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Advertising & Marketing 2022

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Advertising and Marketing: 2022 in Review

Although the COVID-19 pandemic continues to affect many parts of the globe, for the most part, it is gradually being left in the past. As consumers and advertisers return to pre-pandemic life, there has been a shift in priorities for advertising regulators around the world. Where attention was, for a time, focused on combatting practices that arose as consequences of COVID-19, regulators have returned their primary attention to broader areas of interest, with the pandemic only accelerating a renewed focus on the digital economy.

In the last year, there has been an explosion in novel uses of advertising through the introduction of new technologies like augmented reality, virtual reality (the precursor to the metaverse), non-fungible tokens (NFTs) and cryptocurrency. Around the world, advertisers' interest in the digital economy shows no signs of waning.

So, while general marketing and advertising concepts continue to dominate the contents of this guide as they continue to apply to new technologies, this year's guide will also explore new emerging themes of the digital economy, such as the regulation of dark patterns and growth marketing, and how new technologies are fundamentally changing marketing and advertising concepts and practices. The guide will also address developing sub-areas of advertising and marketing law, such as greenwashing regulation and the restriction of disinformation and misinformation.

NFTs

The prevalence of NFTs – the unique digital assets that connect ownership to digitalised items such as works of art, real estate, music or video - continued to rise throughout the pandemic, particularly as advertisers embraced NFTs as a new means of increasing brand visibility and secondary revenue streams. However, increased use of NFTs has uncovered new legal challenges. For instance, the pervasive use of NFTs as prizes in contests and sweepstakes brought to light new challenges and considerations, such as the question of how to determine the approximate retail value of an NFT, which may significantly increase or decrease during the contest or sweepstakes period, as a result of the volatile nature of NFT prices. It has been common for intellectual property issues to arise as to whether copyrights and/or trade marks associated with an NFT have been adequately transferred.

Cryptocurrency

Cryptocurrency, digital currency in which transactions are processed through a decentralised system rather than by a centralised authority, gained popularity during the pandemic. In light of its potential for astronomical returns, regulators around the world have sought to crack down on false and misleading claims, such as those that resulted in pyramid schemes that promised large returns for a small cryptocurrency payment, as well the promotion of cryptocurrency by influencers and celebrities.

Unlike most other forms of new digital technologies, non-advertising authorities have been heavily involved in trying to regulate the advertising and marketing of cryptocurrency. Earlier this year, the UK's Financial Conduct Authority unveiled plans to regulate the advertising and marketing of cryptocurrencies by making them subject to the same regulations as marketing for other financial products such as shares and insurance. In Canada, provincial securities regulators have indicated their intention to regulate in

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this space, while the Canadian Securities Administrators and the Investment Industry Regulatory Organization of Canada (IIROC) have published guidance on the application of securities legislation and IIROC rules to the advertising, marketing and social media activities of crypto trading platforms and cryptocurrency service providers (CSPs).

Other jurisdictions have taken an even stricter approach. In early 2022, Singapore's financial regulator issued guidance prohibiting CSPs from advertising their services through any public channel, including television, billboards and social media, permitting them only to advertise and market cryptocurrencies through their own social media accounts or corporate websites.

Augmented reality and virtual reality

Augmented reality, the integration of digital information and assets within a user's environment in real time, and virtual reality (home of the metaverse), provide new and original opportunities for marketers. While existing legal principles continue to apply to these new technologies, they bring about novel issues.

An influx of computer-generated influencers and avatars in consumers' augmented reality, and even more commonly in the metaverse, has reached prominent levels. Unlike human influencers, these virtual influencers are fully controllable and can subtly but persuasively communicate an advertiser's messaging, leading to challenges in ensuring adequate disclosure of material connections.

As these novel practices become more widely known and used, courts and regulators are beginning to address the resulting legal issues in varying ways. In Europe, the fact that virtual influencers are generally not considered "persons" brings into question whether transparency rules apply, and even whether general advertising rules apply. In the United States, the Federal Trade Commission recently proposed an update to the influencer guidance to expand the definition of influencers to expressly include virtual influencers, in order to avoid this ambiguity.

Big tech regulation

Big tech organisations, as the creators of some of these new technologies, continue to have strong involvement in the advertising and marketing on their platforms. In the recent past, there has been an increasing trend of regulators seeking to crack down on perceived self-preferencing.

In the EU, lawmakers have passed sweeping legislation aimed at curbing big tech's influence in the form of the Digital Services Act (DSA) and the Digital Markets Act (DMA), which would further regulate marketing and advertising, including by limiting the industry's ability to favour its products and services through positive rankings. Under the reforms, big tech gatekeepers, which are broadly defined and include large search engines, social networks and video-sharing platforms, would be subject to various transparency obligations (such as making the internal workings of their advertising and ranking algorithms more transparent), ostensibly to level the playing field for competitors who also use the platform to advertise competing products and/or services.

US legislators have made a similar move with the introduction of the American Innovation and Choice Online Act, which would take a similar stance. Although the legislation has cleared the Senate Judiciary Committee, the bill continues to be highly debated in advance of the country's approaching 2022 midterm elections.

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Dark patterns

Dark patterns refer to user interfaces or design elements that have been carefully crafted to obscure, mislead, coerce and/or deceive users into making unintended and potentially harmful decisions. As these tactics rise in popularity in certain areas of marketing and advertising, regulators across the globe have begun to prioritise addressing the potential negative effects of dark patterns.

In the EU, the DSA will ban dark patterns and misleading practices aimed at manipulating users' choices and capitalising on those choices through advertising and marketing. In the US, the Federal Trade Commission released an enforcement policy statement warning companies against the deployment of illegal dark patterns, and it more recently launched a public consultation aimed at developing guidance on the use of dark patterns.

Growth marketing

While growth marketing as a concept has been around for more than a decade, it has only surged in popularity in the past few years with the rise of the digital economy, and it is now often referred to as the next frontier of marketing. Although growth marketing can be defined in various ways, it is ultimately a marketing strategy focused on sustainably and profitably growing a business line by attracting, engaging, and/or retaining customers, typically achieved through merging data analytics with rapid experimentation across various channels (eg, email, websites and social media).

Despite the benefits to marketers and advertisers associated with growth marketing strategies, there are various intricate legal risks to consider, such as misleading representations, as they relate to the collection and use of personal data, dynamic and pricing discrimination, and the proper presentation and qualification of refer-a-friend programmes with monetary incentives.

Disinformation and misinformation

The use of disinformation and misinformation in advertising and marketing grew exponentially during the course of the pandemic, as the world shifted online. While the rise of misinformation online and on social media was first notably linked to COVID-19, misinformation has been tied to all elements of life, such as local politics, geo-politics and social injustice. As a result of rising misinformation, regulators around the world are trying to tackle this issue. For example, EU legislators, through the DSA, have created rules for big tech against manipulation that may result in fake news and content. These rules create new expectations for conventional advertisers and marketers, particularly those that leverage influencers and consumer- or user-generated materials as part of advertising campaigns.

Greenwashing and environmental claims

As consumers become more sustainability conscious, advertisers and marketers have increasingly focused on advertising the sustainability of their products. While this is not a new phenomenon, nor one that is yet to receive enforcement attention from regulators, the environmental claims today are increasingly viewed through a real-time lens of climate change and global consequences of environmental decisions.

The advent of a new level of environmental and sustainable claims has increasingly become the subject of regulators' renewed scrutiny and focus across the globe, with a sharp increase in attention on representations about the environmental impacts of products and their life cycle.

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Baker McKenzie provides, through its Canadian advertising and marketing practice, full-service Canadian advertising and marketing support to leading domestic and international companies, focused on food, cosmetic, drug, device and consumer product safety, packaging and labelling compliance; misleading advertising and deceptive marketing practices compliance; marketing-related privacy, anti-spam and direct marketing regulation; consumer protection, e-commerce and online sales regulation; complex contests, sweepstakes and promotions; social media and digital marketing risk management; advertising clearance, standards and consumer/trade complaints; interface and advocacy with advertising regulators; and marketing-related commercial agreements. The practice has a long record of success in serving leading clients in the Canadian market, including high-profile domestic and international companies in sectors including food and beverage, fashion and luxury, cosmetics and personal care, pharmaceutical and health products, consumer electronics and retail.

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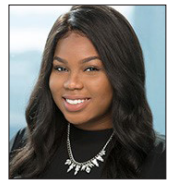

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BELGIUM

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1. Legal Framework and Regulatory Bodies

1.1 Primary Laws and Regulation

General Rules on Advertising

The most important instrument containing general rules on advertising practices in Belgium is the Belgian Economic Law Code (ELC).

The following sections of the ELC are particularly relevant with regard to advertising.

