the judiciary has already recognised in a few cases that some claims can be considered puffery. According to such decisions, puffery exists in cases of using exaggerated or even playful expressions that do not mislead the consumer by any means.

Therefore, notwithstanding that there is no provision in the law or in the existed regulation, puffing has been a mechanism that turns out to be an exception to the principle of truth and abusive or misleading advertising, even in cases where its content may have a comparative connotation.

Rules on misleading advertising

17 | What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

Any advertisement that, even by omission, is entirely or partially false or is in any way capable of inducing the consumer to make a mistake regarding any characteristic of the product or service advertised is considered misleading advertising.

Abusive advertising includes adverts that:

- are discriminatory in nature;
- incite violence or exploit fear or superstition;
- take advantage of a child's lack of judgement or experience;
- disrespect environmental values; or
- may cause the consumer to behave in a way that will bring harm to his or her health or safety.

Disclaimers and footnotes are permitted in Brazil; however, some precautions have to be taken to make such tools valid. For instance, disclaimers must be implemented in a horizontal position, be readable to the average person and contain all the information necessary to support and clarify the claim, among other requirements.

Substantiating advertising claims

18 | Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

The advertiser must have proof of a claim's content ready to be presented if and when requested by the authorities, consumers or competitors.

There is no standard for the type of proof required to substantiate the claims. However, the proof must be substantiated or be issued by a third party with recognised expertise and credibility.

Survey results

19 | Are there specific requirements for advertising claims based on the results of surveys?

There are no specific requirements for advertising claims based on the results of surveys. However, the claims must be substantiated in real results, and preferably validated by a third party with recognised expertise and know-how.

Comparisons with competitors

20 | What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

Comparative advertising is accepted in Brazil by CONAR and the judiciary, as the parameters are respected. Despite being commonly accepted by the market, comparative advertising must focus on the information's veracity and, also, the objective criteria to be used for such a comparison.

According to the applicable legislation, the primary purpose must be clarification of the consumer's protection. Therefore, among other requirements, the comparative advertisement must be objective and supported by evidence, must not create any confusion between the products and the competitor's brands, and must include no unfair competition or denigration of the image or another company's products.

Based on the disposition of the Industrial Property Law, there is a constant debate related to the right to use a competitor's brand or products in comparative publicity.

The Supreme Court recently issued two important decisions in which the right to use a competitor's brand and products in comparative advertising, only in cases where the publicity brings relevant information to the consumer, was recognised.

Supreme Court decisions are positive and will allow companies to compare their products with others, with evidence, and will, above all, provide consumers with important information to help them decide which product best fits their demands and needs.

Test and study results

21 | Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

There are no provisions in the applicable regulation relating to special types of proof. However, because competitors may challenge the proof or the substantiation presented by advertisers, it is necessary to support a claim with strong data, preferably issued by a third party with unquestionable competence and reputation.

Demonstrating performance

22 | Are there special rules for advertising depicting or demonstrating product performance?

There is no specific provision in the applicable regulations to demonstrate a product's performance. However, it is necessary to observe other obligations applicable to advertisers. For example, when demonstrating a product's performance, the advertiser should properly demonstrate results that are achievable by the product. In addition, because this kind of advertising is often an indirect form of comparative advertising, the advertiser must also have tests that prove the viability of performance announced, in order to be able to defend the advertising if the authorities, competitors or consumers challenge the result announced.

Third-party endorsements

23 | Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief or experience?

The CBAP establishes special rules for endorsements or testimonials by third parties. According to such regulation, there are different categories of testimonial: specialist, famous person and common person. For each category, there are specific rules and conditions to comply with.

In all cases, if the third party is contracted or in any way motivated by the advertiser to carry out an endorsement or statement, the third party should inform the consumers that the endorsement or the statement is publicity, sponsored by the advertiser.

Guarantees

24 | Are there special rules for advertising guarantees?

Brazilian law establishes a mandatory guarantee to protect consumers' rights. Consequently, if an advertiser is offering a complementary guarantee and decides to detail this benefit in its advertising, the advertiser must include the terms and conditions of the complementary guarantee in its advertisement to avoid any complaints related to misleading advertising.

This information may be briefly included in the legal notice, provided that it is made available to the consumer in the owner's manual, contract or on the advertiser's website, depending on the case.

Environmental impact

25 | Are there special rules for claims about a product's impact on the environment?

The claim should always respect all the requirements and obligations provided by the law and regulations so as not to constitute a misleading or abusive advertisement.

According to the applicable regulation, claims regarding sustainability must respect some special rules, such as, among others:

- they must correspond to actual practices adopted by the advertiser;
- the broadcast information must be true, verifiable and possible to corroborate;
- the claim must be accurate and precise; and
- the claim must be provided with supporting data and an external source endorsement.

Free and special price claims

26 | Are there special rules for describing something as free or a free trial or for special price or savings claims?

The use of the words such as 'free' and 'free trial' or other expressions with the same meaning on marketing campaigns is permitted only when there is no actual cost to the consumer concerning the promised free product or service.

In campaigns involving the payment of expenses to be paid by the consumer, such as postal charges, freight, delivery charges, database consumption or taxes, it is necessary to specify to the consumer, in a prominent way, all the expenses involved, so that the consumer easily understands the scope and limitations of the announced benefit.

In addition, regarding special price or saving claims, is important to highlight that is very common in Brazil to sell products in instalments with or without interest. In these sorts of transactions, the advertiser must inform the consumers of the original price, the quantity of instalments and the final price. If applicable, it is also necessary to provide information regarding the interest, bank fees, expenses (total effective cost), as well as the original price and the final price to be paid by the consumer on the transaction.

New and improved

27 | Are there special rules for claiming a product is new or improved?

There is no specific rule for claiming a product is new or improved. Notwithstanding this, the claim should always respect all the requirements and obligations provided by the law and regulations so as not to constitute a misleading or abusive advertisement, especially if there is any relevant difference between the old and the new product that the consumer must be informed of.

Claims of origin

28 | Are there special rules for claiming where a product is made (such as country of origin)?

There are no special rules to provide, in the advertising material, the country of origin or where a product is made. The country of origin must be given in the owner manual and on the labels applied on the product, as established by specific laws and regulations.

PROHIBITED AND CONTROLLED ADVERTISING

Prohibited products and services

29 | What products and services may not be advertised?

There are unique categories of advertisements based on their economic or social importance or public or societal repercussions, and certain categories of advertisements that are subject to special care and specific rules, for instance:

- alcoholic beverages;
- education: courses and teaching;
- real property: sale and lease;
- investments: loans and securities markets;
- food: soft drinks, juice and similar beverages;
- over-the-counter pharmaceutical products;
- tobacco products;
- firearms; and
- children's advertising.

Brazilian law and regulations allow the advertising of any products and services, except illicit products and services, as well as gambling.

Prohibited advertising methods

30 | Are certain advertising methods prohibited?

Yes. Subliminal advertising and ambush marketing are prohibited.

Ambush marketing is considered to be undue and unlawful and includes methods that apply tricks or artifice, without the support of a regular agreement entered into by the lawful parties providing for a

lawful object, and without the previous agreement of the communication medium or holders of the involved rights.

With regard to the methods applied to children's advertising, there are several prohibited methods that must be analysed case by case.

Protection of minors

31 | What are the rules for advertising as regards minors and their protection?

Brazil has specific laws and regulations that guide the advertising of services and products targeted at minors (ie, children (up to 12 years of age) and teenagers (between 12 and 18 years of age)).

The most relevant regulations are the Consumer Protection Code, Statute of the Children and Adolescents, Convention on the Rights of the Child (Decree No. 99,710/90) and the Brazilian Advertising Self-Regulation Code, which, in summary, prohibit the exploitation of the lack of judgement of the minor and the incentivisation of the consumption of goods or services.

Although it is clear that children's advertising is legal, the lack of a detailed regulation has created a massive controversy surrounding this issue, mostly driven by marketing promoted by social media influencers.

It is worth mentioning CONANDA's Resolution No. 163/2014. CONANDA is an administrative council created to issue opinions on how other authorities should develop their activities and enforce relevant legal provisions protecting children and teenagers.

Exceeding the limits of its purpose and power, CONANDA issued Resolution No. 163/2014, in which it considered as abusive all advertising (or any form of marketing and communication to induce to consumption) that has children as a target and contains:

- children's language, special effects and colour excesses;
- soundtracks with children's songs or music sung using children's voices;
- representations or images of children;
- persons or celebrities that hold appeal for children;
- children's characters or presenters;
- cartoons or animations;
- dolls or similar items;
- promotions involving the distribution of prizes or collectible gifts that hold appeal for children; and
- commercial promotions using competitions or games that hold appeal for children.

The Resolution even broadens the characterisation of market communication, including 'printed advertisements, television commercials, radio spots, internet banners and pages, packaging or wrapping, promotions, merchandising or product placement, initiatives acting through concerts or shows, and presentations and arrangements of products at points of sale' in their category of abusive communications for children.

According to the Brazilian Constitution, CONANDA does not have the power to legislate, enforce or judge any matter; although there are entities and authorities that defend the validity of the CONANDA's Resolution, advertisers and the National Advertising Self-Regulation Council (CONAR) do not consider the Resolution in their marketing activities.

Owing to the importance of this matter, there are several bills of law and initiatives to regulate children's advertising.

Credit and financial products

32 | Are there special rules for advertising credit or financial products?

The advertisement must respect the right of information of individual and institutional investors, shareholders, third parties dealing with

securities, and public institutions and international bodies, with strict observance of the need to offer them the clarification necessary to enable a sensible and informed decision. In this sense, the main rules are summarised as follows:

- advertising must emphasise the informative and educational content of the message; and
- advertising must avoid assertions that may give ambiguous information or create confusion among investors.

Additionally, companies that are part of the National Financial System must comply with the rules applicable to advertising issued by their institutional representation bodies if and when specific campaigns recommend common procedure and uniformity in the communication process to provide investors with better orientation and information.

Therapeutic goods and services

33 | Are there special rules for claims made about therapeutic goods and services?

Both the National Health Surveillance Agency resolutions (ANVISA) and CONAR issued rules for medical and therapeutic goods.

Over-the-counter pharmaceutical products are permitted to be advertised by law, and the advertisements must, inter alia:

- not contain any assertion as to the action of the product other than those based on clinical or scientific evidence;
- not be made so as to suggest the healing or prevention of any disease that requires medically supervised treatment;
- not be made in a manner that results in different use of the therapeutic action contained in the report submitted to the competent Health Authority;
- not offer any award, participation in contests or similar methods so as to induce the consumer towards unnecessary use of medication;
- avoid any inference associated with excessive use of the product;
- not be made so as to induce the use of products by children without parental guidance, to whom the message shall be exclusively addressed;
- not stimulate the consumer towards physical, gastronomical or alcohol excess;
- not show any character in dependence on the continuous use of medication as a simple solution to an emotional problem or condition related to mood;
- not induce the consumer to error concerning the content, size of package, appearance, use, speed of relief or therapeutic action of the product and its classification (similar or generic);
- be careful and true as to the use of the written or spoken word as well as to visual effects. The choice of words must not only be in conformity with the definition contained in updated dictionaries but must also take into account the meaning generally understood by the public;
- not contain affirmations or dramatisations that may induce the reader or spectator to fear or distress that he or she has or may have, without treatment, any serious disease;
- emphasise the use and action of the product in question. Offensive comparisons with competitors will not be permitted. Any comparison shall only be permitted when it may be easily perceived by the consumer or based on scientifically verifiable evidence. No scientific terminology with irrelevant data or statistics of doubtful or restricted validity can be used so as to suggest a scientific basis that the product being advertised does not have; and
- not contain, under any circumstances, any offer to reimburse paid money or any other benefit of any nature for purchase of a medication owing to possible ineffectiveness.

Food and health

34 | Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

Specific rules are provided to regulate the commercial advertising of food, food supplements, soft drinks, juice, chocolate beverages, non-carbonated beverages and similar non-alcoholic beverages.

The following main specific rules for claims related to health, nutrition and weight control provide that advertisements must:

- comply with ANVISA's requirement and limitations;
- contain terminology consistent with the official licensing, either to designate qualities such as 'diet', 'light', 'it does not contain sugar' and 'it does not contain gluten', or to describe any other distinctive characteristics that may guide consumer choices;
- avoid any association with pharmaceutical-medical products;
- valorise and stimulate, whenever possible, the practice of physical exercises and similar activities;
- abstain from stimulating or encouraging excessive consumption or presenting situations that may stimulate exaggerated consumption or be in conflict with this recommendation;
- refrain from denigrating the importance of a healthy, varied and balanced diet;
- refrain from presenting any product as a replacement for basic meals (breakfast, lunch and dinner), unless such indication is based on a responsible medical or nutritional opinion, recognised by the competent authorities;
- restrict the technical assertions relating to benefits to health and nutrition to those compatible with the official licensing and supported by a responsible medical or nutritional opinion;
- correctly present the characteristics of taste, size, content, weight, nutritional and health benefits;
- avoid the exploitation of eventual benefits that might be derived from the consumption of the product, such as more popularity, higher social status or social or sexual success, and better academic or sports performance;
- not demerit the role of parents, educators, authorities and health professionals concerning the correct information on healthy nutritional habits and other healthcare;
- when using children's characters or presenters of programmes directed at that target audience, do so only while showing the distinction between the advertising message and the editorial or programming content; and
- refrain from using children with low or high weight according to the commonly accepted biometric standards and avoid offending such children and others. When the product is aimed at children, the advertisement must not contain any stimulation of consumption, especially if presented by a family, school, medical or sports institution or cultural or public authority, or one of an institutional nature, promoting healthy eating habits.

Alcohol

35 | What are the rules for advertising alcoholic beverages?

For the purposes of advertising, an alcoholic beverage is the beverage classified as such according to the official rules and regulations to which its licensing is subject. However, the Brazilian Advertising Self-Regulation Code establishes a distinction between three categories of alcoholic beverages:

- those usually taken during meals, and thus called meal beverages (beer and wine);
- other alcoholic beverages, either fermented, distilled, rectified, premixed or cocktails (usually served in doses); and
- the ready-to-drink category, in which the alcoholic beverage is presented in a mixture with water, juice or soft drink.

Each category has different and specific rules for broadcast and non-broadcast advertising, including, but not limited to, the warning clause. All advertisements must be analysed case by case by a local lawyer.

As alcoholic beverages are products for restricted consumption and improper for certain public and other situations, the advertising must be structured in a socially responsible manner, without deviating from its major purpose of promoting the brand and its features, provided that any imperative consumption appeal and the exaggerated offer of units of the product in any advertisement, either by text or image, directly or indirectly, including the slogan, shall be prohibited.

Tobacco

36 | What are the rules for advertising tobacco products?

A tobacco product advertisement must observe the following rules:

- it must not suggest that the products have relaxing or stimulating properties, reduce fatigue, tension or produce any similar effect;
- it must not associate the product with ideas or images suggesting it will make people more successful in terms of sexuality, or insinuate an increase in virility or femininity of smokers;
- it must not suggest or promote exaggerated or irresponsible consumption, associate consumption with welfare or health or show consumption in illegal or dangerous places;
- it must not associate the use of the product with the practice of Olympic sports or use Olympic sports clothing to promote its marks;
- it must make no appeal specifically addressed to children below 18, and any person who appears in an advertisement subject to these rules, either smoking or not smoking, must look and be older than 25 years old;
- it must not use imperative forms that may directly encourage consumption; and
- media planning must be careful concerning the target public.

The advertisement must not be inserted in any publication, programme or website addressed to minors.

The sales outlet materials must reflect similar care.

Gambling

37 | Are there special rules for advertising gambling?

Gambling and betting activities are generally prohibited in Brazil (with some exceptions as provided by law, namely, the state-run lottery and horse races conducted at duly authorised race courses).

The Brazilian Federal Union is exclusively competent to legislate on bingos and lotteries.

Gambling is a criminal offence and is defined as a game where the result depends exclusively or mainly on chance, or any betting on horse races outside authorised race courses.

There are many bills of law aimed at either creating additional restrictions or legalising gambling in Brazil.

Lotteries

38 | What are the rules for advertising lotteries?

If the advertiser's activity is legal and authorised by the agency responsible for regulating the lottery in Brazil, the advertiser must respect the standard advertising laws and rules.

In addition, the framework in 2020 has changed since the Supreme Court decided unanimously that the exploitation of lotteries is not exclusive to the Union and, therefore, the governments of the states and the Federal District can also manage lottery activities.

Promotional contests

39 | What are the requirements for advertising and offering promotional contests?

At the end of 2018, Federal Law No. 13,756/2018 was issued, granting exclusive powers to the Ministry of Finance, and specifically to the Secretary of Evaluation, Planning, Energy and Lottery (SECAP), to analyse, authorise and supervise commercial promotions, including philanthropic sweepstakes, which was previously shared with the Federal Controlled Bank.

In terms of commercial promotions, it is mandatory to include the following legal text in all broadcast and non-broadcast advertising:

- the term 'promotional contest' with the title of the contest and the authorising entity (usually the SECAP or the Superintendence of Private Insurance);
- a certificate authorisation number; and
- the promoter's website address.

In addition, the commercial promotion may be advertised only once a certificate of authorisation is obtained.

In addition, the following directions related to promotional contests must be complied with:

- the promotion must be national, state, municipal or may involve more than two cities or states; however, participation may be open to the public from any Brazilian region;
- respecting some limitations, the promotion may also be international; and
- foreign companies cannot be sponsors in commercial promotions in Brazil without a local branch.

Currently, SECAP has an efficient approval system in Brazil, which has allowed the implementation of promotions with less bureaucracy and within very short deadlines (10 to 15 business days).

Indirect marketing

40 | Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

Indirect advertising or 'merchandising' is permitted; however, it must be authentic and be identified as advertising.

In addition, indirect merchandising or advertising that depicts children and uses elements of the infant universe or other artifices with the deliberate purpose of capturing the attention of this audience, whatever the vehicle may be, is prohibited.

Other advertising rules

41 | Briefly give details of any other notable special advertising regimes.

The following are specific rules from the Brazilian Advertising Self-Regulation Code that must be adhered to in general advertising:

- all advertising activities must respect the dignity of human beings, privacy, social interest, institutions and national symbols, constituted authorities and family;
- no advertisement can encourage or stimulate any type of offence or racial, social, political, religious or national discrimination;
- the advertisement must contain nothing that may induce criminal or illegal activities – or that may encourage, stimulate or incite such activities;
- no advertisement can contain statements or visual or audio presentations that may offend the decency standards of the audience it intends to reach;

- the advertisement must not exploit the consumer's credulity, lack of knowledge or inexperience;
- no advertisement can cause fear without a relevant social reason;
- no advertisement can exploit any type of superstition;
- the advertisement must contain nothing that may induce violence;
- the advertisement must contain a truthful presentation of the product being offered;
- any advertisement that disrespects religious belief and other susceptibilities of persons who descend from or relate to deceased persons whose image or reference appears in the advertisement is prohibited;
- the advertisement must use correct grammar and restrict the use of slang and foreign expressions, unless they are absolutely necessary to transmit the information or the intended 'climate'. However, this recommendation does not invalidate certain concepts universally adopted in the creation of advertisements and campaigns;
- with regard to advertisements to be broadcast by radio and television, advertisers, agencies and media must ensure the good pronunciation of the Portuguese language and avoid aggravating prosodic vices that have already contributed to disfigure the legacy that we received from our ancestors;
- advertisements must not use bad language;
- any technical description of the product that may be included in the advertisement must be based on the official nomenclature of the relevant segment and whenever possible it must follow the rules and directives of the Brazilian Association of Technical Rules and the National Institute of Metrology, Rules and Industrial Quality;
- no advertisement may contain visual or audio presentations that may offend the decency standards of the audience it intends to reach or offensive comparisons with competitors;
- the advertisement must not refer to a survey or statistic that has no identifiable and responsible source;
- the use of partial data of a survey or statistic cannot lead to distorted findings or to conclusions opposed to those that would be reached through the use of all available data; and
- the advertisement must only use pertinent and defensible information expressed in a clear manner even for layperson.

SOCIAL MEDIA

Regulation

42 | Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?

According to the Consumer Protection Code, it is mandatory that all advertising material be published in such a way that the consumer immediately identifies it as publicity (eg, with hashtags, such as #publicidade, #anuncio and #conteudopago).

In December 2020, the National Advertising Self-Regulation Council (CONAR) issued the Advertising Guide and the Table Chart for Digital Influencers. The Guide set forth that advertising carried out by influencers is a 'message designed to stimulate the consumption of goods and / or services, carried out by so-called Digital Influencers, after being contracted by the Advertiser and / or Agency.'

According to the Guide, there are three cumulative elements to evaluate advertising by influencers:

- the disclosure of the product, service, cause or other sign associated with them;
- the compensation or commercial relationship, even if not financial, with the advertiser or agency; and
- an editorial control exercised by the advertiser or agency in the influencer's activities and posts.

To facilitate understanding of the new rules, CONAR has published a practical Table Chart, which illustrates how advertising content should be identified as advertising. For instance, it is recommended to use hashtags with easy identification, such as #publicity or #sponsorship. The Guide states that the use of foreign expressions or abbreviations that may make it difficult for the consumers to comprehend (ie, only #ad) cannot be used.

With this new recommendation from CONAR, hiring (direct or indirect) influencers and reposting by the advertiser of spontaneous media, among other activities involving personalities and influencers, must comply with the new provisions established by CONAR.

43 | Have there been notable instances of advertisers being criticised for their use of social media?

The majority of the criticisms for the use of social media by advertisers is related to influencers, especially when the influencer is a minor or the content is targeted at children. There are also criticisms of campaigns in which the influencer does not identify that the content is advertising.

Another issue that caused a lot of controversy were the lives held by singers and artists during the pandemic. In addition to the fact that influencers do not respect certain advertising rules, such as consuming alcoholic beverages from their sponsor during the event, it was not clear whether the products displayed at live events were supplied from sponsors or not.

44 | Are there regulations governing privacy concerns when using social media?

In Brazil, Law No. 13,709/2018 (LGPD) has been in force since September 2020 (inspired by the Regulation (EU) 2016/679 (GDPR)), and has the purpose of protecting the essential rights of freedom and privacy and the free development of the personality of the individuals on personal data processing activities.

According to the LGPD, 'the processing of personal data which access is public shall consider the purpose, the good faith and the public interest that would justify the availability thereof'.

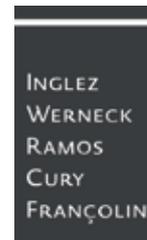
This means that, even data that is publicly accessible (eg, through social media) can only be processed considering:

- the principles of purpose: the purpose for which it was made public must be respected;
- good faith: the use cannot distort the legitimate expectations of its data subjects; and
- public interest: the public interest that supported the availability of data must be identified.

Additionally, the LGPD also establishes that it is not necessary to collect consent from the data subject for processing activities involving data made manifestly public by the data subject, provided the rights of the data subject and the principles set forth in the LGPD are observed.

Another important law dealing with privacy in relation to the use of the internet in Brazil, which includes the use of social media, is Law No. 12,965/2014, which establishes principles, guarantees, rights and obligations for use of the internet in Brazil. In article 3, the Law determines as principles for the use of the internet in Brazil the protection of privacy and protection of personal data, pursuant to the LGPD. In addition, the Law also ensures that users' rights, among other things, include the inviolability of intimacy and privacy.

Therefore, considering the laws set out above, it is possible to conclude that the requirement of consent for the data manifestly made public by the data subject is waived; however, it is necessary to have another legal basis that justifies the processing of this type of data, and it is also necessary to observe the principles established in the LGPD,



Luiz Werneck

lwerneck@iwrcef.com.br

Talita Sabatini Garcia

tsabatini@iwrcef.com.br

Avenue Engenheiro Luís Carlos Berrini, 105
17th Floor
Ed Berrini One
São Paulo
Brazil
Tel: +55 11 4550 5000
www.iwrcef.com.br

such as purpose and transparency, in addition to guaranteeing the rights of data subjects.

UPDATE AND TRENDS

Recent developments

45 | Are there any emerging trends or hot topics in your jurisdiction?

Although it is clear that children's advertising is legal, the lack of a detailed regulation has recently created a massive controversy surrounding this issue, mostly driven by the marketing promoted by social media influencers.

Motivated by some class associations that questioned the legality of children's advertising, the Public Prosecutor's Office of São Paulo (MP/SP) filed a claim against Google seeking, among other things, the removal of several videos of underage YouTubers from YouTube.

MP/SP and such associations claim that the companies exploit the children's market illegally by using YouTubers, including underage children, as a tool to promote their products, making them act as their ambassadors, promoters or both. In order to do so, companies send sealed toys to children so that underage YouTubers carry out the practice known as 'unboxing' (ie, product unpacking) in videos with large number of views on YouTube. For MP/SP and such associations, this is considered an abusive practice of advertising, as it consists of exploiting the hyper-vulnerability of children. It could be also seen as veiled advertising, that is, representing the difficulty of the receiver of the advert's message on identifying the child YouTubers as non-advertisers, because they do not present as such. The case is ongoing without any relevant decision to date.

In December 2019, Google enter into a Conduct Adjustment Agreement with São Paulo Public Prosecutor's Office. Among the countless measures to be adopted by Google, one of the most relevant is the joint development by Google and the National Advertising Self-Regulation Council of a manual aimed at children's advertising. The purpose is to prevent abusive practices, serving as a guide to good practice in the digital environment.

On 15 January 2020, the National Consumer Secretariat linked to the Ministry of Justice and Public Security initiated a public consultation related to a new ordinance aimed at child advertising, guided by the protection of children and teenagers, qualifying them as 'hyper-vulnerable'.

Most of the local associations are working together to try to overturn the new ordinance, as in practice it will cause even more obstruction to companies that wish to promote children's advertising, owing to more regulation on the subject, including more bodies being responsible to apply it.

Based on this scenario, despite the fact that the legislation in force does not prohibit children's publicity, advertisers must be very careful and strategic when conducting any children's advertising campaigns with influencers and directed at minors.

Coronavirus

46 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There are no emergency legislation or relief programmes that directly impact marketing activities. However, with the restrictions resulting from the covid-19 pandemic, the government implemented programmes to encourage the maintenance of commercial agreements, which includes contracts related to marketing actions, events and shows.

One of the main points of discussion was whether the pandemic would be considered a force majeure event, and whether it would be possible to terminate ongoing contracts owing to the pandemic without any penalty to the parties involved.

The judiciary quickly clarified that contracts should be analysed on a case-by-case basis to ascertain whether, in fact, the pandemic would render the activity provided for in the contract unfeasible. In the judiciary's understanding, in view of the principle of the social function of the contract, only contracts that could not be fulfilled would be subject to cancellation, and the parties should seek a composition to equalise their losses.

In view of this scenario, we have advised our clients to rapidly evaluate their ongoing contracts to anticipate negotiations to maintain the economic and financial balance of the contract or, if necessary and feasible, postpone the effects of the contract until the market get back on track. The purpose of the anticipation of the discussion is to demonstrate good faith and avoiding the abrupt termination of the contract and the discussion of loss and damages.

Germany

Beatrice Brunn and Stefan Engels

DLA Piper

LEGISLATION AND REGULATION

Legal framework

- 1 | What are the principal statutes regulating advertising generally?

In Germany, advertising is not governed by a comprehensive law. The Unfair Competition Act (UWG) constitutes the central framework of rules governing market behaviour and refers in particular to advertising. The UWG seeks to protect consumers, competitors and other market participants against unfair commercial practices. Also, a variety of sector-specific regulations apply to advertising and marketing for specific products and services, and within different communication channels. In addition, specific professional guilds have published codes of conduct to maintain the guilds' integrity. The codes are only obligatory for the members of those guilds.

Moreover, additions or restrictions may depend on the communication channel used.

Broadcasting is, in particular, subject to advertising limitation rules. Restrictions can be found in the State Media Treaty (MStV), the media laws of the states and the Interstate Treaty on the Protection of Minors. In addition, the state media authorities have published a number of guidelines for advertising activities, product placement and sponsorship, particularly on television. However, these provisions only take effect in their administration and are not binding in the courts.

Advertising in the press is governed by the special provisions of the State Press Acts.

The Telemedia Act contains rules regarding digital commercial communication. The MStV also contains rules for advertising in telemedia.

Regulators

- 2 | Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

Since there is no comprehensive law governing commercial practices, the regulation and enforcement of rules on advertising lie with the respective supervising authorities or, when it falls within the scope of application of the UWG, with the competitors or qualified entities for the protection of consumer interests. Different supervising authorities may exercise their powers independently.

Regulators' powers

- 3 | What powers do the regulators have?

In their field of competence, the respective authorities may issue administration orders and prohibitions or impose fines up to €500,000

according to section 115, paragraph 2 of the MStV, and up to €300,000 according to section 20, paragraph 2 of the UWG in the case of advertising by means of a telephone call or using an automatic calling machine without the consumer's prior consent.

Regulators' priorities

- 4 | What are the current major concerns of regulators?

One major concern of the media authorities is that political ads in social networks are often not marked as such. According to the authorities, voluntary self-regulation by social media platforms does not work. The regulators demand more regulation and stricter rules for social media when dealing with advertising. Furthermore, the state data protection authorities are concerned about the use of personal data for customised advertising campaigns, especially in the area of online marketing. Surreptitious advertising remains a central task for state media authorities, although the majority of litigation is currently being conducted on the basis of alleged violations of the UWG.

Industry codes

- 5 | Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

The legal provisions are flanked by various industry codes of practice. As one of the most important bodies in the area of advertising regulation, the German advertising council develops guidelines and codes of conduct for specific advertising activities and specific products and services (eg, covering alcoholic beverages or gambling). These codes of conduct are based on the principle of self-regulation and, therefore, are on the whole not binding. Nonetheless, in the case of non-compliance, complaints may be issued. If the conduct objected to is not changed or removed, the advertising council may also issue a public reprimand. However, non-compliance can be seen as an indication of unfair competition.

This basically also applies to the various sector-specific guidelines, such as the code of conduct for the insurance industry.

Authorisation

- 6 | Must advertisers register or obtain a licence?

German law does not provide a general obligation for registering or licensing advertising activities. However, this might be different for certain business operations (eg, broadcasters and gambling providers require permission from the competent authority). In cases such as these, advertising is only permissible if the operation itself is authorised.

Clearance

- 7 | May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

There is no general clearance procedure for advertising. In a few areas, the use of specific claims may be regulated by sector-specific laws. This applies, for example, to the advertising of food products. When claiming that certain food products have health benefits, the respective claim must be approved by the European Commission.

PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)

Challenging competitors advertising

- 8 | What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?

When advertising activity is considered to be unfair within the terms of the Unfair Competition Act (UWG), the law provides for several remedies for the competitors concerned. The focus is on removal and to cease-and-desist from further infringements. The injured party may also demand information about the extent of the infringement and damages. Current practice is to issue a warning, together with the request to sign a declaration to cease and desist, within a short period of time (containing a penalty clause). A particular advantage of this approach is that an out-of-court settlement may be achieved within a few days.

Contractual penalties are also an effective means to prevent further violations. If the requested declaration is not given or is not given in due time, the claimant may file for an interlocutory injunction or bring an action before the competent court. The former allows the enforcement of an injunctive relief within a few days or weeks, while court proceedings in the main may take several months or several years. As the request for interim measures requires some urgency, the claims must generally be asserted within a short period of time following the violation. Those procedures only provide for an interim measure. A final decision about whether the contested advertisement is lawful can only be achieved in the main proceedings. Furthermore, if a preliminary injunction has been revoked, the defendant may demand compensation for any injury caused by the measure.

Public challenges

- 9 | How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

Under the UWG, only competitors, some business associations, qualified entities for the protection of consumer interests and the chambers of industry, commerce or handicrafts are entitled to challenge advertising. Consumers may only report infringements to the entities for the protection of consumer interests. If a qualified entity can prove that it is entered in the list of qualified entities pursuant to section 4 of the Injunctive Relief Act or in the list of the European Commission pursuant to article 4, paragraph 3 of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, it may assert its own claims for removal and cease and desist like a competitor. However, these entities cannot claim for damages.

Consumers may report potential inadmissible advertising to the competent supervising authority or inform the respective commercial association where such a body exists. However, regulatory proceedings can only be formally initiated by the competent authorities.

Burden of proof

- 10 | Which party bears the burden of proof?

According to German procedural law, generally, each party has to explain and prove the facts that act in their favour. This means that the claimant bears the burden of proof for the claim's requirements. However, this does not apply if the defendant only has knowledge of a specific fact. In some cases, producing evidence is facilitated by legal presumptions. For instance, pursuant to section 5, paragraph 4 of the UWG, it is presumed to be misleading to advertise a price reduction in cases where the price concerned has been demanded for only an incommensurably short period of time. In the event of a dispute, the advertiser has to disprove this presumption. In the proceedings for interim relief, the applicant only needs to establish facts from which it may be presumed that the affected advertising is inadmissible.

Remedies

- 11 | What remedies may the courts or other adjudicators grant?

In the case of claims based on unfair competition, the courts may grant several remedies that are subject to compulsory execution, namely, petitions for injunction, verdicts or court settlements.

Length of proceedings

- 12 | How long do proceedings normally take from start to conclusion?

The length of proceedings is difficult to estimate reliably. Several factors have to be taken into account, such as the complexity of the case or the chosen procedure. A decision in the proceedings for preliminary legal protection may be obtained within days or weeks, while the proceedings in the principal action usually take months or even years. The duration significantly increases if an appeal is filed.

Cost of proceedings

- 13 | How much do such proceedings typically cost? Are costs and legal fees recoverable?

The costs of the proceedings are proportionate to the value of the claim. In determining the value of a claim, several factors have to be taken into account, such as the extent and seriousness of the infringement. In addition, case law has developed 'flat fees' for typical violations, particularly regarding unfair competition. As an example, based on a value of €50,000, the court fees at first instance amount to €1,803 and attorneys' fees for both parties will be €7,657.66 including value added tax.

In principle, the costs are borne by the unsuccessful party. If both parties partially win, the costs will be shared proportionately.

Appeals

- 14 | What appeals are available from the decision of a court or other adjudicating body?

Verdicts in the first instance may be challenged with an appeal. An appeal on points of law may be filed against the final judgments delivered by the appeal instance. In addition, there is the possibility of a 'leapfrog' appeal. Furthermore, interlocutory injunction orders can be challenged with a note of objection. Objections may also be raised to orders of supervising authorities, such as fines.

MISLEADING ADVERTISING

Editorial and advertising

15 | How is editorial content differentiated from advertising?

Content is considered to be editorial if it constitutes independent reporting (driven by the public interest and not influenced by third parties). Often, it is also the expression of an activity in accordance with journalistic standards. This is characterised by a recognisable journalistic objective and a selection and compilation of information according to its assumed public relevance. It is characteristic for editorial contributions to serve the primary purpose of providing information and forming opinions of their recipients. Advertising, on the other hand, serves to directly or indirectly promote the sale of goods and services.

Under German law, advertisements must be clearly recognisable as such and strictly separated from editorial content. To ensure the integrity of editorial content, advertising must be clearly identified. Pursuant to the general rules of the Unfair Competition Act (UWG), failing to identify the commercial intent of advertising and all other kinds of commercial practices is deemed to be a misleading omission and, therefore, unfair competition.

Additionally, the separation requirement is specifically regulated in section 8, paragraph 3, sentence 1 of the State Media Treaty (MStV) regarding broadcasts; in section 22, paragraph 1, sentence 1 of the MStV regarding telemedia; and in the State Press Acts ('obligation to identify paid publications', mainly section 10). Within the scope of these provisions, advertising must be clearly recognisable as such and clearly separated from other content.