- Article I.8, which contains the definitions of advertising and comparative advertising. Advertising is broadly defined as "any communication aimed directly or indirectly at promoting the sale of products, regardless of the place or means of communication used". Comparative advertising is defined as "any form of advertising in which a competitor or goods or services offered by a competitor are explicitly or implicitly mentioned".
- Book VI of the ELC, which contains various general provisions on advertising (Article VI.6 ff), comparative advertising (Article VI.17 ff), as well as unfair commercial practices (including advertising and marketing practices), both in the B2C and B2B context (Article VI.92 ff). Part of this legislation is the implementation of the EU Directives on misleading and comparative advertising (Directive 2006/114/EC) and unfair commercial practices towards consumers (Directive 2005/29/EG).
- Articles 64-68 of the ELC and Articles 123-124 of Book VII of the ELC, which contain specific provisions relating to the advertising of consumer and mortgage credits.
- Book XII of the ELC and the related Royal Decree of 4 April 2003 regulating the sending of advertising by electronic mail, which contain provisions on online advertising.

Specific Legislation

There is also specific legislation prohibiting, restricting or dealing with certain types of advertising (amongst others, product-related advertising restrictions and advertising restrictions relating to the means of communication or the content of the advertising). Some of these provisions are the implementation of international conventions, EU Regulations or EU Directives. By way of example, such provisions can be found in:

- The Act of 24 January 1977 on the protection of the health of users in the field of food and other products, which prohibits tobacco advertising and sponsorship, etc.
- The Act of 25 March 1964 on medicines for human use and the Royal Decree of 7 April 1995 on information and advertising on medicines for human use.
- The Royal Decree of 17 April 1980 on advertising for foodstuffs (in addition to the rules as set out in EU legislation – eg, EU Regulation 1169/2011 on the provision of food information to consumers and EU Regulation 1924/2006 on nutrition and health claims made on foods).
- The Act of 8 June 2006 regulating economic and individual activities with weapons, containing a prohibition on advertising for illegal weapons and a restriction for advertising weapons for which a licence is required.
- The Act of 7 May 1999 on games of chance, gambling, gaming establishments and the protection of players and the Royal Decree of 25 October 2018 on the conditions for operating games of chance and betting through information society instruments, containing limitations on advertising for games of chance, gambling and gaming establishments.

- The Act of 23 May 2013 regulating the qualifications required to perform procedures of non-dental aesthetic medicine and aesthetic surgery and regulating the advertising and information concerning such procedures, which prohibits advertising for cosmetic surgery (Article 20/1).
- The Act of 23 January 2002 concerning the advertising of motor vehicles.
- The Flemish primary school Decree of 25 February 1997, restricting advertisements in primary schools.
- The Flemish Decree of 29 March 2009 on radio and television broadcasting, containing advertising and sponsorship restrictions for broadcasters.
- The French Decree of 4 February 2021 on audio-visual media services and video sharing services, containing advertising and sponsorship restrictions for broadcasters.

Self-Regulatory Codes

In addition to the legal framework, there are also various self-regulatory codes regulating advertising within a specific industry (eg, the Belgian convention on alcohol marketing), in a certain context (eg, sport regulations restricting advertising in sports) or more generally (eg, the consolidated ICC Advertising and Marketing Communications Code).

1.2 Enforcement and Regulatory Authorities

The regulatory authority responsible for enforcing the advertising provisions under the ELC is the Federal Public Service (FPS) Economy (and more specifically, the Directorate-General Economic Inspection (in Dutch: "*Algemene Directie Economische Inspectie*"; in French: "*Direction Générale de l'Inspection Economique*"). Enforcement can be done through the initiation of cease-and-desist actions, through warnings, administrative fines, or the proposal of settlement offers.

With regard to more specific legislation containing advertising regulations, other authorities may also be charged with enforcement. For instance, the contractual personnel of the Federal Public Service Public Health, Food Chain Safety and Environment monitors the implementation of the provisions of the Act of 24 January 1977 on the protection of the health of users in the field of food and other products (which prohibits, inter alia, tobacco advertising and sponsorship) and its implementing decrees.

Advertising violations may also be subject to criminal prosecution by the public prosecutor.

1.3 Liability for Deceptive Advertising

General

For violations of restrictions placed on the content of advertising and/or the products advertised, the advertiser could, in principle, be held liable.

Conversely, if advertising prohibitions or restrictions relate to the means of communication of the advertising (eg, advertisements close to highways, online advertisements) or the context surrounding the publication of the advertisement (eg, advertising in primary schools or in a sports context), then, in principle, the person publishing, broadcasting, setting up or maintaining the advertisement through such means or in such context will be held accountable. This can also be the advertiser, but this is not necessarily the case.

The legislator may, however, deviate from the above-mentioned principles and/or hold other persons jointly liable, for example, those who assist in the creation of the advertisement. For

example, Article XV.69 of the ELC expressly stipulates that the provisions on criminal complicity apply unless expressly excluded.

Cease-and-Desist Actions for Violations of Book VI of the ELC

For cease-and-desist actions in response to violations of Articles VI.17, VI.93-VI.95, VI.105 and VI.106 of the ELC (including cease-and-desist actions relating to deceptive advertising), the legislator provided for a specific cascade liability on the basis of which a cease-and-desist action can also be initiated against the following in order of priority:

- the publisher (written advertisement) or the producer (audio-visual advertisement);
- the one printing or creating the advertisement; and
- the distributor of the advertisement, in case the advertiser, the publisher/producer or printer/creator, respectively, is not domiciled in Belgium and has not appointed a responsible person domiciled in Belgium (Article XVII.10, ELC).

The liability of the aforementioned persons is purely an objective one and does not require the publisher, producer, printer, creator or distributor to be at fault. Since the cascade system is only designed for bringing a cease-and-desist action, and the application of the system does not require the publisher/producer, printer/creator or distributor of the advertisement to be at fault, no civil, criminal or administrative sanctions can be imposed on them merely on this basis.

1.4 Self-Regulatory Authorities

The "*Jury voor Ethische Praktijken inzake Reclame*" or "*Jury d'Ethique Publicitaire*" ("Jury for Ethical Advertising Practices" - JEP) is the self-regulatory body of the advertising sector in Belgium. The JEP examines whether the content of advertising messages conforms to the rules of advertising ethics, basing itself on legislation and self-regulatory codes.

The following persons can submit a complaint to the JEP: consumers, consumer organisations, sociocultural associations, professional associations/federations, members or representatives of an official body or public authority. In addition, advertisers, advertising agencies and distributors of advertisements (eg, media) may also submit a request to the JEP to obtain an advisory opinion on an advertising campaign.

If the JEP considers that the advertising does not contain any element that violates the applicable legislation and/or self-regulatory codes, it will not make any comments. This does, however, not imply that the JEP approves the advertisement in question. In the event of a dispute, the courts can still decide that the advertisement is illegal.

If the JEP considers that the advertising message contains editorial and/or visual elements that do not comply with the legislation or codes, it will issue a request to modify or stop the advertising, depending on the nature and extent of the violations. This decision will be addressed to the responsible advertiser. If no action is taken by the advertiser or in the absence of a response, the JEP will address a suspension recommendation to the media, which supports the JEP's work and has undertaken to comply with its decisions.

As the JEP is a self-regulatory authority, its decisions are in principle only binding for its members. However, if no action is taken by the advertiser or in the absence of a response, the JEP will address a suspension recommendation to the

media, which supports the JEP's work and has undertaken to comply with its decisions.

Apart from the self-regulatory codes that are applied by it, the JEP has also issued various recommendations on many sub-topics in advertising such as:

- depictions of persons;
- use of humour;
- advertising for children's holidays;
- advertising for isolation, fuel and heating;
- non-commercial advertising;
- advertising for weight loss products; and
- influencer marketing.

1.5 Private Right of Action for Consumers

Any interested party may bring a cease-and-desist action before the court. Apart from a cease-and-desist action, injured persons may also bring other claims, such as a claim for damages or for the recall, destruction or removal of the infringing advertising material. They can also demand the publication of the judgment rendered. As an additional (civil) sanction, in case an agreement has been concluded with a consumer as a result of an unfair market practice, a consumer may be entitled to the reimbursement of the amounts paid by it, without having to return the product supplied to it (Article VI.38, ELC).

Damaged parties may also file a complaint to bring/initiate a criminal action in the criminal courts, to the extent the violation in question is subject to punishment by criminal sanctions.

The FPS Economy has a consumer "Contact Point" to report (alleged) violations of advertising regulations and other consumer protection laws.

An out-of-court dispute settlement may also be pursued by the consumer through the Consumer Ombudsservice (Articles XVI.5-XVI.23, ELC).

Consumers can also file a complaint with the JEP.

1.6 Regulatory and Legal Trends

Implementation of Omnibus Directive

The most important legal trend in the past 12 months regarding (deceptive) advertising is the implementation of the Omnibus Directive (Directive (EU) 2019/216 on the better enforcement and modernisation of Union consumer protection rules).