Advertising that requires substantiation

16 | How does your law distinguish between 'puffery' and advertising claims that require support?

It is important to distinguish between factual claims (claims that can be proved) and mere value judgements. The latter are not covered by the regulations of the UWG. The decisive factor when distinguishing between the two is the target public's viewpoint. If the respective statement is understood as a factual claim rather than mere puffery, it must be correct. This applies in particular to advertising using exaggerations, superlatives or unique selling propositions (such as 'the best' or 'the greatest'). Where such claims are taken seriously by the relevant consumers, the advertiser must be able to prove his or her alleged exceptional position. This may, however, only be reviewed on a case-by-case basis.

Eye-catching advertising is understood as advertising using specially highlighted claims (by specific graphic representation) to attract consumers' attention. Case law has developed specific criteria for the admissibility of such advertisements: objectively incorrect claims are prohibited. Claims that are not objectively incorrect, but may lead to misconceptions, shall be accompanied by further information, usually presented in a footnote. The requirements regarding the content and format of this supplementary information depend on the respective product or service and the respective communication channel.

Rules on misleading advertising

17 | What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

The main provisions governing misleading advertising can be found in the UWG. Under these regulations, advertising is deemed to be misleading if it contains untruthful information or other information suited to deception regarding specific circumstances such as

the essential characteristics or risks of the products and services concerned. At the same time, advertising with facts that simply state the obvious is prohibited.

Section 5a of the UWG provides a duty to clearly and in due time disclose all essential information that is likely to affect the consumer's decision. Within the meaning of the law, 'essential information' should include the identity and postal address of the company concerned, service conditions, terms of delivery, final costs and the right of withdrawal and revocation. The scale of information that is to be disclosed mainly depends on two factors: the understanding of the targeted members of the public and the actual technical capabilities of the communication channel used. Regarding the former, the average (reasonably well-informed and reasonably observant and circumspect) customer's understanding is decisive.

In addition, the requirements depend on the respective communication channel. The limitation of information tools may lead to the limitation of information obligations. For instance, the use of reference to the advertiser's website may be sufficient to meet the obligations. In this context, any other measures taken by the trader to make the information available to consumers shall be taken into account when deciding whether essential information has been omitted (see section 5a, paragraph 5 UWG).

Although the required amount of information can only be assessed on a case-by-case basis, sector-specific rules may provide for mandatory information that must be disclosed (eg, when advertising credit and financial products).

Substantiating advertising claims

18 | Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

Advertising claims must not be inaccurate or misleading. This does not always require prior proof. However, in the event of a dispute the advertiser must provide the necessary evidence as to the accuracy of the advertisement being challenged.

Furthermore, sector-specific law may require proof for claims about particular products and services, such as the Advertising of Medicines Act (HWG) regarding medicinal products. According to section 3, No. 1 of the HWG, advertising statements about therapeutic efficacy are only permissible if there is scientific proof to support the claim.

Survey results

19 | Are there specific requirements for advertising claims based on the results of surveys?

Advertising claims based on the results of surveys are subject to the general rules of the UWG. As such advertising is not explicitly regulated, case law sets out the criteria about whether respective claims are misleading or not. Surveys must be representative and current. The claim must be clear so that it does not refer to the result of an independent study. Under these conditions, advertising is even permissible if the survey has been commissioned by the advertiser itself. If the claim is based on comparisons with competing products, the rules on comparative advertising will also apply.

Comparisons with competitors

20 | What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

Comparative advertising is explicitly regulated by section 6 of the UWG. It is legally defined as any advertising that explicitly, or by implication,

identifies a competitor, or goods or services offered by a competitor. Such advertising is generally permissible, but may be deemed to be misleading where a comparison is used that does not relate to goods or services that meet the same needs or are intended for the same purpose, and that:

- does not objectively relate to one or more:
 - materials;
 - relevant, verifiable and representative features of the goods concerned; or
 - to the price of those goods and services;
- takes unfair advantage of, or impairs, the reputation of a distinguishing mark used by a competitor;
- discredits or denigrates the goods, services, activities or personal or business circumstances of a competitor; or
- presents goods or services as imitations or replicas of goods or services sold under a protected distinguishing mark.

Provided these conditions are met, the competitor's name may be used. Even the use of third-party trademarks is permissible, provided it does not lead in the course of trade to a risk of confusion between the advertiser and a competitor, or between the products or services offered or the distinguishing marks used by them.

Test and study results

21 | Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

The following requirements must be met:

- precise reference of the respective study is to be given;
- the result must be summarised correctly;
- the test must refer to the particular product being advertised; and
- the study must be conducted by an independent body.

If a product was rated best, the respective claim is generally permissible. Where a competing product has achieved a higher rating, the rank of the advertised product must be specified.

The popular consumer magazine *Stiftung Warentest* has published recommendations on advertising using test results.

Advertising with test seals is qualified as misleading by case law if there has been no testing conducted by neutral testers according to objective criteria, but the seal only refers to an internal quality control.

Demonstrating performance

22 | Are there special rules for advertising depicting or demonstrating product performance?

For advertisements depicting or demonstrating a product's performance, the general principles for misleading advertising are applicable. Such advertising is therefore subject to the restrictions of the UWG and may be deemed to be unfair competition if the pictures are arranged in such a way to cause the observer to misunderstand.

In addition, advertising depicting product performance is subject to sector-specific regulations. The HWG prohibits the use of improper, repugnant or misleading pictures of the human body. The same applies to plastic surgery advertisements with 'before and after' pictures.

Third-party endorsements

23 | Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief or experience?

Advertising claims based on endorsements or third-party testimonials are subject to the general rules of the UWG, particularly regarding misleading advertising. Such advertising is generally permissible. However, sector-specific regulations may provide for stricter limitations. Broad restrictions for advertising medicinal products using third-party testimonials can be found in the HWG.

The use of testimonials or pictures of third parties must be approved by the persons concerned. The use of celebrities' photographs for advertising purposes without consent may be permissible under specific circumstances.

Adherence to a code of practice may be advertised if the advertiser is actually bound by the respective code and complies with the provisions.

Advertising using an actual existing quality mark is only permissible if the competent body has authorised the use. In all other cases, the use of quality marks for advertising purposes is misleading if the advertiser itself has awarded the mark or no objective verification has taken place.

Guarantees

24 | Are there special rules for advertising guarantees?

Pursuant to the general provisions of the UWG, such advertising is permissible if it does not contain false or deceptive information. Furthermore, it must be distinguished between statutory warranties and voluntary guarantees. Because the former are already granted by law, advertising would be deemed to be misleading.

If a voluntary guarantee is granted, the advertiser must ensure that the consumer can easily determine whether a guarantee case exists, what rights he or she has under the guarantee against whom and in what form, and within what period he or she can assert them (section 479, paragraph 1 German Civil Code).

Environmental impact

25 | Are there special rules for claims about a product's impact on the environment?

The admissibility of such claims will be determined in accordance with the provisions of the UWG. Terms such as 'environmentally friendly' are only permissible if the consumer is clearly informed about the advantage of the product or service. According to the rules for the use of quality marks, the use of eco labels must state the exact product or service for which the label has been awarded. Abusive use of a European eco label is a breach of competition law. Regarding other eco labels, advertising is only permissible if the environmental compatibility is clearly proven and the consumers are not misled. In some cases, the use of eco labels is regulated by contractual provisions.

Free and special price claims

26 | Are there special rules for describing something as free or a free trial or for special price or savings claims?

Special rules for information on prices can be found in the Ordinance Regulating the Indication of Prices. This act requires, inter alia, the disclosure of the final prices including value added tax and other price components in relation to consumers. Violations of these provisions shall be treated as unfair competition.

Moreover, the general rules of the UWG apply. Describing products or services as 'free' or a 'free trial' is misleading advertising when actual

costs are incurred. However, this shall not apply to the unavoidable costs of responding to the offer, or of collecting or paying for delivery, or of using the services.

The HWG contains special regulations for the advertisement of remedies (eg, with 'free trials'). For example, the distribution of free samples of medicinal products is prohibited. For other grants and advertising gifts that advertise a company or product, the HWG contains individual case-related labelling requirements.

Advertising with discounts and price savings is permissible only if clear and comprehensive information about the conditions is provided, such as the duration of the sales period, the exact scope of goods and services covered or potential restrictions.

Furthermore, it is misleading to advertise a price reduction where the price concerned has only been used for an incommensurably short period of time.

New and improved

27 | Are there special rules for claiming a product is new or improved?

Such advertising claims are governed by the general rules of the UWG. It would be misleading advertising to use a term such as 'new' or 'first-time' if the product or service had been introduced in the market some time ago. The same applies to the use of the term 'improved'. The period of time for which such a claim is permissible depends on the particular market and the particular product or service and can only be reviewed on a case-by-case basis.

Claims of origin

28 | Are there special rules for claiming where a product is made (such as country of origin)?

Section 127, paragraph 1 of the German Law on Trademarks states that indications of geographical origin may not be used in trade for goods or services that do not originate from the place, area, territory or country that is designated by the indication of geographical origin if it is likely to mislead regarding the geographical origin. According to paragraph 2, if the goods or services marked by an indication of geographical origin have special properties or a special quality, the indication of geographical origin may only be used in trade for the corresponding goods or services of this origin if the goods or services have these properties or this quality. Paragraph 3 states that if an indication of geographical origin enjoys a particular reputation, it may not be used in trade for goods or services of a different origin even if it is not likely to mislead concerning the geographical origin if use provides without good cause an opportunity for goods or services of a different origin to take unfair advantage of or be detrimental to the reputation of the indication of geographical origin or its distinctive character.

Additionally, according to the UWG, the labelling must not deceive the customer about the origin of the product and raise false expectations regarding the quality. Depending on the nature of the information (a distinction is made between geographical indications and designations of origin), the legal community has different expectations of the advertised product, which may also affect the quality.

For example, advertising with designations of origin is allowed only for products that have undergone a treatment that is critical to the product quality in the respective country. In the case of industrial goods, the value of the industrial product is important. This is determined by the processing operation. The place of origin of such goods is thus the place where the goods are essentially manufactured. Under which conditions a production is essential can be measured on the basis of a value added share. The value of the processing of a substance must not be significantly less than the value of the substance.

PROHIBITED AND CONTROLLED ADVERTISING

Prohibited products and services

29 | What products and services may not be advertised?

German law does not provide for absolute limitations for advertising products and services in general if the products and services themselves are permitted. An exception hereto applies to advertising for pornographic material, which is generally prohibited, and under some circumstances for advertising for procuring abortions (section 219a German Criminal Code). Moreover, specific restrictions exist for advertising particular products and services, mainly depending on specific communication channels. For example, tobacco advertising is banned on German radio and television. Advertising tobacco products in the press and on the internet is also mostly prohibited.

Prohibited advertising methods

30 | Are certain advertising methods prohibited?

The prohibitions on certain advertising methods are mainly derived from the general rules of the Unfair Competition Act (UWG). Advertising activities are inadmissible whenever the freedom of decision of consumers is impaired, for example, through applying pressure or exploiting a consumer's credulity or fear.

Sending advertising emails without the prior consent of the recipient is generally prohibited. The same applies to telephone advertising ('cold calls'). If the commercial nature of these commercial practices is not clear, it is a misleading omission pursuant to section 5a, paragraph 6 of the UWG, and subliminal advertising is generally prohibited.

Regarding broadcasting and telemedia, particular advertising methods are also subject to the specific rules of the State Media Treaty (MStV). It also contains, for example, rules prohibiting the use of subliminal techniques.

Protection of minors

31 | What are the rules for advertising as regards minors and their protection?

Rules on the protection of minors in advertising via broadcasting and telemedia can be found in particular in section 6 of the Interstate Treaty on the Protection of Minors in the Media (JMStV). As a general principle, advertising must not harm children and juveniles physically or mentally. Advertising must not directly exhort minors to buy a product or service by exploiting their inexperience or credulity, or directly encourage them to persuade their parents to purchase the goods or services being advertised (section 6, paragraph 2 JMStV). Further restrictions can be found in the German Minors Protection Act (JuSchG). Furthermore, the Advertising of Medicines Act (HWG) prohibits advertising in particular for medicinal products that are aimed exclusively or predominantly at children under the age of 14. Additionally, the general rules of the UWG are applicable (see also No. 28 Annex of section 3, paragraph 3 UWG).

Credit and financial products

32 | Are there special rules for advertising credit or financial products?

Advertising of credit or financial products must meet the specific requirements for clear and comprehensive information about the product. In this regard, the Ordinance Regulating the Indication of Prices contains detailed provisions, particularly on the amount of mandatory information. For example, credit advertising must contain information on the net loan amount, the borrowing rate and the annual percentage

rate using an easily understood example. Infringement of these rules is deemed unfair competition.

Furthermore, such advertising is subject to the general rules of the UWG and, therefore, must not contain any misleading information. This applies, in particular, to claims about the risks and the earning potential of the investments being advertised.

Therapeutic goods and services

33 | Are there special rules for claims made about therapeutic goods and services?

Specific rules for therapeutic claims can be found in the HWG, the Medical Devices Act or the professional requirements for pharmacists at state level. Misleading advertising for therapeutic goods and services is also deemed to be unfair competition pursuant to the rules of the UWG. The HWG provides special rules for advertising outside the medical circle of experts. The act contains a list of broad restrictions for third-party endorsements and testimonials, advertisements using pictures and specific advertising methods. In addition, it is generally prohibited to advertise remote medical treatment. Furthermore, advertising medicines that have not been approved for sale on the German market is forbidden.

Food and health

34 | Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

The use of health and nutrition claims for advertising is only permissible if the respective claim complies with the provisions of Regulation (EC) No. 1924/2006 on nutrition and health claims made on foods. While the latter must be authorised by the competent authority, the Regulation contains a list of approved nutrition claims. Advertisers should review the EU Register of permitted nutrition claims, authorised health claims and their respective conditions of use. Violations of this Regulation may be deemed to be unfair competition pursuant to the UWG.

Claims that make reference to weight control are generally permitted if they are scientifically substantiated and not misleading.

Specific advertising activities outside the scope of the Regulation are covered by the national rules of the German Food and Feed Code.

Alcohol

35 | What are the rules for advertising alcoholic beverages?

According to section 8, paragraph 10 of the MStV, advertising for alcoholic drinks must not promote the excessive consumption of such drinks. Beyond that, advertising alcoholic beverages is subject to the general regulations of the JuSchG and the JMStV. Pursuant to section 6, paragraph 5 of the JMStV, advertising of alcoholic beverages must not be aimed at minors, nor specifically appeal to them through its presentation or show minors consuming alcohol. Furthermore, the German Advertising Council has established a strict code of conduct for advertising alcoholic beverages.

Such advertising is also covered by the general regulations of the UWG.

Tobacco

36 | What are the rules for advertising tobacco products?

Advertising tobacco products and electronic cigarettes is strictly regulated in Germany. In May 2016, the Tobacco Products Directive (Directive 2014/40/EU) was transposed into national law by the Law on Tobacco Products and Related Products. The Act provides for restrictions on any communication channel. While tobacco advertising is completely banned on television and radio, advertising in print media and on the internet is

restricted to media that is only available for tobacco distributors or that mainly contains information about tobacco products. A sole exception is still made for billboard advertising, which is generally permissible, and tobacco advertisements in cinemas after 6pm.

Similar to the advertising of alcoholic beverages, advertising for tobacco must not be addressed to minors.

Gambling

37 | Are there special rules for advertising gambling?

In Germany, the operation of gambling is strictly regulated. The same applies to its advertising, which is in particular subject to the regulations of the State Treaty on Gambling (GlüStV). Pursuant to section 5, paragraph 2 of the GlüStV, advertising shall not be aimed at minors or comparably vulnerable target groups. Misleading claims, in particular regarding the chances of winning or the nature or amount of the winnings, are prohibited. Public gambling advertisements on television, the internet or telecommunications systems are forbidden. A sole exception is made for online gambling and advertising in the state of Schleswig-Holstein. According to section 5, paragraph 3, sentence 2 of the GlüStV, other states may also grant exemptions for lotteries, sports and horse race betting. However, advertising for sports betting is still prohibited directly before and during live sports events (section 5, paragraph 3, sentence 3 GlüStV). The states also adopt joint regulations to define the nature and scope of permissible gambling advertising.

However, a fundamental revision of gambling law in Germany is due to take effect on 1 July 2021. At that time, a revised nationwide State Gambling Treaty is scheduled to come into force. The State Treaty on Gambling 2021 (GlüStV 2021) was agreed upon by the prime ministers of the federal states in March 2020 and signed at the end of October 2020. Ratification by the parliaments of the federal states is still pending. The GlüStV 2021 will provide the opportunity to obtain a permit for online poker, virtual slot machines and online casino games, and already existing possibilities to obtain permits – eg, for sports betting and for lotteries – will be extended. Permits issued by Schleswig-Holstein will continue to be valid until 31 December 2024 at the latest under the transitional provisions of section 29, paragraph 7 of the GlüStV 2021, if the respective provider submits an application for a permit under the new interstate treaty by 1 July 2022. The German states have also adopted a transitional regime for sports betting, virtual slots and online poker. The enforcement of the current restrictions shall already be adjusted with regard to the future changes of the law.

Subject to other statutory provisions, holders of a permit may advertise the permitted gambling activities and engage in sponsorship under the GlüStV 2021. They may also commission third parties to conduct the advertising. In the issued permit, further specifications for the advertising shall be made.

However, there are still strict generally applicable guidelines on the way advertising is carried out. The nature and amount of the advertising must not contradict the objectives of GlüStV 2021. Furthermore, advertising must, in particular, not be excessive, must not be directed at minors or comparably vulnerable target groups, and must not contain any misleading statements. Advertising for sports betting with active athletes and officials is not permitted.

Furthermore, there are additional specific regulations with regard to the respective communication channel used. In particular, between 6am and 9pm, advertising via broadcast and the internet for virtual slot machine games, online poker and online casino games is prohibited. Immediately before or during the live broadcast of sports events, advertising for sports betting based on this sports event is not permitted on the broadcasting channel.

Advertising via telephone or SMS is prohibited, unless a telephone call is initiated by a (potential) customer and the customer gives his or her

consent to the advertising. The prohibition does not apply to telecommunications within an existing contractual relationship. Advertising targeted at individual persons, in particular via postal mail or via email, may only be carried out if the recipient has given his or her prior consent and a query has been made as to whether he or she is barred from participating in such gambling owing to inclusion in a blacklist, for which consent is required too. Furthermore, no variable remuneration, in particular remuneration based on revenue, deposits or stakes, may be agreed upon or paid for advertising, in particular in the form of affiliate links.

Advertising for unauthorised gambling will remain prohibited under the GlüStV 2021.

Lotteries

38 | What are the rules for advertising lotteries?

As a sub-category of gambling, lotteries are subject to the general provisions of the GlüStV and, presumably, after 1 July 2021, of the GlüStV 2021. Besides the above-mentioned restrictions, advertising lotteries may be permissible in accordance with the Joint Advertising Guideline of the States Regarding Gambling that was issued on the basis of the current GlüStV. This framework applies to lotteries that are organised no more than twice a week and those with a low-risk potential.

The restriction regarding the targeting of individual persons and the prohibition of variable compensation for advertising under the GlüStV 2021 do not apply to lotteries that are organised no more than twice a week, as well as lotteries in connection with savings plans. However, this privilege does not apply to instant lotteries on the internet. Nevertheless, the general rules, in particular those of the UWG and the GDPR, remain applicable when addressing persons individually.

Promotional contests

39 | What are the requirements for advertising and offering promotional contests?

Advertising activities for promotional contests and games are generally permissible if they are transparent and not misleading. They should provide information on the terms and conditions of participation, particularly the costs, and the announcement of the solution. False statements or non-disclosure of mandatory information are prohibited.

Sweepstake shows and contests in broadcasts and in telemedia are generally permitted by the MStV. They must be transparent, protect the interests of participants and must not mislead or harm the interests of participants. In particular, the programme must provide information about the costs of participation, eligibility, the design of the game and the solution of the posed riddle. The protection of minors must be ensured. In addition, the state media authorities have jointly issued statutes on sweepstake shows and contests. This statute specifies in particular the penalties for violations and the conditions for the participation of minors.

Indirect marketing

40 | Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

Indirect marketing is highly restricted in broadcasting and internet media. Section 10 of the MStV contains specific provisions for commercial sponsorship in broadcasts. Sponsored programmes must be clearly identified as such by the name, logo or any other symbol of the sponsor at the beginning or at the end of the programmes. Sponsors must not have any influence on the content and scheduling. This applies accordingly to on-demand audiovisual media services and services consisting of programmes that can be accessed for an individual fee.

According to section 8, paragraph 7 of the MStV, surreptitious advertising and purposeful topic placement as well as corresponding practices are prohibited. However, product placements are generally permitted. There are only exceptions for some specific types of broadcasts, in particular news programmes and programmes for children. Nevertheless, editorial responsibility and independence with regard to content and placement in the broadcast schedule must remain unimpaired, the product placement must not directly encourage the purchase, rental or lease of goods or services, and the product must not be featured too prominently. Product placement must also be clearly indicated.

Furthermore, indirect marketing is subject to the general rules of the UWG. It may be deemed unfair competition if the advertising character is not clearly recognisable.

Other advertising rules

41 | Briefly give details of any other notable special advertising regimes.

Section 8, paragraph 9, sentence 1 of the MStV declares political, religious and ideological advertising to be inadmissible in broadcasts. However, this does not apply to public service announcements and charity appeals. These rules are also applicable for on-demand audiovisual media services. Advertisement of a political, ideological or religious nature in other telemedia is permitted, but it must clearly indicate the advertiser in an appropriate manner.

SOCIAL MEDIA

Regulation

42 | Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?

The use of social media for advertising purposes is not governed by a comprehensive act. However, specific provisions of the Telemedia Act (TMG) and the Federal Data Protection Act are of particular importance in this regard.

In addition, the general rules of the Unfair Competition Act (UWG) apply to advertising using social media channels. According to section 5a, paragraph 6 of the UWG, disguising the nature of advertising is prohibited. Unfortunately, German courts ruled differently on the limits to influencer marketing in the past few years. Because of that, the German federal government plans to review the law in order to implement clear regulations for influencer advertising.

43 | Have there been notable instances of advertisers being criticised for their use of social media?

One development of particular public interest remains the use of personal data for highly targeted advertising on social media platforms (eg, 'custom audiences'). Some propose that this data transfer between advertising companies and platform operators is not permissible without explicit prior consent of the persons concerned.

Some viral marketing campaigns (eg, via YouTube) have been the subject of complaint as their advertising nature was not clearly recognisable in all cases.

44 | Are there regulations governing privacy concerns when using social media?

Privacy concerns are regulated by the TMG and the General Data Protection Regulation (GDPR). These provisions are designed in particular to ensure transparency in the use of personal data.

Since the entry into force of the GDPR in May 2018, companies that use social media for advertising purposes must comply with stricter requirements than under the previous law. They have to base their activities more frequently on the 'legitimate interest' in accordance with article 6, paragraph 1, lit. f GDPR because the requirements for the effective consent of the person affected have been significantly increased. For example, the declaration of consent must be voluntary.

Under the GDPR, any disadvantage connected with a refusal of consent results in 'involuntary' consent (eg, where the processing of the data for advertising purposes is not required for the purpose of contract execution).

The declaration of consent is revocable at any time without giving a reason. Users have extensive rights to information, correction and deletion of their data. Previously given declarations of consent continue only if the requirements of the GDPR are complied with.

Furthermore, the user must be informed about the body responsible for the social media site's content by it stating its full imprint (in general, name, address, legal form, representative and email address). In individual cases, additional disclosures may be required pursuant to section 5 of the TMG.

UPDATE AND TRENDS

Recent developments

45 | Are there any emerging trends or hot topics in your jurisdiction?

The State Media Treaty came into force on 7 November 2020. It replaces the previously applicable State Broadcasting Treaty and implements the modifications of the Audiovisual Media Services Directive 2010/13/EU. The regulation is in particular extended to newer types of media, such as video-sharing services.

The Act to Strengthen Fair Competition introduced, in particular, a list of qualified trade associations in which associations must be registered to be able to assert violations of the Unfair Competition Act. This amendment becomes effective on 1 December 2021. Additionally, owing to an amendment that is already effective as of 2 December 2020, the ability to freely choose the court before which competition cases can be filed has been significantly restricted.

Furthermore, a new State Gambling Treaty is expected to enter into force on 1 July 2021. On this basis, licences can be granted in particular for sports betting, online poker and virtual slot machine games. Holders of a licence may then also advertise and sponsor the permitted gambling activities, barring any other statutory provisions. They may also commission third parties to carry out the advertising.

Lastly, the federal government also plans to introduce a documentation requirement for consent to advertising by telephone. The proof is to be documented, archived for five years and submitted to the responsible supervisory authority immediately upon request. Violations of the documentation and archiving requirements shall be penalised with a fine.

Coronavirus

46 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The pandemic and the measures to contain it had a major impact on the economy in 2020 and are likely to continue to do so in 2021. The German government has launched numerous aid packages with economic



Beatrice Brunn

beatrice.brunn@dlapiper.com

Stefan Engels

stefan.engels@dlapiper.com

Alter Wall 4
20457 Hamburg
Germany
Tel: +49 40 1 88 88 0
Fax: +49 40 1 88 88 111
www.dlapiper.com

assistance for affected companies. However, no measures have been issued specifically for the advertising and marketing sector. Affected companies in this area should therefore examine whether they meet the requirements of the general assistance programmes.

Hong Kong

Angus Forsyth

Angus Forsyth & Co

LEGISLATION AND REGULATION

Legal framework

1 | What are the principal statutes regulating advertising generally?

Hong Kong has always valued total freedom of expression. It is a cardinal maxim of principle guiding all consideration of any possible legislative action or enactment. It is expressly protected by the China-enacted Basic Law for Hong Kong and by the new Hong Kong National Security Law enacted in 2020 – which, however, identifies four specific subversive fields of activity contrary to the national security of both Hong Kong and of China.

Apart from the general controls on television and radio advertising, and controls under specific protection laws described below under the control of the Hong Kong government authorities appointed by the law, there is no generally applicable legislated restraint or restriction on advertising. The specific instances of particular regulation of advertising content categories are dealt with below.

In addition to the legislated specific enactments applicable to specific products or circumstances, there is a self-regulatory structure established by the Code of Practice (the 4As Code) ordained for all its members by the Association of Accredited Advertisers (the 4As) to which all advertising agency members of the 4As must ensure compliance.

All targeted recipients of any invitation are 'data subjects' for the purposes of the Personal Data Privacy Ordinance (PDPO). This includes any invitation communicated by way of advertisement.

'Personal data' is defined as anything that will enable a living person to be identified. This certainly includes the officially allocated number of any personal identifying documentary publication such as a national passport or national identity card. These days, the meaning of the term can arguably be extended to biometric recording and transmission by communication of the photographic image of the data subject, and possibly to other biometric records such as the transmitted shape of the data subject's walking profile.

The PDPO requires a set of six data protection principles regulating the collection and use of personal data to be observed by the data user in regard to acceptance and execution of an invitation to participate, for which a response requires submission of personal data by the participant with the result that the personal data is collected by the data user.

Accordingly, the data user must collect the personal data in a lawful and fair manner for a lawful purpose directly related to a function or activity of the data user, and obtain the formal consent of each data subject. The data subject must be fully notified and informed of the express purpose of the invitation, such that the data subject's acceptance of the invitation is clearly for the specific use and purpose set out. The submission of personal data is only available for specific purposes and for a stated time, both clearly identified in the invitation. Any proposed future use of the personal data in future advertising must also be clearly included in the stated purpose.

The Privacy Commissioner has successfully categorised 'blind' recruitment advertisements inserted by advertising recruitment agents as being in breach of Data Protection Principle 1 by not expressing the name of the employer data user for whose benefit the advertisement is inserted.

Regulators

2 | Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

Control guidance for broadcast advertising to be observed by broadcasting service licensees is set by the Communications Authority established under the Broadcasting Ordinance. The Broadcasting Ordinance specifically provides that the internet is not a television programme service, and therefore not a broadcasting service requiring a licence.

Controls on the advertising of solicitation of investment opportunities are controlled by the Securities and Futures Commission (SFC).

Equally, controls on the advertising of investment opportunities by authorised institutions such as licensed banks are controlled by the Hong Kong Monetary Authority (HKMA), which coordinates its regulatory functions with those of the SFC in respect of the compulsory registration and licensing with the SFC of all authorised financial institutions under the general control of the HKMA.

The Home Affairs Department of the Hong Kong government exercises control over a range of specific potential advertisement outreach in the products and services specifically set out below.

Regulators' powers

3 | What powers do the regulators have?

Penalties are provided for under specific ordinances exercising control over advertisement outreach.

The regulators are empowered to apply a mixture of sanctions, the principal one being the finding that a particular advertiser is not 'fit and proper' to continue to have a licensed registration with the relevant registering or licensing authority.

This is a possible concern of a licensed securities dealer regulated by the SFC in respect of which a breach of the advertising controls on investment opportunities runs the risk of the licensed dealer being found not 'fit and proper' to continue as an SFC licensee.

Regulators' priorities

4 | What are the current major concerns of regulators?

The current major concerns of regulators are clearly provided for in the relevant respective legislative enactments providing for regulation or control of advertisement content and schedules.

Apart from addressing regulatory concern through constant monitoring both by relevant departments of the government and by consumer awareness, the specific respective legislative enactments providing for regulation or control of advertisement content and schedules are always under review, if only because the needs of the community develop and move on in a continual flow.

Aside from specific topic issues, an overall regulatory concern is with personal data collection, unsolicited emails, accurate descriptions and practices in the lifeblood of trade in goods and services, anti-money laundering and drug trafficking. Hong Kong is by no means immune from these problems and specific laws are rigorously enforced by vigilant supervisory authorities and the courts.

Industry codes

5 | Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

The principal controls upon licensees are as follows:

- for television broadcasting under the Broadcasting Ordinance, the controller is the Communications Authority, which is fully empowered to issue and, in certain circumstances, withhold or withdraw a broadcasting service licence. The Communications Authority administers its Generic Code of Practice on Television Advertising Standards, setting out the details of the advertising standards with which a licensee must comply (the Television Advertising Code);
- the internet is expressly provided as not to be regarded as a television programme service, and matter communicated on the internet is therefore not of itself subject to regulation by the government;
- the Television Advertising Code requires licensees to ensure that any advertisements included in their licensed services comply with it, and is defined to apply to any material included in a television programme service that is designed to advance the sale of any particular product or service or to promote the interests of any organisation, commercial concern or individual in or through a wide range of designated media;
- advertising material is required to be clearly identifiable as an advertisement with a clear distinction between what is required to be stated to be an advertisement and programme content, and (inter alia) competitor disparaging is prohibited; and
- the Television Advertising Code requires advertisements to be legal, clean, honest and truthful and compliant with the laws of Hong Kong, and there is a wide range of stipulations as to factual claims and best-selling claims required to be substantiated and a listing of unacceptable advertisements for specified products or services. Advertisements are required to be identified as such and to be distinguished from programmes.

Under the Telecommunications Ordinance, the Radio Code of Practice on Advertising Standards (the Radio Advertising Code) must be complied with, for radio broadcasting, by licensees of any sound broadcasting service licensed under the Telecommunication Ordinance. The Communications Authority has power to impose sanctions on licensees who do not comply with this Code.

Control of advertising other than that specifically legislated for is left to the advertising profession as a self-regulatory function, which is effectively controlled by the 4As in the 4As Code, which all advertising agency members of the 4As must adhere to and comply with.

The Television Advertising Code and the Radio Advertising Code are collectively referred to as 'the Broadcast Codes'.

Authorisation

6 | Must advertisers register or obtain a licence?

Hong Kong has no dedicated registration function or licensing requirement for advertisers or advertising agents per se but the licensed broadcast carriers of advertisements both on television and on radio are required to comply with the respective advertising codes.

Clearance

7 | May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

There is no regulatory authority with which potential advertisements can be discussed or cleared by advertisers. On the whole, the internal self-regulation of the advertising industry through the 4As Code has, over many years, proved itself to result in a well-moderated discipline of approach and outreach and works well.

PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)

Challenging competitors advertising

8 | What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?

Hong Kong has a Consumer Council established under the Consumer Control Ordinance. The Hong Kong Consumer Council has no actual powers of control over, or regulation of, advertising. Its role is to enhance consumer welfare and to empower consumers to protect themselves. It frequently draws public attention to a misleading advertisement or display, which then invites control or regulation from the specifically authorised controllers under the relevant law, ordinance or code. The Television Advertising Code and the Radio Advertising Code (the Broadcast Codes) require that broadcast advertising matter should contain no claims that have the effect of disparaging competitors, competing products or services to other industries, professions or institutions.

Public challenges

9 | How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

In the event of conflict between truth and misrepresentation in any particular advertisement, whether identified or drawn attention to by the Consumer Council or in some other way, the relevant regulatory authority can take criminal action against the advertiser at the instance or instigation of a member of the public or consumer association as detailed below.

Further, television and radio broadcasting licences contain conditions of observance of the Broadcast Codes, and the Communications Authority is given the ultimate sanction of cancelling and revoking a broadcast licence.

With some exceptions, the Broadcasting Ordinance provides that, where a person makes a complaint to the Communications Authority that a licensee or any other person has contravened the Broadcasting Ordinance or the Telecommunications Ordinance or the terms or

conditions of a licence or the Broadcast Codes, the Communications Authority must refer the complaint to the Broadcast Complaints Committee, which may hold hearings and enable the licensee or any other person to make representations and finally make recommendations concerning the complaint to the Communications Authority.

Burden of proof

10 | Which party bears the burden of proof?

In civil actions in the civil courts, the complainant bears the burden of proof. In criminal actions for criminal prosecution for infringement against any duly legislated legal sanction, the Department of Justice carries the burden of proof.

Remedies

11 | What remedies may the courts or other adjudicators grant?

Courts in Hong Kong are required, in the event of successful prosecution for advertisement law breaches, to impose criminal sanctions that, on conviction, can involve criminal penalties such as fines or imprisonment.

Length of proceedings

12 | How long do proceedings normally take from start to conclusion?

There is no set time constraint upon action in the courts, but proceedings are reasonably expeditious.

Cost of proceedings

13 | How much do such proceedings typically cost? Are costs and legal fees recoverable?

Both civil and criminal proceedings are expensive. In the criminal jurisdiction courts, the engagement of legal counsel is optional but a body corporate can appear and plead its case only through legal counsel.

In civil jurisdiction, engagement of legal counsel is also voluntary, except in the case of bodies corporate.

A substantial proportion of the court-taxed costs of a successful civil plaintiff can be ordered against the losing defendant in a civil trial.

If a defendant is acquitted of a charge in a criminal trial, the magistrate or judge hearing the case has a discretion to award reasonable legal costs to the acquitted defendant. The exercise of the discretion is subject to careful review of all relevant factors.

Appeals

14 | What appeals are available from the decision of a court or other adjudicating body?

Appeals from the Court of First Instance lie in the Court of Appeal. Appeals from the Court of Appeal lie in the Court of Final Appeal. This is the highest court in Hong Kong exercising both civil and criminal jurisdiction and its decisions are final but subject to the authority of the State Council of the Peoples Republic of China. However, only two cases have been referred to the State Council in the past 20 years.

Appeals from specific tribunals set up under specific ad hoc ordinances lie in the specified appeal boards, of which there are more than 60, as provided in the specific ordinance concerned.

MISLEADING ADVERTISING

Editorial and advertising

15 | How is editorial content differentiated from advertising?

The principal legislation governing advertising content, whether editorial or substantive, is the Trade Descriptions Ordinance (TDO). However, the TDO does not contain specific requirements for advertisers to disclose the influential content of editorial.

The Television Advertising Code and the Radio Advertising Code (the Broadcast Codes) require that advertising material should be clearly identifiable and distinguishable as such and should be recognisably separate from relevant broadcast programmes and any advertisement adopting a programme style must be carefully assessed, to ensure that there is no risk of confusion with the programme material and that any advertisement adopting a programme style must be flagged as such by superimposing a caption stating 'advertisement' or 'advertising magazine', in a clearly legible manner for the entire duration of the programme.

Advertising matter should be presented with courtesy and good taste in harmony with the programme with which it appears. No advertisement may contain any descriptions, claims or illustrations that expressly or by implication depart from truth or mislead about the product or service advertised or about its suitability for the purpose recommended.

Advertisements should not be permitted to imitate the name or advertising slogans of competitors and advertisements should not unduly play on fear.

If a licensee did not know and had no reason to suspect that the claims made in an advertisement were false or misleading and could not with reasonable diligence have been ascertained as false or misleading, the licensee is discharged from responsibility for it.

Advertising that requires substantiation

16 | How does your law distinguish between 'puffery' and advertising claims that require support?

Puffery, which must clearly communicate self-promotion in an honest and innocent way, is not culpable. However, the lines between puffery and the mandatory support of advertising claims must be carefully drawn. Generally speaking, exaggerated claims made in common advertising practice are legitimate, provided that:

- the statements are not meant to be taken literally; and
- the average consumer would be unlikely to take literally the meaning of these obvious exaggerations or puffery.

The general principle being that in the ordinary course of commercial dealings, a certain degree of 'puffing' or embellishment is expected and it is clear that any such puffing should steer clear of any absolute statement capable of being regarded as objective assessment or comparative claim that is clearly not fanciful or non-comparative.

Rules on misleading advertising

17 | What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

The Broadcast Codes prohibit any misleading claim or implication that the product or service being advertised or any ingredient of it has some special feature or composition that is incapable of being established. Care should be taken to not mislead viewers or listeners and to present results of research surveys or tests relating to the advertised product or service. Irrelevant data and scientific jargon should not be used to make claims appear to have a scientific basis that they do not possess.

Particular reference is made requiring that any pricing element or comparison must be accurate and not misleading by undue emphasis or distortion.

The TDO provides that a false trade description (which can include an oral statement), whether applied to goods or communicated in respect of the provision of services, 'means a trade description that is false to a material degree, or a trade description which, though not false, is misleading, that is to say, likely to be taken for a trade description of a kind that would be false to a material degree'. For example, a cream that contains synthetic materials, such as preservatives, should not be described as '100 per cent natural', and a beauty consultant should not tell a consumer that a slimming product has been acquired by a celebrity for his or her personal use with good results if that celebrity has never acquired or agreed to acquire the product.

The following factors can be used to help to identify a possible false trade description:

- form and content;
- time;
- place;
- manner; and
- frequency of publication and all other relevant matters.

Misleading omissions can be as likely to constitute a false trade description as a misleading positive statement if the result does not give consumers sufficient material information about the goods or services that is necessary for them to make a fully informed transactional decision.

Examples of misleading omissions can be seen as:

- the use of small fine print to state the unit of quantity of the goods (even if the price is given in a clear manner, the unit of quantity is so small that an average consumer could not read it in a readily comprehensible manner); and
- a beauty group promotes a stem cell transfusion service stated to be performed by a medical practitioner without disclosing the risk of the medical treatment and this disclosure is omitted until after the consumer pays for the service.

The TDO further prohibits aggressive commercial practices defined as a practice that significantly impairs or is likely to significantly impair the freedom of choice of the average consumer or conduct in relation to the goods or services concerned through the use by the seller or service provider of harassment, coercion or undue influence and that therefore causes or is likely to cause a consumer to make a decision that he or she would not have made otherwise.

The TDO further prohibits bait advertising defined as an offence for a trader failing to offer specific products for supply at a specified price for a period that is, and in quantities that are, reasonable, having regard to: the nature of the market in which the trader carries on business; and the nature of the advertisement.

The TDO further prohibits 'bait and switch', defined as an invitation to purchase a product at a specified price and then a refusal to show or demonstrate that product and the demonstration of a defective example of it, with the intention of promoting a different product.

The TDO further provides that liability under the Ordinance is attributed to certain classes of persons of a body corporate or of an unincorporated body if the offence is committed by the body corporate. The persons concerned include directors, company secretaries, principal officers or managers.

The Broadcast Codes require that any material in a licensed television or radio service designed to advance the sale of any particular product or service or to promote the interests of any organisation, commercial concern or individual must be legal, clean, honest and truthful and presented with courtesy and good taste without disparagement of competitors or competing products or services.

The Broadcast Codes require that all factual claims and best-selling claims should be capable of substantiation. Statements should not be used in respect of any products that they are 'the best', 'the most successful', 'the safest' or 'the quickest' or containing any similar use of superlative adjectives unless the truthfulness of such statements is adequately substantiated either by research or by testing based on the advertiser's own assessment or by independently audited sales figures or probability sample surveys recognised or endorsed by an industry body or accepted under industry-wide standards of the relevant trade.

No advertisement may misleadingly claim or imply that the product advertised or any ingredient of it has some special features or composition that are incapable of being established, and information conveyed must be accurate and not misleading by concealing or failing to make clear significant facts.

Substantiating advertising claims

18 | **Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?**

The Broadcast Codes require that any best-selling claim must be substantiated by independently audited sales figures or industry recognised or endorsed body sample surveys of probability to ensure that the findings advertised are statistically significant, reliable and valid.

In particular, superlatives like 'most popular', 'most preferred', 'most favoured', etc, when used in a manner that clearly suggests a leading or topmost sales position, must be subject to the same standards of independent substantiation governing best-selling claims.

Survey results

19 | **Are there specific requirements for advertising claims based on the results of surveys?**

Consistent with the general requirement of truthfulness, reliance upon and reference to any survey should be supported only by thoroughly and responsibly conducted surveys.

Comparisons with competitors

20 | **What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?**

The Broadcast Codes require that advertising matter should contain no claims intended to disparage competitors, competing products or other industries, professions or institutions.

The Code of Practice (the 4As Code) does not permit its members to indulge in 'disparaging' advertisement, defined as advertisement that seeks to compare a product or service to similar or other products and services in a way that is misleading, derogatory or false in implication or in fact. An extension prohibits implication that a competitive product is not fit for purpose.

Test and study results

21 | **Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?**

The Broadcast Codes require that advertising matter should not use statements in respect of any products claiming that they are 'the best', 'the most successful', 'the safest' or 'the quickest', or containing any similar use of unsupported superlative adjectives involving comparison with other products or departures from strict truth. Advertisers must be

prepared to produce evidence to substantiate any descriptions, claims or illustrations (including 'best-selling' claims).

Demonstrating performance

22 | Are there special rules for advertising depicting or demonstrating product performance?

The Broadcast Codes and the 4As Code contain specific restrictions upon advertising content for product performance.

Third-party endorsements

23 | Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief or experience?

Without substantiation that professional advice or recommendation has been obtained from an acceptable organisation of the relevant profession, advertisements containing presentations of medically qualified practitioners giving the impression of professional advice or recommendations, statements giving the impression of professional advice or recommendation by those persons appearing in advertisements and presented as being qualified to give such advice or recommendation and references to the approval, acceptance or recommendation of, or preference for, the specific products or their ingredients or their use by any professional body are not acceptable.

The growth of using influencers through their pages on social media has been substantial but has not yet been seen to require legislative or regulatory controls.

Guarantees

24 | Are there special rules for advertising guarantees?

The basic requirement of truthfulness and enforceability of the guarantee or related undertaking apply.

Environmental impact

25 | Are there special rules for claims about a product's impact on the environment?

No.

Free and special price claims

26 | Are there special rules for describing something as free or a free trial or for special price or savings claims?

The Broadcast Codes require that visual and verbal presentations of advertisements indicating price, price comparisons or reductions or any pricing element must be accurate and must not be misleading by undue emphasis or distortion.

The TDO provides that trade descriptions are specifically prohibited if they are false and misleading representations concerning the price of goods or services. The word 'free' has been clearly identified for special attention as a word that should be handled with very great care, and it is accordingly reasonably clear that 'free' from the consumer viewpoint means absolutely free of charge or cost.

New and improved

27 | Are there special rules for claiming a product is new or improved?

Under the TDO, claims of newness or improved quality must be justifiably correct and capable of substantiation.

Claims of origin

28 | Are there special rules for claiming where a product is made (such as country of origin)?

See the False Trade Description sanctions under the TDO.

PROHIBITED AND CONTROLLED ADVERTISING

Prohibited products and services

29 | What products and services may not be advertised?

Broadcast advertising

Under the Television Advertising Code and the Radio Advertising Code (the Broadcast Codes), advertisements for any of the following are not acceptable whether directly or indirectly for inclusion in a licensed broadcasting service:

- firearms and associated equipment;
- fortune tellers, but not precluding advertisements or publications on subjects of general interest such as horoscopes, astrology, Chinese almanacs, feng shui, etc;
- undertakers or others associated with death or burial except dignified and restrained presentation of advertisements for columbaria provided that all explicit references to death and technical aspects of associated services and morbid details are avoided;
- unlicensed employment services, registries or bureaus;
- organisations, companies or persons seeking to advertise for the purpose of giving betting tips;
- betting, unless authorised by or under the Betting Duty Ordinance and for horse racing or football betting publications and related matters. No advertisements for these items should be shown within or in proximity to children's programmes, and any advertisement for lotteries are subject to specific restrictions, which are that they:
 - cannot be shown between 4pm and 8.30pm;
 - must target adult only audiences, without depicting any child or adolescent participation;
 - must not feature any personality who has particular appeal to children or adolescents;
 - must not contain any statement or praise for those participating in lotteries or football or horse race betting;
 - must not denigrate those who abstain from such;
 - must not mislead or exaggerate the likelihood of winning;
 - cannot be instructional in nature or unduly exhort the public to bet; and
 - cannot feature excessive or reckless betting or present lotteries, football or horse race betting as an alternative to work or as a way out of financial difficulty;
- night clubs, dance halls, massage palaces, sauna houses and such like;
- escort services and dating agencies targeting young persons under the age of 18; and
- pay-per-call information.

Further, any advertisement for an acceptable product or service may be unacceptable if, in the opinion, and at the discretion of, the Communications Authority, a significant effect of the advertisement would publicise indirectly an unacceptable product or service.

The Broadcast Codes contain further detailed provisions on the advertising of specific products or services.

Prohibited advertising methods

30 | Are certain advertising methods prohibited?

General controls on internet-based approaches to consumers are enacted and provided for under the Unsolicited Electronic Messages Ordinance (UEMO), Hong Kong's anti-spam law, which prohibits professional spamming activities such as the use of unscrupulous practices to reach out to more recipients, and fraudulent activities in relation to sending commercial electronic messages. In particular, the UEMO sets out the rules for sending commercial electronic messages (eg, the requirement to provide full sender information and, particularly, to include and to honour an unsubscribe facility and requests as well as providing for the do-not-call registers that must all be kept for at least three years after receipt). The Unsolicited Electronic Messages Regulation (UEMR) prescribes, under the UEMO, detailed requirements relating to the accuracy of 'sender information', an 'unsubscribe facility' and an 'unsubscribe facility statement' to be included in electronic messages.

In addition to the UEMO and the UEMR, there is a Code of Practice (COP). The COP aims to provide guidance in respect of the application or operation of the provisions of the UEMO.

However, the UEMO regulates the sending of 'commercial electronic messages' with a 'Hong Kong link'. In general, a commercial electronic message has a Hong Kong link if the message:

- originates in Hong Kong;
- is sent to Hong Kong; or
- is sent to a Hong Kong telephone or fax number.

However, in a careful legislative avoidance of controls upon direct marketing to consumers, the following messages are exempt from application of the UEMO:

- person-to-person telemarketing calls;
- sound broadcasting or television programme services; and
- partial commercial electronic message exemption exists if an electronic message is sent in response to a request by the recipient and the primary purpose is related to a commercial transaction with which the recipient is currently involved.

The Judicial Proceedings (Regulation of Reports) Ordinance provides that, with respect to the privacy and confidentiality assistance afforded by law, it is unlawful to print or publish, or cause or procure to be printed or published, in relation to any judicial proceedings for dissolution of marriage, nullity of marriage or judicial separation of parties, any particulars other than:

- the names, addresses and occupations of the parties and witnesses;
- a concise statement of the charges, defences and counter-charges;
- any submissions on a point of law and the decision of the court thereon; and
- the summing up of the judge and the finding of the jury and observations made by the judge in giving judgment.

Any person contravening this restriction shall be guilty of an offence and liable to fine and imprisonment provided that the sanctions are expressly stated to apply to any proprietor, editor, master printer or publisher, and otherwise the sanctions or restriction are expressly stated not to apply to judicial proceedings or communication to the persons concerned in the proceedings or by way of law reports.

Subliminal advertising

The Television Code specifically prohibits subliminal advertising by a licensee on its television channels.

The Broadcast Codes require advertising to be stated as such and clearly distinguished from programme material.

In this connection, 'advertisement' or 'advertising material' means any material that is effectively designed to advance the sale of any particular product or service or to promote the interests of any organisation, commercial concern or individual in whatever way and included in the course of a programme to any products or services. All such purely commercial promotional material must be clearly distinguished from the actual programme material and there are regulations limiting the time span of advertisements in relation to actual programme material.

All sponsored programmes must be clearly identified as such and sponsor identifications must be distinguishable from advertisements and must not contain superlative claims, price information or direct exhortations to the public. In the Television Broadcast Code, it is provided that viewers should not be subject to any hidden editorial influence.

A 2017 survey was conducted for the Communications Authority on the regulation of indirect advertising defined as the mingling of programme and advertising material or of the embedding of advertising material within programme content, whether inadvertently or by design, as distinguished from product or sponsorship defined as the inclusion of products or services within a programme in return for payment or other valuable consideration.

This survey generally established that the majority of television viewers considered that the current restrictions on the aggregate advertising time per clock hour were necessary. It was further considered by approximately half of television viewers surveyed that relevant restrictions on the employment of product placement should, in principle, achieve the goal of avoiding affecting the integrity and attractiveness of programmes.

Protection of minors

31 | What are the rules for advertising as regards minors and their protection?

The Broadcast Codes prohibit a wide range of advertisements and participation in advertisements and the showing of advertisements with or to children and prohibit transmission of these advertisements at times within or in close proximity to programmes targeting children.

Credit and financial products

32 | Are there special rules for advertising credit or financial products?

The Broadcast Codes require licensees to ensure that advertisements comply with all relevant legal and regulatory requirements in respect of a wide range of ordinances and codes for investment products. It is the responsibility of users of these codes to ascertain the applicable and up-to-date legal and regulatory requirements.

Further provisions require compliance in respect of:

- deposit and savings facilities;
- mortgage lending and credit;
- advice about the stock market or investment products and regulated activities under the Securities and Futures Ordinance;
- proceeds of insurance policies; and
- any sale or letting advertisement for real estate property, unless the advertiser is able to substantiate that any such proposal does not constitute any breach of the conditions relating to such sale or letting imposed in the government's lease conditions affecting the land on which any completed building on such real estate property stands.

Therapeutic goods and services

33 | Are there special rules for claims made about therapeutic goods and services?

As per the Public Health and Municipal Services Ordinance, no person shall sell, offer, expose or advertise for sale any drug injuriously affected in its quality, constitution or potency by means of adding a substance to, or abstracting any constituent from, a drug so as to affect injuriously the quality, constitution or potency of the drug.

The Broadcast Codes require that claims relating to nutrition or dietary effects of products or services should be handled with care and claims of effects or treatment for conditions of health for which qualified medical attention or advice should reasonably be sought are not acceptable.

In addition, always subject to required compliance with the provisions of the Undesirable Medical Advertisements Ordinance, there are specific provisions relating to the claimed nutritional value of food and dietary supplements, and claims related to weight loss, fat reduction or obesity.

Food and health

34 | Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

No person shall sell, offer or expose for sale, or advertise under the designation of milk, any liquid in the making of which any separated milk, or any dried or condensed milk has been used.

If any person publishes or is party to the publication of an advertisement falsely describing any food or drug or is likely to mislead as to the nature, substance or quality of any food or drug, he or she shall be guilty of an offence and be liable on conviction to a fine and imprisonment.

In any proceedings in respect of such advertisement against the manufacturer, producer or importer of the food or drug, the burden of proof that he or she did not publish and was not a party to the publication of the advertisement, is on the defendant, but in any proceedings for such an offence, it shall be a defence for the defendant to prove either that he or she did not know, and could not with reasonable diligence have ascertained, that the advertisement was a false description or likely to mislead, or that, being a person whose business it is to publish or arrange for the publication of advertisements, he or she received the advertisement in the ordinary course of business.

Alcohol

35 | What are the rules for advertising alcoholic beverages?

The Broadcast Codes require that the advertising of alcoholic beverages should target only an adult audience and no children or adolescents shall be allowed to participate in the presentation of such advertisements. Such advertisements should not be shown in proximity to children's programmes or programmes that, in the opinion of the Communications Authority, target young persons under the age of 18.

Advertisements that attempt to portray drinking as a desirable new experience or that portray drinking as indispensable to popularity and success are not permitted, and the presentation of alcoholic liquor as prizes or gifts in isolation for broadcast content are not permitted.

There are further detailed prohibitions upon the effect or communicated effect of alcoholic beverage advertisements that, generally speaking, should not encourage immoderate drinking, misuse or abuse of alcohol, should not portray alcohol as a prerequisite to relaxation, or encourage or challenge non-drinkers or young persons under the age of 18 to drink.

Tobacco

36 | What are the rules for advertising tobacco products?

No person shall print, publish or cause to be published a tobacco advertisement in any local newspaper or any printed document printed, published or distributed in Hong Kong, nor display or cause to be displayed or published or distributed for purpose of display, or broadcast by radio waves or visual images or sound or exhibit by film or place on the internet any tobacco advertisement. 'Tobacco advertisement' is defined as any advertisement containing any express or implied inducement, suggestion or request to purchase or smoke cigarettes or promote or encourage the use of tobacco products and any person who contravenes these provisions commits an offence and is liable on summary conviction to a fine.

However, an advertisement is not to be regarded as a tobacco advertisement if its purpose is to discourage smoking.

The Broadcast Codes require that all licensees comply with all relevant provisions relating to tobacco advertisements under the Smoking (Public Health) Ordinance and prohibit presentation of tobacco products as prizes or gifts for broadcast content. Any advertisement for tobacco-related products, such as cigarette holders, tobacco filters and other smoking accessories, shall target only adult audiences, not allow participation by children or adolescents, nor show advertisements in proximity to children's programmes or programmes that target young persons under the age of 18.

On 13 February 2019, the Hong Kong government introduced to the Legislative Council a bill to prohibit any Hong Kong internal market dealing such as selling, providing or advertising any alternative smoking products, such as e-cigarettes.

Gambling

37 | Are there special rules for advertising gambling?

Under the Gambling Ordinance, advertisements to promote or facilitate bookmaking and betting-related services are prohibited and it is illegal for any person to advertise offshore bookmaking in Hong Kong.

Lotteries

38 | What are the rules for advertising lotteries?

The Secretary for Home Affairs has issued a Code of Practice for the conduct of football betting and lotteries, which gives guidance on how the licensing conditions for football betting and lotteries may be complied with. Licensees should not advertise the conduct of football betting and lotteries in, or in close proximity to, educational and training institutions for juveniles nor place advertisements or promotional materials on billboards or other outdoor displays that are directly adjacent to such institutions. A juvenile is a person under 18 years of age.

Under the Gambling Ordinance, in terms of the holding or organisation of a lottery that is defined as a sweepstake involving an element of chance for picking winners as opposed to the exercise of skill for picking winners, there are two permissible lottery or sweepstake functions, but otherwise all gambling is illegal.

There are two permissible exceptions to the illegality of lotteries, which are:

- a licensed lottery registered with the Secretary for Home Affairs and organised for strictly charitable purposes under a licence issued under strict conditions; and
- a licence issued by the Licensing Office for the holding of a sweepstake under strictly applied sweepstake rules approved in advance by the Licensing Office, which provides for an exception for a game of chance but prohibits a money prize.

Promotional contests

39 | What are the requirements for advertising and offering promotional contests?

In the absence of any element of gambling in a promotional contest, there are no controls outside those applicable to the relevant advertising agency under the Code of Practice.

However, if a promotional contest is promoted as a business operation and involves any element of chance in the selection of winners, then it is illegal gambling under the Gambling Ordinance, with one exception. The exception is that the law recognises the promotion, for purposes of trade, of games of chance and as a specific exception to the prohibition as illegal gambling of a trade promotion competition, the competition can be organised, but only under the terms and conditions of an advance licence applied for by the overseas or Hong Kong domestic organiser in advance of the promotional contest. Specific conditions apply.

Indirect marketing

40 | Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

The Broadcast Codes contain specific restrictions.

Other advertising rules

41 | Briefly give details of any other notable special advertising regimes.

The Broadcast Codes prohibit the insertion of advertisements in the course of a religious service or other devotional programme or school programmes within educational television time slots supplied by the government for domestic free television programme services.

The Broadcast Codes impose a broadcast ban on political advertising and, in general, no election advertisements should appear in television or radio broadcasts.

Comments on, or references to, candidates in any broadcast programme should be treated fairly and equally and there is a risk that promotional or prejudicial comments on a political candidate might be treated as an election advertisement, which may stimulate the Electoral Affairs Commission to refer the same to the Communications Authority for appropriate action. The 2012 Guidelines to follow Codes of Practice when requiring news and current affairs programmes to be fair, objective and impartial are expressly stated as not seeking to shackle the free expression of editorial comment. There is freedom for electoral candidates to advertise freely in printed media, subject, always, to a clear statement that the advertisement concerned is an election advertisement.

The Public Health and Municipal Services Ordinance provides regulatory control of advertisements under regulations that may be made by the Public Health and Municipal Services Authority to restrict, regulate or prohibit the exhibition of advertisements, declarations or signs of any kind whatsoever in any place or in such manner or by such means as the authority may deem to affect injuriously or disfigure any natural beauty amenities or historic place.

Further, under this Ordinance, no bill or poster shall be displayed or affixed on any private land except with the written permission of the owner or occupier thereof and where any such permission is given, any bill or poster display shall be maintained in a clean and tidy condition to the reasonable satisfaction of the Authority; the breach of this requirement results in the contravening person being liable to prosecution for the offence committed.

The Broadcast Codes require that any advertisement for a film that is classified under the Film Censorship Ordinance intended for public



Angus Forsyth
angus@angfor.hk

16A Hillier Commercial Building
65-67 Bonham Strand
Sheung Wan
Hong Kong
Tel: +852 2638 9099
Fax: +852 2638 9880
www.angfor.hk

exhibition in Hong Kong must display the appropriate symbol applicable to that particular film and for any film other than the general category I to carry legible visual or aural advisories (or both) to the effect that they are not suitable for particular groups of persons or approved for exhibition to persons aged 18 or above.

The Personal Data Privacy Ordinance contains strict regulation of direct marketing through mail, fax, electronic mail or other means of communication, or making telephone calls to specific persons without the written consent of the marketing target person.

The Unsolicited Electronic Messages Ordinance prohibits the sending of a commercial electronic message with a Hong Kong link without the consent of the target recipient.

SOCIAL MEDIA

Regulation

42 | Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?

No.

43 | Have there been notable instances of advertisers being criticised for their use of social media?

No.

44 | Are there regulations governing privacy concerns when using social media?

The Personal Data Privacy Ordinance sanctions apply to solicitation of personal data through social media.

UPDATE AND TRENDS

Recent developments

45 | Are there any emerging trends or hot topics in your jurisdiction?

No updates at this time.

Coronavirus

46 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Under the Public Health and Municipal Services Ordinance (Chapter 132) of the Laws of Hong Kong, the Secretary for Food and Health administers through the Food and Health Bureau and the Centre for Food Safety in the Food and Environmental Hygiene Department all aspects of the safeguard of regulatory arrangements for the protection of public health.

The Secretary for Food and Health has introduced separate regulations such as the Prevention and Control of Disease (Compulsory Testing for Certain Persons) Regulation and the Compulsory Quarantine of Persons Arriving at Hong Kong from Foreign Places Regulation under the enabling ordinance and by which quick ad hoc regulations can be introduced on a regular and essential basis for better control of covid-19.

Accordingly, in response to covid-19, the Secretary is used to issuing public notices restricting various forms of behaviour, hours of operation and behavioural habits such as the mandatory wearing of masks on public transport; banning flights from anywhere to land in Hong Kong or banning a Hong Kong resident from boarding an aircraft to travel elsewhere; and making it compulsory to quarantine for 14 days after arrival into Hong Kong. The risks have been accepted by a well-behaved Hong Kong public, although the restriction of numbers at restaurant tables, public gatherings and closure of licensed premises after six o'clock in the evening is extremely irksome but recognised by all as in the public interest.

India

Safir R Anand and Swati Sharma

Anand and Anand

LEGISLATION AND REGULATION

Legal framework

1 | What are the principal statutes regulating advertising generally?

The Advertising Standard Council of India (ASCI) is a voluntary, self-regulatory council established in 1985 to promote responsible advertising and to enhance public confidence in advertisements. Complaints against misleading advertisements can be filed with this body. Adverts that contravene the provisions of the following acts of the government or various state governments are not acceptable:

- the ASCI's Code for Self-Regulation 1985 (the ASCI Code);
- the Code for Commercial Advertising on Doordarshan and All India Radio;
- the Drugs and Magic Remedies Act 1954;
- the Emblems and Names Act 1950;
- the Indecent Representation of Women Act 1986;
- the Trademarks Act 1999;
- the Consumer Protection Act 2019;
- the Cable Television Network Amendment Act 2011;
- the Drugs and Cosmetics Act 1940;
- the Prize Competitions Act 1955;
- the Press Council Act 1978;
- the Cable Television Network Rules 1994;
- the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002;
- the Bar Council of India Rules formulated under the Advocates Act 1961;
- the Cigarettes and other Tobacco Products Act 2003; and
- the Food Safety and Standards Act 2006.

By a similar analogy, any advert that violates any statutory provision of law or is misleading to any interest can be looked into.

Regulators

2 | Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

The primary regulatory body responsible for issuing advertising regulations and enforcing rules on advertising is the ASCI. In addition to the ASCI, courts can be approached on issues of consumer interest, disparagement, false claims, intellectual property violations or moral grounds. Courts have a judicial role and their orders are binding, while the ASCI is more akin to a regulator that would recommend alterations or amendments to, or the removal of, adverts, but would not, for example, pass any damages or injunction relief or rendition of accounts.

With the judgment of the Delhi High Court in *Metro Tyres Ltd v the Advertising Standards Council of India and Others* 2017 (70) PTC 394 (Del), the scope of powers of the ASCI has been enhanced. It has been given the power to adjudicate upon matters concerning infringement and passing-off in an advertisement.

Regulators' powers

3 | What powers do the regulators have?

On receipt of a complaint, the Secretariat of the ASCI acknowledges the complaint and requests the advertiser or agency to provide comments in respect of the complaint. The Consumer Complaints Council (CCC) usually decides upon the complaints within four to six weeks of the party concerned being afforded the opportunity to present its case. If the complaint is upheld, the advertiser and its agency are informed of the CCC's decision within five working days. The advertiser is given two weeks to comply with the CCC's decision. Details of non-compliant advertisements are published in the ASCI's media quarterly release throughout India.

Further, the ASCI has also been given the power to adjudicate in matters concerning infringement and passing off. Any appeal to such matters may be taken to the courts.

Regulators' priorities

4 | What are the current major concerns of regulators?

The ASCI Code contains basic guidelines for all advertisements to ensure the following:

- the truthfulness and honesty of representations and claims made by advertisements to safeguard against misleading advertisements;
- that advertisements are not offensive and do not contain anything indecent, vulgar or repulsive that is likely, in the light of generally prevailing standards of decency and propriety, to cause grave or widespread offence;
- the safeguarding against the promotion of products that are regarded as hazardous or harmful to society or individuals, particularly minors, to a degree or of a type that is unacceptable to society at large;
- that advertisements observe fairness in competition so that the consumers' need to be informed on choices in the marketplace and the standards of generally accepted competitive behaviour in business are both served; and
- in matters concerning celebrity endorsements, celebrities are expected to have adequate knowledge of the Codes and it is the duty of the advertiser and the agency to make sure that the celebrity they wish to engage with is made aware of them. Testimonials, endorsements or representations of opinions or preference of celebrities must be genuine.

Advertising any of the following is not permissible in India:

- tobacco;
- human organs;
- magical remedies for diseases and disorders;
- products relating to prenatal determination of sex;
- infant formula;
- prize chit and money circulation schemes;
- alcohol (beer, wine and spirits);
- firearms, weapons and ammunition;
- gaming (gambling, games of chance and private-sector or state lotteries);
- occult (psychic) services; and
- sexual services.

Industry codes

- 5 | Give brief details of any issued industry codes of practice.
| What are the consequences for non-compliance?

There are different codes for different industries. Some of the key industries are discussed below.

Pharmaceutical industry

The advertising of medicines is controlled by the code of ethics framed by the Indian Board of Alternative Medicines and is as follows.

A practitioner should not attempt to advertise him or herself in any way except by the legitimate means of proficiency in his or her work and by skill and success in his or her practice. It is unethical for a practitioner to insert any advertisement in the public press or issue any card or circular relating to his or her profession or the clinical practice, except for the following:

- on commencing practice;
- on changing his or her address;
- on temporary absence from practice;
- on resumption of practice;
- on disposal of practice;
- on succeeding to another practice;
- on entering or retiring from a partnership; or
- if a colleague leaves the practice.

A medical journal advertisement must be as simple and direct as possible. Every advertisement shall be 'run on', without spacing and without display. The type shall be that ordinarily used for articles.

Letters or abbreviations indicating all other qualifications may be added. A statement of specialism may be included only if that specialism has constituted the practice of the healer for at least five years.

It is unethical for any practitioner to permit his or her name to be used in any material relating to diseases or their treatment that is published in the public press or broadcast on radio or television. Approval may be given by the Indian Board of Alternative Medicines, on application, to waive this rule when departure from anonymity is in the public or professional interest.

No interview with a media reporter on subjects relating to diseases and their treatment should be given by a practitioner, and the following additional rules also apply:

- the name of the practitioner interviewed should not be published, nor should his or her identity be revealed, in any report published of the interview, except with the approval of the Indian Board of Alternative Medicines or an authorised organisation;
- if possible, a copy of the report proposed to be published should be submitted for prior approval; and
- the practitioner interviewed should not imply that he or she has superior ability over other practitioners.

Public lectures or addresses to lay audiences may be given on professional subjects to promote alternative medicines.

No practitioner, except with the approval in writing of the Indian Board of Alternative Medicines, shall have his or her name plate affixed anywhere except at his or her residence and on the premises where he or she treats patients.

Name plates shall be unostentatious in size, lettering and form, and may bear the practitioner's name, qualification and practice hours. A statement of specialty may appear only if that specialty constitutes the sole practice of the practitioner. Practitioners may display their titles, after confirmation, in addition to their clinical qualifications.

Unless prescribed by a registered medical practitioner, no person or company shall take part in the publication of an advertisement referring to any drug that produces a miscarriage in women or prevents conception, or that maintains or improves capacity for sexual pleasure.

Non-compliance may lead to the following consequences:

- the practitioner's name may be removed from the medical register maintained by the Board by reasons of conviction of an indictable offence or infamous conduct in a professional respect;
- the Indian Board of Alternative Medicines shall have the power to deregister any practitioner for conduct that is likely to bring the profession or the Board into disrepute, or on the grounds that the practitioner has wilfully and persistently refused to comply with the rules, articles or by-laws of the Board;
- an expelled practitioner shall be liable to pay all sums due from him or her to the Board at the time of his or her expulsion; and
- no canvassing for membership of any professional society is allowed. This rule must be strictly followed at congresses and symposia.

Insurance industry

In exercise of the powers conferred by section 26 of the Insurance Regulatory and Development Authority Act 1999, the Insurance Regulatory and Development Authority of India, in consultation with the Insurance Advisory Committee, hereby makes the following regulations:

- every insurance company shall be required to prominently disclose in the advertisement, and that part of the advertisement that is required to be returned to the company or insurance intermediary or insurance agent by a prospective insured or an insured, the full particulars of the insurance company, and not merely a trade name or logo; and
- where benefits are more fully described, the form number of the policy and the type of coverage shall be disclosed fully.

If an advertisement is not in accordance with these regulations the ASCI may take action in one or more of the following ways:

- issue a letter to the advertiser seeking information within a specific time, not more than 10 days from the date of issue of the letter;
- direct the advertiser to correct or modify the advertisement already issued in a manner suggested by the Authority with a stipulation that the corrected or modified advertisement shall receive the same type of publicity as the one sought to be corrected or modified;
- direct the advertiser to discontinue the advertisement; or
- any other action considered appropriate by the Authority to ensure that the interests of the public are protected.

The advertiser may seek additional time from the Authority to comply with the directions. The Authority may, however, refuse to grant an extension of time if it feels that the advertiser is seeking only to delay matters. Any failure on the part of the advertiser to comply with the directions of the Authority may result in the latter taking action as necessary, including levying a penalty.

The ASCI also has specific guidelines for other industries, including the following.

The automobile industry

Advertising within the automobile industry must not:

- portray violation of the Traffic Rules;
- show at speed manoeuvres in a manner that encourages unsafe or reckless driving, which could harm the driver, passengers or the general public; or
- show stunts or actions, which require professional driving skills, in normal traffic conditions that, in any case, should carry a readable cautionary message drawing viewer attention to the depiction of stunts.

The food and beverage industry

Some examples of the sector-specific guidelines for the food and beverage industry include the following:

- advertisements should not be misleading or deceptive, and, specifically, they should not mislead consumers to believe that consumption of the product advertised will directly result in personal changes in intelligence, physical ability or exceptional recognition;
- claims made in advertisements should be supported and substantiated with evidence and with adequate scientific basis and advertisements that include information that the consumer, acting reasonably, might interpret as health or nutritional claims shall be supported by appropriate scientific evidence and must meet the requirement of basic food standards laid down under the Food Safety Standards Act and Rules, wherever applicable;
- advertisements should not disparage good dietary practice or the selection of options, such as fresh fruits and vegetables that accepted dietary opinion recommends should form part of a normal diet, and advertisements should not encourage over or excessive consumption or show inappropriately large portions of any food or beverage. Certain advertisements for food or beverages, unless nutritionally designed as such, should not be promoted or portrayed as a meal replacement;
- advertisements should not undermine the importance of healthy lifestyles or mislead as to the nutritive value of the food or beverage and should not undermine the role of parental care and guidance in ensuring proper food choices are made by children;
- claims in advertisements should not be inconsistent with information on the label or packaging of the food or beverage; and
- advertisements for food and beverages should not claim or imply endorsement by any government agency, professional body, independent agency or individual in a particular profession in India unless there is prior consent, the claim is current, the endorsement is verifiable and the agency body is named.