The Belgian transposition of the Omnibus Directive (EU) 2019/2161 entered into force on 28 May 2022.

Expected Regulation on Advertising of Cryptocurrencies

On 19 July 2022, the existing Act of 2 August 2002 on the supervision of the financial sector and financial services (Financial Supervision Act) was amended to grant new supervisory powers to the Financial Services and Markets Authority (FSMA) regarding the promotion of virtual currencies to non-professional investors. The FSMA is currently working on a draft regulation to regulate the advertising and marketing of virtual currencies (see **9.1 Cryptocurrency and Non-fungible Tokens (NFTs)**).

1.7 COVID-19, Regulation & Enforcement

Partly in response to the fact that the number of gamblers has dramatically increased during the COVID-19 pandemic, the Belgian government is preparing a new Royal Decree to ban all advertising for games of chance and gambling by the end of 2022. Also, sport sponsoring by gambling

operators would be prohibited (albeit subject to a transition period).

Another noticeable development since the pandemic is that the authorities have generally become more active in enforcing regulatory requirements (including advertising regulations).

1.8 Politics, Regulation and Enforcement

No changes in the political climate or administration have impacted the regulation of advertising and/or the enforcement of advertising regulations.

2. Advertising Claims

2.1 Deceptive or Misleading Claims

General Principles

As a general rule that applies both in a B2C and in a B2B context, commercial practices (including advertising and the claims contained therein) may not be unfair.

Pursuant to the general rule of Article VI.93 of the ELC, a commercial practice is unfair if it is contrary to the requirements of professional diligence and materially distorts or is likely to materially distort the economic behaviour of the average consumer whom it reaches or targets, with regard to the underlying product.

In B2B relations, it is prohibited for a company to take any action that would violate fair market practices as a result of which the professional interests of one or more other companies are harmed or may be harmed (Article VI.104, ELC).

In addition to the general "unfairness" prohibition, a commercial practice will in any event be considered unfair if it is either misleading or aggressive.

Misleading Commercial Practices towards Consumers (Articles VI.97 - VI.100, ELC)

Black list

Article VI.100 of the ELC provides for a "black list" of commercial practices that are irrefutably considered misleading towards consumers under all circumstances. This black list includes practices such as:

- claiming to have signed a code of conduct when this is not the case;
- falsely claiming that a product will only be available (under certain conditions) for a very limited time, in order to make the consumer decide immediately, giving them no time or insufficient time to make an informed decision;
- claiming or otherwise giving the impression that a product can be legally sold when it cannot;
- making factually incorrect claims concerning the nature and extent of the danger that would threaten the personal safety of the consumer or their family if the consumer does not purchase the product;
- falsely claiming that a product can cure diseases, defects or malformations;
- describing a product as "free" or "at no charge" if the consumer has to pay something other than the unavoidable cost of accepting the offer and collecting the product or having it delivered; and
- claiming that product reviews have been submitted by consumers who have actually used or purchased the product, without taking reasonable and proportionate steps to verify that these reviews are from such consumers.

Grey list

Articles VI.97-VI.99 of the ELC furthermore lay out a "grey list" of misleading commercial practices, which should only be regarded as mis-

leading if they contain inaccurate information, or, where the information it contains is factually correct, if they deceive or are likely to deceive the average consumer in any way, including by their overall presentation, as to one or more of the following elements. In either case, the advertising must cause or be likely to cause the average consumer to make a decision on a transaction that they would not otherwise have made. The following is the list of elements in relation to which the average consumer must be deceived (or be likely to be deceived) to constitute a misleading practice:

- the existence or nature of the advertised product;
- the main characteristics of the product, eg, availability, advantages, risks, execution, composition, accessories, customer service and complaints handling, production process, manufacturing date, delivery, suitability and possibilities for use, quantity, specification, geographical or commercial origin, results to be expected from use, or characteristics and results of tests carried out on the product;
- the scope of the advertiser's obligations, the motives behind the advertisement, the nature of the sales process, any statement or symbol suggesting sponsorship or direct or indirect support for the advertiser or the product;
- the price or the manner in which the price is calculated, or the existence of a specific price advantage;
- the need for a service, part, replacement or repair;
- the capacity, characteristics and rights of the advertiser or its intermediary, such as its identity, assets, qualifications, status, recognition, affiliation, connections, industrial, commercial or intellectual property rights or its awards and distinctions; and
- the rights of the consumer, including the right to replacement or reimbursement of a product under Belgian law.

The law also explicitly states that the following marketing practices are to be considered misleading if they cause or are likely to cause the average consumer to make a transactional decision that they would not otherwise have made:

- marketing a product, including through comparative advertising, in such a way as to create confusion with products, trade marks, trade names and other distinguishing features of a competitor; and
- marketing products across EU member states as being identical when, in reality, they have a significantly different composition or different characteristics.

Advertising can also be considered misleading if, taking into account the full context, it omits or conceals essential information that the average consumer needs to make an informed decision on a transaction and that causes or is likely to cause the average consumer to make a decision on a transaction which they would not otherwise have made.

Aggressive Commercial Practices towards Consumers (VI.101 - VI.103, ELC)

Similar to the rules on misleading commercial practices, the ELC also includes a black and grey list of aggressive commercial practices.

Black list

The black list of aggressive commercial practices in Article VI.103 of the ELC includes:

- directly inciting children to buy the advertised products or to persuade their parents or other adults to buy such products for them;

- persistent and unwanted solicitation by telephone, fax, email or other remote media; and
- giving the false impression that the consumer has already won or will win a prize upon completion of a formality, when in fact, either:

  (a) there is no prize or other equivalent benefit; or
  (b) the entering in/qualification for the pool of potential winners of the prize or equivalent benefit is subject to a stake requirement.

Grey list

Articles VI.101 and VI.102 of the ELC furthermore include a more general prohibition on aggressive commercial practices, under which a commercial practice should be regarded as aggressive towards consumers if, in its factual context, taking into account all its features and circumstances, it distorts or is likely to significantly distort the average consumer's freedom of choice or conduct with regard to the product, by harassment, coercion, including the use of physical force, or undue influence, and thereby causes or is likely to cause them to make a decision on a transaction that they would not otherwise have made. In order to assess whether a commercial practice can be considered aggressive, the time, place, nature and persistence of the practice, as well as the use of threatening and abusive language or conduct, are taken into account.

Misleading and Aggressive Practices towards Other Companies (B2B)

Similar rules apply in B2B context (Article VI.105 ff, ELC).

2.2 Regulation of Advertising Claims

The prohibition of unfair (ie, misleading or aggressive) commercial practices applies to all advertising claims, whether they relate to objectively measurable elements or not. For each claim, an individual assessment should be made by the competent authorities or courts.

2.3 Substantiation of Advertising Claims

Advertising should always be truthful and honest and should not mislead the recipient.

Article XV.16 of the ELC provides for a specific obligation for the advertiser to provide evidence of the accuracy of the factual elements it has communicated as part of its commercial practices if requested by the authorities. If such evidence is not provided by the advertiser within one month or appears insufficient, the claim may be regarded as an unfair or misleading commercial practice. In principle, the substantiation of a claim should not be included in the advertisement itself.

2.4 Testing to Support Advertising Claims

No general standard for testing applies in Belgium. However, factual claims should be accurate and advertisers may be required to provide evidence of the material accuracy of any objectively verifiable claims they make.

There may, however, be specific testing standards or requirements that apply to the advertising of particular products. For instance, the self-regulatory Advertising Code for Cosmetic Products states that any advertisement for cosmetic products referring to testing should explicitly state the nature of such testing, make sure that the tests are statistically valid, and clearly differentiate between tests relating to customer satisfaction and scientific effects.

2.5 Human Clinical Studies

There is no specific requirement to conduct human clinical studies in order to be allowed to make certain advertising claims.

2.6 Representation and Stereotypes in Advertising

Legal Framework

The general principles of non-discrimination, diversity and equality are governed by the Anti-Racism Act of 30 July 1981, the Anti-Discrimination Act of 10 May 2007, the Gender Act of 10 May 2007, as well as the non-discrimination prohibition that is included in the Belgian Constitution.

Self-Regulation

The ICC Advertising and Marketing Communications Code also provides that all marketing communications must respect human dignity and must not involve, encourage or incite any form of discrimination on the basis of ethnic or national origin, religion, gender, age, disability or orientation.

In addition, the JEP has issued a separate recommendation for the depiction of persons in advertising, which states that advertisers should take into account the evolution of moral standards and avoid contributing to the perpetuation of social prejudices or stereotypes that are contrary to social evolution or to prevailing morals within the population.

2.7 Environmental Claims

Legal Framework

There are currently no specific Belgian laws dealing specifically with environmental claims in general. Of course, the general rules on unfair and misleading commercial practices continue to apply.