Educational institutions and programmes

Some examples of the sector-specific guidelines for the advertising of educational institutions and programmes include the following:

- advertisements shall not state, or lead the public to believe, that an institution or course or programme is official, recognised, authorised, accredited, approved, registered, affiliated, endorsed or has a legal defined situation, unless the advertiser is able to substantiate this with evidence;
- an advertisement offering a degree or diploma or certificate that, by law, requires to be recognised or approved by an authority shall have the name of that authority specified for that particular field;
- if the advertised institution or programme is not recognised or approved by any mandatory authority, but is affiliated to another institution that is approved or recognised by a mandatory authority, then the full name and location of the said affiliating institution shall also be stated in the advertisement;
- the name of the affiliating institution shall not be less than 50 per cent of the font size of the name of the advertised institution

or programme in visual media such as print, internet, hoarding, leaflet, prospectus etc, including television. In audio and audio-visual media, such as radio or TV, the name of the affiliating institution (if applicable) must be stated;

- advertisements shall not state, or lead the public to believe, that enrolment in the institution or programme, preparation course or coaching class will provide the student with a temporary or permanent job, admission to institutions, job promotions or salary increase unless the advertiser is able to submit substantiation to such effect. In addition, the advertisement must carry a disclaimer stating 'past record is no guarantee of future job prospects'. The font size of the disclaimer should not be less than the size of the claim being made in the advertisement;
- advertisements shall not make claims regarding the extent of course passes achieved, the highest or average salary achieved by graduates, the enrolment of students, the admission of students to renowned educational institutions, marks and rankings of graduates, testimonial of top students, the institution's or its programme's competitive ranking, the size and qualification of the institution's faculty, its affiliation with a foreign institution, or its infrastructure, unless these claims are from the latest completed academic year and substantiated with evidence;
- advertisements stating the competitive ranking of the institution or its programme shall also provide the full name and date of the publication or medium that released the rankings, and the testimonial of top students in an advertisement shall be from students who have participated in the testimony programme, exams or subject from the advertising institution only; and
- any visual of an institution's infrastructure shown in advertisements shall be real and existing at the time of advertisement's release.

Authorisation

6 | Must advertisers register or obtain a licence?

Most companies have self-regulation guidelines, standards and policies to which their adverts must adhere. Companies also review their adverts to be sure any claims made are reasonable and verified and do not mislead or deceive consumers.

The ASCI is a voluntary self-regulatory council, registered as a not-for-profit company under section 25 of the Companies Act. The members of the ASCI are firms of considerable repute within the advertising industry in India and comprise advertisers, media companies, advertising agencies and other professionals connected with advertising practice. The ASCI Code regulates misleading and false advertisements.

Clearance

7 | May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

The ASCI offers pre-production or pre-release advertising advice to its members. A panel has been formed of experienced persons who have close knowledge of the ASCI Code and rules, and experience in the workings of the ASCI Board and its CCC. The form that advertising advice takes may vary, but it has two essential characteristics: it is non-binding and it concerns a specific advertising proposal.

PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)

Challenging competitors advertising

- 8 | What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?

Competitors may challenge advertising through the Advertising Standard Council of India (ASCI) for disparagement, unfair claims, dilution, violation of any statutory law or intellectual property law. In cases of defamation, recourse to the court is available. The advantages and disadvantages of different avenues to challenge advertising are that procedures with the ASCI are quicker and less costly, but they are regulatory, whereas procedures in courts have judicial authority, are enforceable with a penalty for violation and also apply to non-members of the ASCI. However, following a recent Delhi High Court judgment, the ASCI has been given a statutory flavour by recognising its compliance by advertisers under Rule 7(9) of the Cable Television Network Rules 1994.

Public challenges

- 9 | How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

As a general rule, the ASCI does not disclose the identity of the complainant. Under the ASCI Code, complaints against advertisements can be filed from a cross-section of consumers and the general public, and this covers individuals, advertising practitioners, advertising firms, the media, advertising agencies and ancillary services connected with advertising. There are three types of complaints handled by the ASCI: complaints from the general public, including government officials, consumer groups, etc; suo motu complaints from the members of the ASCI Board, the Consumer Complaints Council or the Secretariat; and intra-industry complaints (ie, complaints by one advertiser against another).

The grounds on which complaints are filed include specific claims or visual depictions that are considered to be false, misleading or objectionable and the reasons for the same.

Burden of proof

- 10 | Which party bears the burden of proof?

The party that filed the action (whether a criminal complaint by the state's attorney, or a civil lawsuit by a private party) bears the burden of proof.

Remedies

- 11 | What remedies may the courts or other adjudicators grant?

Injunctions or damages are the remedies that courts or other adjudicators can grant. Injunctions may be obtained on the first day.

Length of proceedings

- 12 | How long do proceedings normally take from start to conclusion?

The duration of proceedings depends on the courts, the complexity of the case and the matters involved. Interim relief may be granted on the first day. The parties also have the option of expedited trial.

Cost of proceedings

- 13 | How much do such proceedings typically cost? Are costs and legal fees recoverable?

The total cost for filing a lawsuit can range from 200,000 to 120,000 rupees. Legal fees and costs may be recoverable if the courts grant punitive damages to the plaintiff.

As in the case of the ASCI, registering a complaint is free of charge to the consumer and all other complainants except in the case of intra-industry (ie, among ASCI members) complaints lodged under the Fast Track Complaint Redressal scheme, where decisions are delivered by the Fast Track Complaint Council within seven days, and a fee of 75,000 rupees is charged to the complainant.

Appeals

- 14 | What appeals are available from the decision of a court or other adjudicating body?

Appeals available from the decision of a court depend on the hierarchy of the court in which they are filed. The hierarchy is (from lower to higher) district courts, high courts (some with original jurisdiction) and the Supreme Court.

MISLEADING ADVERTISING

Editorial and advertising

- 15 | How is editorial content differentiated from advertising?

'Editorials' technically refers to opinion articles in newspapers. Since the vast majority of blogging falls into the 'opinion' category, 'editorial blog content' has come to mean posts that the blogger has posted out of genuine interest, in an unpaid capacity. On the other hand, advertising content is content that the author has been paid to produce. This is usually negotiated in advance. The brand will have certain parameters and goals for the post. Advertisers may compromise accuracy or try to manipulate content, but at least there is no ambiguity regarding their motivation: they are driven by profit.

Advertising that requires substantiation

- 16 | How does your law distinguish between 'puffery' and advertising claims that require support?

False or misleading advertisements, or advertisements that create false associations, are prohibited by law, namely the Trademarks Act, the Consumer Protection Act and the Advertising Standard Council of India (ASCI) Code. The advertisers can use superlatives (puffery) to boost the merits of their products, such as 'the best', 'number 1' or 'the greatest'.

Any advertisement or promotion through television, radio or any other electronic media, or newspapers, banners, posters, handbills or wall writing, etc, to misrepresent the nature, characteristics, qualities or geographic origin of goods, services or commercial activities so as to mislead the consumer could be broadly defined as a misleading advertisement.

However, where advertising claims are expressly stated to be based on, or supported by, independent research or assessment, the source and date of this should be indicated in the advertisement.

Rules on misleading advertising

- 17 | What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

Under the ASCI Code, general rules regarding advertising are to ensure the truthfulness and honesty of representations and claims made by advertisements, and to safeguard against misleading advertisements. In addition, the advertisement must carry a disclaimer stating 'past results are no guarantee of similar future outcomes and results may vary'. The font size of the disclaimer should not be less than the size of the claim being made in the advertisement and it is also specified that such disclaimers should not be in italics.

Disclaimers can 'expand or clarify a claim, make qualifications, or resolve ambiguities, to explain the claim in further detail, but should not contradict the material claim made or contradict the main message conveyed by the advertiser or change the dictionary meaning of the words used in the claims received or perceived by a consumer'.

Substantiating advertising claims

- 18 | Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

All descriptions, claims and comparisons that relate to matters of objectively ascertainable facts should be capable of substantiation. Advertisers and advertising agencies are required to produce such substantiation as and when called to do so by the ASCI.

Survey results

- 19 | Are there specific requirements for advertising claims based on the results of surveys?

Where advertising claims are expressly stated to be based on or supported by independent research or assessment, or the results of a survey, the source and date of this should be indicated in the advertisement under the Advertising Standard Council of India Code. Surveys should be conducted by a reliable source so as to be credible and should be backed by evidence to prove their authenticity.

Comparisons with competitors

- 20 | What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

Comparative advertising is allowed to some extent in India. A trader is entitled to compare his or her goods with the goods of another trader and to establish the superiority of his or her goods over that of others, but while doing so, the courts in India have upheld that the advertiser cannot say that the goods of the competitor are inferior, bad or undesirable. If any such statement is made, it would be an act constituting 'product disparagement', which is not allowed. The ASCI Code also requires that advertisements shall not make unjustifiable use of the name or initials of any other firm, company or institution, or take unfair advantage of the goodwill attached to the trademark or symbol of another firm or its product, or the goodwill acquired by its advertising campaign.

Section 29(8) of the Trademarks Act states that a registered trademark is infringed by any advertising of that trademark if such advertising:

- takes unfair advantage of and is contrary to honest practices in industrial or commercial matters;
- is detrimental to its distinctive character; or
- is against the reputation of the trademark.

However, section 30(1) creates an exception to such infringement, namely that a trademark is not infringed where the use of the mark is in accordance with honest practices in industrial or commercial matters or the use is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trademark.

The following steps should be followed when creating a comparative advertisement:

- the advertiser should ensure that the customer is aware who the advertiser is and which of the products or services that feature in the advertisement are the advertiser's and which belong to the competitor;
- the advertiser should assess what overall interpretation their target audience will put on the advertisement, making sure it is not misleading or confusing;
- they should compare 'like for like';
- they should avoid making exaggerated claims (puffery) or poking fun at the competitor, their products or services (the advertiser should be careful as it might lead to trademark infringement claims against them);
- if the advertisement identifies dates when particular prices applied, the advertiser must identify the location where the competitor's goods or services were offered at that price (the advertiser must have documentary evidence to prove this); and
- the advertiser must keep documentary evidence to confirm and prove the accuracy of data and statistics that the advertiser are relying on.

Test and study results

- 21 | Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

Yes, claims suggesting tests and studies prove a product's superiority require proof. Where advertising claims are expressly stated to be based on or supported by independent research or assessment, the source and date of this should be indicated in the advertisement under the ASCI Code. Surveys should be conducted by a reliable source so as to be credible and authentic.

Demonstrating performance

- 22 | Are there special rules for advertising depicting or demonstrating product performance?

There are no specific rules or provisions that require an advertiser to mandatorily demonstrate product performance. However, if an advertisement depicts the performance of a product, such a demonstration must be true and factual, otherwise a consumer complaint may arise regarding the difference in the performance of the product as claimed by the owner in an advertisement when compared to the performance of the same product in the hands of a consumer. An advertisement is misleading if it creates, increases or exploits a false belief about expected product performance. Advertisements are also considered misleading if they create a false impression, even if everything stated in the advertisement may be literally true. Misleading advertising occurs when a claim about a product or service is materially false or misleading, in an attempt to persuade the consumer to buy it.

Third-party endorsements

23 | Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief or experience?

To ensure the truthfulness and honesty of representations and claims made by the advertisements and to safeguard against misleading advertisements, the ASCI Code requires that the advertisement shall not, without permission from the person, firm or institution referred to, contain any reference to such person, firm or institution that confers an unjustified advantage on the product advertised or tends to bring the person, firm or institution into ridicule or disrepute. If and when required to do so by the ASCI, the advertisers and the advertising agency shall produce explicit permission from the person, firm or institution referred to in the advertisement.

The Consumer Protection Act 2019 (the CPA 2019) now provides for penalties for misleading advertisements made by endorsers. As per section 21 of the CPA 2019, the Central Authority under the Act may order discontinuation or modification of a misleading or false advertisement that is prejudicial to the interest of the consumer or in contravention with the consumer's rights. The Central Authority may also impose a penalty on the endorser of the false or misleading advertisement that may extend to 1 million rupees, and up to 5 million rupees for every subsequent contravention. The Central Authority may further prohibit the endorser of a false or misleading advertisement from making endorsement of any product or service for a period that may extend to one year, and up to three years for every subsequent contravention. However, the only defence available to the endorsers to help them evade the sanctions under the CPA 2019 are by proving that they exercised due diligence to verify the veracity of the claims made in the advertisement regarding the product or service being endorsed by them.

Guarantees

24 | Are there special rules for advertising guarantees?

There are no special rules for advertisement guarantees. Under the ASCI Code, claims such as 'guaranteed for up to five years' are not accepted if there is a likelihood of the consumer being misled, either as to the extent of the product's availability or as to the applicability of the benefits offered.

Further, the ASCI lays down specific rules for skin lightening or fairness improvement products where it explicitly requires advertisers to not claim or guarantee any false fact.

Environmental impact

25 | Are there special rules for claims about a product's impact on the environment?

The Air (Prevention and Control of Pollution) Act 1981 and the Environment (Protection) Act 1986 empowered the government to take necessary steps towards the protection of the environment. The Eco-mark scheme was launched in 1991 to encourage consumers to buy products that have a less harmful impact on the environment. The scheme provides accreditation and labelling for household and other consumer products that meet certain environmental criteria along with the quality requirements of Indian standards for the product. The scheme is voluntary and invites participation from citizens and concerned industrial sectors in the wider interests of the environment.

Free and special price claims

26 | Are there special rules for describing something as free or a free trial or for special price or savings claims?

Indian law does not prohibit sales promotions by advertisers. However, sales promotions have to meet the requirements of the ASCI Code. No advertisement shall be permitted to contain any claim so exaggerated as to lead to grave or widespread disappointment in the minds of consumers. As per the ASCI Code:

- products shall not be described as 'free' where there is any direct cost to the consumer other than the actual cost of any delivery, freight or postage. Where such costs are payable by the consumer, a clear statement that this is the case shall be made in the advertisement; and
- where a claim is made that if a product is purchased another product will be provided 'free', the advertiser is required to show, as and when called to do so by the ASCI, that the price paid by the consumer for the product offered for purchase with the advertised incentive is no more than the price of the product without the advertised incentive.

New and improved

27 | Are there special rules for claiming a product is new or improved?

Yes, the ASCI lays down validity and duration of claiming new and improved as follows:

- the definition of 'new': the words 'new' and 'improved' must specify what aspect of the product or service is new or improved, regarding the product's utility, function, product design, package design, etc; and
- the period over which it can be claimed: the above-mentioned words may be used in advertisements only for a period of one year from the time the new or improved product or service was launched or introduced into the market.

Claims of origin

28 | Are there special rules for claiming where a product is made (such as country of origin)?

See www.lexology.com/gtdt.

PROHIBITED AND CONTROLLED ADVERTISING

Prohibited products and services

29 | What products and services may not be advertised?

Products and services that may not be advertised are the following:

- tobacco, under the Cigarettes and other Tobacco Products Act;
- alcoholic beverages, under the Cable Television Network (Regulation) Amendment Bill;
- human organs, under the Transplantation of Human Organs Act 1994;
- magical remedies, under the Drugs and Magical Remedies (Objectionable Advertisements) Act 1954;
- for prenatal determination of sex, under the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994;
- prize chits and money circulation schemes, under the Prize Chits and Money Circulation Schemes (Banning) Act 1978;
- physicians, under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations; and
- legal services, under the Bar Council of India Rules, formulated under the Advocates Act.

Prohibited advertising methods

30 | Are certain advertising methods prohibited?

While there are no laws defining subliminal advertising or restricting such practice, misleading advertisements are banned.

Protection of minors

31 | What are the rules for advertising as regards minors and their protection?

According to the Advertising Standard Council of India (ASCI) Code, advertisements addressed to minors shall not contain anything, whether in illustration or otherwise, that might result in their physical, mental or moral harm, or that exploits their vulnerability. For example, advertisements may not feature minors promoting tobacco or alcohol-based products; show minors using or playing with matches or any inflammable or explosive substances; or show minors playing with or using sharp knives or guns, the careless use of which could lead to cuts, burns, shocks or other injuries.

Credit and financial products

32 | Are there special rules for advertising credit or financial products?

With specific reference to advertisements of financial products and services, the ASCI Code states that:

advertisements inviting the public to invest money shall not contain statements which may mislead the consumer in respect of the security offered, rates of return or terms of amortisation; where any of the foregoing elements are contingent upon the continuance of or change in existing conditions, or any other assumption, such conditions or assumptions must be clearly indicated in the advertisement.

According to the Reserve Bank of India's guidelines, banks should also not promote schemes for zero per cent interest finance schemes by publishing advertisements in different newspapers and media indicating that they are promoting or financing consumers under such schemes. They should also refrain from linking their names in any form or manner with any incentive-based advertisement where clarity regarding interest rates is absent.

Therapeutic goods and services

33 | Are there special rules for claims made about therapeutic goods and services?

Under section 3 of the Drugs and Magical Remedies (Objectionable Advertisements) Act, there are specific laws that prohibit the advertising of certain drugs for the treatment of certain diseases and disorders. The Act also prohibits any individual or company from claiming they can cure diseases. The Act states that, unless prescribed by a registered medical practitioner, no person or company shall take part in the publication of an advertisement referring to any drug that claims to:

- produce miscarriages in women or prevent conception;
- maintain or improve capacity for sexual pleasure;
- correct menstrual disorders in women; or
- diagnose, mitigate, cure or prevent any disease specified in the Act.

Food and health

34 | Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

The Food Safety Standard Authority of India also checks many products for misleading adverts. Section 24 of the Foods Safety and Standards Act states that:

- no advertisement shall be made about any food that is misleading or deceptive or that contravenes the provisions of the Act; and
- no person shall engage in any unfair trade practice for the purpose of promoting the sale, supply, use and consumption of articles of food or adopt any unfair or deceptive practice, including the practice of making any statement, whether orally, in writing or by visible representation, that:
 - falsely claims that the food is of a particular standard, quality, quantity or grade composition;
 - makes a false or misleading representation concerning the need to consume the food; or
 - gives the public any guarantee of the food's efficacy that is not based on adequate or scientific justification.

Alcohol

35 | What are the rules for advertising alcoholic beverages?

Advertising alcoholic beverages is banned in India as per the Cable Television Network (Regulation) Amendment Bill, which came into effect on 8 September 2000. Private channels often permit alcohol companies to advertise using surrogate means, such as selling the brand name for soda or water or music.

Tobacco

36 | What are the rules for advertising tobacco products?

According to clause 6 of the ASCI Code, tobacco products, alcohol and gambling are prohibited from being advertised. Advertisements for these products are made indirectly sometimes by purporting to be advertisements for other products. Indirect advertisement for these products and services is prohibited.

Further, the Cigarettes and other Tobacco Products Act prohibits advertisement of such products per se.

Gambling

37 | Are there special rules for advertising gambling?

With specific reference to gambling, advertisements for gambling in India are highly regulated on account of specific laws such as the Indian Contract Act 1872, the Lotteries (Regulation) Act 1998, the Public Gambling Act 1867 and the Indian Penal Code 1860. State governments have the power to promote or prohibit lotteries within their territorial jurisdiction.

Chapter III, clause 6 of the ASCI Code states that an indirect advertisement for gambling (gaming) services is prohibited.

In judging whether an advertisement is an indirect advertisement for a product that is prohibited, attention must be paid to the following:

- the visual content of the advertisement must depict only the product being advertised and not the prohibited or restricted product in any form or manner;
- the advertisement must not make any direct or indirect reference to the prohibited or restricted products; and
- the advertisement must not create any nuances or phrases promoting prohibited products.

Lotteries

38 | What are the rules for advertising lotteries?

The Lotteries Act provides a framework for organising lotteries in the country. Under this Act, the state governments have been authorised to promote as well as prohibit lotteries within their territorial jurisdiction. This Act also provides for the manner in which the lotteries are to be conducted and prescribes penalties in cases of breach of its provisions. Lotteries not authorised by the state have been made an offence under the Penal Code.

Promotional contests

39 | What are the requirements for advertising and offering promotional contests?

Indian law does not prohibit sales promotions by advertisers. However, sales promotions must meet the requirements of the ASCI Code. By making no express bar to 'sales promotions', the ASCI advises that advertisements shall not be framed so as to abuse the trust of consumers or exploit their lack of experience or knowledge. No advertisement shall be permitted to contain any claim so exaggerated as to lead to grave or widespread disappointment in the minds of consumers. For example, as per the ASCI Code, advertisements inviting the public to take part in lotteries or prize competitions permitted under law or that hold out the prospect of gifts shall state clearly all material conditions so as to enable consumers to obtain a true and fair view of their prospects in such activities.

Indirect marketing

40 | Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

There is no specific law in India that bars or governs product placement. The ASCI Code is also applicable to product placement. The Cable Television Network Rules, the Code for Commercial Advertising on Doordarshan and All India Radio and the Norms for Journalist Conduct issued by the Press Council of India, prohibit any advertisement directly or indirectly promoting the production, sale or consumption of tobacco products, alcohol or other intoxicants. However, some states allow advertising through billboards, signboards, etc, but this is subject to many restrictions. In addition, the ASCI Code prohibits the use of minors for advertising alcohol products. Products that are banned from advertising may not be used to provide any kind of sponsorship. Further, misleading representation of sponsorship is an unfair trade practice under the Consumer Protection Act.

Other advertising rules

41 | Briefly give details of any other notable special advertising regimes.

The ASCI does not accept and process complaints against political and non-commercial government advertising.

The ASCI's self-regulation system is established as an industry initiative with the objective of regulating commercial communications (ie, advertising that directly or indirectly solicits the exchange of money for goods and services). The ASCI Code specifically states that 'the code for self-regulation has been accepted by individuals, corporate bodies and associations engaged in or otherwise concerned with the practice of advertising in the best interests of the ultimate consumer'. Therefore, political and non-commercial government advertising attempting to influence voters does not come under the ambit of the ASCI.

It is important to the ASCI's integrity that it is seen as an impartial adjudicator free from the perception of political bias. It is not possible

to make decisions about whether a political or non-commercial government advertisement breaches the Code without the potential to be seen as taking a political viewpoint.

The ASCI has mandates from industry associations such as the Indian Society of Advertisers, the Advertising Agencies Association India and the Indian Broadcasting Foundation representing India's advertisers, advertising agencies and media to self-regulate advertising content. The ASCI currently has no mandate to regulate government or political advertising. Complainants need to be aware that the ASCI is an industry-funded body. It is inappropriate for the ASCI to assume jurisdiction over the content of political or government advertising in the absence of political parties' or the government's support for such advertising to be regulated by the ASCI.

The ASCI recommends that anyone with a complaint against a political advertisement should write to the Election Commission of India. Complaints against a non-commercial, government-issued TV advertisement should be made to the Ministry of Information and Broadcasting, which is the regulator for TV content and press advertisements, or to the Press Council of India, which is the regulator for print content.

SOCIAL MEDIA

Regulation

42 | Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?

Online advertisements and website content, including social media sites such as Facebook and Twitter, must comply with a range of marketing, consumer, privacy and contract laws. Online advertisers should comply with the Advertising Standard Council of India Code, the Indian Penal Code, the Information Technology Act 2000 (the IT Act) and other applicable laws. For this purpose, the IT Act was amended in 2011.

43 | Have there been notable instances of advertisers being criticised for their use of social media?

There have been no notable instances of advertisers being criticised for their use of social media in India.

44 | Are there regulations governing privacy concerns when using social media?

There is no specific law in India that deals with online behavioural advertising. However, online behavioural advertising is regulated by data privacy laws and contract law in India, namely the IT Act and the Indian Contract Act. Under the provision of section 43A of the IT Act, the government also enacted the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules 2011 (the Rules). The Rules govern the collection, storage and dissemination of personal data.

As per the Rules, any entity collecting personal information online from a customer must:

- provide the customer with a privacy policy for the handling of or dealing in personal information that has been provided by the customer under a lawful contract or consent. The privacy policy must indicate the purpose of collection and usage of such information and reasonable security practices and procedures followed by the entity collecting the information;
- obtain the consent of the customer regarding the purpose of usage before collection of such information;
- inform the customer of the intended recipients of the information;
- inform the customer of the period for which this information will be held;

- only use the information collected for the expressed purpose;
- allow the customer to review the information provided on request and ensure that personal information found to be inaccurate or deficient be corrected or amended if feasible;
- give the customer the option to not provide the data or information sought or to withdraw consent given earlier; and
- have the prior permission of the customer before disclosing personal information unless the disclosure was agreed to at the time of consent.

UPDATE AND TRENDS

Recent developments

45 | Are there any emerging trends or hot topics in your jurisdiction?

The Consumer Protection Act 2019 has brought about many changes that aim to protect consumers' interest in India. Listed below are some of the significant changes brought about, which aim at making advertisements more fair, reasonable, transparent and truthful.

- The new Act proposes the establishment of the Central Consumer Protection Authority to promote, protect and enforce the rights of consumers.
- The Act seeks to be more holistic with stricter rules, including penal provisions for unfair trade practices like adulteration and misleading advertisements.
- The Act makes provisions for the initiation of class action, including enforcing the recall, refund and return of products.
- The Act has made it easier for a consumers to file a complaint at the district or state consumer commission closest to them instead of initiating the complaint at the location where the service was sold.
- The culpable business can be penalised with up to six months of imprisonment or fined as much as 100,000 rupees if the consumers has not suffered injuries. If a consumer is injured, the penalties can be as much as 500,000 rupees or up to seven years' imprisonment.
- If the unfair trade practice leads to the death of a consumer, a minimum fine of 500,000 rupees and at least seven years of imprisonment can be imposed, which can even be extended into a life imprisonment, depending on the gravity of the complaint.

Coronavirus

46 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There are no specific legislative changes introduced during the covid-19 pandemic in relation to advertising in India. The principles and laws that are already in force in India prior to the pandemic continue to stay in place.

The focus of all laws governing advertising in India remains:

- ensuring the truthfulness and honesty of representations and claims made by advertisements;
- ensuring that advertisements are not offensive to generally accepted standards of public decency;
- safeguarding against the indiscriminate use of advertising for the promotion of products regarded as hazardous to society or to individuals; and
- ensuring that advertisements observe fairness in competition to inform the consumer on choices in the marketplace, while observing the canon of generally accepted competitive behaviour in business.



Safir Anand

safir@anandandanand.com

Swati Sharma

swatisharma@anandandanand.com

First Channel Building
Plot No. 17 A, Sector 16 A
Film City
Noida
Uttar Pradesh 201301
India
Tel: +91 120 405 9300
Fax: +91 120 424 3056/3058
www.anandandanand.com

Japan

Chie Kasahara

Atsumi & Sakai

LEGISLATION AND REGULATION

Legal framework

1 | What are the principal statutes regulating advertising generally?

Advertising activities are generally regulated in Japan mainly by the following acts:

- the Act against Unjustifiable Premiums and Misleading Representations (AUPMR);
- the Act on Specified Commercial Transactions;
- the Medical Care Act;
- the Act on Pharmaceuticals and Medical Devices (formerly the Pharmaceutical Affairs Act);
- the Health Promotion Act; and
- the Outdoor Advertisement Act.

There is also a 'fair commission code' applicable to advertising, and a number of advertising guidelines issued by trade associations authorised by the Secretary General of Consumer Affairs Agency and the Chief of the Fair Trade Commission of Japan responsible for specific industries.

Regulators

2 | Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

The Secretary General of the Consumer Affairs Agency (CAA) and prefecture governors are responsible for issuing advertising regulations and enforcing rules on advertising in accordance with the AUPMR. The Minister of the Economy, Trade and Industry (METI) also has responsibility in accordance with the Act on Specified Commercial Transactions.

In addition, the Japan Advertising Review Organisation, a self-regulatory body established by the advertising industry, handles complaints and enquiries from consumers, competitors and others, and makes recommendations for the modification or discontinuance of questionable representations.

Regulators' powers

3 | What powers do the regulators have?

If a representation is found to be misleading, the Secretary General of the CAA may order the advertiser to cease the misleading representation, to take the measures necessary to prevent a reoccurrence or to take any other necessary action, including public notice of the matters relating to the implementation of such measures (collectively, a cease-and-desist order). Such an order may be issued even if the violation has already ceased to exist.

In addition, where an advertiser has misrepresented the quality and value of a product or services, the CAA may order the advertiser to pay 3 per cent of sales value, for up to three years, of the represented products or services if the value is more than ¥50 million (the Penal Charge System). The advertiser may deduct the penal charge through submitting a refund plan to the CAA. In such an event, the Secretary General of the CAA authorises the refund plan and the advertiser refunds the amount authorised by the CAA to the applying customers and reports the refund to the CAA within one week. The CAA may deduct a penal equivalent to the amount refunded. If the amount refunded exceeds the amount for the penal charge, the CAA will not order payment of the penal charge.

If a prefectural governor recognises that misleading representations have been made in violation of the AUPMR, he or she may issue a cease-and-desist instruction similar to the order described above. If the advertiser does not comply with this instruction, or the prefectural governor finds it necessary to put an end to a violation, or prevent its reoccurrence, he or she may take appropriate measures, including the issuance of a cease-and-desist order. A prefectural governor may ask the advertiser itself, or others who have a business relationship with the advertiser (eg, its advertising agent or a media company) to report on the misleading representations, and may also have his or her officials enter the advertiser's offices or other places of business, or those of other persons who have a business relationship with the advertiser, to inspect its books and documents, etc, or to ask questions about the persons concerned. The power of a prefectural governor has been strengthened, allowing him or her to independently take appropriate measures, without going through the CAA.

Where a seller or a service provider designated under the Act on Specified Commercial Transactions has violated the obligation to indicate certain information concerning goods, rights or services (eg, price, payment due and method, and cancellation) in an advertisement, the prohibition of misleading advertising, or the prohibition from sending email advertising without consent, and if the METI finds that the conduct is likely to significantly prejudice the fairness of a transaction arising from mail order sales and the interests of the purchaser or the service recipient, or if the seller or the service provider fail to comply with the above obligations and abide by the above prohibitions, the METI may order the seller or the service provider to suspend business activities that are connected with such mail order sales, either partially or completely, for a specified period of no longer than one year.

Regulators' priorities

4 | What are the current major concerns of regulators?

The CAA has concerns over compliance with existing laws by new means of advertising through the internet, such as the many 'advertising agents' that offer services related to providing positive feedback and comments on evaluation sites where there is an assumption of

voluntary 'word-of-mouth' evaluation. The CAA has announced that such staged word-of-mouth evaluations are deemed to be an unjustifiable representation under the AUPMR.

Regulators have increased oversight on misleading representation on health food (there are several categories such as (1) foods for specified health use, (2) foods with nutrient function claims, (3) foods with functional labelling, etc) and supplements that are required to comply with strict advertising and labelling regulations, such as the Pharmaceuticals and Medical Devices Act, the Health Promotion Act, the Food Labelling Act, the Food Sanitation Act, and the Act on Specified Commercial Transactions as well as AUPMR, although they are considered food not pharmaceuticals, because they are products that consumers expect to have certain health and beauty effects.

The CAA also requires advertisers to comply with AUPMR and related laws and regulations by instructing employees and assigning a person in charge of advertising and promotion.

Industry codes

- 5 | Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

Each industry usually has its own code of practice. These are voluntary rules, but members generally follow these rules once formulated. Advertising agencies and media companies are also generally familiar with, and comply with, the rules specific to their clients' industries. Non-compliance is very rare and could directly lead to a cease-and-desist order by the Consumer Affairs Agency and calls for commercial boycott by consumers.

Authorisation

- 6 | Must advertisers register or obtain a licence?

No.

Clearance

- 7 | May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

Advice may generally be sought from regulators; however, clearance before publication or broadcasting is not necessarily required. Each prefecture has its own advisory desk (eg, the Bureau of Social Welfare and Public Health in Tokyo), which can provide advice in relation to the Act on Pharmaceuticals and Medical Devices, the Act against Unjustifiable Premiums and Misleading Representations and the Health Promotion Act. However, confirmation before publication or broadcast is optional.

In addition, the Advertising Review Council, Japan (ARC), a public interest incorporated foundation authorised by the Cabinet Office and originally established by major Japanese newspaper companies, can also research and provide a report on the contents of advertising prior to publication or broadcast, if requested by a member media organisation. Such ARC reports are not legally binding.

PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)

Challenging competitors advertising

- 8 | What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?

If an advertisement infringes the rights of a competitor, the competitor may bring a lawsuit against the advertiser. The competitor may ask the court for an injunction, damages and other remedies. However, litigation is costly and time-consuming, so advertising-related litigation of this kind is rare. A competitor may also complain to the Japan Advertising Review Organisation (JARO) and ask them to recommend that the advertiser modify or discontinue any questionable advertising. This is relatively inexpensive, and generally produces reasonable results.

Notifying a prefectural governor or the Consumer Affairs Agency (CAA), or both, is another option. However, handling of complaints is at the discretion of the governor of the prefecture or the CAA, so notification is not always an effective remedy. In practice, directly contacting and discussing the questionable advertising with the advertiser or the advertising agency that is handling it can be fast and effective. If the assertions of the competitor are reasonable, faster settlement and an effective remedy can be obtained in many cases.

Public challenges

- 9 | How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

In practice, most advertising is challenged through the CAA or the JARO. Anyone may contact the CAA and the JARO, and no grounds are required to bring a complaint with either of these organisations.

If the CAA receives notice of questionable advertising, it will research the advertising, and, if it agrees that the advertising is misleading, it may issue a cease-and-desist order.

If the JARO receives complaints and enquiries concerning advertising, it examines them and, where necessary, recommends the advertiser to modify or discontinue making any questionable representations. Advice or information is also provided in response to enquiries.

Burden of proof

- 10 | Which party bears the burden of proof?

In the court, the party asserting that there has been an infringement of rights bears the burden of proof.

In a procedure before the Consumer Affairs Agency under the Act against Unjustifiable Premiums and Misleading Representations, the advertiser bears the burden of proof.

There are no specific rules regarding burden of proof in procedures before the JARO, though, in practice, the advertiser bears the burden of proof.

Remedies

- 11 | What remedies may the courts or other adjudicators grant?

The courts may grant an injunction, damages and other remedies, such as publishing additional advertisements to correct an original misleading representation, or making a public apology if there is sufficient cause.

The Consumer Affairs Agency may issue a cease-and-desist order against the advertiser. Such an order includes, in practice, an injunction

to restrain the advertisement; necessary measures to prevent recurrence of the misleading advertising; a public notice of the above measure through newspapers; and requiring that all planned future advertising be submitted for approval.

Length of proceedings

12 | How long do proceedings normally take from start to conclusion?

The injunction process usually takes a few months in court (both parties are involved); a court proceeding related to damages and other remedies would generally take one to two years from start to conclusion.

Procedures through the Consumer Affairs Agency or the JARO would generally take two to six months, depending on the case.

Cost of proceedings

13 | How much do such proceedings typically cost? Are costs and legal fees recoverable?

Judicial proceedings cost about ¥800,000 to ¥1.5 million (legal fees, depending on counsel) plus ¥2,000 (court costs) for an injunction; and approximately ¥1 million to ¥2 million (legal fees) plus ¥10,000 (if the amount claimed is up to ¥1 million) or more in relation to an action for damages and remedies, depending on the amount of damages claimed. The successful party can recover its court costs, but, in practice, legal fees are not fully recoverable. Consumer Affairs Agency and JARO proceedings entail low costs, but they are not recoverable.

Appeals

14 | What appeals are available from the decision of a court or other adjudicating body?

Appeal to a higher court is available from the decision of a court. Administrative litigation is available from the decision of the Consumer Affairs Agency.

MISLEADING ADVERTISING

Editorial and advertising

15 | How is editorial content differentiated from advertising?

There are no such requirements to disclose where advertisers have influenced editorial content.

Advertising that requires substantiation

16 | How does your law distinguish between 'puffery' and advertising claims that require support?

Advertising claims generally require support in Japan. If claims cannot be supported, they are generally treated as misleading or untruthful advertising. What might be considered puffery in another jurisdiction can potentially be subject to challenge.

Rules on misleading advertising

17 | What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

Misleading advertising is considered to occur in the case of any representation:

- by which the quality, standard or any other matter relating to the substance of goods or services are shown to general consumers to be much better than is actually the case or much better than that of

other competitors, contrary to the facts, and that thereby tends to unjustly influence customers and impede fair competition;

- by which price or any other trade terms of goods or services will be misunderstood by general consumers as being much more favourable to them than is actually the case or more favourable than those of competitors, and that thereby tends to unjustly influence and impede fair competition; or
- that is likely to cause any matter relating to transactions for goods or services to be misunderstood by general consumers and that is designated by the Consumer Affairs Agency as being likely to unjustly influence customers and to impede fair competition.

Misleading advertising is prohibited in Japan.

It is not necessary to disclose all material information, and footnotes are permissible. There are no specific rules on disclaimers, but it is not common to use disclaimers in advertising, with some exceptions of tobacco, alcohol, health foods, and aesthetics and beauty treatment advertising. In tobacco advertising, disclaimers such as 'light neither means low tar nor low risk' or 'mild does not mean mild effect' are generally used.

Substantiating advertising claims

18 | Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

It is not necessary to have proof of the claims before publishing, and there are no recognised standards for the type of proof in Japan, but it is advisable to have proof of any claims before publishing if you are going to make any claims that might appear to be misleading.

Survey results

19 | Are there specific requirements for advertising claims based on the results of surveys?

No.

Comparisons with competitors

20 | What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

Advertising may use comparisons if the comparison is proven objectively, is supported by evidence and presented correctly and appropriately and is fair in methodology. It is permissible to identify a competitor by name, although it is rare in practice.

Test and study results

21 | Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

There are no specific degrees or types of proof. However, tests and studies must be objective, must be supported by results and facts, and must be fair.

Demonstrating performance

22 | Are there special rules for advertising depicting or demonstrating product performance?

No.

Third-party endorsements

23 | Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief or experience?

No. Industry codes of practice generally stipulate that a statement of opinions, beliefs and experience must not mislead consumers, and advertisers use notes on statements such as 'this is an individual experience and not for everyone'. Endorsement by third parties may not be used without their prior consent and must not mislead consumers. Professional comments, for example, by a doctor or a specialist, must be general and not for a specific good or service.

Guarantees

24 | Are there special rules for advertising guarantees?

No.

Environmental impact

25 | Are there special rules for claims about a product's impact on the environment?

No.

Free and special price claims

26 | Are there special rules for describing something as free or a free trial or for special price or savings claims?

No. However, there is a special guideline on representation of pricing in relation to the Act against Unjustifiable Premiums and Misleading Representations issued by the Fair Trade Committee (now taken over by the Consumer Affairs Agency), and, again, any misleading advertising is prohibited.

New and improved

27 | Are there special rules for claiming a product is new or improved?

No. However, some industry-based fair commission codes only allow the use of 'new product' or 'newly on sale' for the first six months after a new product is introduced to the market.

Claims of origin

28 | Are there special rules for claiming where a product is made (such as country of origin)?

There is a notice on origin of products under the Act against Unjustifiable Premiums and Misleading Representations. If a representation of the origin of a product is found to be misleading, the Secretary General of the Consumer Affairs Agency may order the advertiser to cease the misleading representation and to take necessary measures to prevent such misleading representations.

However, there are no specific rules on representation of origin of products excepting geographic indication (GI) on certain agricultural, forestry and fishery products and foodstuffs.

The Act on Protection of the Names of Specific Agricultural, Forestry and Fishery Products and Foodstuffs (the GI Act) entered into force in June 2015. The GI Act provides a system whereby the government protects names of such products as intellectual property. Using a geographical indication or similar indication on any other agricultural, forestry and fishery products and foodstuffs not belonging to the classification of specific agricultural, forestry and fishery products and foodstuffs protected under the GI Act is prohibited; and the Minister of

Agriculture, Forestry and Fisheries may order a person who violates the GI Act to take necessary measures, remove or erase the geographical indication or an indication similar thereto.

PROHIBITED AND CONTROLLED ADVERTISING

Prohibited products and services

29 | What products and services may not be advertised?

Under the Medical Care Act, advertising regarding a medical practice, dental practice, hospital or clinic is strictly limited and comparative advertising, misleading or exaggerated advertising, non-objective advertising (without good evidence) and immoral advertising are prohibited. Advertising of the following details is permitted:

- details on whether medical professionals are physicians or dentists;
- the clinical department's name;
- the name, telephone number or any information that indicates the location of the hospital or clinic, and the name of the administrator of the hospital or clinic;
- the days and hours of practice, or whether an appointment can be booked;
- the names, ages, genders, positions and brief personal records of physicians, dentists, pharmacists, nurses and other medical professionals practising at the hospital or clinic; and
- other matters related to these people that are prescribed by the Minister of Health, Labour and Welfare as matters that contribute to recipients of medical care making appropriate choices with regard to their medical care.

Advertisements by lawyers, law firms and foreign lawyers were prohibited until 2000. They are now permitted, but still strictly limited in Japan. Regulations on advertising by lawyers and foreign lawyers (Regulation No. 44 of 24 March 2000) and related guidelines prohibit advertising that is false, misleading, exaggerated, comparative, illegal or that infringes regulations of the national bar association and local bar association, or damaging or in danger of damaging the dignity of lawyers, etc. There is no prohibition on media types, but the wording, placement and methods are strictly limited. The advertiser must maintain a record of the advertising for three years. Any local bar association may investigate records of questionable advertising, facts relating to the advertising, order an injunction or take other measures.

Prohibited advertising methods

30 | Are certain advertising methods prohibited?

Spam emails are prohibited under the Act on Specified Commercial Transactions. There are no legal prohibitions on subliminal messages. However, the Japan Commercial Broadcasters Association prohibits the use of subliminal effects on broadcasting by its regulation for broadcasting, so in practice it is not possible to broadcast advertising with subliminal messages.

Protection of minors

31 | What are the rules for advertising as regards minors and their protection?

Some voluntary rules (eg, rules on alcoholic beverages and tobacco) prohibit certain advertising to protect minors. In addition, local ordinances on advertising issued by local governments prohibit certain kinds of advertising (eg, advertising of gambling and any immoral advertising).

Credit and financial products

32 | Are there special rules for advertising credit or financial products?

The Financial Instruments and Exchange Act requires a financial instruments business operator to indicate the following information in such advertising:

- the name or trade name of the financial instruments business operator;
- the fact that the financial instruments business operator is authorised as a financial instruments business operator, and its registration number; and
- the matters concerning the contents of the financial instruments business conducted by the financial instruments business operator.

These matters are specified by Cabinet order as important matters that may have an impact on customers' judgement.

There are also rules against making an indication that is significantly contradictory to facts, or seriously misleading with regard to the outlook of profits from conducting financial transactions and other matters specified by Cabinet Office ordinance.

Therapeutic goods and services

33 | Are there special rules for claims made about therapeutic goods and services?

The Act on Pharmaceuticals and Medical Devices prohibits the following:

- false or exaggerated advertising in relation to the name, effect or efficiency of medicines, quasi-drugs (whose effect on the human body is milder than drugs), cosmetics, medical equipment and regenerative medical products;
- advertising that misleads consumers into thinking that a doctor guarantees the effect or efficiency of a medicine, quasi-drug, cosmetic or medical equipment; and
- advertising that suggests abortion or uses obscene documents or images in relation to medicines, quasi-drugs, cosmetics or medical equipment.

Food and health

34 | Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

The Health Promotion Act prohibits false or exaggerating advertising of foodstuffs in relation to maintaining or improving health. The Minister of Health, Labour and Welfare or a chief of a local bureau of health, labour and welfare may recommend advertisers to take measures necessary to correct misleading advertising, and order advertisers to take necessary measures if they do not follow the recommendation. Penalties including imprisonment with labour of up to six months or a fine of up to ¥1 million may apply.

A company may make certain health claims if it is approved by the Consumer Affairs Agency (CAA) to state that the particular food product in question has certain health effects as a 'food for specified health use' (FOSHU), which refers to food containing ingredients that are shown to have certain functions for health and are officially approved to claim to have certain physiological effects on the human body. Once approved, this allows the use of a FOSHU seal of approval. The CAA also recommends that FOSHU-approved food advertising include a health advice statement such as: 'Our eating habits should be based on a staple diet, a main dish and side dishes, and balanced eating.' Approval to make the above-mentioned health claims does not, of course, allow the company to make exaggerated or false claims, which can attract punishments including imprisonment with labour of up to six months and fines of up

to ¥1 million, although this would most likely come after governmental warnings and orders.

Alcohol

35 | What are the rules for advertising alcoholic beverages?

There is no specific legislation on alcohol advertising, and alcohol advertising in Japan is regulated only via voluntary rules adopted by the industry (the Commission on Alcohol Beverages, which consists of nine major beverage groups).

These voluntary rules basically stipulate:

- the prohibition of alcohol-related TV advertisements from 5am to 6pm, with some exemptions such as adverts warning about the effects of drinking (eg, for minors or pregnant women), and adverts aiming to improve the company's corporate image through, for example, emphasising its commitment to social responsibility;
- alcohol adverts shall follow only after TV or radio programmes that have been confirmed as having an audience of which 70 per cent or more are of drinking age (20 years or older in Japan);
- characters and celebrities appealing to the younger generation may not be used;
- warnings must be provided for pregnant women and nursing mothers (that alcohol may have a harmful influence on their embryos or babies);
- a warning to minors such as 'you can drink after you are 20 years old' or 'minors' drinking is prohibited by law' must be included; and
- the above warnings must be given in a specified manner in terms of, for example, wording, point size of type and timing of the warning.

In addition to the above voluntary rules, pregnant celebrities may not appear in alcohol adverts. There are no substantial sanctions under the voluntary rules, though in practice, negative public relations may arise if there is a failure to respect these.

Tobacco

36 | What are the rules for advertising tobacco products?

There are no legal rules on tobacco advertising and packaging. However, the Tobacco Institute of Japan has issued voluntary rules on advertising and the industry obeys these rules. The voluntary rules essentially:

- prohibit TV, radio, cinema and internet advertisements, with some exemptions, such as where it is technically possible to target adults only;
- prohibit the use of signboards in public places, with exemptions around tobacco stores, vending machines and smoking places;
- prohibit the targeting of minors;
- prohibit the use of characters and celebrities appealing to the younger generation;
- require health warnings, including on the quantity of tar and nicotine; and
- provide for the format of the above warning, for example, wording, point size of type and package design.

Gambling

37 | Are there special rules for advertising gambling?

There are no special rules for advertising gambling. Legally, gambling is only permitted if supervised by a national government body, and illegal gambling is, of course, not advertised. Advertising gambling is under general advertising voluntary regulations.

Lotteries

38 | What are the rules for advertising lotteries?

There are no specific rules for advertising lotteries. Legally, lotteries are regulated by the Act against Unjustifiable Premiums and Misleading Representations, and illegal lotteries are, of course, not advertised.

Promotional contests

39 | What are the requirements for advertising and offering promotional contests?

There are no specific rules for advertising and offering promotional contests.

Indirect marketing

40 | Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

No.

Other advertising rules

41 | Briefly give details of any other notable special advertising regimes.

Generally, the right to advertise is protected by the Constitution as an example of freedom of speech in Japan. Political advertising is freely done in practice, unless the advertising infringes the rights of others.

Election candidate advertising through social media (which was previously prohibited) is now permitted, and some candidates and political parties use social media actively for election campaigns.

SOCIAL MEDIA

Regulation

42 | Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?

There are some self-regulatory rules in Japan. The 'WOMJ Guideline', prepared by the Word of Mouth Japan Marketing Association in 2017 and the 'Moral Manifesto for Internet Advertising and Guideline for Publication', prepared by the Japan Interactive Advertising Association in 2015 are the main self-regulatory rules on advertising and marketing related to social media in Japan.

43 | Have there been notable instances of advertisers being criticised for their use of social media?

Advertising agencies that put false 'word of mouth' comments on evaluation websites (eg, restaurant recommendation sites) have come under intense pressure in recent years for the untruthful use of social media, and many such agencies have changed their methods of advertising.

44 | Are there regulations governing privacy concerns when using social media?

There are no specific regulations governing privacy concerns. However, the Act on the Protection of Personal Information and the respective guidelines also apply to the use of social media.



Chie Kasahara
chie.kasahara@aplaw.jp

Fukoku Seimei Building
2-2-2 Uchisaiwaicho, Chiyoda-ku
Tokyo 100-0011
Japan
Tel: +81 3 5501 2111
Fax: +81 3 5501 2211
www.aplaw.jp

UPDATE AND TRENDS

Recent developments

45 | Are there any emerging trends or hot topics in your jurisdiction?

Conscious or unconscious bias on race, gender or both in advertising has recently been criticised in Japan. For example, advertising using publicity of Naomi Osaka, a famous tennis player whose father is from Haiti, as a character of a popular cartoon, 'the Prince of Tennis', was criticised as discrimination because her skin colour in the animation was portrayed as being lighter than in real life (ie, 'white-washed'). The advertiser ceased to use the advertising and issued a public apology in which a spokesperson for the company said: 'There is no intention of whitewashing. We were not sensitive enough and will pay more attention to the diversity issue in the future.'

A famous department group has been criticised for gender and sexual discrimination by using advertising in which a popular actress is portrayed as walking in on a situation where many cream pies are flying around and, as a pie bumps against her face, the following text appears: 'We don't need an "Age of Women", do we? Being forced to do something because you're a woman. Being ignored because you're a woman. Being marked down because you're a woman. Having the news talk about how difficult it is to live as a woman. Every time those things happen, the "Age of Women" gets pushed farther away.'

This kind of emotive message is used to attract attention from target customers. However, public criticism of advertising can lead to the withdrawal of advertising or damage a company's reputation in Japan, irrespective of the legal circumstances.

Advertisers should be aware of the potential for reputational damage arising from bias in advertising, even if there is no regulation to prohibit the particular expressions.

Coronavirus

46 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There is no special advertising legislation or regulation on covid-19 in Japan.

Due to the spread of covid-19, between March and May 2020, the number of advertisements was reduced and advertisements by the Advertising Counsel Japan, which supports non-profit organisations involved in public welfare activities, increased. After release of the first emergency declaration by the government (25 May 2020), the number of general advertisements gradually increased, and, as of January 2021, there was no big difference in advertisements; although, the number of advertisements for products related to disinfection and sterilisation is increasing.

The Consumer Affairs Agency has been watching for misleading and exaggerated advertisements on covid-19-related products. It is advisable that advertisers have objective evidence and comply with standards set by fair trade codes when claiming the effectiveness of elimination of a virus or bacteria.

Switzerland

Sylvia Anthamatten

Walder Wyss

LEGISLATION AND REGULATION

Legal framework

1 | What are the principal statutes regulating advertising generally?

The legal framework regulating advertising in Switzerland is rather complex. The right to advertise is guaranteed on a constitutional level. Basic principles applicable to advertisement can be found in the Federal Act against Unfair Competition (UCA). The UCA prohibits unfair business, including advertising practices, and protects the good faith in business. In addition, various sector-specific regulations exist that regulate advertising in relation to specific products and services (eg, tobacco, alcohol, gaming and pharmaceuticals). Furthermore, different regulations apply to specific advertising media. Regarding broadcast advertising, the Federal Radio and Television Act (RTA) sets up various restrictions.

The applicable rules vary in their legal nature and may constitute civil, public or penal law, either on a federal, cantonal or communal level. Additionally, the self-regulatory regime of the Swiss Commission for Fairness is particularly relevant to advertising in Switzerland.

Regulators

2 | Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

Since there is no comprehensive law governing advertising, which parliament of the federal system has legislative power to regulate advertising depends on the matter concerned. In the case of concurrent jurisdiction among regulators, regulations of a lower body remain in force as long as, and to the extent that, the higher body has not made (full) use of its competence. If the federal parliament is competent, as it is in regard to broadcasting, the federal government may issue additional ordinances.

In general, claims are to be enforced by the courts. In addition, the Swiss Commission for Fairness issues decisions on the fairness of advertising upon complaint. Although its decisions are not binding, the respective proceeding is popular and has become a useful tool to enforce rules on advertising.

Regulators' powers

3 | What powers do the regulators have?

The applicable laws foresee a wide range of remedies and penalties. From a civil law perspective, the prohibition of an impending infringement and the elimination of an existing infringement are paramount. Competitors may also claim damages, satisfaction or the handing over

of profits or demand that a rectification or judgment be published. Criminal penalties include monetary sanctions or custodial sentences. Further, according to a new criminal provision added to the UCA as of 1 January 2021, domain names and phone numbers used for certain unlawful marketing practices may be blocked. Under administrative law, authorisations can be revoked, or regulatory fines can be imposed. In contrast, the Swiss Commission on Fairness may not impose any sanctions. Its decisions are rather considered recommendations or requests.

Regulators' priorities

4 | What are the current major concerns of regulators?

Personalised advertising is currently a widespread topic in regulation and legal discourse. Several areas of law are affected, in particular, the laws on data protection and e-privacy. Discussions held on an EU level have raised controversy about the admissibility of profiling, also affecting the current revision of the Federal Data Protection Act.

Another issue that has been identified as not sufficiently addressed yet by (enforceable) Swiss law is the requirement for separating advertising content from editorial content in connection with the activities of influencers on social media. However, in 2019, the Swiss Commission on Fairness issued its first decisions in this respect. Out of five complaints about posts on a social media platform (Instagram) by famous Swiss people, one complaint has been successful. A Swiss athlete was held to have violated the guidance that advertising content shall be identifiable as such and separated from other content. In 2020, the Swiss Commission on Fairness confirmed such principle and held that it applies to any form of communication, including private communication.

In addition, a new media law is currently going through the legislative process, which is intended to replace the existing RTA. The estimated date of entry into force is early 2022. The new law shall open up the possibility that, in addition to radio and television, online media can contribute to and be promoted as a public media service. The advertising restrictions in the current RTA are intended to remain in place. Already revised and in force since 1 January 2021 is a new regulation on time-shift television stating that the regulation on advertising and sponsorship equally applies to time-shift television.

Industry codes

5 | Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

In the advertising sector, the fair commercial communication guidelines of the self-regulatory body Swiss Commission for Fairness are of major importance. They are based on the International Chamber of Commerce Advertising and Marketing Communication Code and promote a rather high ethical standard. Although they have no legal status beyond proceedings before the Swiss Commission for Fairness, they are often invoked in judicial proceedings when arguing that an act of competition

is unfair in terms of the UCA. Based on the guidelines, the Commission may not prohibit unfair advertising; however, it may demand that advertisers refrain from further publishing an advertisement.

Additional industry self-regulations are the guidelines on the marketing of cigarettes and e-cigarettes and the code of conduct for the alcohol industry. Further, it can be referred to the Pharma Code (the code of conduct of the pharmaceutical industry in Switzerland), the Pharma Cooperation Code (the code of conduct of the pharmaceutical industry in Switzerland on cooperation with healthcare professional circles and patient organisations), the guidelines on native advertising of the Interactive Advertising Bureau Switzerland Association and the declaration of the duties and rights of journalists of the Swiss Press Council. Consequences for non-compliance depend on the specific codices in question.

Authorisation

6 | Must advertisers register or obtain a licence?

There is no general obligation for advertisers to register or obtain a licence. However, in some sectors, for example lotteries, advertising may occur only through licensed entities.

Clearance

7 | May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

In general, the regulator does not give any advisory opinions on the legality of advertising. However, depending on the advertised product, there may be a specific point of contact to receive an advisory opinion on advertising drafts. For example, the Swiss Alcohol Board examines advertising of alcoholic beverages upon request. As regards radio and television broadcast, the Federal Office of Communications has issued guidelines interpreting the advertising and sponsorship regulations.

Depending on the advertised goods or services, the place of advertising or the content of advertising, specific advertising may be subject to prior approval. For example, this may apply to advertising for medicinal products, advertising on public ground or outdoor promotion elements and advertising with animals.

PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)

Challenging competitors advertising

8 | What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?

As regards unfair advertising, competitors are entitled to file a claim before the Swiss Commission for Fairness. The respective decisions are issued rather rapidly (within approximately four months) and the proceedings are free of charge. However, the remedies available are limited and the decisions are not binding. Nevertheless, as practice shows, such avenue is an effective way to challenge unfair advertising and the issued recommendations are usually observed.

A competitor may also bring a lawsuit before the competent courts to claim a violation of the Federal Act against Unfair Competition (UCA). Under certain conditions, preliminary injunctions are available or, in cases of special urgency, the court may order interim measures immediately and without hearing the opposing party (ex parte preliminary measures). Preliminary measures may consist of every measure suitable for preventing the threatened harm, which includes injunctions and

orders to eliminate the unlawful situation. An injunction on a permanent basis (ie, in an action on the merits) requires full proof and not only prima facie evidence for an infringement. A permanent injunction does not require that the infringement, were it to continue, would cause irreparable harm. In Switzerland, competitors are also entitled to compensation of damages or an account of profits.

Public challenges

9 | How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

Actions under the UCA may also be brought by customers whose economic interests are threatened or infringed by an act of unfair competition, such as unfair advertising. Further, professional and trade associations whose articles of association authorise them to defend the economic interests of their members and organisations devoted to consumer protection based on their articles of association may challenge advertising under the UCA. In addition, anyone, including consumers and consumer associations, may address the Swiss Commission for Fairness to challenge advertising.

Burden of proof

10 | Which party bears the burden of proof?

In court proceedings, the party claiming an infringement must prove the facts complained about. However, the law provides for the possibility of a reversal of the burden of proof to the detriment of the advertiser. The judge can thus require the advertiser to prove the correctness of the factual claims contained in the advertisement.

In proceedings before the Swiss Commission for Fairness, the advertiser bears the full burden of proof for the correctness of its advertising statement.

Remedies

11 | What remedies may the courts or other adjudicators grant?

The applicable laws foresee a wide range of remedies. This may reach from the prohibition of an impending infringement or the elimination of an existing infringement to the award of damages, satisfaction or the handing over of profits. Furthermore, a rectification of the unlawful advertising claim or the judgment may be published. Additionally, monetary sanctions or custodial sentences may be imposed and official authorisations can be revoked.

In contrast, the Swiss Commission on Fairness may not impose any sanctions. Its decisions are rather considered as recommendations or requests. Nevertheless, the regular publication of the Commission's decisions intensifies the impact.

Length of proceedings

12 | How long do proceedings normally take from start to conclusion?

As regards proceedings before the Swiss Commission for Fairness, the decisions are issued within approximately four months. If they are appealed to the plenary assembly, the length of the proceedings depends on the biannual meeting of such assembly.

The duration of court proceedings depends on various factors such as the complexity of the matter, the court in charge, the number of hearings, etc. For court proceedings on preliminary injunctions, a timeline of approximately two to four months seems realistic. However, ex parte injunctions may be granted within a few days only. Proceedings on the merits take up to two to three years.

Cost of proceedings

13 | How much do such proceedings typically cost? Are costs and legal fees recoverable?

The procedural costs (court and legal fees) largely depend on the amount in dispute, the complexity of the case and the time requirement of the court and lawyers. Different cantons have their own schedules of fees. The court may demand an advance payment up to the amount of the expected court fees. Procedures before the Swiss Commission for Fairness are free of charge.

As a general rule, the costs, if any, are charged to the unsuccessful party. Court fees are fully recoverable and legal fees are recoverable up to a certain amount as decided by the court.

Appeals

14 | What appeals are available from the decision of a court or other adjudicating body?

The competent courts for UCA claims for an amount in dispute with a value higher than 30,000 Swiss francs are the upper cantonal courts (in some cantons, commercial courts). Decisions of such instances may be appealed to the Swiss Federal Supreme Court.

Decisions of the Swiss Commission for Fairness may be appealed to the plenary assembly of the Commission.

MISLEADING ADVERTISING

Editorial and advertising

15 | How is editorial content differentiated from advertising?

The guidelines of the Swiss Commission for Fairness stipulate, in implementing the Federal Act against Unfair Competition's (UCA) general prohibition of unfair advertisement, that commercial communications, regardless of the form or media, must be identified as such and separated from other content such as editorial content. It is unfair, for the purpose of the acquisition of commercial mandates, to promise editorial content or to make commercial mandates dependent on concessions in editorial content. Further, product placement in editorial communication against payment is not allowed if it remains non-transparent to the consumer. In addition, surreptitious advertising is not allowed.

Advertising that requires substantiation

16 | How does your law distinguish between 'puffery' and advertising claims that require support?

The UCA prohibits the making of incorrect or misleading statements in commercial communication. Thus, factual statements in advertising must be true. However, puffery statements are allowed in so far as value judgments or subjective statements of opinion are concerned that are readily recognisable as such by the addressees of the advertisement and are therefore not taken seriously by the public.

Rules on misleading advertising

17 | What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

Misleading advertising is unfair and prohibited by law. As such, advertising must not only be true but also clear. The consumer should receive the goods and services that he or she imagines and may reasonably imagine on the basis of a relatively fleeting overall view of an advertisement. As such, all material information must be disclosed in a clearly recognisable manner. Disclaimers and footnotes are often used;

however, the respective information must correspond to the aforementioned preconditions. Sector-specific rules may require specific information to be provided in advertisements.

Substantiating advertising claims

18 | Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

Generally speaking, advertisers are not required to provide proof of their advertising claims before publishing. However, the UCA requires that the information provided in advertising, for example, information on the company, goods or services, prices, quantities in stock, sales events or business relationships, must be true.

As regards the standard of proof, the general procedural rules apply. The court must be convinced in such a way that any doubts appear to be irrelevant. Although generally the party claiming an infringement must prove the facts complained about, the law provides for the possibility of a reversal of the burden of proof to the detriment of the advertiser. The judge can thus require the advertiser to prove the correctness of the factual claims contained in the advertisement.

Survey results

19 | Are there specific requirements for advertising claims based on the results of surveys?

Advertising claims based on the results of surveys have to correspond with the general rules applicable to advertising. The fair commercial communication guidelines of the Swiss Commission for Fairness provide some guidance on the conduct of tests and the commercial communication of respective results. However, mere consumer and opinion surveys are not considered as 'tests' and must not be designated as such.

Comparisons with competitors

20 | What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

Subject to the provision in article 3(1)(e) of the UCA, and provided the comparison is not likely to create confusion among traders or consumers, it is allowed to make comparisons with competitors and their products – in particular, by using their names. The UCA prohibits comparative advertising only if it compares products or prices by means of incorrect, misleading or unnecessarily offensive statements or in an unnecessarily condescending manner. The guidelines of the Swiss Commission for Fairness state that, among others, the products compared in advertising must allow for a comprehensive and conclusive factual comparison, relevant facts must not be suppressed, no unnecessary intervention with the personality of market participants must occur and the value of the compared product must not be unnecessarily reduced.

Test and study results

21 | Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

Producers may advertise their products and services by using expert opinions beneficial to them, if such opinions or tests have been released for advertising purposes. There are no specific rules governing a higher or special degree of proof; the general rules of the UCA apply.

The fair commercial communication guidelines provide some guidance on the conduct of surveys and tests and the commercial

communication of respective results. They must correspond to the principles of neutrality, objectivity, relevance and transparency and, thus, be true, clear, complete and comprehensible. Further details are provided in the guidelines for tests, also issued by the Swiss Commission for Fairness.

Legislation on advertising for medicines strictly prohibits the use of clinical studies, scientific publications or expert opinions in advertising to the public.

Demonstrating performance

22 | Are there special rules for advertising depicting or demonstrating product performance?

There are no specific rules governing the depicting or demonstrating of product performance. Advertisers must, however, consider all general rules such as those of the UCA and specific rules concerning, for example, discriminatory content or the use of tobacco products.

Third-party endorsements

23 | Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief or experience?

Advertisers that use testimonials or expert opinions should be able to bring forth the original document or in another way prove its authenticity. This also applies to foreign testimonials and opinions as they must be verifiable in the place they are being used as advertisement. Such third-party opinions and testimonials may be published only with the explicit consent of the author or at least the consent may not have been retracted.

If correct, the adherence to a code of practice may be mentioned in advertising. In addition, the use of certifications and quality marks is generally encouraged. However, the use of untrustworthy or invented labels not only violates the rules on misleading statements of the UCA but may also bear consequences in more specific areas such as laws regulating the advertising of chemicals.

Guarantees

24 | Are there special rules for advertising guarantees?

There are no special rules for advertising guarantees.

Environmental impact

25 | Are there special rules for claims about a product's impact on the environment?

Any claims such as 'environmentally friendly' and 'ecological packaging' must be clearly defined and explained. The reasons for such claims may be that the product is refillable or that it can be disposed in an environmentally non-damaging way. Special rules can be found, for example, in the Federal Ordinance on Protection against Dangerous Substances and Preparations.

Free and special price claims

26 | Are there special rules for describing something as free or a free trial or for special price or savings claims?

As regards pricing claims in general, the Federal Ordinance on the Disclosure of Prices must be observed. Article 18 of the UCA prohibits pointing out price reductions in a misleading way. A price quotation without sufficient informative value, for example, that does not show the value of the discount or the final price or that is based on fictitious comparison prices, is misleading. Moreover, the customer must not be

misled into believing that a particular product can be obtained only at a special price for a short period of time, although the promotion is not limited in time or the product is no longer available at all after the promotion. Further, it is considered unfair if goods are repeatedly offered below cost price and if such offers are particularly highlighted and customers are thereby deceived about the vendor's ability to perform (article 3(1)(f) UCA). Customers must also not be deceived about the actual value of an offer by adding free encores (article 3(1)(g) UCA).

New and improved

27 | Are there special rules for claiming a product is new or improved?

No specific rules apply for claiming the novelty or the improvement of a product. The general rules apply, which is why respective claims must be true and not misleading. The time span during which a product can be fairly qualified as 'new' or the level of improvement that must be reached for it to qualify as 'improved' substantially depends on the particular product and the market concerned.

Claims of origin

28 | Are there special rules for claiming where a product is made (such as country of origin)?

There is no general obligation in advertising for claiming where a product is made. However, if a respective claim is made, it must correspond to the applicable legislation. The Federal Trade Mark Protection Act (TMA) protects against any kind of unlawful use of geographical indications of source and states that respective indications in advertising are considered to be correct only if the origin of all of the products and services advertised corresponds to the rules in articles 48 and 49 of the TMA. The respective requirements largely depend on the specifics of the advertised product, for example, whether it is a natural product, foodstuff or an industrial product.

PROHIBITED AND CONTROLLED ADVERTISING

Prohibited products and services

29 | What products and services may not be advertised?

Certain products are banned from public advertising altogether such as prescription drugs. Further, there are several restrictions concerning broadcast advertising: in addition to alcohol and tobacco, advertisements for gambling and lotteries without licence, for political parties and political persons either holding or running for office, and for religious beliefs, are prohibited. Topics that are subject to the popular vote and religious denominations as well as the people and institutions representing them may also not be advertised on the radio or television.

Prohibited advertising methods

30 | Are certain advertising methods prohibited?

Any aggressive methods such as exercising physical or psychological pressure, cornering prospective clients or in any other way limiting their free decision-making abilities are prohibited. Spam emails are allowed only if the sender of the advertisement is visibly and correctly recognisable, the message includes a 'remove me' or 'unsubscribe' option that, when clicked, removes the recipient from the mailing list and if the recipient has given either prior consent to their inclusion in the mailing list or has previously purchased something from the sender. Additionally, mass advertising is restricted, and with the newly adopted article 45a of the Telecommunications Act, telecommunications service providers are now obliged to combat unfair mass advertising. Further,

newly adopted provisions of the UCA restrict advertising calls and add a respective opt-in obligation. They also prohibit spoofing in connection with advertising calls. There are a few more specific rules such as, for example, prohibiting the use of loudspeakers on motor vehicles as well as individual cantonal regulations. Furthermore, the guidelines of the Swiss Commission for Fairness ban gender-discriminatory advertising and consider advertising as sexist and, thus, unfair if it lacks a natural link between the person embodying the gender and the advertised product.

Protection of minors

31 | What are the rules for advertising as regards minors and their protection?

There is no special law concerning the protection of minors in Switzerland: thus, such regulation in the area of advertising falls under the provisions of the UCA. Products unsuitable for minors may not be advertised in media aimed at this target group. Material unsuitable for children must be clearly marked as such. Advertising must not exploit the inexperience and credulity of minors and may especially not display the performance and use of the product in an exaggerated or false manner. It is not appropriate to compromise the social values of minors by, for example, undermining the authority of their parents, displaying violent content or linking the product to social standing.

The Federal Radio and Television Act stipulates specific rules on advertising to minors in broadcasting, such as the rule that programmes for children may not be interrupted by advertising at all. The advertisement of tobacco products directed at minors is prohibited. There are industry codices self-restricting the advertisement of further goods to minors, such as e-cigarettes.

Credit and financial products

32 | Are there special rules for advertising credit or financial products?

The UCA regulates the advertising of credit or financial products. In public advertising of a consumer credit, the name of the company of the creditor must be easily and clearly recognisable. The law requires clear indications in the advertisement concerning the net amount of the credit, its total costs and the actual annual interest as well as at least one example calculation. The Swiss Banking Association advises its members to refrain from any targeted advertising. It further discourages any sort of misleading statements such as 'savings credit' and any statements that could encourage uneconomical behaviour.

Therapeutic goods and services

33 | Are there special rules for claims made about therapeutic goods and services?

Specific provisions for the advertising of therapeutic goods and services are included in the Federal Ordinance on the Advertising of Medicinal Products, the Federal Ordinance on Medical Devices and the Federal Act on Medicinal Products and Medical Devices. Furthermore, such advertising also falls under the general legal provisions of the UCA.

The applicable law differentiates clearly between advertising targeted at professionals and advertising targeted at the general public. It contains specific provisions and lists regulating what may or may not be advertised or included in such advertising. Advertising directed at the general public for prescription-only medicinal products is prohibited. Advertising for over-the-counter medicinal products to the general public is, in principle, permitted. However, medicinal products which have not (yet) obtained a marketing authorisation in Switzerland may not be advertised.

Food and health

34 | Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

Advertising of foodstuffs is regulated by the Federal Act on Foodstuffs and the Ordinance on Foodstuffs and Commodities. Claims concerning the effects or properties of a food that, according to current scientific knowledge, it does not possess, or that are not sufficiently scientifically substantiated are prohibited. Health claims are explicitly prohibited in the advertising of foodstuffs save for a list of authorised nutrition claims. Advertisers may apply for special approval for claims from the Federal Health Ministry. Any nutrition or health claims must be correct and formulated in a way that they are understandable to consumers. Advertisements may not claim possible health hazards in the case of non-consumption of the product and must always include indications on the importance of a varied and balanced diet and a healthy lifestyle. Any health-related claims may not be associated with claims concerning weight loss or the duration and extent thereof.

Alcohol

35 | What are the rules for advertising alcoholic beverages?

Advertisements for alcoholic beverages are, among others, regulated by the Federal Act on Foodstuffs and the Federal Act on Alcohol. As a general rule, advertising for alcoholic beverages must not be directed at children or adolescents and may not include any type of health claims. Additionally, many cantons and municipalities have chosen to issue a general prohibition for public advertising of alcoholic beverages.

The advertising of alcoholic beverages of more than 15 per cent by volume is subject to severe restrictions: for example, advertising is permitted only if its content is directly related to the product; it is prohibited to advertise spirits on the radio or television, on public buildings, on sporting grounds or on public transport.

Tobacco

36 | What are the rules for advertising tobacco products?

Advertising tobacco products is especially regulated in the Federal Ordinance on Tobacco Products and Products Containing Tobacco Substitutes. It is prohibited to advertise tobacco products on the radio or television and to direct such advertisements towards children and adolescents. All advertisements are subject to a declaration requirement as well as an obligation to display warnings.