Self-Regulation

The ICC Advertising and Marketing Communications Code includes several recommendations on (the substantiation of) environmental claims.

In addition, a governmental commission on environmental labelling and environmental advertising issued a self-regulatory Environmental Advertising Code.

2.8 Other Regulated Claims

Some products are subject to specific claim regulations under Belgian and/or EU law. The below overview is merely intended to give some examples and should not be considered exhaustive.

Cosmetic Products

EU Regulation 1223/2009 provides that in the labelling, making available on the market and advertising of cosmetic products, text, names, trade marks, pictures and figurative or other signs may not be used to imply that these products have characteristics or functions that they do not have. The responsible person may refer, on the product packaging or in any document, notice, label, ring or collar accompanying or referring to the cosmetic product, to the fact that no animal tests have been carried out only if the manufacturer and its suppliers have not carried out or commissioned any animal tests on the finished cosmetic product, or its prototype, or any of the ingredients contained in it, or used any ingredients that have been tested on animals by others for the purpose of developing new cosmetic products.

The Annex to Commission Regulation (EU) 655/2013 furthermore lays down common criteria to justify the use of a claim in relation to cosmetic products. Also the self-regulatory Advertising Code on Cosmetic Products sets

out different recommendations for advertising claims in relation to cosmetic products.

Food
At EU level, health claims and nutrition claims can only be used if the products meet the conditions for such claims (as set out in the Annex to Regulation (EC) 1924/2006 and the related regulations).

The Belgian Royal Decree of 17 April 1980 furthermore provides that it is prohibited to attribute properties regarding the composition of a food that cannot be demonstrated through objective or measurable criteria.

3. Comparative Advertising

3.1 Specific Rules or Restrictions

The rules on comparative advertising can be found in Book VI of the ELC, as an implementation of EU Directive 2006/114/EC on misleading and comparative advertising. Comparative advertising is defined as "any form of advertising that explicitly or implicitly mentions a competitor, or goods or services offered by a competitor" (Article I.8, 14°, ELC).

Comparative advertising is permissible under Belgian law, subject to the following restrictions (Article VI.17, ELC).

- It is not misleading (this refers to the situation in which the advertising in any way, including by its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor).
- It compares goods or services that meet the same needs or are intended for the same purpose.
- It objectively compares one or more material, relevant, verifiable and representative characteristics of those goods and services, which may include price. Subjective characteristics, such as taste or smell may also be included to the extent that they are based on relevant statistical research conducted according to best practices.
- It does not result in the advertiser being confused with a competitor, or in the advertiser's brands, trade names, other distinguishing marks, goods or services being confused with those of a competitor.
- It does not discredit or denigrate the good name of the brands, trade names, other distinguishing characteristics, goods, services, activities or circumstances of a competitor, or use any derogatory language with regard thereto.
- For goods bearing a designation of origin, it should relate to goods bearing the same designation;
- It does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designations of origin of competing goods.
- It does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

3.2 Comparative Advertising Standards

In addition to the standards for general advertising claims, comparative advertising should in any event comply with the conditions listed in Article VI.17, ELC (see **3.1 Specific Rules or Restrictions**).

3.3 Challenging Comparative Claims Made by Competitors

An advertiser can challenge a claim made by a competitor before a Belgian court. To successfully do so, the advertiser would need to prove that:

- the claim has a comparative character in the sense of Article I.8, 14° of the ELC;
- the two companies can be considered competitors; and
- the claim does not comply with any of the general rules applicable to advertising practices, and/or does not meet all the specific requirements set forth in Article VI.17 of the ELC.

The court may grant an injunction (ie, a prohibition on the advertiser from using or distributing the concerned advertisement in the future), award damages (eg, reputational) incurred by the competitor, or take other remedial actions. For a more detailed overview of the various actions available, see **1.3 Liability for Deceptive Advertising**, **1.4 Self-Regulatory Authorities** and **1.5 Private Right of Action for Consumers**.

4. Social/Digital Media

4.1 Special Rules Applicable to Social Media

General

In Belgium, there are no specific rules for advertising on social media.

Such advertising remains, however, subject to all general rules applicable to advertising practices, as well as the specific provisions of Book XII of the ELC, which originate from EU Directives 2000/31/EC and 2009/136/EG and lay out the principles of identification and transparency for advertisements that are part of an information society service or that constitute such service.

Commercial Communication as (Part of) Information Society Services

Information society services are services that are usually provided in exchange for consideration, by electronic means from a distance and at the individual request of a service recipient. The consideration does not necessarily have to come from the recipient of the service, but may also be derived from sponsorship and advertising income.

Article XII.12 of the ELC specifies that online advertisements should meet the following conditions.

- The advertisement, given its overall impression, including its presentation, must be clearly identifiable as such. Otherwise, it shall bear the word “advertising” in a legible, visible and unambiguous manner.
- The natural or legal person on whose behalf the advertising is made must be clearly identifiable.
- Promotional offers, such as reduced-price offer announcements and combined offers, must be clearly identifiable as such and the conditions for benefiting from them must be easily accessible and presented in a clear and unambiguous manner.
- Promotional contests or games must be clearly identifiable as such, the conditions of participation should be easy to fulfil and such conditions should be indicated in a clear and unambiguous manner.

4.2 Key Legal Challenges

Protection Measures and Disclosure Requirements

At both EU and Belgian levels, there seems to be a tendency to impose additional protection measures and disclosure requirements with regard to online advertising, and to label campaigns as such. When sharing content on social media, brands should furthermore be careful not to infringe on privacy rights (including image rights), IP rights and local advertising law.

Quality Control

When sponsoring or associating themselves with social media posts or videos without conducting a quality control of the message it is sponsoring (eg, sponsoring of YouTube videos, without the advertisers being aware of the content they are sponsoring), there is a risk that companies see themselves associated with morally objectionable films, sites or other messages. As in the case of online sponsorship, the quality check is often automated. This leads to errors slipping into the algorithm more quickly.

For other, more influencer-related challenges on social media, see **5.1 Trends in the Use of Influencer Campaigns**.

4.3 Liability for Third-Party Content

Whether an individual/company whose products are advertised can be held responsible for content posted by others on its site or social media channels will depend on whether the advertiser has commissioned such posts or the networks, advertising agencies, platforms and other parties who intervene in the marketing of the products.

If so, the advertiser could, in principle, be held liable (together with the persons placing the advertisement and, as the case may be, any networks, agencies, platforms and other parties who play a part in the marketing of the post on social media).

4.4 Disclosure Requirements

Social and digital media advertising are subject to all general rules applicable to advertising practices (including, for example, the prohibition on unfair or misleading practices set out in the ELC), as well as the specific provisions of Book XII of the ELC (see **4.1 Special Rules Applicable to Social Media**).

As mentioned under **4.2 Key Legal Requirement**s, in order not to mislead, it must be made clear that the advertisement constitutes paid advertising/sponsoring.

Article XII.12, 2° of the ELC furthermore requires that the natural or legal person on whose behalf the advertisement is made should be clearly identifiable.

For the sake of completeness, it should be noted that stricter disclosure requirements may apply to influencers (see **5.2 Special Rules/Regulations on Influencer Campaigns**).

4.5 Requirements for Use of Social Media Platform

There are no unique rules or regulations that apply to the use of social media platforms.

Obviously, compliance is required with all applicable rules contained in the ELC and any other relevant legislation, as well as with Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR).

4.6 Special Rules for Native Advertising

Article XII.12, 1° of the ELC provides that an advertisement, given its overall impression, including its presentation, must be clearly identifiable as such. If it is not possible to irrevocably identify it as an advertisement, it shall bear the word "advertising" in a legible, visible and unambiguous manner. In addition, the natural or legal person on whose behalf the advertisement is made, should be clearly identifiable (Article XII.12, 2°, ELC).

4.7 Misinformation

Under Belgian law, there are no specific regulations relating to misinformation on topics of public importance. Several initiatives, such as citizen consultation and expert reports, have been launched in the past, but so far, no legislation has been adopted in relation to this issue.

5. Social Media Influencer Campaigns and Online Reviews

5.1 Trends in the Use of Influencer Campaigns

Being service providers of an information society service, influencers are required to mention their address and company number on their social media accounts (Article XII.6, ELC). Earlier in 2022, various influencers in Belgium received a warning from the Federal Public Service (FPS) Economy, establishing their non-compliance with this rule. This has raised strong concerns with regard to the safety and privacy of the persons involved. The federal government therefore gave them some additional time to come to a workable solution that is supported by the entire sector. One of the proposals is to unite the sector and designate a shared physical location. The address of such location could then be published online, instead of the home addresses.

5.2 Special Rules/Regulations on Influencer Campaigns

General

All rules applicable to digital advertising (**4. Social/Digital Media**) equally apply to influencers. An influencer is subject to the advertising rules if:

- they are putting a spotlight on a product, a company, service or brand (verbally, visually or in text); and
- they receive a benefit from the company behind the brand, product or service.