The organisation 'Swiss Cigarette' has established an agreement with the Swiss Commission for Fairness that further specifies and limits tobacco advertising. It particularly states that a general warning must always be in the three official Swiss languages and take up at least 10 per cent of the advertising surface.

Against the applicable provisions in the Federal Act on Foodstuffs, based on a recent decision of the Federal Supreme Court, e-cigarettes containing nicotine can now be sold and advertised in Switzerland without particular restrictions as regards the protection of minors if they meet the technical requirements of an EU or EEA member state. However, one of the applicable soft law codices prohibiting sales and advertising to minors has recently been extended to 'other nicotine-containing products' such as e-cigarettes. Under the new Tobacco Products Act, which is anticipated to come into force in mid-2023, e-cigarettes are intended to be regulated extensively (including their advertising).

Gambling

37 | Are there special rules for advertising gambling?

The offering and advertising of money games are subject to the strict regulation of the Money Games Act. Advertising is allowed only for licensed money games and if it is not misleading or intrusive. In addition, the advertising must not be directed at minors or persons barred from playing money games. The Act further prohibits advertising that implies that the players' knowledge, skills or other characteristics influence their chances of winning without this actually being the case. There are additional restrictions on the form and time of the advertising. Inadmissible advertising to blocked or underage persons is punishable by a fine of up to 500,000 Swiss francs.

Lotteries

38 | What are the rules for advertising lotteries?

Lotteries are also regulated by the Money Games Act. In general, the running of lotteries must be licensed. As regards the advertising of lotteries, it can be referred to the respective rules applicable to money games. Accordingly, advertising must not be carried out in a misleading or intrusive manner and may not be directed at minors or blocked persons.

Promotional contests

39 | What are the requirements for advertising and offering promotional contests?

The Money Games Act has lifted the previously existing general ban on games of chance for sales promotion. Provided that promotional contests are carried out for a short period only and do not create any danger of excessive gambling, they are exempted from the scope of the Act and the respective rules on licensing and advertising do not apply. The case law will have to show what the terms 'promotional', 'short period' and 'danger of excessive gambling' mean. However, stricter rules apply to media companies: they are required to offer and advertise promotional contest only if the participation is free and unconditional on purchase.

The UCA requires that all participants in a competition be informed in detail about the conditions of participation and winning. Any ambiguities and misleading information are not permitted in the case of games and promotional contests.

Indirect marketing

40 | Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

Sponsoring in radio and television broadcasts is permitted; however, it must be clearly distinguishable from advertising and the editorial content. Sponsors must be named at the beginning and the end of the broadcasts and advertising statements may not be included in the broadcasts. Companies whose products fall under an advertisement prohibition may usually not act as sponsors. Product placements constitute sponsoring and may not have any advertising effect for the sponsor and towards third parties. Broadcasts with product placements must indicate this at the beginning thereof. Product placement is prohibited in children's shows.

Other advertising rules

41 | Briefly give details of any other notable special advertising regimes.

Owing to their recognised need to protect their local language, some cantons have special provisions under which advertisements are required to be in a certain language.

Certain professions such as lawyers and doctors are subject to advertising restrictions. In addition, political advertising on the radio and television is banned; however, it is allowed in other media.

According to the Coat of Arms Protection Act, federal, cantonal and communal coats of arms or related symbols and characteristics may not be used in advertising by private persons.

SOCIAL MEDIA

Regulation

42 | Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?

There is no comprehensive legislation on e-commerce in Switzerland that covers advertising on social media. The general provisions of the Federal Act against Unfair Competition (UCA) apply. The principle of good faith, aiming at transparency and the undistorted formation of opinions among recipients (general clause in article 2 UCA), requires advertisements to be recognisable as such. However, as this clause is not subject to penal law, infringements are rarely prosecuted in court.

Nevertheless, the guidelines of the Swiss Commission for Fairness clearly state that commercial communications are unfair if they are not clearly separable from other content. Surreptitious advertising is prohibited while product placement, sponsoring and public relations messages are allowed only if the commercial communication is clearly marked and is visible to the onlooker.

43 | Have there been notable instances of advertisers being criticised for their use of social media?

General dissatisfaction has arisen among Swiss people as regards the difficulties in identifying advertising on social media and differentiating it from editorial content. In 2019, the Swiss Commission for Fairness decided, for the first time, five complaints about influencer-marketing on a social media platform (Instagram). It held that one athlete did not comply with the Swiss Commission for Fairness' principle that commercial communications have to be clearly identifiable as such. The athlete (Iouri Podladtchikov) should have marked his post, in which he was standing in front of a store of his main sponsor with the caption 'what to wear', as advertisement. On the other hand, in a case regarding another athlete (Roger Federer), it was found that the athlete's Instagram post did not have to be explicitly marked as advertisement, since it was held that it is evident, and the relevant public is well aware of the fact that the depicted brands have commercial relations with the athlete, as sponsoring in sports is common. In May 2020, the plenary assembly of the Swiss Commission for Fairness confirmed such decision upon appeal and held that the obligation to separate advertising from editorial content would cover every form of communication, not only journalistic communication but also private communication. On the merits, the Commission took an influencer-friendly position as it acknowledged that posts clearly identifiable as commercial do not need to be labelled and that even young followers are able to recognise potential commercial intentions underlying a post and that they have a critical attitude towards influencer posts.

44 | Are there regulations governing privacy concerns when using social media?

There are no specific provisions regarding the use of social media. The protection of privacy is essentially regulated by the Federal Data Protection Act (currently under revision), the Telecommunications Act and the UCA. As such, the general rules on the protection of personal data apply. In the context of social media, questions on the admissibility of profiling as the basis of personalised advertising arise. The regulation of profiling is still subject of debate in the context of the revision of the Federal Data Protection Act. Under certain circumstances, the General Data Protection Regulation and, for the future, the e-privacy regulation of the European Union, will also have an impact in Switzerland.

UPDATE AND TRENDS

Recent developments

45 | Are there any emerging trends or hot topics in your jurisdiction?

The Federal Data Protection Act is currently under revision. It shall be adapted to the transformed technological and social conditions and particularly improve the transparency of data processing and strengthen the self-determination of data subjects. The revised Act will also have an impact on the advertising sector, in particular with respect to online and personalised advertising. Additional reforms concern possible justification for the processing of personal data, handling of automated decisions and data security. The revision will also bring a closer alignment to the General Data Protection Regulation, inter alia, with respect to accountability requirements, and will provide for a continued adequate legal standard of data protection. The revised Act is expected to come into force in 2022.

A public initiative has been launched calling for the prohibition of any tobacco advertisement that can reach children and adolescents. Coupled with the legislative work on a new Tobacco Products Act, this shows a trend towards ever-stricter regulation of tobacco and e-cigarette advertisement. However, the Federal Council recently advocated against the initiative as it would result in a very far-reaching ban on tobacco advertising. It rather proposed to supplement the draft of the new Tobacco Products Act with additional restrictions on advertising in cinemas and on posters. This would enable Switzerland to meet the minimum requirements of the WHO Framework Convention on Tobacco Control.

Coronavirus

46 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

A number of regulatory measures have been taken in the course of the covid-19 pandemic. For example, the Swiss Federal Council adopted support measures for all types of media. The measures in favour of print media are being extended until mid-2021, and those in favour of online media until the end of 2021. Additionally, the Swiss Confederation assumes the costs of the news agency Keystone-SDA for the time being.

Furthermore, advertising relating to the pandemic has already been subject to an official procedure in 2020: the Swiss Commission for Fairness dismissed a complaint regarding a private campaign that advertised the slogan 'Staying at home saves lives. Help us!' The complainant considered the campaign to be ethically and morally questionable,

walderwyss

Sylvia Anthamatten

sylvia.anthamatten@walderwyss.com

Seefeldstrasse 123
8034 Zurich
Switzerland
Tel: +41 58 658 58 58
Fax: +41 58 658 59 59
www.walderwyss.com

claiming that such statements were reserved for the authorities. The Commission disagreed, advocating the freedom of expression and the fact that the Swiss Federal Administration has called for private companies to disseminate its messages.

Turkey

Bentley Yaffe, Sila Sayli, Mina Yanik and Bengisu Incikli

CETINKAYA

LEGISLATION AND REGULATION

Legal framework

- 1 | What are the principal statutes regulating advertising generally?

The general principles of advertising in Turkey are defined in the Law on Consumer Protection, the Commercial Advertising and Unfair Commercial Practices Regulation issued based on this Law and the Law on the Establishment of Radio and Television and Broadcasting Services. Additionally, other laws and regulations have separate special provisions regarding different channels and product groups.

Regulators

- 2 | Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

The Advertising Board was established to ensure that commercial advertisements are reviewed and that they comply with the relevant rules. The Board determines the rules advertisements must comply with, evaluating them within the framework of the Consumer Protection Law.

Additionally, the Radio and Television Supreme Council (RTÜK) is responsible for the regulation and supervision of radio, television and on-demand broadcasting services and broadcast advertising.

Regulation regarding different sales channels and product groups also grant certain rights and authority to the relevant sectoral regulators.

In cases falling under both the sectoral regulator and advertising authority, jurisdictional issues are solved by characteristics of an event. For example, if a penalty is imposed solely because of advertising, the Advertising Board imposes a penalty, and if other non-advertising issues are penalised, the sectoral regulator is authorised to act.

Regulators' powers

- 3 | What powers do the regulators have?

The primary competent authority regarding advertising is the Advertising Board. The Board is responsible for reviewing alleged violation of consumer legislation. The Board has a duty and the power to make regulations to protect consumers against unfair commercial practices. After reviewing practices within this framework, a review is carried out if it is deemed necessary. The Board can initiate ex officio examinations, or act on consumer complaints regarding deceptive and unlawful advertising from institutions, organisations and competitor companies.

The Board has authority to impose administrative sanctions on advertisers, advertising agencies and media organisations if a

commercial advertisement is not fair, honest or in accordance with public moral standards, public order or personal rights; or is deceptive, exploits consumers' lack of knowledge or experience, endangers life or property, encourages violence or crime, damages public health, or exploits elders, children or the disabled. It may impose suspension, correction or administrative fines and cautionary suspension of up to three months if deemed necessary.

The secondary competent authority is the RTÜK. RTÜK and the Advertising Board are not mutually exclusive institutions. Therefore, a media channel under the jurisdiction of RTÜK can also be fined by the Advertising Board for advertising or unfair commercial practices. RTÜK's responsibility includes radio, television and on-demand broadcasts, programme support, product placement and similar advertising practices.

Regulators' priorities

- 4 | What are the current major concerns of regulators?

A major concern of the Advertising Board is advertising complying with basic principles, accuracy and honesty principles in the Commercial Advertising and Unfair Commercial Practices Regulation. These principles emphasise that advertisements should be created in a way that avoids unfair competition, and does not abuse the consumer's trust or benefit the advertiser through a lack of a consumer's experience and knowledge, or should not contain expressions or images that may directly or indirectly mislead the consumer. Disguised advertising is prohibited, and the Board also observes whether comparative advertisements are made within its rules.

Owing to covid-19, the Board has increased the number of penalties in its recent decisions, especially for health claims. Reasons for this include advertisers marketing food supplements as medicines or medicinal products for human use, or the marketing of medicines or medicinal products as food supplements. The promotion of food supplements for disease treatment and advertising of medicines and medicinal products for human use are prohibited.

Industry codes

- 5 | Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

The Advertising Self-Regulatory Board (RÖK) is the main association of note for industry codes. RÖK was established by the Advertisers' Association and the Advertising Agents' Association. They decide on the RÖK principles of suitability for advertisements published in advertising media in Turkey. If advertising messages are found to be against the Self-Regulatory Principles, a recommendation is made to correct or remove the advertisement. If the broadcast continues without making their suggested corrections, RÖK conveys its opinion and states that the advertisement should not be broadcast in its current form.

Authorisation

6 | Must advertisers register or obtain a licence?

Turkish law does not provide a general obligation for registering or licensing advertising activities.

Clearance

7 | May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

Real and legal persons can request information from regulatory bodies in the form of a right to information. Therefore, advertisers can request information from regulatory bodies, unless the request exceeds the limits of information, causing the regulatory body to conduct further research. This means that only general information can be requested from regulatory bodies and that a preliminary examination before publication or broadcast cannot be requested based on the right to information.

However, advertisers and advertising agencies may seek pre-broadcast consultancy services from RÖK, who provide non-binding and advisory opinions regarding consumer complaints.

PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)

Challenging competitors advertising

8 | What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?

Advertisements must not lead to unfair competition under Turkish law as provided by the Consumer Protection Law. Competitors can file a complaint before the Advertising Board on the grounds that the advertisement does not comply with advertising principles and constitutes unfair competition. The Advertising Board is authorised to impose sanctions such as suspension, rectification and administrative fines on unfair competition practices upon the request of the competitor or ex officio.

Competitors can also apply to the Advertising Self-Regulatory Board (RÖK) regarding an advertisement. However, as they are not a regulatory board, decisions granted are not binding and are only advisory. They can advise parties to amend advertisements or to cease publishing or broadcasting them. In cases where parties do not comply with recommendations, RÖK may advise broadcasters and publishers to cease the broadcast and publication of the advertisement.

Competitors can also file a civil lawsuit before the commercial courts for compensation if advertising constitutes unfair competition and causes damage to the competitor. In addition, a competitor can request to the court the ceasing of unfair competition.

Public challenges

9 | How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

Commercial advertisements must be honest, accurate and in accordance with public morality, public order, personal rights and the principles set by the Advertising Board. The Advertising Board is responsible for protecting consumer rights against unfair commercial practices and is entitled to impose sanctions against advertisers, advertising agencies and media organisations that act contrary to the obligations specified in the legislation. This examination can be conducted either upon the request of a third party or ex officio.

Consumers may also file a lawsuit before consumer courts for the advertiser to compensate damages. For damage to occur, the advertisement must be deceptive or constitute an unfair commercial practice.

Consumers, competitors, relevant institutions and organisations are entitled to apply to the Advertising Board. For bringing a civil action, on the other hand, the plaintiff must have suffered damage from the unlawful advertisement.

Burden of proof

10 | Which party bears the burden of proof?

Investigations conducted before the Advertising Board are an inquisitorial process. Therefore, the Board collects evidence regarding the violation ex officio. The advertiser can also submit information and documents to the Board.

In the case of a civil action regarding a deceptive advertisement and unfair commercial practice, the advertiser bears the burden of proof in terms of proving that the advertisement is in accordance with the advertising rules. The advertiser must provide scientifically valid information and documentation.

In a compensation claim arising from unfair competition, the plaintiff bears the burden of proof in terms of proving the damage.

Remedies

11 | What remedies may the courts or other adjudicators grant?

The Advertising Board and Radio Television Board can impose sanctions against advertisers in the case of a violation of the law.

The Advertising Board may suspend the advertisement, request it to be corrected or impose an administrative fine of up to 200,000 Turkish lira on advertisers, advertising agencies and media organisations in the case of a violation. The Advertising Board may impose such administrative fines up to 10 times if the violation, subject to investigation, is repeated within one year. The Advertising Board is also authorised to impose a cautionary suspension of the advertisement of up to three months if it is deemed necessary.

In the case of a violation, several administrative sanctions can be imposed by the Radio Television Board to broadcasters. These broadcasting rules also apply to on-demand broadcasting platforms.

Alternatively, it is always possible to file a lawsuit in the courts for compensation if an advertisement causes damage to a consumer or a competitor. The persons whose personal rights are infringed upon can also initiate a civil action. In such cases, the compensation amount will be evaluated according to general provisions of the Civil Code and Code of Obligations. Competitors can request to the court the ceasing of unfair competition as an interim measure while filing these lawsuits. In such a case, the court can decide to suspend the broadcasting of an advertisement. In addition, competitors can bring their claims regarding the ceasing of unfair competition as a separate lawsuit.

Length of proceedings

12 | How long do proceedings normally take from start to conclusion?

There is no time limit prescribed for investigations conducted by the Advertising Board. Proceedings may take up to one year.

Civil court actions filed before consumer courts are likely to be concluded between one year and one and a half years, including the mandatory mediation proceedings, which is the general timeline for consumer disputes. Civil actions filed before commercial courts can take approximately two years, considering the complex nature of unfair competition disputes.

Cost of proceedings

13 | How much do such proceedings typically cost? Are costs and legal fees recoverable?

No fee is provided for applications that are made to the Advertising Board or Radio Television Board, as these proceedings are inquisitorial.

For civil actions before the courts, the application fee may vary according to the compensation amount requested. However, expenses are paid in advance to cover potential expenses incurred within the scope of the case. The court may later require extra expenses during proceedings for things such as an expert report or investigation if necessary.

Appeals

14 | What appeals are available from the decision of a court or other adjudicating body?

Against the Advertising Board's administrative sanction decisions, an annulment lawsuit may be filed in the administrative courts within 30 days following the notification date of the relevant sanction. The decisions of the Radio Television Board can also be challenged before the administrative courts by filing a lawsuit within 15 days from the decision date.

Parties can appeal a decision to the regional court of appeal, which is the first stage of the two-tiered appeal system in Turkey. Decisions of the regional court of appeal can also be appealed to the Court of Cassation, which is the second and final stage of appeal. Turkish law provides limits regarding the appeal. According to that, decisions with a value not exceeding 5,880 Turkish lira cannot be appealed to the regional court of appeal, while decisions with a value less than 78,630 Turkish lira cannot be appealed to the Court of Cassation.

MISLEADING ADVERTISING

Editorial and advertising

15 | How is editorial content differentiated from advertising?

Advertisements must be visually and aurally distinguishable from editorial content.

If a title, logo, set or music identified with the article, broadcast, or programme published in any broadcast media is used in an advertisement, it should be easy for consumers to notice that the message in question is an advertisement.

If an image or sound effect identified with news bulletins or public service announcements is used in an advertisement, it should be easy for consumers to notice that the message in question is an advertisement.

Except for films and series created for cinema and television, sports, and general entertainment programmes, product placement is not allowed in broadcasts. In product placement, the rental or purchase of products or services cannot be directly encouraged and excessive emphasis cannot be placed on the product. At the beginning of the programme, at the end of the programme and after the advertisement break when the programme starts, viewers must be informed about the existence of product placement.

Advertising that requires substantiation

16 | How does your law distinguish between 'puffery' and advertising claims that require support?

Puffery advertising refers to the use of exaggerated expressions in advertisements. Although there is no explicit provision for exaggerated advertisements in the respective legislation, according to the general advertising principles, objectively incorrect claims that may mislead the consumer should be avoided by advertisers.

However, not all advertisements that contain exaggerated expressions are considered misleading advertising in advance. The determining factor here is considered to be a consumer's objective perception. If the level of surrealism of an expression can easily be perceived or may not be taken seriously by the consumer, then this would strengthen the notion that the relevant advertisement is in accordance with the advertising legislation. By contrast, where such expressions may be taken seriously by the target public, then it means the advertisement may be considered within the scope of a misleading act and sanctioned.

In addition, some laws include specific provisions for exaggerated advertising. For example, it is explicitly prohibited to include exaggerated information in health-related advertisements as per the Private Hospital Regulation published in 2004.

Rules on misleading advertising

17 | What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

Commercial advertisements misleading the consumer or exploiting their lack of experience and knowledge are not allowed according to the general rules regarding misleading advertising.

Names, trademarks, logos or other distinctive shapes or expressions related to goods or services in articles, news, broadcasts and programmes without clearly indicating that they are advertisements, placing the trade names or business names to advertise and presenting it as promotional in nature, is considered covert advertising. Covert advertising is also prohibited in all kinds of audio, written and visual communication tools.

Disclaimers and footnotes are permissible in advertisements; however, they must be of readable and perceptible speed and size. In addition to this, conditions or exceptions in subtitles, static text or footnotes should not entirely or largely eliminate the advantages of the essential promise and should not be inconsistent with it.

Audio expressions, visuals, footnotes, subtitles or information contained in stationary texts should not conflict with each other.

Substantiating advertising claims

18 | Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

There is no legal obligation to prove the claims asserted in advertisements before publication or within the advertisement. However, upon complaint or in the case of a possible ex-officio examination by the Advertising Board, scientific reports and documents should be presented to the Board.

For comparative advertising, the advertiser is obliged to prove the accuracy of every claim in commercial advertisements. Where necessary, it must be proved with documented information from relevant university departments or by accredited or independent research, testing and evaluation institutions.

It may be accepted that some abstract claims are not expected to be proven by the Advertising Board. However, the Board takes an entirely different attitude in terms of claims that are both abstract and superlative in advertisements. The Board imposes sanctions on statements such as 'the best', 'perfect' and 'number one in the world' if these allegations are not proven, on the grounds that these allegations exceed abstract claims and must be proven.

Survey results

19 | Are there specific requirements for advertising claims based on the results of surveys?

According to the Regulation on Commercial Advertisement and Unfair Commercial Practices, claims regarding verifiable facts in advertisements must be proven with scientifically valid information and documentation. If deemed necessary, information and documents obtained from relevant departments of universities or independent research, testing and evaluation institutions may be requested by respective authorities.

In this context, any information that may affect the consumer's final purchasing decision must be included in a time and form that the average consumer can perceive. For this reason, considering that research results have a role in influencing the decisions of consumers, reasonable information should be briefly included in the relevant content. It is also explicitly prohibited by the Regulation to distort research results contained in advertisements or quotations from scientific publications, and to present statistics differently from the actual results.

Moreover, it is stipulated in the Law on the Establishment of Radio and Television Enterprises that surveys and public opinion polls conducted or made by the media service provider must be carried out under the supervision of a notary from the preparation stage until the announcement of results.

Comparisons with competitors

20 | What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

According to the current advertising legislation in force, comparative advertisements are only allowed provided that:

- they do not include any distinctive signs and expressions of competitors;
- they are not of a misleading nature;
- they do not give rise to unfair competition in the market;
- the compared goods or services meet the same needs or purpose the same aim;
- an aspect providing benefits to the consumers is compared;
- the relevant goods or services objectively compare one or more tangible, essential, verifiable and characteristic features, including the price of the compared goods or services;
- objective and measurable arguments based on numeric data can be proved by tests, reports or such other documents;
- they do not disparage or disgrace a rival's goods, services, activities or other properties;
- the goods or services are procured from the same geographical region in cases where the goods or services are of a known origin;
- they do not give rise to confusion between the advertiser and a rival of the advertiser, the rival's trademarks, trade name, company name, other distinctive marks or goods or services; and
- they are not contrary to the principles determined by the Advertising Board.

Namely, it is not permissible to identify a competitor's trade name, company name or other distinctive signs and expressions under the Advertising Regulation.

Test and study results

21 | Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

Advertisers are obliged to prove the accuracy of claims in their advertisements. Claims regarding verifiable facts in advertisements must be proven with scientifically valid information and documentation. If deemed necessary, information and documents obtained from relevant departments of universities, or accredited or independent research, testing and evaluation institutions may be requested by respective authorities.

Moreover, claims that are subject to comparison in comparative advertisements must in any case be proven by information and documents obtained from relevant departments of universities, or accredited or independent research from testing and evaluation institutions. The reports submitted in this context must prove the claims in the advertisement at the publishing date.

Demonstrating performance

22 | Are there special rules for advertising depicting or demonstrating product performance?

As per the main guiding legislation, advertisements must be prepared in accordance with awareness of economic and social responsibility by considering their possible impacts on consumers. Accordingly, they may not contain any expression or image that may directly or indirectly mislead the consumer about the properties of the product, such as the structure, composition, supply, benefit, risk, accessories, production method and date, suitability for the purpose, usage, useful life and usage areas, technical features, efficiency and performance, quantity, origin, and environmental impact.

Third-party endorsements

23 | Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief or experience?

According to the Regulation on Commercial Advertisement and Unfair Commercial Practices, advertisements may not contain any statement or image regarding the private or social life of third parties or refer directly to relevant persons without endorsement. Moreover, they may not display or specify the private property of the relevant person in a way that would create the effect of personal approval being given to the product or organisation.

The Regulation also stipulates that advertisements may not include or refer to any unreal testimony or confirmation statement that is not based on the experience, knowledge or research results of a person, institution or organisation whose testimony is consulted.

In addition, any action that deceives or is likely to deceive consumers about relevant statements or symbols indicating the approval of products or services by the competent authorities is considered as a 'misleading action'. For this reason, documents such as licences, permits, approvals, registrations and other legal documents required to be obtained as per the relevant legislation, may not be used in advertisements in a way that creates the perception that the product or service is different or superior compared to other products or services in the market.

Guarantees

24 | Are there special rules for advertising guarantees?

Under the Regulation on Commercial Advertisement and Unfair Commercial Practices, it is stipulated that advertisements may not contain misleading statements about delivery, product exchanges or return, warranty, after-sales services, spare parts or maintenance and repair conditions as it would constitute a 'misleading action'. Therefore, all claims in advertisements must be accurate and honest regarding guarantees and warranties.

Environmental impact

25 | Are there special rules for claims about a product's impact on the environment?

According to the relevant article of the Regulation on Commercial Advertisement and Unfair Commercial Practices covering environmental issues, any action that deceives or is likely to deceive consumers about the environmental impact of a product or service are considered to be a misleading action. Any commercial practice regarding a misleading action would constitute an unfair commercial practice, and such actions may therefore be sanctioned as per the Regulation.

Moreover, advertisements may not be created in a way that exploits the environmental awareness of consumers or the possible lack of information that they might have. Within this scope, it is prohibited by the Regulation to use environmental signs, symbols or approvals in a way that deceives consumers in advertisements.

Only scientific findings and technical expressions that are based on scientific studies approved by relevant academic institutions on environmental impacts may be used in advertisements.

In advertisements for products that require energy labelling, in accordance with the relevant legislation, the energy efficiency class of the relevant product must be clearly specified if information related to this matter will be included.

Free and special price claims

26 | Are there special rules for describing something as free or a free trial or for special price or savings claims?

If an advertisement contains the price or the calculating method of a price, information given must be directly related to the specific advertised product or service. It is prohibited to mislead consumers by providing inaccurate information about pricing or to cause ambiguity.

If a product or service will be provided free of charge, the obligations to be fulfilled by consumers must be clearly stated in the main message of the advertisement. In terms of advertisements that include any written, audio or visual statement indicating a discount for a product or service, it is mandatory to state clearly and understandably the start and end dates of the discounted sale and the quantity of products or services, if such items are offered in limited amounts. Moreover, in discounted sales advertisements, it is prohibited to use any expression or image that may mislead consumers by causing ambiguity about which products or services are subject to a relevant discount, as well as the amount of discount offered.

The burden of proof that the products or services subject to a discount are offered for sale at a price lower than the actual price belongs to the advertiser.

New and improved

27 | Are there special rules for claiming a product is new or improved?

According to the Regulation on Commercial Advertisement and Unfair Commercial Practices, all advertisements must be true. Advertisements may not mislead the consumer by containing expressions or images that may directly or indirectly indicate a product is 'new' or 'improved' unless it really is so. Otherwise, it would constitute a misleading commercial activity to use such terms if the relevant product or service had already been advertised before, and such advertising would then be subject to sanction.

Claims of origin

28 | Are there special rules for claiming where a product is made (such as country of origin)?

General principles of the Regulation on Commercial Advertisement and Unfair Commercial Practices apply. Accordingly, it is explicitly prohibited to misdirect the consumer about the country of origin. If a product or service was not produced in the mentioned place, it is a misleading advertisement and may be sanctioned by the competent authorities.

To claim a product's country of origin: the product must be created entirely in the country of origin; or it must be created in the country of origin and can contain substances not fully created or obtained in the country of origin, provided that they have been adequately processed within the country of origin.

PROHIBITED AND CONTROLLED ADVERTISING

Prohibited products and services

29 | What products and services may not be advertised?

The main prohibited products and services are introduced in the primary legislation. Additionally, there are complementary prohibitions introduced in a number of specific sectoral legislation.

The goods and services that are prohibited as per the primary legislation are:

- in the field of healthcare: pharmaceuticals and medical treatments subject to prescriptions;
- in the field of adult content: pornography and resources containing explicit content, prostitution and sex services, massages, stripping and strip clubs, adult erotic and sexual products, and match-making services;
- in the field of gambling: illegal gambling, casinos, online casinos and all products or services organised similarly to gambling; and
- in the field of alternative entertainment: services of psychics, astrologers and seers.

The goods and services that are prohibited as per sectoral legislation are:

- in the field of business: legal and audit services and suppliers of these services, tax and financial consultancy, legal consultancy, and medical advice services;
- in the field of stimulating products: alcoholic beverages, tobacco products, drugs or any activity facilitators and stimulants; and
- in the field of gambling: games of chance played by virtual media.

Prohibited advertising methods

30 | Are certain advertising methods prohibited?

According to the Regulation on Broadcast Service Procedure and Principles, commercial communication with subliminal messages and

hidden commercial communication are prohibited. 'Hidden commercial communication' is defined as when a producer of goods or services uses their activities, brands, names and services for advertising purposes without explicitly stating that it is advertising and outside a space designated for advertising.

Apart from these regulations, a restriction has been imposed on electronic commerce. According to the Law on the Regulation of Electronic Commerce, prior consent is required to send emails to individuals for advertising or promotional purposes. This consent can be obtained in writing or by any means of electronic communication. The content of the commercial electronic message must comply with the consent received from the recipient. An exception has been made for traders and merchants. Commercial electronic messages can be sent to these persons without prior consent.

Protection of minors

31 | What are the rules for advertising as regards minors and their protection?

The Commercial Advertising and Unfair Commercial Practices Regulation contains detailed provisions regarding advertisements to children. The primary rules regarding advertisements aimed at or likely to affect children are as follows.

Advertisements aimed at or likely to affect children, and advertisements with characters played by children:

- cannot contain any expression or image that could negatively affect the physical, mental, moral, psychological and social development of children;
- cannot contain any expressions or images that could put children in dangerous situations or encourage them to associate with people they do not know or enter unknown or dangerous places;
- cannot contain violent elements that children can imitate;
- cannot contain statements or images of abuse of the private trust children have in their parents, teachers or other persons;
- cannot contain elements that would weaken or eliminate the authority and responsibility of parents or teachers;
- cannot contain elements that would weaken or eliminate the authority and responsibility of parents or teachers; and
- must contain reminders in the forms of symbols or warnings that ensure that the necessary precautions are taken for goods or services that may harm the health of children or those around them if no measures are taken.

Credit and financial products

32 | Are there special rules for advertising credit or financial products?

According to the Commercial Advertising and Unfair Commercial Practices Regulation, in advertisements where interest and dividend rates are included, these rates must be clearly specified and conditions affecting the total amount obtained at the end of the term must be included. If interest and profit share rates are included in advertisements for credit services, the monthly and annual percentage value of the total cost of the loan to the consumer should be clearly and understandably stated in the main promise of the advertisement. In such advertisements, consumers cannot be misled regarding the type and term of the loan, the required guarantees, or other required features or repayment conditions.

Therapeutic goods and services

33 | Are there special rules for claims made about therapeutic goods and services?

Advertising pharmaceutical products to consumers is prohibited by Turkish law. However, the promotion of these products to inform necessary authorities, such as medical practitioners about pharmaceutical products is not completely prohibited. In accordance with the Regulation on Promotional Activities for Medicinal Products for Human Use, promotional activities for medicinal products for human use within the scope of the Regulation can be conducted for physicians, dentists and pharmacists. Promotion can be carried out by using promotional materials, organising or supporting scientific meetings and product promotion meetings, or by visiting these people using product promotion representatives. However, these products cannot be promoted directly or indirectly to the public through any media or communication medium open to the public, including the internet.

The regulation of medical devices is included in the Medical Device Sales, Advertising and Promotion Regulation. Accordingly, devices such as oral care products, plasters, condoms and cotton can be advertised freely to consumers. Devices that are sold only in hearing aid centres, custom-made prosthesis and orthotics centres, opticians, dental prosthesis laboratories, or are intended to be used or applied exclusively by healthcare professionals and that require application in medical device sales centres, cannot be advertised.

Food and health

34 | Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

The Regulation on Import, Production, Processing and Market Supply of Supplementary Foods and the Turkish Food Codex Supplementary Food Communiqué contains comprehensive provisions on supplementary foods. According to the regulations, supplementary foods refer to capsules, tablets and similar dosed products that are used to support the diet of people and contain vitamins, minerals, amino acids, herbs or bioactive substances. As supplements are not evaluated in the pharmaceutical category, statements requiring scientific evidence, misleading or deceptive claims and health claims other than those allowed in the legislation cannot be included in advertisements of these foodstuffs. Additionally, according to the most recent version of the Commercial Advertising and Unfair Commercial Practices Regulation, comparative advertising of supplementary foods is completely prohibited.

As complementary regulators in this regard, the Advertising Board and the Radio and Television Supreme Council (RTÜK) acts carefully on advertisements of supplementary foods. Recently, penalties have been imposed for advertising slimming drugs and supplements that claim to be effective against covid-19. The reason for the penalties is that these products are promoted as drugs in advertisements, but they contain misleading information and are not drugs. Advertisements containing such misleading information are considered as deceptive advertisements, and the Advertising Board and RTÜK can impose fines on advertisers and media channels.

Alcohol

35 | What are the rules for advertising alcoholic beverages?

Advertising alcoholic beverages on radio and television or through any other media channel is completely prohibited. In addition, campaigns and promotions for alcoholic beverages are also prohibited. Emblems, brands or logos of these products cannot appear on showcases, signs or similar surfaces. Workplaces with an alcoholic beverage licence are the only areas that can be considered outside the prohibition. The

service equipment of these workplaces can have an alcoholic beverage brand, logo or emblem.

Alcoholic beverage producers, importers and marketers may not sponsor any event using the brand, logo or emblem of the products. These products may only be promoted internationally at special fairs and scientific publications and events. It is also prohibited to distribute alcoholic beverages as promotions, giveaways, incentives, gifts or free of charge.

Tobacco

36 | What are the rules for advertising tobacco products?

Recently, new regulations have been introduced regarding tobacco products. These regulations, which began with rules regarding health warnings on tobacco packages, were followed by rules that required flat and standard form in the packages. The manufacturer's brand, logo, symbol or other marks must not appear anywhere on tobacco products. The brand can only be written in the colour and font determined by the regulation. Additionally, in order not to encourage these products, it is prohibited to display tobacco products in any content shown on any media channel.

Gambling

37 | Are there special rules for advertising gambling?

For betting games to be played legally, special permission must be obtained from the state in Turkey. Placing online bets outside of authorised betting sites is a crime according to the Law on the Regulation of Betting in Football and Other Sports Competitions. Within the scope of this Law, advertising illegal gambling and illegal betting sites is also a crime, and those who do this can be subject to both judicial and administrative penalties. The Commercial Advertising and Unfair Commercial Practices Regulation also clearly states that illegal betting and gambling games cannot be advertised in any way. It is also possible to block access to websites that advertise illegal betting and gambling.

Lotteries

38 | What are the rules for advertising lotteries?

In Turkey, lotteries and sweepstakes can be divided into two categories: cash equivalent and non-cash equivalent lotteries. The right to organise lotteries with cash equivalent belongs only to the General Directorate of the National Lottery Administration. Real and legal persons engaged in business activities, public institutions and organisations, associations, foundations, communities, retirement and solidarity funds, sports clubs, and parent-teacher associations can organise non-cash equivalent lotteries. However, these persons must obtain permission from the Administration to organise lotteries.

According to the National Lottery Administration Regulation on Non-Cash Lottery and Sweepstakes, it is forbidden to carry out advertising and promotional activities that disturb the public order, encourage harmful and bad habits, are contrary to general morality and manners, and deceive or mislead the public. Additionally, it must be clearly stated in the lottery announcements and advertisements that those under the age of 18 cannot participate in the organised lottery and that prizes they win will not be awarded even if they have participated.