This is also the case if the influencer:

- shares a discount code they received from the brand with their followers;
- gives away products for the brand or runs a contest; or
- share an affiliate link for a brand;

The benefit can be diverse, for example:

- a free of charge product (even if the influencer did not ask for it);
- a discount;
- cash payment;
- a lend of a product;
- free tickets to a festival;
- a free night in a hotel;
- a free meal at a restaurant;
- an invitation to an event; and
- a percentage of the sale of products through the affiliate link shared;

Guidelines on Influencer Marketing, Issued by the FPS Economy

Earlier in 2022, the FPS Economy issued additional guidelines for influencers and content creators, which seem to be more specific and

slightly stricter than the recommendation issued by the Belgian Centre for Communication.

Influencers must clearly communicate the commercial nature of their advertising messages. In principle, the commercial nature must be clear from the context of the message itself. This means that it must be immediately clear to their followers that the post constitutes advertising. The best way to do this is by tagging the post as an advertisement. This tag must be immediately visible to social media users, without them having to click or expand the post and is preferably mentioned at the beginning of the post or placed directly in the photo or in the video. The "advertising" labelling should always be:

- made at least in the language of the post;
- be included in a prominent place, depending on the type of social media (ie, in the picture or video, at the beginning of the post, etc); and
- be visible regardless of the device used (desktop, mobile, tablet, in-app, etc).

It should not be buried in different hashtags, or put in a colour that contrasts poorly with the background.

Recommendations for Online Influencers, Issued by the Belgian Centre for Communication

In October 2018, the Centre for Communication published recommendations for online influencers and content creators, which have been updated in 2022.

One of the recommendations is that an influencer has to add a "tag" to their publication explicitly identifying its nature, such as "advertisement". Such tags should be adapted to the target audience and be easily noticeable by the average consumer.

The JEP is responsible for monitoring whether influencers and the companies on whose behalf the advertisements are made comply with these recommendations, and to handle any complaints in this regard. Should it decide that a violation has occurred, the JEP can request the influencer and/or the brand to amend or delete the concerned advertisement(s). All decisions by the JEP are published on their website.

5.3 Advertiser Liability for Influencer Content

Whether a person/company whose products are advertised can be held responsible for content posted by influencers, will depend on whether the advertiser has commissioned such posts or the networks, advertising agencies, platforms and other parties who intervene in the marketing of the products.

If so, the advertiser has a duty to monitor its influences and could therefore, in principle, also be held liable for violations of the applicable advertising regulations (together with the influencer and, as the case may be, any networks, agencies, platforms and other parties who play a part in the marketing of the post).

The Belgian Centre for Communication further specifies in its (non-binding) recommendations that the following persons in any event can be held responsible by the JEP for violations of the applicable rules:

- the person publishing the post (ie, the influencer);
- the company or brand requesting the publishing of the post; and

- any networks, agencies, platforms and other parties who play a part in the marketing of the post on social media.

5.4 Misleading/Fake Reviews

Under the Belgian transposition of the Omnibus Directive, the following practices have been added to the "black list" of misleading commercial practices of Article VI.100 of the ELC (meaning that they are prohibited under all circumstances, without the possibility of rebutting the unfairness presumption):

- providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results;
- stating that reviews of a product were submitted by consumers who actually used or purchased that product when no reasonable and proportionate steps were taken to ensure that they originate from such consumers; and
- submitting or commissioning another legal or natural person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements, in order to promote products.

Moreover, when companies provide access to consumer reviews of products, information about whether and how the company ensures that the published reviews originate from consumers who have actually used or purchased the product shall be regarded as material. Belgian law explicitly foresees that omitting this information shall be considered a misleading omission in the sense of Article VI.99 of the ELC.

6. Privacy and Advertising

6.1 Email Marketing

Legal Framework

In Belgium, three main sets of regulations apply to marketing by email:

- Articles XII.12 and XII.13 of the ELC;
- the Royal Decree of 4 April 2003 regulating advertising by electronic mail; and
- data protection legislation, in particular the GDPR and the Belgian Data Protection Act of 30 July 2018.

It is also worth mentioning that the FPS Economy and the Belgian Data Protection Authority have both published guidance on spamming and direct marketing.

Opt-In Principle

Under Article XII.13 of the ELC, the use of electronic mail for advertising purposes is prohibited without the prior, free, specific and informed consent of the recipient of the messages (the so-called "opt-in principle").

Electronic mail is broadly defined in the ELC as any message in the form of text, voice, sound or image sent over a public communications network which may be stored in the network or in the recipient's terminal equipment until retrieved by the recipient (Article I.18, 2°, ELC). It accordingly covers marketing communications through email, SMS, MMS, social media postings and push notifications.

Exceptions to the Opt-In Principle (Royal Decree of 4 April 2003)

The applicable Belgian law provides for two exceptions to prior opt-in.

Electronic marketing mails sent to legal entities

An organisation may send electronic marketing mail to a legal entity (even if it is not a customer) without the prior consent of the recipient if the following cumulative conditions are met:

- the marketing communication is sent to an impersonal email address (eg, "info@company.com", etc) - if, however, it is sent to a personal email address of an employee within the company (eg, "firstname.lastname@company.com"), the opt-in rule remains applicable; and
- the promoted services or goods are intended for the legal entity's activities (eg, one could not send promotional materials about men's or women's clothing without prior consent to a legal entity active in the banking and financial sector).

Electronic marketing mails sent to existing customers ("soft-spam" exception)

An organisation may send electronic marketing communications to existing customers (legal or natural persons) if the following cumulative conditions are met:

- the recipient's electronic contact details were collected directly from the recipient upon the selling of goods or services and the data collection has been done in accordance with the Belgian data protection legislation;
- the recipient's electronic contact details are used for the exclusive purpose of promoting goods or services similar to those already sold to the recipient and are offered by the same entity that has initially collected the data; and
- upon collection of their electronic contact details, the recipient is able, easily and free of charge, to object to the processing of their data for direct marketing purposes.

Right to Opt-Out (Royal Decree of 4 April 2003)

The recipient of marketing communications by electronic mail must be given, in a simple and unambiguous way, the possibility to object to such marketing communications:

- at the time of collection of their data; and
- in each subsequent message through valid contact information.

The process of unsubscribing must be free of charge, simple, direct, without justification and easily accessible. Every commercial email must include a link activating the opt-out or referring to an opt-out page, or mention an opt-out email address.

Where personal data is processed for direct marketing purposes, the above is without prejudice to the data subject's right to object at any time to processing of personal data concerning them for such marketing, which includes profiling, to the extent that it is related to such direct marketing (Article 21.2, GDPR) (see **6.4 Targeted/Interest-Based Advertising**).

Specific Information and Transparency Requirements

As per Article XII.13 of the ELC, when sending marketing communications by electronic mail, the provider must:

- provide clear and comprehensible information concerning the right to object to receiving advertisements in the future; and
- indicate and make available an appropriate means of effectively exercising this right by electronic means.

In addition, the information requirements laid down under Article XII.12 ELC as described in **4.1 Special Rules Applicable to Social Media** need to be complied with.

In accordance with data protection legislation, at the time of data collection, the recipient must be informed about all aspects of the processing of their data in accordance with Article 13 of the GDPR (purposes and legal bases of the processing, recipients of their data, data protection rights, etc), including about the fact that their email address, phone number, etc, may be used for marketing purposes and about the right to object at any time to the processing of their personal data for marketing purposes.

In addition, when sending marketing communications by electronic mail, it is prohibited to (Article XII.13, ELC):

- use the electronic mail address or identity of a third party;
- falsify or hide any information that would allow the identification of the origin of the electronic mail message or its transmission path; and
- encourage the recipient of the messages to visit websites that contain advertising messages that infringe Article XII.12 of the ELC.

The above information requirements in relation to marketing through electronic mail are without prejudice to general information requirements.

Unfair Commercial Practice

Pursuant to Article VI.103, 3° of the ELC, making persistent and unwanted solicitations by electronic mail or other remote media is considered an aggressive commercial practice, which. in principle, is prohibited, except where legal or regulatory provisions authorise it in order to ensure the performance of a contractual obligation or where Article XII.13 of the ELC is complied with.

Enforcement and Liability

Non-compliance with the ELC

See **1.2 Enforcement and Regulatory Authorities**.

Non-compliance with data protection legislation

The provider acting as data controller is responsible for compliance with the rules laid down in applicable data protection legislation, in particular the GDPR and the Belgian Data Protection Act. The Belgian Data Protection Authority is the competent enforcement authority for violations of the GDPR and the Belgian Data Protection Act in Belgium. Specific rules exist for cross-border processing of personal data.