Promotional contests

39 | What are the requirements for advertising and offering promotional contests?

According to the Commercial Advertising and Unfair Commercial Practices Regulation, if marketing techniques that give the right to

participate in a contest are announced by purchasing the advertised goods or services or accumulating a certain number of coupons, labels, caps or similar items, the start and end date of the promotion period and conditions regarding the delivery of goods or performance of services must be explained to consumers. The prize should meet average consumer expectations within the scope of the contest and must not differ from what was promised. All rules, conditions and other issues related to the advertisement must be in Turkish.

Indirect marketing

40 | Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

Product placement and sponsorship activities can be shown as examples of indirect marketing in Turkish law. In the Regulation on Broadcast Service Procedure and Principles, product placement can be made in films, series, sports and general entertainment programmes made for cinema and television, and also in radio broadcasting services. Although product placement is not restricted, certain conditions must be met in order to do so. For instance, it should be stated that there is product placement in certain parts of the programme where product placement will be applied. The placed product should be used in its natural environment as if it were a part of the programme, and the products under advertising prohibition should not be used for product placement. Product placement must not be carried out in a way that breaks the surreptitious advertising ban.

In Turkey, the Law on the Establishment and Broadcast Services of Radio and Television uses the concept of programme support instead of programme sponsorship. According to the Law, programme support is any kind of contribution made to programmes to promote the name, brand, logo, image, activities or products of real or legal persons who are not connected with the provision of broadcasting services or production of audiovisual works. The main difference between sponsorship and product placement is the inclusion in the programme. At the beginning and end of the programme and during commercial breaks, it is stated that the programme is supported by the sponsor, but the sponsor cannot be referred to in the programme promotions. In the supported programme, no reference can be made to sponsor-owned goods or services. Programmes cannot be supported by real and legal persons dealing with the production or sale of goods and services whose advertisement is prohibited. Additionally, programme support is not allowed in news bulletins and religious ceremony broadcasts.

Other advertising rules

41 | Briefly give details of any other notable special advertising regimes.

Political advertisements are permitted in the Law on the Establishment and Broadcast Services of Radio and Televisions. Within the scope of the Law, media service providers may broadcast advertisements for political parties and candidates during the election period until the start of prescribed election broadcasting bans. The aim of the political advertisement is for candidates to explain themselves and their political activities to the public. For this reason, media service providers should provide services in a way that ensures equal opportunity among candidates so that the selection can be made freely and fairly under equal conditions.

In the Commercial Advertising and Unfair Commercial Practices Regulation, it is stated that advertisements cannot contain expressions or images contrary to the general morality rules. It is also stated in the same Regulation that advertisements cannot contain denigration, abuse, prejudice or discrimination against different languages, races,

colours, genders, political opinions, philosophical beliefs, religions, sects or similar characteristics. Similar rules are also stipulated in the Law. According to the principles of the broadcast service, broadcast services cannot incite society to hatred and hostility or create feelings of hatred in the society by considering race, language, religion, gender, class, region and sect.

To protect the language, it is stated in various regulations that Turkish used in advertisements should be correct, clear and understandable. In addition, advertising messages cannot be given in slang words.

SOCIAL MEDIA

Regulation

42 | Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?

There is no specific regulation regarding social media advertising provided by Turkish law. Advertising through social media is subject to general advertising principles such as accuracy, honesty, public order, not misleading target public and not causing unfair competition in the market. In addition, social media activities in general are subject to the Law on the Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of Such Publications.

The main advertising rule usually violated in social media is prohibition of covert advertising. Under the Consumer Protection Law, covert advertisements are prohibited in all kinds of communication media, including audio, written, visual and social media, on the grounds it constitutes a misleading act. Names, brands, logos or expressions related to goods or services may not be advertised in an introductory manner without explicitly indicating that it is an advertisement. However, as it is controversial whether an influencer's post regarding a product or service used is within the scope of covert advertising or not, the Advertising Board usually considers and imposes sanctions against social media advertisements of products that are only prohibited to be advertised, such as health products, alcoholic beverages and tobacco products.

43 | Have there been notable instances of advertisers being criticised for their use of social media?

In practice, covert advertisements on social media platforms are frequently criticised by users. When users see any advice or suggestion regarding a brand in the content they are exposed to, they generally get the impression that it is an advertisement. In this context, such viral advertisements may sometimes be subject to user complaints. For example, the Advertising Board has recently imposed an administrative fine against influencers and celebrities owing to their expressions on social media stating that a certain health product provides production against covid-19.

44 | Are there regulations governing privacy concerns when using social media?

Privacy matters regarding social media advertisements are mainly regulated by the general Law on Personal Data Protection. As social media providers are considered data controllers, they must comply with all the obligations set out under the personal data protection legislation. Advertisers who would like to make advertisements by using visuals and information of the persons are also subject to the provisions of Law on Personal Data Protection. Accordingly, such data can only be used or processed by advertisers if the use and processing of data has a legal base or the explicit consent of the data owners is obtained.

In addition, the deficit in the regulation on cookies has started to be met gradually by the Personal Data Protection Board. In a recent

CETINKAYA

Bentley Yaffe

bentley.yaffe@cetinkaya.com

Sila Sayli

silasayli@cetinkaya.com

Mina Yanik

mina.yanik@cetinkaya.com

Bengisu Incikli

bengisu.incikli@cetinkaya.com

Akat Mah Cebeci Cad No 24

Besiktas 34335

Istanbul

Turkey

Tel +90 212 351 31 40

Fax +90 212 352 31 40

www.cetinkaya.com

decision of the Board, the investigated company was fined because the explicit consent of the data owners has not been taken, for the cookies that require explicit consent, and the investigated company did not meet its clarification obligation. Therefore, advertisers who do advertise on social media should consider their cookie collection policies.

UPDATE AND TRENDS

Recent developments

45 | Are there any emerging trends or hot topics in your jurisdiction?

The most important change affecting advertising rules is the amendment to Law on Establishing Radio and Television Platforms and Broadcasting Services No. 6112 on 27 March 2018. Accordingly, the Regulation on Radio Television and On-Demand Broadcast on the Internet entered into force on 1 August 2019, which introduces principles of the licensing and audit of such broadcasts. With the amendment and regulation, broadcasting on the internet became subject to the broadcasting principles of the Radio Television Board. Accordingly, the advertisements broadcast on such platforms are also subject to the general broadcasting principles of the Radio Television Board.

Another hot topic in Turkey is social media advertising. There is no special regulation implemented on social media advertising. However, the number of misleading and covert advertisements on social media is rapidly growing. The Advertising Board is trying to solve this problem through general principles and rules on advertising. However, as social media advertising can be seen in many different forms, the existing regulations are not sufficient for preventing unlawful advertisements published on social media.

Coronavirus

46 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Turkish government introduced a number of general covid-19 relief measures for companies and employers; such general measures have also been utilised in the advertising and marketing industries.

The main remedies are the employment law remedies that have been enacted to protect both employees and employers.

To this effect, the Turkish government passed measures to prevent employers from terminating the employment contracts of their employees during the pandemic. Accordingly, the Employment Law was amended, and the termination of the employment contracts has been restricted unless the employee has violated the moral rules and goodwill, the employment contract is expired, the workplace is closed or the work the employee was employed for is over.

While the above amendment protects the employees and prevents an increase in unemployment levels in Turkey, employers are also allowed to unilaterally place employees on unpaid leave up to the duration that the prohibition on termination of employment continues.

In addition, the Turkish government allowed the companies whose business operations decreased owing to the pandemic to apply for short-time working allowance.

United States

Terri Seligman and Jordyn Eisenpress

Frankfurt Kurnit Klein & Selz PC

LEGISLATION AND REGULATION

Legal framework

1 | What are the principal statutes regulating advertising generally?

Federal law

There are numerous federal laws governing advertising in the United States, many enforced by the Federal Trade Commission (FTC). There are general statutes prohibiting deceptive practices, as well as statutes governing specific marketing practices. Some key examples are:

- the FTC Act, which prohibits 'unfair or deceptive acts or practices';
- the Lanham Act, which is the federal false advertising statute; and
- the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The Consumer Financial Protection Bureau (CFPB) has the authority to implement and enforce federal consumer financial law, and their purview is 'non-bank' financial companies that have historically fallen outside the domain of consumer protection agencies.

State and local law

Each state also regulates advertising, with general consumer protection statutes (many modelled on the FTC Act) as well as with statutes regulating specific practices (such as the administration of sweepstakes and contests). Some counties and municipalities also have consumer protection laws. These laws run the spectrum from general prohibitions on deception to specific requirements related to pricing and other retail practices. Some examples include:

- New York: the General Business Law in New York provides that 'deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful'. New York law also prohibits 'false advertising in the conduct of any business, trade or commerce or in the furnishing of any service';
- California: the Business and Professions Code in California provides that it is unlawful to make any statement that 'is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading' (see *Williams v Gerber Products Co*, 523 F3d 934 (Ninth Circuit 2008) and *Kwikset Corp v Superior Court*, 51 Cal 4th 310 (2011)); and
- New York City: New York City prohibits 'any deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts' (see NYC Administrative Code, section 20-700). The New York Court of Appeals has interpreted the statute to give New York City broad authority to go after a wide range of deceptive practices (see, for example, *Polonetsky v Better Homes Depot Inc*, 735 NYS 2d 479 (2001) (real estate sales and repairs) and *Karlin v IVF America Inc*, 690 NYS 2d 495 (1999) (medical services)).

Regulators

2 | Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

Numerous regulatory bodies have authority over advertising and marketing. Among them are the following:

- the FTC is primarily responsible for enforcing the nation's federal consumer protection laws, including the FTC Act, which prohibits 'unfair or deceptive acts or practices' (see 15 USC section 45); and
- state attorneys general and local district attorneys also have jurisdiction to enforce state and local consumer protection laws.

In addition, there are regulatory agencies charged with responsibility over specific industries and their advertising and marketing practices:

- the US Food and Drug Administration (FDA) is charged with regulating prescription drug and biomedical advertising (see, for example, 21 CFR 312.7(a));
- the CFPB has authority to implement and enforce federal consumer financial law for 'non-bank' financial companies (see, for example, 12 USC section 5491);
- the Department of Transportation has jurisdiction to regulate airline advertising (see, for example, 49 USC section 41712);
- the Securities Exchange Commission has control over the false advertising of securities (see, for example, Securities Act of 1933 and Securities Exchange Act of 1934);
- the Financial Industries Regulatory Authority (FINRA) has a variety of rules and guidelines affecting advertising by its members (see, for example, FINRA Rule 2210); and
- the Federal Alcohol Administration regulates unfair competition, including false advertising, in connection with the interstate sale of alcoholic beverages (see, for example, 27 USCA section 205(e), (f)).

Regulators' powers

3 | What powers do the regulators have?

Remedies available for false advertising vary widely, based on the claims that were brought, and range from equitable relief to substantial money damages. Examples of the types of remedies that may be available to the FTC include:

- disgorgement: an order requiring the advertiser to pay the total amount of revenue or profits by refunds to consumers;
- penalties: civil penalties of up to US\$16,000 per violation, in certain types of cases;
- injunction: an order prohibiting the marketing method or practice;
- fencing in: a 'fencing in' order prohibits more than the current conduct and prohibits marketing practices or marketing a type of product;

- products: an order prohibiting advertising certain types of products;
- marketing practices: an order prohibiting engaging in certain types of marketing practices;
- trade name: an order barring the use of a deceptive trade name;
- disclosures: an order requiring certain disclosures to be included in future advertising;
- direct notification: an order requiring sending notices to consumers;
- consumer education: requiring the marketer to supply or publish information; and
- corrective advertising: an order requiring the advertiser to engage in corrective advertising;

If a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief that lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.

(*Novartis Corp v FTC*, 223 F3d 783 (DC Cir 2000).)

Regulators' priorities

4 | What are the current major concerns of regulators?

Regulators in the United States have been particularly focused in recent months on disclosures by influencers and other endorsers of their connection with an advertiser. The FTC and the states have been actively pursuing measures and cases that require marketers to sufficiently disclose any material connection between the advertiser and the endorser speaking on their behalf. Other areas of concern are claims about native advertising (eg, adverts designed to mimic the look and feel of editorial content), 'Made in the USA' claims, environmental benefits, health and nutrition, the sufficiency of digital disclosures on small screens and mobile devices, and privacy.

Industry codes

5 | Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

Self-regulation plays an important role in the advertising industry. Industry groups have promulgated respected and widely followed self-regulatory codes, and many advertising disputes are resolved through self-regulatory dispute mechanisms. Examples of self-regulatory groups, with advertising codes or dispute regulation programmes, include:

- the National Advertising Division (NAD), part of BBB National Programs, Inc, resolves truth-in-advertising disputes;
- the Children's Advertising Review Unit (CARU), also part of BBB National Programs, Inc, resolves disputes regarding compliance with the CARU Self-Regulatory Guidelines for Children's Advertising;
- the Direct Selling Self-Regulatory Council (DSSRC), also part of BBB National Programs, Inc, resolves disputes regarding certain claims made by direct selling companies and their sales forces;
- the Better Business Bureau has issued its own Code of Advertising;
- the Data and Marketing Association has issued numerous guidelines on marketing practices, such as the Guidelines for Ethical Business Practice;
- the Mobile Marketing Association has issued various guidelines for the mobile marketing industry; and

- the Brand Activation Association has issued industry guidance, including its Best Practices for Rebates.

Participation in cases heard by advertising review programmes administered by the Council of Better Business Bureaus, such as NAD, CARU and the DSSRC, is voluntary and their recommendations are not binding. However, regulators, particularly the FTC, have given notice that they will investigate cases referred to them by self-regulatory agencies where the marketer has declined to participate. Examples of remedies sought include:

- withdrawal: ceasing use of the advertising (or element of the advertising) that has been determined false or misleading;
- modifications: modifications to the advertising in the future as specified by the regulatory group;
- disclosures: adding specific information to the advertising that is deemed necessary in order to avoid consumer confusion or deception; and
- product name change: for example, removing 'all-day' from the 'one-a-day all-day energy' product name.

Authorisation

6 | Must advertisers register or obtain a licence?

No, not in the United States.

Clearance

7 | May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

The FTC's Rules of Practice provide that the FTC or its staff, in appropriate circumstances, may offer industry guidance in the form of an advisory opinion. Advisory opinions serve a public informational and educational function, in addition to their value to the opinion requesters. The basic requirements for obtaining advisory opinions, the limitations on their issuance and application, and the point at which both a request for an advisory opinion and the advisory opinion will be placed on the public record are described in sections 1.1 to 1.4 of the Commission's Rules of Practice, 16 CFR.

The major broadcast networks (such as ABC, CBS, NBC and Fox), as well as some others, require that commercials that air on their networks comply with their guidelines. In order to ensure compliance, the networks pre-clear commercials before they are accepted for broadcast.

Some industry groups provide ratings on entertainment products, to give consumers information about the content of those products. They include the Motion Picture Association of America, the Entertainment Software Rating Board and the Recording Industry Association of America (www.riaa.com).

Many industry groups have also issued self-regulatory guidelines that are applicable to the marketing of specific types of products. Examples include the Distilled Spirits Council of the United States and the American Gaming Association.

PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)

Challenging competitors advertising

- 8 | What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?

The federal Lanham Act provides the main remedy (in addition to state law claims) for competitors to address false advertising claims. Section 43 of the Lanham Act provides, in the relevant part:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which ... in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

See 15 USC section 1125(a)(1)(B).

Additionally, many advertising disputes are resolved through self-regulatory dispute mechanisms such as the National Advertising Division (NAD) and CARU.

Public challenges

- 9 | How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

Private consumer actions for false advertising, including class actions, may be brought under state laws in various state and federal courts, as consumers in most states have standing under state false advertising statutes (see, for example, California Civil Code section 1780(a); NY General Business Law section 350).

Burden of proof

- 10 | Which party bears the burden of proof?

Private plaintiffs, as well as administrative authorities, bear the burden of proof in false advertising litigation.

Remedies

- 11 | What remedies may the courts or other adjudicators grant?

Temporary restraining orders prohibiting publication of advertising pending a preliminary injunction hearing are possible, but they are rarely granted. First Amendment concerns and the need for evidence of the meaning actually communicated are grounds for waiting for a hearing. However, where advertising makes a claim that is found to be literally false, a court may issue a temporary order prohibiting publication pending a hearing. Within a week to 10 days of a section 43(a) action, it should be possible to have a hearing – usually devoted to the interpretation of the advertising and the adequacy of the substantiation. Irreparable injury is presumed if likelihood of success on the merits of a false advertising claim is established by a direct competitor. In most cases the ruling on a preliminary injunction has been dispositive. Frequently, the parties consent to one hearing, combining the preliminary injunction hearing with the trial. Altering the advertising that has

been preliminarily enjoined is usually less expensive than continuing the litigation. Permanent injunctions are granted without proof of lost sales.

One tactic that has met with mixed results is to pull the offending advertising and submit revised material to the court. In order to recover damages, a plaintiff must establish actual consumer confusion or deception or establish that the defendant's actions were intentionally deceptive, giving rise to a rebuttable presumption of consumer confusion. The court may treble actual damages and award attorneys' fees under sections 35 and 36 of the Lanham Act. A competitor's damages may include the profits obtained during the time that the false advertising was in use, as well as an amount equal to the cost of the advertising campaign to permit advertising to correct the misimpression. Such damages may only be available where the advertising was published wilfully and in bad faith.

Length of proceedings

- 12 | How long do proceedings normally take from start to conclusion?

A Lanham Act case instituted in a federal court may be concluded in a matter of months, if the parties consent to merge the trial with the preliminary hearing. However, the judge may reserve his or her decision and might take several months to decide, even whether to grant a preliminary hearing. Often the losing party will appeal the grant or denial of the preliminary injunction, as this is a strong indicator of the way the judge will rule even after hearing additional evidence. The appeal can be expedited and therefore only take a month, or may proceed normally and take three to six months or more. A full trial can take a year or more and be followed by an appeal. Damages are usually left for a later hearing, after the rendering of the decision on liability, and are rarely pursued, as once the only issue is the amount of money, settlement makes more economic sense.

Cost of proceedings

- 13 | How much do such proceedings typically cost? Are costs and legal fees recoverable?

A federal false advertising case moves quickly with the attendant costs during the first few weeks culminating in the preliminary injunction hearing mounting rapidly. Depending on the complexity of the claim (and whether scientific evidence and experts will be necessary or whether the claim is implied so that consumer perception studies are necessary), the cost could range from US\$100,000 to US\$500,000 (if a large US or global firm is retained). The prevailing party may recover reasonable attorney's fees, but only by the discretion of the judge and only on proving that the deception was knowing and wilful.

Appeals

- 14 | What appeals are available from the decision of a court or other adjudicating body?

A decision of a trial court is appealable as of right to a higher tribunal to address claimed errors of law, but generally not errors of facts found by a trial court. NAD decisions can be appealed to the National Advertising Review Board, which composes a panel of five advertising experts to review the ruling of NAD staff attorneys. These panels rarely reverse NAD determinations about the competence of substantiation, but will frequently reassess the determination of what is communicated by the advertising.

MISLEADING ADVERTISING

Editorial and advertising

15 | How is editorial content differentiated from advertising?

Section 5 of the Federal Trade Commission (FTC) Act prohibits 'unfair or deceptive acts or practices'. The FTC has held that it is potentially deceptive (or a 'misrepresentation or omission likely to mislead the consumer acting reasonably to the consumer's detriment') for an advertiser not to disclose that its content is not pure editorial content but is instead advertising (see, for example, www.ftc.gov/opa/2012/01/fakenews.shtm). In December 2015, following on from its 2013 workshop 'Blurred Lines: Advertising or Content', the FTC issued enforcement guidance on native advertising in the form of an Enforcement Policy Statement and a Guide for Business. Highlights from the Guidance and Policy Statement include the following:

- although the FTC does not define 'native advertising', the Policy Statement notes that native advertising encompasses a broad range of advertising and promotional messages that match the design, style and behaviour of the digital media in which it is disseminated. The FTC says that native advertising is deceptive when it misleads consumers as to the 'nature or source' of the content. In other words, it is deceptive when consumers do not realise that an advertiser is behind the content they are viewing;
- the more a native advert is similar in format and topic to content on the publisher's site, the more likely that a disclosure will be needed to prevent deception. Disclosures may be necessary on both the publisher's site and on linked pages where the content appears;
- an article that is not itself an advert, when promoted by a company through a recommendation widget can become an advert by the company. That company is in turn responsible for ensuring that the statements in the article are truthful and substantiated;
- the FTC reiterated that, like other disclosures, whether a disclosure regarding a native advert's commercial nature is clear and conspicuous will be measured by its performance: did consumers actually notice, process and understand the disclosure? In order to be effective, according to the FTC, disclosures should appear near where consumers are likely to look first; and
- common terms like 'promoted' or 'presented' may no longer be adequate to convey that a sponsoring advertiser was involved in the creation of the content. Phrases that include the actual word 'advertisement' are preferable.

The FTC has also promulgated the Guides Concerning Use of Endorsements and Testimonials in Advertising (16 CFR section 255 et seq). Under the Guides, advertisers could ostensibly be subject to liability for failure to adequately communicate any material information that the consumer of the content should have to comprehend any material influence over its content other than the apparent author's unbiased choice (id section 255.1(a); *RJ Reynolds Tobacco Co v FTC*, 192 F2d 535 (Seventh Circuit 1951); *Cliffdale Associates*, 103 FTC 110 (1984)). Also, content deemed 'advertising' (as opposed to editorial content) can have implications for clearance issues. Once the content becomes advertising, or 'commercial speech', it is granted less First Amendment protection (eg, for fair use in copyright) and no protection against right of publicity claims.

Advertising that requires substantiation

16 | How does your law distinguish between 'puffery' and advertising claims that require support?

Claims by advertisers must be able to be substantiated, but substantiation is not required for puffery (see *In the matter of Pfizer Inc*, 81 FTC

23 (1972)). The crucial issue is whether the advertising makes an actual, objectively provable claim about the product that is likely to influence consumers' purchasing decisions or whether the claim is an obviously exaggerated representation that 'ordinary consumers do not take seriously' (see the *FTC Deception Policy Statement appended to In the matter of Cliffdale Associates, Inc* 103 FTC 110 (1984)).

Rules on misleading advertising

17 | What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

Section 5 of the FTC Act prohibits 'deceptive' acts or practices. The FTC defines a 'deceptive' act or practice as a misrepresentation or omission that is likely to mislead the consumer acting reasonably under the circumstances to the consumer's detriment (see the *FTC Deception Policy Statement appended to Cliffdale Associates Inc*, 103 FTC 110 (1984); see also *FTC v Telebrands*, 2005 WL 2395791 (2005) (FTC decision)). If a disclosure is required to prevent a claim from being misleading, the FTC generally requires the disclosure to be 'clear and conspicuous'. The factors that the FTC considers when determining whether a disclosure is 'clear and conspicuous' include the placement of the disclosure in the advert, the proximity to the claim being modified, the prominence of the disclosure and how the disclosure is presented (such as, are there other elements of the advert that distract consumers' attention from the disclosure and is the disclosure in language that is easy to understand?) (see, for example, '.com Disclosures: How to Make Effective Disclosures in Digital Advertising' and FTC Deception Policy Statement 'Qualifying disclosures must be legible and understandable').

Substantiating advertising claims

18 | Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

The general rule is that all express and implied claims that are made in advertising must be truthful and not deceptive, and there must be proof for claims before they are disseminated (see 15 USC section 45). An advertiser must have a 'reasonable basis' for any claims that it makes in its advertising (see *In the matter of Pfizer Inc*, 81 FTC 23, 87 (1972) and FTC Advertising Substantiation Policy Statement). In order to determine whether an advertiser has a 'reasonable basis' for its claims, the following factors are considered: the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation and the level of substantiation that experts in the field would agree is reasonable.

Survey results

19 | Are there specific requirements for advertising claims based on the results of surveys?

Surveys must conform to the appropriate research techniques. An expert in research methodologies is usually required to be sure that the survey is projectable both geographically and demographically over the scope suggested in any advertising. If no limitations are expressed, the survey must be projectable on a national basis. The population surveyed should be unbiased. Any bias or limitation with respect to the population should be disclosed (see *Litton Industries*, 92 FTC 1 (1981), *aff'd*, 676 F2d 364 (1982) (the survey was limited to Litton-authorized dealers)).

Comparisons with competitors

20 | What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

The FTC specifically encourages comparative advertising, when truthful and non-deceptive, since it is a source of 'important information to consumers and assists them in making rational purchase decisions' and because it 'encourages product improvement and innovation, and can lead to lower prices in the marketplace' (see 16 CFR section 14.15(c)). But comparative advertisements must be truthful, not deceptive or misleading, and, if an advertiser chooses to compare unlike products, it has the obligation to clearly delineate the nature and limitations of the comparison and disclose material differences between the products. In a truthful comparative advertisement, an advertiser may use a competitor's name, mark, logo or likeness, but any advertising that contains disparaging, unfair, baseless, incomplete or false comments or comparisons of competitors' products, or any that makes false or misleading claims about a competitor (or its products or services) could put the advertiser at risk of liability under the Lanham Act.

Test and study results

21 | Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

If an advertiser claims in its advertising to have specific substantiation for its claims (eg, 'tests prove . . .'), then it must, in fact, have that substantiation (see the FTC Advertising Substantiation Policy Statement). When dealing with health and safety claims, the FTC generally requires a higher level of substantiation. The FTC typically requires 'competent and reliable scientific evidence' (see, for example, *FTC v Garvey, et al.* (2000) (consent order)). The FTC has defined 'competent and reliable scientific evidence' as: 'tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results' (see, for example, *id.*).

The FTC has indicated that 'competent and reliable scientific evidence' consists of 'at least two adequate and well-controlled human clinical studies of the product, or of an essentially equivalent product, conducted by different researchers, independently of each other'. See *FTC v Iovate Health Sciences USA Inc* (2010) (consent order) (claims by dietary supplement manufacturer that its supplements could help consumers lose weight and treat or prevent colds and other illnesses); In the matter of *Nestlé Healthcare Nutrition Inc* (consent order) (claims by Nestlé that its BOOST Kid Essentials protects against cold, flu and other illnesses by strengthening the immune system); but see *Pom Wonderful LLC v FTC*, No. 13-1060 (DC Circuit 30 January 2015) (holding that the FTC failed to justify its requirement that Pom have at least two randomised and controlled trials as a precondition for making disease claims).

Demonstrating performance

22 | Are there special rules for advertising depicting or demonstrating product performance?

If a product's performance is shown in an advertisement, the general rule is that the demonstration must be real, without any special effects whatsoever. In addition, the advertiser must also be able to substantiate that the performance shown reflects the performance that consumers can typically expect. Demonstrations must accurately show a product's performance, characteristics or features. Demonstrations must show the performance that consumers can typically expect to achieve. It is

generally deceptive to use an undisclosed mock-up of product performance. Special effects should not generally be used to demonstrate (or misrepresent) product performance. Even if a demonstration is accurate, advertisers are still responsible for implied claims that may be communicated. Not all depictions of product performance are 'demonstrations', however. If the depiction is not understood to communicate product performance or specific product attributes, it may not be necessary for the depiction to be real. A dramatisation may be permissible, when the fact of the dramatisation is disclosed, so long as the dramatisation accurately reflects product performance.

Third-party endorsements

23 | Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief or experience?

The FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising set forth the FTC's views on the use of consumer, celebrity, expert and organisational endorsements in advertising (see 16 CFR section 255.5). Endorsements must be truthful, non-deceptive and be substantiated by the advertiser. Any connection between the endorser and the advertiser that might materially affect the weight or credibility of the endorsement (in other words, a relationship not reasonably expected by the audience) should be disclosed (see 16 CFR section 255.5).

Guarantees

24 | Are there special rules for advertising guarantees?

A guarantee serves to reinforce the advertiser's promise of performance and will often be treated as a factual claim that must be substantiated. It is not sufficient that the advertiser will in fact refund the purchase price if the product does not perform as advertised. The advertiser must have a reasonable basis for believing that the product will perform as advertised. In addition, certain products are subject to rules requiring that the terms of their warranty must be available before purchase (see FTC Pre-Sale Availability Rule, 16 CFR section 702). Any advertising of such goods that references their warranty must disclose that the warranty document is available for examination prior to purchase (FTC Guidelines for Advertising Warranties, 16 CFR section 239). A 'money-back guarantee' is deemed to be unconditional unless the terms and conditions are clearly communicated. Thus, if the consumer must return the unused portion, or send in the proof of purchase, this must be disclosed (16 CFR section 239.3). A 'lifetime guarantee' is presumably the life of the original purchaser unless it is clarified in the advertising, for example, 'for as long as you own your car' or 'for as long as your car runs' (16 CFR section 239.4).

Environmental impact

25 | Are there special rules for claims about a product's impact on the environment?

The FTC Guides for the Use of Environmental Marketing Claims (the Green Guides) set forth general standards for promoting the environmental benefits of products in advertising (see 16 CFR part 260).

Free and special price claims

26 | Are there special rules for describing something as free or a free trial or for special price or savings claims?

'Free' suggests a special offer giving the consumer the free item at no cost over the cost previously established or actually planned (in the case of an introductory offer) (see FTC Guidelines on the Use of 'Free', 16

CFR section 251 and *FTC v Mary Carter Paint Co*, 382 US 46 (1965)). Any conditions or limitations on the free offer must be clearly and conspicuously disclosed. Local regulations may specify type size and placement (see, for example, New York City Consumer Protection Regulation 2, requiring a type size at least half the size of the word 'free').

The use of auto-renew programmes in connection with free trials is heavily regulated through both federal and state law. At the federal level, the Restoring Online Shoppers' Confidence Act requires marketers to clearly and conspicuously disclose all material terms of the transaction before obtaining a consumer's billing information, obtain the consumer's express informed consent before charging the payment, and provide simple mechanisms for a consumer to stop recurring charges (see 15 USC section 8403). Many states have enacted similar regulations that apply to transactions offline as well. For example, California's law specifically requires that when the auto-renew programme is offered in connection with a free trial, marketers must include clear and conspicuous explanations of the price that will be charged when it ends (see Cal Bus & Prof Code section 17602). There has been considerable enforcement by regulators at the federal and state level (and by the class action bar) in the past few years regarding auto-renew programmes that fail to include appropriate disclosures, do not require affirmative consent by consumers to the auto-renew feature of the programme, or that make cancellation of the auto-renew feature difficult.

When making claims about special prices, marketers should be mindful of FTC and state regulations governing deceptive pricing practices. The FTC's Guides Against Deceptive Prices provides guidance on various forms of bargain advertising. Recently, regulators and plaintiffs have pursued claims related to deceptive former price comparisons. The FTC Guides direct marketers to make former price comparison claims only if the former price is the 'actual bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time' (see 16 CFR section 233).

New and improved

27 | Are there special rules for claiming a product is new or improved?

An FTC advisory opinion suggests that 'new', 'introducing' and similar terms should be used only where the product has been generally available in the particular market where the advertising appears for less than six months (see <http://rms3647.typepad.com/files/advisory-opinion.pdf>). Under the rules governing the identification of textiles, fabric cannot be advertised as 'new' if it has been reclaimed or respun. The rules governing advertising claims for tyres prohibit the use of the word 'new' to describe retreads. However, when no specific regulation applies, each case must be considered within the context of the advert. At least one FTC advisory opinion has suggested a six-month limit on the use of the word when advertising the introduction of a 'new' product not previously on the market.

The old FTC guidance says that a product may be described as 'new' if it 'has been changed in a functionally significant and substantial respect'. A product may not be called 'new' when only the packaging has been altered or some other change is made that is functionally insignificant or insubstantial. In a staff advisory opinion in response to a Sony Electronics Inc proposal, the FTC has also suggested that the term 'new' may be used to describe returned consumer electronics products when it can reasonably be determined that the products were never used.

Claims of origin

28 | Are there special rules for claiming where a product is made (such as country of origin)?

The FTC has required that advertisers who claim a product is 'Made in the USA' (or depict products as such through the use of American flags or similar claims) be 'all or virtually all' made in the United States. In connection, the FTC issued the Enforcement Policy Statement on US Origin Claims about how to comply with the standard. The FTC has contacted dozens of advertisers regarding their 'Made in USA' claims over the past few years and has issued numerous public closing letters.

US content must be disclosed on automobiles, textiles, wool and fur products. These products are subject to the American Automobile Labeling Act, the Textile Fiber Products Identification Act, the Wool Products Labeling Act and the Fur Products Labeling Act, respectively.

The US Customs Service requires country of origin markings on all products of foreign import. If a product contains materials or processing from more than one foreign location, the country of origin designation should be the last country in which a 'substantial transformation' occurred (see 19 USC section 1304).

PROHIBITED AND CONTROLLED ADVERTISING

Prohibited products and services

29 | What products and services may not be advertised?

Any legal product may be advertised. Disclosures, for example, tobacco product warnings, may be required. Restrictions apply to targeting certain product advertising to minors, and advertising directed at children may require special disclosures.

Prohibited advertising methods

30 | Are certain advertising methods prohibited?

In 1974, the Federal Communications Commission (FCC) issued a public notice defining subliminal advertising as: 'any technique whereby an attempt is made to convey information to the viewer by transmitting messages below the threshold level of normal awareness' (see Public Notice Concerning the Broadcast of Information By Means of 'Subliminal Perception' Techniques, 44 FCC 2d 1016, 1017 (1974)). The same policy statement provides:

We believe that use of subliminal perception [technique] is inconsistent with the obligations of a licensee, and we take this occasion to make clear that broadcasts employing such techniques are contrary to the public interest. Whether effective or not, such broadcasts clearly are intended to be deceptive. (Id.)

Contemporary thinking is that subliminal advertising is ineffective and, if used, a form of deceptive advertising. In the current version of the Federal Trade Commission (FTC)'s 'Advertising FAQ's: A Guide for Small Business', the FTC states that 'it would be deceptive for marketers to embed ads with subliminal messages that could affect consumer behaviour. However, most consumer behaviour experts have concluded that such methods aren't effective.'

The Federal CAN-SPAM Act of 2003, 15 USC section 7701, pre-empts state law and regulates unsolicited commercial emails, which refers to any electronic mail message with the principal purpose of promoting the sale of goods or services, that is sent to a consumer with whom the sender does not have an existing business or personal relationship and that is sent without the consumer's consent or prior request (see 15 USC section 7702(2)(a)). The Act requires any commercial email to include:

- a working opt-out procedure;
- notice of the recipient's right to opt out;
- the sender's physical address;
- accurate header information and subject lines;
- labelling the message an advertisement (but not necessarily 'ADV' in the subject line); and
- warning labels on sexually explicit material.

In addition, the Act prohibits opening multiple email accounts using false information, using open relays to transmit unsolicited commercial emails, falsifying header information, using deceptive subject lines and harvesting email addresses.

Protection of minors

31 | What are the rules for advertising as regards minors and their protection?

There have been numerous efforts, led primarily by the Children's Advertising Review Unit (CARU), to protect children from inappropriate marketing messages and purchase solicitations. One of the CARU's most significant efforts is its Self-Regulatory Guidelines for Children's Advertising, which, although lacking the direct force of law, are – like the FTC's Fair Information Practice Principles – extremely influential and useful to advertisers, as well as e-commerce companies. Advertising for adult products should not be directed at minors. Advertising directed at minors may require additional disclosures, for example, separation from the content on broadcast advertising, and hosts of children's programmes may not advertise products on the programmes.

Credit and financial products

32 | Are there special rules for advertising credit or financial products?