In cases of non-compliance with the rules set forth by the GDPR or the Belgian Data Protection Act, administrative fines up to EUR20 million or 4% of the turnover of the company, whichever is higher, could be imposed. The Data Protection Authority also has the power to issue warnings, reprimands and orders, and to impose temporary or definitive limitations, including bans on the processing, order rectification or erasure of personal data, etc. A faulty data controller or processor could also be subject to claims for damages from data subjects.

Criminal sanctions are also possible for specific violations under the Belgian Data Protection Act.

6.2 Telemarketing

Legal Framework

In Belgium, two main sets of regulations apply to telemarketing:

- the ELC, in particular Articles VI.110 to VI.115; and
- data protection legislation, in particular the GDPR and the Belgian Data Protection Act of 30 July 2018.

The FPS Economy has recently published guidelines on direct marketing by telephone.

As a general remark, Belgian law does not make a distinction for telemarketing in the B2C and B2B contexts.

Automated Calling Systems and Faxes □ Opt-In

Under Article VI.110 ELC, the use of automated calling systems without human intervention and faxes for direct marketing purposes are prohibited without the prior free, specific and informed consent of the recipient of the messages. The person who gave their consent can withdraw it at any time, without justification and free of charge.

Phone Calls (Except Automated Calling Systems) □ Opt-Out

Without prejudice to Article XII.13 of the ELC, mentioned under **6.1 Email Marketing**, unsolicited communications for direct marketing purposes that are carried out by techniques other than automated calling systems and faxes (eg, phone) are authorised provided that the recipient, whether a natural or legal person, has not manifestly opposed such communication (the so-called "opt-out principle") (Article VI.110, ELC).

When carrying out advertisement by such means of communication, it is prohibited to conceal the identity of the company on whose behalf the communication is made (Article VI.110, ELC).

Right to Opt-Out

The recipient must be given, in a simple and unambiguous way, the possibility to object to marketing communications by phone:

- at the time of collection of their data; and
- in each subsequent call through valid contact information.

The process of unsubscribing must be free of charge, simple, direct, without justification and easily accessible. Unsubscribing can be done over the phone, by mail or by email.

"Do Not Call Me" List

Recipients who do not want to receive marketing phone calls from any company can register themselves on the "do-not-call-me" (DNCM) list maintained by the non-profit association Do Not Call Me (which has been appointed by Royal Decree to manage that list).

Before performing direct marketing by phone (other than by automated calling systems for which opt-in is required, see above), all companies have the obligation to check whether the recipient and corresponding phone number is included on the DNCM list (Article VI.112, ELC).

Pursuant to Article VI.112 of the ELC, it is prohibited to contact persons (whether B2C or B2B) for direct marketing purposes who are registered on the DNCM list.

The prohibition does, however, not apply to calls to telephone numbers of subscribers who have given their express consent to use their personal data for such purposes.

The provider must obtain a licence to consult the list (see https://www.dncm.be/en/home). The

rule applies to both local and non-local entities that target Belgian residents.

Information Requirements

In addition to the information to be provided to data subjects in relation to the processing of their personal data under the GDPR (see **6.1 Email Marketing**), the recipient of a marketing call must be informed of:

- the identity of the caller;
- the commercial nature of the communication; and
- the right to opt-out in each call through valid contact information.

Unfair Commercial Practice

Pursuant to Article VI.103, 3° of the ELC, making persistent and unwanted solicitations by telephone, fax or other remote media is considered an aggressive commercial practice which is in principle prohibited, except where legal or regulatory provisions authorise it in order to ensure the performance of a contractual obligation or where Article VI.110 of the ELC is complied with.

Enforcement and Liability

Non-compliance with the ELC

See **1.2 Enforcement and Regulatory Authorities**.

Non-compliance with data protection legislation

See **6.1 Email Marketing**.

6.3 Text Messaging

As mentioned in **6.1 Email Marketing**, the wide definition of electronic mail in the ELC (Article I.18, 2°) covers marketing communications through text messaging (eg, SMS, MMS and instant messaging).

6.4 Targeted/Interest-Based Advertising

Legal Framework

In Belgium, targeted and interest-based advertising are mainly regulated by three main sets of regulations.

- The ELC, and in particular the rules regarding market practices and consumer protection (Book VI, ELC) as well as the transparency requirements set out by Articles XII.6 and XII.12 of the ELC. In the context of targeted and interest-based advertising, providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results constitutes a prohibited misleading commercial practice (Article VI.100, 24°, ELC).
- Data protection legislation (GDPR and the Belgian Data Protection Act of 30 July 2018), in particular the lawfulness principle (Article 6, GDPR), the transparency requirements (Articles 13 and 14, GDPR), the right to object (Article 21, GDPR) and specific rules regarding automated individual decision-marking, including profiling (Article 22, GDPR).
- The cookie rules laid down in the Belgian Data Protection Act of 30 July 2018.

GDPR Principle of Lawful Processing

Targeted and interest-based advertising imply personal data processing operations, which need to be based on one of the lawful bases for data processing laid down in Article 6 of the GDPR.

As pointed out by the Belgian Data Protection Authority, in the context of direct marketing, which includes targeted and interest-based advertising, the legal bases of consent (Article 6.1 (a), GDPR), the necessity for the perfor-

mance of a contract (Article 6.1 (b), GDPR) and the advertiser's or a third party's legitimate interests (Article 6.1 (f), GDPR) are usually the most appropriate legal bases. A careful assessment is necessary on a case-by-case basis.

GDPR Transparency Requirements

As with any data processing operation, to the extent targeted and interest-based advertising rely on the processing of personal data, data subjects must be provided with information on all aspects of the processing including, inter alia, the purpose of the processing, the identity of the controller/advertiser, the categories of recipients that have access to the data and their right to object, to access, to rectify or to delete their data (as per Articles 13 and 14, GDPR).

GDPR - Right to Object

Pursuant to Article 21.2 of the GDPR, where personal data is processed for direct marketing purposes, the data subject shall have the right to object at any time to processing of personal data concerning them for such marketing, which includes profiling to the extent that it is related to such direct marketing.

GDPR - Automated Individual Decision-Making and Profiling

Pursuant to Article 22 of the GDPR, subject to certain exceptions, data subjects have the right not to be subject to decisions based solely on automated processing, including profiling, which produce legal effects concerning them or similarly significantly affect them.

Cookie Rules

In practice, targeted and interest-based advertising usually relies on the use of cookies or similar tracking technologies. The use of cookies must in essence comply with the general rules laid down in data protection legislation, in particular with the specific requirements set out under Article 10/2 of the Belgian Data Protection Act. According to this provision, the placing of cookies is only allowed provided that:

- the user or subscriber concerned receives clear and detailed information about the purposes of the processing underlying the placing of cookies and their rights pursuant to data protection legislation; and
- the user or subscriber has given their consent prior to the placing of the cookies, after having received the above information, it being understood that they can withdraw consent freely and in an easy manner.

The above-mentioned rule is, however, subject to exceptions under strict conditions.

The Belgian Data Protection Authority has issued guidance regarding the use of cookies for marketing and targeted marketing purposes.

6.5 Marketing to Children

In Belgium, the legal framework regulating marketing to children is fragmented between different sets of regulations. Marketing targeting children is also covered by various self-regulation initiatives.

The below is not intended to provide an exhaustive overview of such rules, but merely a brief outline of the most important restrictions.

Legal Framework

ELC provisions

As per Article VI. 103, 5° of the ELC, including in an advertisement a direct incitement to children to buy advertised products or persuade their parents or other adults to buy advertised products for them is considered a prohibited aggressive commercial practice.

Data protection legislation

In Belgium, the processing of a minor's personal data in relation to the offer of information society services (eg, services provided on the internet, including internet advertising) based on their consent is lawful if the child is at least 13 years old (Article 7, Belgian Data Protection Act). If the child is younger the 13, consent must be given by the holder of parental responsibility (according to Article 8 (1) of the GDPR).

Radio and television advertising rules

Both the Flemish Decree of 27 March 2009 on Radio and Television Broadcasting (Articles 70-77) and the French Decree of 4 February 2021 on audio-visual media services and video sharing services (Article 5.2-5.3) set out, in similar terms, specific conditions for commercial communications targeted at children, including the following:

- such commercial communications cannot cause any moral or physical damage to minors;
- such commercial communications can in principle not represent minors in dangerous situations; and
- such commercial communications cannot encourage or condone excessive consumption of foods and beverages that contain substances that are not recommended for excessive consumption, such as fats and sugars.

Self-Regulation

There are also various self-regulatory codes dealing with advertising targeted to children/minors.

- The French Speaking Community has a Code of Ethics for Children's Broadcast Advertising, which lays down broadcast advertising rules with respect to, inter alia, price indications, contests, health, security and psychological effects.
- The Food Industry Federation has adopted a Code of advertising for foodstuffs. It contains provisions specifically designed to regulate food advertising aimed at children.
- The Code of Advertising and Commercial Communication for Cosmetic Products provides specific rules with respect to advertising for cosmetic products specifically made for children.
- The covenant on advertising and marketing of alcoholic beverages contains specific provisions regarding minors.

Food

See **10. Product Compliance**.

Cosmetic Products

See **10. Product Compliance**.

Alcoholic Beverages

See **10. Product Compliance**.

7. Sweepstakes and Other Consumer Promotions

7.1 Sweepstakes and Contests

Under Belgian law, sweepstakes or lotteries are all operations offered to the public and aiming at obtaining a gain/winning by the sole effect of luck. It is thereby irrelevant whether a stake is required to enter into/qualify for the pool of potential winners. Conversely, a game in which the winners are identified by a combination of chance and effort is not a lottery. However, this can still be qualified as a game of chance (see **7.2Contests of Skill and Games of Chance**).

Lotteries and sweepstakes are in principle prohibited under Belgian law as per Article 301 of the Criminal Code. Exceptions to this prohibition apply when the organisation of lotteries is subject to a federal, provincial or, depending on the territorial scope, municipal authorisation/permit and other strict requirements. For instance, exceptions are granted to the National Lottery (*Nationale Loterij* or *Loterie Nationale*) and to non-profit organisations that organise lotteries or prize draws for the purposes of charity or the encouragement of industry or arts or another public interest and on the basis of a corresponding permit.

When organising a lottery, the general rules of the ELC, such as those relating to unfair terms and misleading and aggressive commercial practices, should also be complied with.

7.2 Contests of Skill and Games of Chance

Belgian law distinguishes lotteries from games of chance. Unlike games of chance and lotteries, other games (such as games of skill) are not specifically regulated.

Games of Chance

The Act of 7 May 1999 on games of chance, gambling, gaming establishments and the protection of players defines a game of chance as "any game, where a stake requirement results either in the loss of this bet by at least one of the players, or in a win of any kind for at least one of the players, or furnishers of the game, and where chance is an even incidental element in the course of the game, the designation of the winner or the determination of the size of the win".

According to this definition, three (cumulative) elements are necessary for a game to be considered a game of chance:

- the stake, which may consist of paying a higher price than the normal price for a product in order to participate in the contest, or calling or sending a text message to a certain number, for which more is to be paid than for a "usual" call or text message;
- the win or loss; and
- chance.

Therefore, even if a game requires a stake, but the participant's skills (rather than coincidence/luck) solely determine the outcome of the game, it will not be qualified as a game of chance.

A game of chance thus differs from a lottery in that a stake is always required (which is not the case with a lottery) and luck does not have to be the sole determining factor. Lotteries are expressly excluded from the scope of the Act.

Other Games (Such as Games of Skill)

Unlike games of chance and lotteries, other games (such as a game of skill - ie, a game that involves skill, without luck being the predominant factor in the determination of the winner or the prize, and which does not qualify as a game of chance) are not generally regulated.

They remain subject to the general rules on advertising, such as those included in the ELC relating to unfair terms and misleading and aggressive commercial practices.

7.3 Registration and Approval Requirements

Lotteries

The organisation of lotteries is subject to a federal, provincial or, depending on the territorial

scope, municipal authorisation/permit and other strict requirements. Commercial lotteries may therefore only be organised by non-profit organisations with a public interest/charity purpose, and authorised by Royal Decree. Commercial companies may not organise lotteries unless they adhere to duly authorised lottery schemes.

Games of Chance

Article 4 of the Act of 7 May 1999 provides that it is prohibited for any person to operate a game of chance or gaming establishment, under any form, in any place and in any direct or indirect manner without a prior licence issued by the Gaming Commission in accordance with this law and subject to the exceptions provided by the law. It is furthermore prohibited to participate in a game of chance, to facilitate the operation of a game of chance or gaming establishment, to advertise a game of chance or gaming establishment, or to recruit players for a game of chance or gaming establishment when the person concerned knows that it involves the operation of a game of chance or gaming establishment that is not licensed under the Act.

The Gaming Commission can grant seven types of licences. In the overview on their website, information on how to apply for each type of licence can be found.

Other Games

Other games (including games of skill) do not need registration or approval by any regulatory body nor approval of rules by a regulatory body.

7.4 Loyalty Programmes

No specific rules apply to loyalty programmes in Belgium.

They remain, however, subject to the general rules of the ELC and any other applicable general legislation (eg, on data protection).

7.5 Free and Reduced-Price Offers

Official End-of-Season Sales Periods (Articles VI.25-VI.28, ELC)

Belgian law provides for specific periods during which end-of-season sales can be run under the specific names "*opruimingen*", "*solden*", "*soldes*", "*Schlussverkauf*" or any other similar names.

Winter sales from 3 January to 31 January (it being noted that if 3 January is a Sunday, winter sales may begin on Saturday 2 January); and summer sales from 1 July to 31 July (it being noted that if 1 July is a Sunday, summer sales may begin on Saturday 30 June).

Only products that have been previously offered for sale by the retailer for at least 30 consecutive or non-consecutive days and are still in the possession of the retailer at the time of the sale may be included in an end-of-season sale.

During the official end-of-seasons sales periods, products that are eligible to be included in the end-of-seasons sales can even be sold at a loss, which is otherwise prohibited under Belgian law (see Articles VI.116-117, ELC).

Black-Out Period prior to the Start of the Official End-of-Season Sales Periods (Article VI.29, ELC)

Before each end-of-season sales period, a "black-out" or "waiting" period must be respected. During this "black-out" period, it is prohibited to announce price reductions (other than those relating to the upcoming end-of-season sales), or to provide price reduction vouchers. Also, price reductions announced before the black-

out period that have effect during the black-out period are prohibited. Retailers remain free to apply price reductions at check-outs during the pre-seasonal sales periods, provided that this price reduction has not been announced to the consumer.

The black-out period is a period of one month prior to the start of the respective official end-of-season sales period.

The black-out period only applies to apparel, leather goods and footwear. It does also not apply to clearance sales (a specific type of sales for retailers ceasing their business), nor to commercial fairs organised by local groups of enterprises (or with their participation) which last for maximum four days per black-out period. The black-out period does not apply to joint offers. Joint offers can be offered to consumers all year long.

General Rules Applicable to Announcements of Promotions

Certain names are reserved for the official end-of-season sales

The use of the denominations, "S *oldes* ", "S *olden* ""O *pruiming* ", "*Schlussverkauf*" or another similar denomination, is only allowed for price reductions applied during the legally defined end-of-season sales periods.

Announcement of price reductions to consumers require indication of reference price (Article VI.18, ELC)

As a result of the implementation of the Omnibus Directive in Belgium, traders are required to indicate a "reference price" when announcing a price reduction to consumers. Such reference price is, in principle, the lowest price applied during the 30 days prior to the start of the price reduction in the same sales channel. Note that this is one of the few areas that allows for national divergences, and that, as such, the Belgian legislator has opted to limit the reference period to seven days for products that have been on the market for less than 30 days. Deviating rules have also been adopted for so-called "progressive discounts" within a period of maximum 30 days.

The obligation to indicate a "reference price" does not apply to goods that spoil quickly or have a limited shelf life, or general communications in which no specifically measurable price reduction or conditional offers is announced. However, in these cases, companies must still comply with the prohibition on unfair commercial practices as set out in the ELC.

Prohibition on selling at a loss (Articles VI.116-VI.117, ELC)

Belgian law prohibits the sale of products at a loss. This means that the price offered to the customer cannot be lower than the price paid by the seller to their supplier or the price the seller would theoretically have to pay for the product if it were to re-order it from the supplier, after the deduction of potential (volume) reductions. In the case of joint offers, the offer is only regarded as a sale at loss if the offer as a whole constitutes a sale at a loss.

The prohibition of sales at a loss does not apply during the official end-of-season sales for products that are eligible to be included in such official end-of-season sales. Other exceptions included goods being offered during clearance sales, goods being offered that cannot be stored any longer, goods being offered that the company, due to external circumstances, can no longer reasonably sell against a price equal or higher than the price of acquisition and goods being offered of which the sale price, for compelling

reasons of competition, is being aligned with the price offered by competing companies for the same or competing good.

Joint offers (Articles I.8, 18°; I.8, 21°; and VI.80-VI.81, ELC)

Joint offers are in principle allowed in Belgium and may be offered all year long, provided that they do not amount to unfair market practices and provided that they comply with consumer information, sales, price indication and advertising rules.

Article VI.81, Section 1 of the ELC, however, prohibits joint offers to consumers, if at least one element of the offer constitutes a financial service, and if such joint offer is made by one company or by different companies acting with a common purpose. The second paragraph of this Article, however, provides for some exceptions to this prohibition.