Federal Reserve Board regulations govern advertising of financing terms. Truth in Lending Act disclosure under Regulation Z requires disclosure of certain terms, including the annual percentage rate of interest when any related representation is made (see 15 USC section 1601 and 12 CFR section 226). Consumer Leasing Act disclosures under Regulation M require disclosure of the following terms whenever any details of the lease terms are included in the advertising:

- 1 the lease;
- 2 the total amount to be paid up front, including security deposit;
- 3 the schedule of payments and total;
- 4 whether there is an option to purchase; and
- 5 the liability at end.

(See 15 USC section 1667 and 12 CFR section 213.) Regulations permit advertising on radio and television to include (1), (2) and (3) with the remaining disclosures on an 800-telephone number or in a print advert. The FTC has aggressively enforced these regulations in leasing advertising (see Grey Advertising, CCH Trade Rep, paragraph 24, 373).

Further, under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB has the authority to implement and enforce federal consumer financial law, and their purview is 'non-bank' financial companies that have historically fallen outside the domain of consumer protection agencies.

Therapeutic goods and services

33 | Are there special rules for claims made about therapeutic goods and services?

The US Food and Drug Administration (FDA) regulates advertising for drugs – essentially any claims that a product affects the body or

disease. Such advertising must present a fair balance between claimed benefits and disclosure of risks and side effects. All advertisements must be submitted to the FDA at the time of the initial dissemination (pre-clearance is the usual practice). Print advertising must include the 'brief summary' describing each specific side effect and contraindication in the FDA-approved labelling. Broadcast advertising must include a thorough description of the major risks in either the audio or in video and provide an effective means for consumers to obtain the approved labelling (see Guidance for Industry: Consumer-Direct Broadcast Advertisements). Off-label use (use of drugs other than as approved by the FDA) may not be advertised. Comparative claims must be supported by two well-controlled clinical studies.

Food and health

34 | Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

Under the Nutrition Labeling and Education Act of 1990, the FDA was required to develop definitions for food labelling of terms such as 'free', 'low', 'light', 'lite', 'reduced', 'less' and 'high'. The regulations for labels became effective in May 1994. The FTC opposed legislation to require food advertising containing nutrient content claims or health claims to conform to the FDA regulations as overly restrictive of advertising. In May 1994, the FTC issued an Enforcement Policy Statement on Food Advertising (59 Fed Reg 28,388). It gives great weight to the FDA definitions. Thus, advertising contrary to the labelling regulations is likely to be investigated by the FTC. The FDA defines a health claim as 'any claim that characterises the relationship of any nutrient to a disease or health-related condition' (21 CFR section 101.14(a)(1)). The health claims recognised by the FDA include calcium for osteoporosis, sodium and hypertension, fat and cholesterol in coronary disease, dietary fat and cancer, fibre found in fruits, vegetables and grains for cancer and heart disease, antioxidants found in fruits and vegetables for cancer and soluble fibre for heart disease.

Nutrient content claims characterised as 'absolute' (low, high, lean, etc), must be described in terms of the amount of the nutrient in one serving of a food, and claims characterised as 'relative' (less, reduced, more, etc), must be described in terms of the same nutrient in another product. Some of the most important definitions of 'low' are the following limits in the larger of a serving or 50g: 'low cholesterol' – no more than 20g; 'low sodium' – no more than 140mg; and 'low calorie' – no more than 40 calories. For 'reduced' or 'less', the regulations for 'calories', 'total fat', 'saturated fat', 'cholesterol', 'sodium' and 'sugars' require at least 25 per cent less per serving compared to an appropriate reference food. 'Healthy' cannot be used for any food high in fat or saturated fat. The FDA has also aggressively pursued labelling issues such as the use of 'fresh' as part of the name of orange juice that was processed and made from concentrate.

Under a memorandum of understanding between the FTC and FDA (36 Fed Reg 18,538 (1971)), the FTC has primary responsibility over food advertising. The FTC has been particularly active on health claims – see the following:

- *Tropicana Prods Inc*, File No. 0422-3154 (claiming cholesterol-reduction benefit);
- *Conopco Inc* (claiming that consumers can get 'Heart Smart' based on low saturated fat in Promise Margarine, but high total fat required – promise to include, in future advertising, total fat information);
- *England's Best Inc*, File No. 9320-3000 (serum cholesterol – corrective advertising ordered);
- *Stouffer Foods*, Dkt No. 9250 (low sodium – but order expanded by the FTC to cover 'any other nutrient or ingredient');
- *Bertolli Olive Oil*, File No. 902-3135 (health benefits of olive oil); and
- *Campbell Soup Co*, Dkt No. 9223 (sodium content).

The FTC's order against Kraft for misrepresenting the amount of calcium in its American cheese slices was based on literally true advertising of the calcium in the milk used in making the product, because some is lost during processing (*Kraft Inc v FTC*, 970 F2d 311 (Seventh Circuit 1992)). The FTC has also been particularly active in policing misleading low-fat claims (see *Haagen-Dazs Co*, File No. 942-3028).

The FTC has also shown great interest in weight-loss products and products touted as dietary supplements. See *FTC v Pacific Herbal Sciences Inc* (CD Cal 18 October 2005). Its consent orders require advertising to disclose:

- average percentage weight loss maintained;
- period of time maintained; and
- that 'for many dieters, weight loss is temporary'.

FTC policies and concerns are summarised in 'A Guide for the Dietary Supplement Industry' – see the following examples:

- *FTC v Enforma Natural Products Inc*, No. 04376JSL (CD Cal 26 April 2000) (US\$10 million consumer redress);
- *FTC v Window Rock Enterprises Inc* (CD Cal 21 September 2005) (US\$4.5 million);
- *FTC v SlimAmerica Inc*, No. 97-6072 (SD Fla 1999) (US\$8.3 million consumer redress); and
- *FTC v Airborne Health Inc* (CD Cal 13 August 2008) (US\$30 million consumer redress in conjunction with private class action lawsuit *Wilson v Airborne Inc* 2008 WL 3854963 (CD Cal 2008)).

Alcohol

35 | What are the rules for advertising alcoholic beverages?

Broadcasters have long voluntarily refused to air hard liquor adverts or even props or references in commercials for other products. NBC, in December 2001, proposed accepting them for airing after 9pm in connection with programming with an 85 per cent adult audience. Actors in the commercials would have to be over 30 years of age. Public objections forced NBC to abandon this experiment. Beverages with less than 24 per cent alcohol by volume may be advertised but are subject to special review in terms of safety, over-consumption, mood alteration, maturity or connection to athletic or other prowess. Models should be 25 years old and appear to be at least 21, and advertising should not be targeted at underage drinkers (see *Becks NA*, 127 FTC 379 (1999) (consent order) (young people holding beers on a sailboat at sea); and *Allied Domecq*, 127 FTC 368 (1999) (consent order) (5.9 per cent alcohol by volume misleadingly claimed to be a 'low alcohol' beverage, since the alcohol content is much higher than numerous other alcoholic beverages)). In March 2011, the FTC announced that it planned to conduct a new study of the self-regulatory efforts of the alcoholic beverage industry (see www.ftc.gov/opa/2011/03/alcohol.shtm). The study would serve as the foundation for the FTC's fourth major report on the efficacy of voluntary industry guidelines designed to reduce alcoholic beverage advertising and marketing to an underage audience. The FTC plans to explore alcoholic beverage company compliance with the following:

- 'voluntary advertising placement provisions, sales, and marketing expenditures';
- 'the status of third-party review of complaints regarding compliance with voluntary advertising codes'; and
- 'industry data-collection practices'.

Additionally, the Distilled Spirits Council of the United States (DISCUS) issued self-regulatory guidelines governing online marketing practices. The guidelines, which became effective on 30 September 2011, apply to marketing on social media sites and other digital communications platforms, including websites, blogs and mobile communications and applications. Key requirements of the new DISCUS guidelines include:

- 'age-gating' on websites before any direct communication between advertisers and consumers;
- regular monitoring and moderating of websites that include user-generated content, and removal of inappropriate content;
- instructions that content should only be forwarded to those who are of legal purchase age, where online content is intended to be forwarded by users;
- clear identification of online communications as advertising;
- social responsibility statements in all communications, where practicable; and
- standards for privacy policies.

The guidelines are intended to supplement, and be read in conjunction with, the DISCUS Code of Responsible Advertising Practices.

Tobacco

36 | What are the rules for advertising tobacco products?

Since 1971, broadcast advertising of cigarettes and little cigars has been banned by federal law. Broadcast advertising of smokeless tobacco was banned in 1986. Surgeon General's warnings are required in all print advertising. Tar and nicotine values measured in accordance with the FTC-approved test methodology are included in advertising based on a voluntary agreement with the FTC. The FDA lacks jurisdiction to regulate tobacco advertising (*FDA v B&W Tobacco Corp*, 529 US 120 (2000)). The multi-state settlement of tobacco litigation includes substantial limitations on permissible advertising (see www.columbia.edu/itc/hs/pubhealth/p9740/readings/master_settlement.pdf), including restrictions on the following:

- cartoon characters;
- outdoor, store window or stadium billboards;
- transit advertising;
- advertising seen by children;
- product placements;
- merchandise and sponsorships; and
- point-of-sale displays.

Recently, there has been an increase in action surrounding the sale and advertising of e-cigarettes, specifically. A number of class actions have been filed against manufacturers and marketers of e-cigarettes, and the FDA has issued statements regarding regulatory plans addressing the sale of e-cigarette devices to youths. Under a new Youth Tobacco Prevention Plan released in 2018, the FDA announced enforcement and regulatory actions against retailers responsible for selling e-cigarettes to minors, including a series of warning letters. The FDA has also announced its intention to limit the sale of certain flavoured e-cigarette posts to age-restricted locations in retail outlets.

Gambling

37 | Are there special rules for advertising gambling?

Prohibitions on depicting gambling in broadcast adverts for casinos, at least in states with lotteries, violate First Amendment rights (see *Greater New Orleans Broadcasting Association v US* and *US v Edge Bag Co*). However, national networks do not permit them, except state lotteries. Advertising for online gambling sites is not protected by the First Amendment (see *Casino City Inc v US DoJ*). The DoJ asserts that offshore gambling by customers in the United States violates sections 1084 (the Wire Act), 1952 (the Travel Act) and 12955 (the Illegal Gambling Business Act) of the US Code (Letter from John G Malcolm to National Association of Broadcasters, 11 June 2003). On 7 April 2005, the World Trade Organization ruled that the United States may restrict internet gambling (United States – Measures Affecting the Cross-Border

Supply of Gambling and Betting Services, WT/DS 285/AB/R). A number of states' attorneys general have also taken the position that online gambling from within the state violates state gambling laws. The state of Washington passed its Internet Gambling Act, SB 6613, effective from 7 June 2006, making it a Class C felony. Creating or publishing advertising may be viewed as aiding and abetting (see 18 USC section 2).

Lotteries

38 | What are the rules for advertising lotteries?

According to the FCC, a lottery is 'any game, contest or promotion that combines the elements of prize, chance and consideration'. Federal law generally prohibits the broadcast of any advertisement or information concerning a lottery. Advertisements or information about the following activities, however, are permitted:

- lotteries conducted by a state acting under the authority of state law, where the advertisement or information is broadcast by a radio or television station licensed to a location in that state or in any other state that conducts such a lottery;
- gambling conducted by an Indian tribe pursuant to the Indian Gaming Regulatory Act; or
- lotteries that are authorised or not otherwise prohibited by the state in which they are conducted, are conducted by a not-for-profit or governmental organisation or are conducted as a promotional activity by a commercial organisation and are clearly occasional and ancillary to the primary business of that organisation.

Casino gambling is a form of lottery because it has the elements of prize, chance and consideration. The FCC has determined that it is permissible to broadcast truthful advertisements for lawful casino gambling, regardless of whether the state in which the broadcaster is licensed permits casino gambling.

Promotional contests

39 | What are the requirements for advertising and offering promotional contests?

The terms 'contests' and 'sweepstakes' are often used interchangeably, but contests are usually promotions that have some element of skill to them. In skill contests, chance does not play a dominant role in determining the outcome. Examples include essay, cooking, and art and photography contests. Most states permit requiring a fee in a skill contest, although some require certain disclosures if a fee is required. Sponsors of skill contests should make sure skill determines the outcome; a tiebreaker should not be determined by chance. It is very important to set out the criteria for winning the skill contest and judging (by qualified judges) must be based on the criteria. The sponsor does not need to award a prize if no one satisfies the contest requirements (for example, getting a hole-in-one). The sponsor must be careful about what is said in advertising to avoid a deception issue. The following are not skill contests: answering multiple choice questions, guessing the number of beans in a jar and determining winners in upcoming sports events. See Terri J Seligman, 'Marketing Through Online Contests and Promotions', 754 PLI/ Pat 429, 438 (July 2003).

There are numerous state laws governing the administration and advertising of chance sweepstakes and skill contests in the United States. All states permit sweepstakes in connection with promotions of other products or services, provided that no consideration is required. For example, 'no purchase necessary' and an explanation of the 'alternate means of entry' must be prominently disclosed. In order to avoid creating an illegal lottery, one of the following must be eliminated: the award of a prize, determined on the basis of chance, where consideration is paid to participate. 'Prize' includes anything of tangible value. The

rules of the sweepstakes are the terms of an offer resulting in a contract and are subject to varying state law requirements.

Indirect marketing

40 | Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

The Lanham Act provides a cause of action where communication 'is likely to cause confusion . . . as to the affiliation, connection, or association of [the advertiser] with another [person, firm or organisation], or as to the origin, sponsorship, or approval of [the advertiser's] goods, services, or commercial activities by [the other person, firm or organisation]' (15 USCA section 1125(a)(1)(A)). It is not necessary to prove that consumers believe a party has endorsed the advertised product, only that consumers think the party has authorised the advertising or promotion. Disclaimers are a favoured way of alleviating consumer confusion as to source or sponsorship.

The Communications Act of 1934 and FCC Rules require that when consideration has been received or promised to a broadcast licensee or cable operator for the airing of material, including product placements, the licensee or cable operator must inform the audience, at the time the programme material is aired, both that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied.

Further, the FTC has said that disclosures may be needed when objective product claims are being made if consumers will be confused about whether those claims are being made by the advertiser or an independent third party. The reason for this is that consumers may give more weight to claims if they think that the claims are being made by someone other than the advertiser. The FTC said, however, that it does not believe that advertisers are generally using product placements to make objective claims about their products. Therefore, the FTC believes that it is not generally deceptive to fail to disclose when something is a product placement. The FTC has cautioned that it can still take action against an advertiser if a product placement is used to make a false claim.

Other advertising rules

41 | Briefly give details of any other notable special advertising regimes.

First Amendment protection for even commercial speech prohibits government regulation of truthful speech. Consequently, unless speech rises to the level of conduct, such as inciting violence or physical action (eg, crying 'fire' in a crowded theatre), there can be no government regulation. Political campaign advertising is not subject to regulation as to truth, and does not have to be substantiated.

SOCIAL MEDIA

Regulation

42 | Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?

Although sites like Facebook, Twitter, Instagram, TikTok, Pinterest, SnapChat and YouTube have transformed traditional notions of advertising, as the law in this area develops, it is becoming increasingly clear that legal principles governing 'traditional' advertising often apply equally to advertising via social media. Advertising through social media can implicate many areas of law, including copyright, trademark, right of publicity, defamation, unfair competition, union issues, idea misappropriation, obscenity and indecency, hate speech, other tort liability,

criminal law and privacy. Advertising involving user-generated content, which has become quite common on social media, can also pose special liability risks for advertisers. Social media advertising is also subject to the terms and conditions of the host platform's own terms of use.

43 | Have there been notable instances of advertisers being criticised for their use of social media?

The Federal Trade Commission (FTC) has reviewed numerous social media advertising cases in recent years. The FTC also issued a guidance document in 2019 called 'Disclosures 101 for Social Media Influencers' to encourage compliance. (See www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf).

The following are select examples of recent social media advertising cases before the Federal Trade Commission:

- *Teami LLC*: in March 2020, the FTC brought a complaint against tea and skincare company Teami alleging that the company and its owners made unsupported claims on social media and on the Teami website representing that their products would help consumers lose weight and provide other health benefits such as fighting cancer, decreasing migraines and more. The FTC also alleged that social media posts by company influencers included inadequate disclosures, as most were buried after the 'more' button in post captions. A proposed settlement order in the case prohibits the defendants from making unsupported health and weight loss claims, requires clear and conspicuous disclosures of material connections and imposes a US\$15.2 million judgment equal to the total sales of the challenged products. In addition to the action against Teami, the FTC also sent warning letters to 10 of the influencers alleged to have made inadequate disclosures.
- *Nudge*: in 2019, the FTC brought a complaint against Nudge LLC, alleging that the company made false claims in connection with their advertising for real estate investment training programmes. In August 2020, the FTC filed an amended complaint to add two of the company's celebrity endorsers as defendants. The FTC alleged that Nudge used the celebrities to 'draw consumers into attending training seminars that falsely promised to teach consumers a proven formula to make money by investing in real estate' and that they did so in part through promotions of the trainings on the celebrities' social media channels.
- *Devumi*: in 2019, the FTC settled with Devumi LLC and its CEO over claims that the company allegedly sold fake indicators of social media influence, including fake followers, subscribers, views and likes, to users across a variety of platforms. The settlement imposed a US\$2.5 million monetary judgment and bars the defendants from selling or assisting others in selling social media influence to users of third-party social media platforms.
- *Sunday Riley*: in 2019, the FTC settled with cosmetics company Sunday Riley Modern Skincare LLC over claims that the company's managers and CEO allegedly posted reviews of their products on a major retailer's website using fake accounts and without disclosing that they were employees of the company, and requested that other employees do the same.
- *TrueAloe and AloCran*: in October 2019, the FTC announced a settlement with two companies that sell aloe vera-based dietary supplements, which they claimed would help seniors with a variety of medical issues, such as diabetes, chronic pain and high cholesterol, in a safe manner without any side effects. The FTC's complaint alleged that NatureCity and its officers, who marketed and sold TrueAloe and AloCran, used testimonial reviews that appeared to be independently made; however, they did not disclose that the reviewers received free products or free lifetime memberships as compensation for providing reviews. The court order prohibits the

defendants from making false and unsubstantiated health claims and requires that they pay US\$537,500, which the FTC may use to provide refunds to defrauded consumers. The order also requires that the defendants disclose any material connection they have with the compensated reviewers. As part of the order, the defendants must clearly and conspicuously disclose to consumers all material connections with anyone providing an endorsement. In addition, the defendants must send notices about the settlements to consumers who purchased the aloe vera-based supplements. The order also imposed an US\$18.7 million judgment against the defendants, which will be partially suspended after they pay the US\$537,500 to the FTC.

- *Roca Labs*: the FTC action against weight loss supplement maker Roca Labs ended with a court order of a little over US\$25 million to provide redress to the defrauded consumers for the unjust gains of the defendants from their unlawful practices. Among the allegations brought against the defendants was that they failed to disclose material connections with endorsers (2019, decision and order).
- *Letters to Companies Selling Flavored E-Liquid Products*: in June 2019, the FTC and the US Food and Drug Administration jointly sent warning letters to four companies that market flavoured e-liquid products citing postings by influencers on social media sites endorsing the companies' products without including required product warnings and failing to include a disclosure about the influencers' material connection with the companies.
- *UrthBox*: the FTC alleged in their complaint that UrthBox offered consumers free snack boxes or store credit for posting their products on social media but 'had no procedures or policies in place to educate or monitor their endorsers' posts on social media or other third-party websites to ensure that the posts included material connection disclosures. The settlement includes barring the defendants from misrepresenting that an endorser of any good or service is an independent user or ordinary consumer of that good or service and requires that they clearly and conspicuously disclose any material connection with a consumer, reviewer or endorser. The order also requires UrthBox pay US\$100,000 to the FTC to refund affected consumers (2019, decision and order).
- *Creaxion Corporation*: in November 2018, the FTC settled with public relations firm Creaxion Corporation and publisher Inside Publications over a failure to disclose material connections in social media posts in a campaign to support FIT Organic Mosquito Repellent, created by Creaxion's client, HealthPro brands. Creaxion partnered with Inside Publications to run a campaign utilising social media posts from athlete endorsers, but the posts did not disclose the endorsers' connections to the brand. The settlement requires the companies to have endorsers sign written statements regarding their responsibility to disclose material connections, monitor endorsers' compliance and terminate an endorser for non-compliance if, after an opportunity to cure, the issue has not been remedied.
- *CSGO Lotto*: in September 2017, the FTC settled its first-ever complaint against individual social media influencers. The complaint was against two social media influencers who co-owned CSGO Lotto, an online service enabling customers to gamble using custom 'skins' from the online, multiplayer game Counter-Strike as virtual currency. The settlement relates to charges that the influencers, Trevor 'TmarTn' Martin and Thomas 'Syndicate' Cassell, deceptively endorsed CSGO Lotto without disclosing their ownership interests in the company and paid other influencers to promote CSGO Lotto on social media without requiring any sponsorship disclosures. The order settling the FTC's charges prohibits Martin and Cassell from misrepresenting that any endorser is an

- independent user or ordinary consumer and requires clear and conspicuous disclosures of any unexpected material connections with endorsers (*FTC v CSGO Lotto, Trevor Martin, and Thomas Cassell*, decision and order, No. 162 3184 (29 November 2017)).
- *Letters to Influencers*: in April 2017, the FTC sent over 90 letters to prominent social media influencers advising them to clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media. Later in September, the FTC followed up on these letters by issuing sterner warning letters to a group of 21 of the social media influencers previously contacted. The warning letters explained why specific social media posts may not comply with the guides and included requests that the recipients respond to the FTC. The letters included specific concerns about various influencer practices including:
 - consumers viewing Instagram posts on mobile devices typically see only the first three lines of a longer post unless they click 'more', which many may not do. When making endorsements on Instagram, influencers should disclose any material connection above the 'more' button;
 - a disclosure among multiple tags, hashtags or links is unlikely to be conspicuous as readers may just skip over them, especially when they appear at the end of a long post. Influencers should either put the material connection disclosure at the beginning of the post or avoid multiple tags, hashtags or links if the material connection disclosure is placed at the end of the post; and
 - a disclosure like '#sp', 'Thanks [Brand]', or '#partner' in an Instagram post is not sufficiently clear. The influencer should use '#ad' or '#sponsored', or craft an alternative disclosure that makes the material connection sufficiently clear.
 - *Lord & Taylor*: in 2016, the FTC alleged that Lord & Taylor deceived consumers by paying for native advertisements, including an article published online by the fashion magazine Nylon, a Nylon Instagram post and other incentivised social media posts by fashion influencers, without disclosing that the posts were actually paid promotions for the company's 2015 Design Lab collection. Among other charges, the FTC alleged that Lord & Taylor gave the influencers a free paisley dress and paid them between US\$1,000 and US\$4,000 each to post a photo of themselves wearing it on Instagram or another social media site. Lord & Taylor pre-approved each proposed post, and the influencers were obliged by contract to tag '@lordandtaylor' as part of the posts and to use the hashtag '#DesignLab' in the caption of the photos. According to the FTC, Lord & Taylor failed to require the influencers to disclose that they received the dresses for free or were paid by Lord & Taylor for their posts (consent order).
 - *Deutsch LA*: ad agency Deutsch LA settled FTC allegations that agency employees promoted its client Sony's products on Twitter without disclosing that they were agency employees (*FTC v Sony and Deutsch LA* (2014) (consent order)).
 - *In the matter of ADT LLC*, File No. 122 3121 (24 June 2014) (consent order): the FTC charged alleged violations by ADT of section 5 of the FTC Act in connection with the company paying US\$300,000 (giving US\$4,000 worth of security products) to spokespeople hired to review, demonstrate and plug ADT's Pulse Home Monitoring System on high-profile TV and radio shows, and across the internet in articles and blog posts, without disclosing that they were paid to do so. The FTC's investigation also extended to Pitch Public Relations, LLC (the public relations firm), Village Green Network (the advertising network that published the blog posts), News Broadcast Network (the booking agency) and even one of the experts herself, Alison Rhodes-Jacobsen, when the FTC had not previously publicly addressed the obligations of an intermediary (ie, a party facilitating payments from a marketer to an endorser) for the failure of endorsers to disclose material connections with marketers.
 - *Cole Haan Inc*, FTC File No. 142-3041 (20 March 2014) (closing letter): the FTC investigated Cole Haan's alleged violation of the endorsement guides in connection to Cole Haan's 'Wandering Sole Pinterest Contest', which instructed entrants to create Pinterest boards with images of Cole Haan shoes and pictures of their 'favorite places to wander' for a chance to win a US\$1,000 shopping spree, but did not instruct contestants to label their pins and Pinterest boards to make clear they were pinning Cole Haan products in exchange for a contest entry.
 - *In the matter of Hyundai Motor America*, FTC File No. 112-3110 (16 November 2011) (closing letter): the FTC investigated Hyundai where bloggers were given gift certificates as an incentive to comment on or post links to the advertisements and were explicitly told not to disclose this information.
 - *FTC v Reverb Communications Inc* (August 2010) (proposed consent order): marketing and PR agency Reverb, hired by video game developers, settled charges that its employees posed as consumers and posted game reviews online without disclosing their affiliation with Reverb.
- There have also been a number of cases involving social media before the National Advertising Division (NAD):
- In 2020, NAD reviewed influencer videos promoting the Procter & Gamble Company's Bounty paper towels featured on TikTok and other platforms such as Instagram. NAD took issue with the lack of material connection disclosures on platforms such as Instagram, noting that when the videos were initially shared on TikTok the disclosures were properly included, but that they did not properly transfer when the videos were transferred to other platforms. The advertiser agreed to take new steps to ensure proper disclosures are included when the TikTok videos are transferred between platforms.
 - As part of its routine monitoring programme, NAD released a decision in 2020 concerning a social media post for Provezza Elderberry Syrup that claimed to provide 'Potent Immune Support During A Severe Season' and claimed that 'Provezza is highly concentrated to deliver antioxidant action for immune defense'. NAD was concerned that the post conveyed the implicit message that taking the product could protect users against covid-19. As such, NAD recommended the advertiser discontinue the post.
 - Also in 2020, the Children's Advertising Review Unit (CARU), through its routine monitoring practice, reviewed the social networking platform Discord, following concerns that the platform was attracting a large number of children under 13 and therefore would be considered a platform directed towards children and subject to CARU's guidelines. CARU ultimately determined that the platform is not primarily or secondarily directed to children under 13, relying on elements such as Discord's terms of service, which prohibit children under 13 from creating accounts; a Discord programme of monitoring the platform and responding to under-age use reports; and a lack of advertising directed at such an audience.
 - NAD also recently opined on the extent to which an advertiser is required to remove older non-compliant social media posts. In a compliance action to assess whether Molekule Inc had made a good faith attempt to bring its advertising into compliance with a previously issued NAD decision, NAD observed that Molekule had not removed certain videos from its previously posted social media posts. While declining to set a bright line rule regarding how far back an advertiser must remove posts, NAD 'urged' the advertiser to remove old non-compliant post 'as expeditiously as possible'.

- The Electronic Retailing Self-Regulation Program (ERSP) (a programme connected to NAD and focused on the direct-response industry), has also opined on social media. In 2019, ERSP issued a decision regarding social media advertising for Alo Yoga, including the identification of about 60 social media accounts of influencers with an apparent connection to the brand. ERSP took issue with the lack of disclosure on the influencers' posts that mentioned or tagged Alo. Upon Alo's confirmation during the inquiry that several of the influencers did in fact have a connection, ERSP 'recommended that any endorsements made by Alo Yoga influencers be modified to include the necessary disclosure, and that any material connections continue to be disclosed on future endorsements pursuant to the FTC Guides.'
- The NAD also brought two actions in connection with advertising for FitTea: one against the advertiser, FitTea, itself, and one against its endorser, Kourtney Kardashian. In the action against FitTea, the NAD was concerned about the republication of Instagram posts on its website by the advertiser's paid endorsers because they did not include a disclosure of the material connection. FitTea agreed to include '#Ad'. The NAD was also concerned about the use of consumers' product reviews on its website, although the reviews were collected appropriately, with no incentive, and were not edited before their publication on the advertiser site. The NAD was thus concerned that their placement next to paid product endorsements could confuse consumers. The NAD determined that it is important for consumers to distinguish between independent reviews and testimonials. It also reiterated its position that the use of product reviews on an advertiser's website is not misleading if the advertiser can show that it collects them in a systematic way, posts them all and collects them from a representative sample of consumers who purchase the product. As to the Kardashians themselves, the NAD was concerned that they were not disclosing the fact that they were being paid to endorse the product (*Fit Products (FitTea)*, NAD Case No. 6042 (December 2016); *Kardashian, Kourtney, et al. (FitTea)*, NAD Case No. 6046 (January 2017)).
- In the 2016 *BodyArmor* case, the NAD looked at the brand's links on its social media pages to consumer blogs with unsubstantiated claims, such as that BodyArmor is all natural and that Gatorade was junk. The NAD made clear that when an advertiser reports or links to third-party content on its own social media pages, it is responsible for the truthfulness and accuracy of that content (*BA Sports Nutrition (Body Armor SuperDrink)*, NAD Case No. 6026 (November 2016)).

44 | Are there regulations governing privacy concerns when using social media?

Use of social media for advertising purposes could implicate numerous privacy laws and regulations in the patchwork of federal, state and sector-specific privacy laws and self-regulation. Historically, most privacy enforcement actions have been brought against companies by the FTC and state attorneys general based on alleged violations of consumer protection and sector-specific laws. The FTC has held in numerous instances that failure to disclose practices or adhere to statements made in a published privacy policy is actionable as false advertising. The FTC has also held that the failure to take appropriate security measures to protect customers' personal information, including sensitive financial information, is actionable. In 2018, US privacy law fundamentally changed with the enactment of the California Consumer Privacy Act (CCPA), the first comprehensive state privacy law and the de facto standard for privacy compliance. The CCPA, effective January 2020, governs the processing of personal information of California residents, provides California residents with the rights to know, delete and opt-out of the sale of their personal information to third parties, and

allows for significant penalties in the event of a violation (including through a private right of action). In November 2020, California voters approved a ballot measure to enact the California Privacy Rights Act (CPRA), which amends the CCPA to further expand protections for California residents. The CPRA takes effect in January 2023 with a look back period to January 2022. Those that the California law touches will have to provide an unprecedented level of transparency to consumers regarding data collection, with the law even granting California residents the right to opt-out of the sharing or disclosure of certain types of data. While other states have considered comprehensive privacy legislation, none have passed such legislation to date.

Scrutiny of social media has significantly increased in recent years, and companies must be extra careful when using social media. Below are some instances where privacy law may be implicated through use of social media:

- where a business directly interacts with users on its brand website or through a chatbot on a social media platform, the collection of information about those users is subject to privacy law;
- where a business obtains information publicly available through a social media platform (such as information posted by users or provided through a developer API), the collection of information about those users is subject to privacy law;
- where a business integrates pixels or other tracking technologies offered by a social media platform into its own website or app (such as for purposes of re-targeting or campaign measurement), the collection of information through those technologies is subject to privacy law; and
- where a business uploads a customer list to a social media platform for matched advertising (such as Facebook Custom Audiences), or uses a third party to provide its own data or conduct campaigns, the provision of information is subject to privacy law.

Additionally, California law requires commercial website operators that collect personal information from consumers residing in California to post a privacy policy that clearly and conspicuously discloses its data practices, including the use of any tracking technologies and available choice for users. If a business engages in targeted advertising in connection with a social media platform, it should carefully review Do Not Sell obligations under the CCPA as well as self-regulatory guidelines issued by the advertising industry, including the Digital Advertising Alliance Self-Regulatory Guidelines, enforced by BBB National Programs and the Network Advertising Initiative Code. These self-regulatory obligations may apply to all participants in the advertising ecosystem, including advertisers, publishers, agencies and technology providers.

Collection of information from children poses another significant concern for social media. The Children's Online Privacy Protection Act (COPPA) limits the types of information a company can collect from children under the age of 13 and the purposes for which it uses children's data. Businesses are prohibited from collecting personal information (which is broadly defined to include IP addresses and other persistent identifiers) from children without verifiable parental consent, or unless it collects such information to support the internal operations of the website, or under another exception. Violations carry heavy penalties. While most social media platforms prohibit children from registering with their services, businesses cannot rely solely on those registrations to protect them from liability under COPPA with respect to child-directed content. In addition, businesses could run afoul of COPPA by integrating social media tracking technologies into their child-directed websites without providing proper notice and obtaining parental consent. Regulators in the United States have recently focused on alleged COPPA violations caused by the use of third-party cookies and other tracking technologies. In September 2019, the FTC announced a record settlement based on allegations that the YouTube video sharing

platform collected personal information – in the form of persistent identifiers – from children without parental consent, and with knowledge that the users were children. Although past enforcement actions have largely targeted publishers, this and other recent settlements highlight the risks extending to companies operating tracking technologies and advertisers associated with these technologies under COPPA.

There are numerous other US federal and state privacy laws that could be implicated through the use of social media, including the Health Insurance Portability and Accountability Act, the Federal Credit Reporting Act, the Gramm-Leach-Bliley Act, the Telephone Consumer Protection Act and state breach notification laws. Some state statutes, most notably the Biometric Information Privacy Act of Illinois, restrict the collection of biometric data and even provide users with a private right of action. In addition, to the extent the use of social media involves the processing of data originating outside the US, international law may apply (including Europe's comprehensive General Data Protection Regulation), which may significantly restrict or entirely prohibit certain social media campaigns and practices.

UPDATE AND TRENDS

Recent developments

45 | Are there any emerging trends or hot topics in your jurisdiction?

No updates at this time.

Coronavirus

46 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There have been a variety of covid-19-related actions brought by various enforcement bodies throughout the pandemic. As of December 2020, the Federal Trade Commission (FTC) issued over 380 warning letters to companies for allegedly making deceptive or unsupported claims about their products' ability to cure covid-19. In at least one instance, the FTC sued a company for failing to comply with a warning letter's request. State attorneys general have similarly stepped in. For example, the Arizona attorneys general sent a warning letter to an Arizona church alleging that its claims about its air purification systems violated the state's consumer fraud act and the Tennessee attorneys general settled with a cleaning products company that allegedly made deceptive and misleading claims that its products and services were approved by the Food and Drug Administration and Environmental Protection Agency. The National Advertising Division has also stepped in, opening numerous cases under its routine monitoring programme focused on companies making false and deceptive covid-related claims.

Additionally, there has been enforcement and regulation surrounding price gouging practices in light of the pandemic. Price gouging laws have been enacted at both the state and local level. For example, New York City adopted a new price gouging rule in 2020 making it illegal for businesses to increase prices by 10 per cent or more (unless they are paying more to obtain the items themselves) and applies to any products or services essential to health, safety and welfare during a declared state of emergency. State attorneys general have stepped in as well, bringing complaints against companies alleging violations of various price gouging regulations.

Guidelines have also been passed pertaining to commercial productions during the pandemic. The Association of Independent Commercial

Frankfurt Kurnit

Terri Seligman

tseligman@fkks.com

Jordyn Eisenpress

jeisenpress@fkks.com

28 Liberty Street

New York 10005

United States

Tel: +1 212 980 0120

Fax: +1 212 593 9175

www.fkks.com

producers entered into an agreement with the Directors Guild of America, the International Alliance of Theatrical Stage Employees and the Teamsters that requires rigorous covid-19 protocols for productions, including but not limited to: mandating a negative covid-19 test result prior to commencement of employment; a zone system with additional testing requirements; a stipend for time spent getting tested; and sick leave compensation. Each production must also include a covid-19 compliance manager with specialised training who will be responsible for compliance and enforcement.

Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)