Cashback and value vouchers (Articles VI.31-VI.33 ELC)

Cashback vouchers

Vouchers entitling the holder to a later reimbursement of (part of) the price ("cashback-vouchers"), offered by a company at the time of the purchase of a good or service, must mention the following:

- the name, address and, where applicable, the form of company and company number of the issuer;
- the amount reimbursed;
- the ultimate date of validity of the voucher (if any); and
- the terms and conditions of reimbursement, including the steps that the holder of the voucher must take to obtain reimbursement and the period within which reimbursement will be made, unless that information is communicated at the same time as the voucher in a separate document.

Value vouchers

Specific rules apply regarding vouchers that were distributed free of charge and that are entitling the holder to an immediate discount upon purchase of one or more goods and/or services ("value vouchers"). Any company to whom such voucher is presented must accept the voucher, so long as the conditions of the offer are fulfilled. It is irrelevant in this regard which company issued the voucher (a voucher issued by a third party must also be accepted). If the voucher was issued to the consumer by a third party, the voucher must mention:

- the name, address and, where applicable, the form of company and company number of the issuer;
- the amount of the discount (this is a nominal amount; a percentage is not allowed);
- the goods or services to which the voucher is applicable;
- the establishments where the voucher can be used, unless it may be used in any establishment offering the relevant goods or services; and
- the term of validity of the voucher, unless it is unlimited.

No unfair or misleading practices

Announcements of promotions (including price reductions, joint offers and the offering of vouchers) must not be unfair or misleading. Whether a given announcement is misleading is to be assessed on a case-by-case basis. In order not to be misleading, promotions must, amongst other things, be effective, meaning that the customer must benefit from a real advantage.

Promotions should therefore also generally be limited in terms of time.

7.6 Automatic Renewal/Continuous Service Offers

Obligation to Inform (Articles VI.2, 6° and VI.45, 15°, ELC)

Prior to consumers being bound by an agreement, the company must provide the consumer with, inter alia, information regarding the duration of the agreement or, if the agreement is indefinite-term or is automatically renewed, the conditions for termination of the agreement by the consumer. This information must be provided by the company, unless it is already clear from the context, in a clear and understandable manner.

Specific Obligation to Inform for Service Agreements with a Fixed Term, Providing for a Tacit Renewal (Article VI.91, ELC)

Tacit renewal provisions in fixed-term service agreements (or agreements relating to both the sale of a product and the provision of services) concluded between a company and a consumer must be printed in bold in a frame separated from the text of the agreement and on the front side of the first page of the agreement.

The term must also describe the consequences of the automatic renewal, including:

- the consumer's right to terminate the agreement at all times following the automatic renewal by providing prior notice as provided in the agreement (with such notice period not exceeding two months); and
- the deadline by which the consumer may object to the tacit renewal and the manner in which such objection must be notified to the company.

Unfair Terms in Consumer Contracts (Articles VI.83, 18°, 19° and 20°, ELC)

The following terms are furthermore considered unfair, and therefore null and void, when included in agreements with consumers:

- terms that are intended to bind the consumer for an indefinite period, without clearly mentioning a reasonable notice period;
- terms that are intended to extend a fixed-term contract for the successive delivery of goods for an unreasonable period of time if the consumer does not give notice of termination in due time; and
- terms that are intended to automatically renew a fixed-term contract in the absence of any contrary notice from the consumer, when the deadline for the consumer to express its intent not to renew the agreement is "too far" away from the end date of the agreement.

Similar terms are presumed to be unfair (and therefore to be null and void) if included in B2B agreements (Article VI.91/5, ELC), unless such presumption is rebutted:

- terms that are intended to tacitly prolong or renew a fixed-term contract with an unreasonable term, without specifying an exit possibility with a reasonable notice period; and
- terms that are intended to bind the parties for a considerable period of time without specifying an exit option with a reasonable notice period.

8. Sports Betting/Gambling

8.1 Legality & General Regulatory Framework

General Framework

Sports betting and any other forms of gambling are considered a "game of chance", and therefore fall within the scope of the Act of 7 May 1999 on games of chance, gambling, gaming establishments and the protection of players (see **7.2 Contests of Skill and Games of Chance**).

According to the Act, a bet is a game of chance where each player makes a stake, and the game results in gain or loss that is not dependent on the acts of the one placing the bet but on the occurrence of uncertain events that transpire without the intervention of the players. A distinction is made between mutual betting and fixed-odds betting.

Types of Betting

There are three types of betting, all of which fall under the competence of the Gaming Commission:

- betting on events or occurrences;
- betting on sports events; and
- betting on horse racing.

Locations to Place Bets

Bets can in principle only be placed in betting shops (class IV gaming establishments). There is a distinction between fixed betting shops (class IV gaming establishments) and temporary betting shops on the occasion of a (sports) event (class IV mobile gaming establishments): the bookmakers.

Outside these fixed and mobile betting shops, bets can also be taken:

- with newsagents, as a secondary activity; and
- within the enclosure of a racecourse.

Required Licences

In order to organise bets, an F1 licence is needed from the Gaming Commission. An F2 licence is used to take bets on behalf of an F1 licence holder. There is a maximum number of F1 and F2 licence holders. As is the case for casinos and slot machine arcades, the staff in a betting shop must have a D licence.

Participant Protection

Various obligations are imposed on organisers with the aim of protecting participants in games of chance. Furthermore, the minimum age of participants in betting/gambling games must be at least 18 years old.

Gaming Commission

The Gaming Commission is the licensing and supervising body. When a licensee violates regulatory provisions, the Gaming Commission may impose administrative sanctions consisting of a warning, the suspension of the operation of some machines for a specified period of time, or the withdrawal of the licence. Infringements of the Act of 7 May 1999 may also be subject to criminal prosecution.

8.2 Special Rules & Regulations

Legal Framework

The Act of 7 May 1999 on games of chance, gambling, gaming establishments and the protection of players contains limitations on advertising for games of chance, gambling and gaming establishments.

Limitations for Advertising (Online) Games of Chance

Limitations have also been imposed on advertisements for online games of chance (including

online betting/gambling). These can be found in the Royal Decree of 25 October 2018 on the conditions for operating games of chance and betting through information society instruments.

Self-Regulatory Code

In 2016, the Belgian Association of Gaming Operators (BAGO) also drew up a self-regulatory covenant for ethical and responsible advertising and marketing of games of chance.

However, the covenant is not sector-wide and currently only binds the six major private gaming and betting companies in Belgium.

Future Legal Developments

Partly in response to the fact that the number of gamblers has dramatically increased during the COVID-19 pandemic, the Belgian government is preparing a new Royal Decree to ban all advertising for games of chance and gambling by the end of 2022. Sport sponsoring by gambling operators would also be prohibited (albeit subject to a transition period).

General Advertising Rules

Apart from the prohibitions and limitations set out in the above-mentioned instruments, advertising for games of chance (including gambling/betting) remains subject to the general rules on advertising as included in, for instance, the ELC.

9. Web 3.0

9.1 Cryptocurrency and Non-fungible Tokens (NFTs)

Cryptocurrencies

Definition

In Belgium, cryptocurrencies are referred to as "virtual currencies". A definition can be found in the Act of 18 September 2017 on the Prevention of Money Laundering and Terrorist Financing and Limiting the Use of Cash ("AML Act"), defining virtual currencies as digital representations of value that:

- are not issued or guaranteed by a central bank or a public authority;
- are not necessarily linked to a legally established currency; and
- do not have the legal status of money or currency, but are accepted as a medium of exchange by natural or legal persons and can be transferred, stored and traded electronically.

Registration obligation for cryptocurrency service providers

Under the AML Act and the Belgian Royal Decree of 8 February 2022 on the status and supervision of service providers for the exchange of virtual currency and fiat currency and custodian wallet providers ("Virtual Currency Royal Decree"), as of 1 May 2022, persons established in Belgium whose regular professional activity consists of providing crypto-exchange services and offering custodian wallets on Belgian territory will be required to register with the FSMA. The registration requirement only applies to virtual currency service providers with a physical presence or permanent establishment in Belgium. Automated teller machines (ATMs) located on Belgian territory allowing for the exchange between virtual currency and fiat currency will be considered an establishment in Belgium and will trigger the requirement to register with the FSMA. The obligation to register with the FSMA also applies to regulated financial institutions (eg, credit institutions, payment institutions, investment firms, etc) that provide or offer, in addition to their core services, crypto exchange services and/or custodian wallet services. However, they will be exempt from those registration conditions that

already apply to them as a result of their other regulated status. To obtain registration with the FSMA, virtual currency service providers must comply with various registration conditions, such as the requirement to possess professional reliability and appropriate expertise. In addition, minimum capital and anti-money laundering (AML) requirements apply. Shareholders must also be fit to ensure sound and prudent management of the company.

Ban on third-country service providers who provide services for the exchange between virtual currencies and fiat currencies or offer custodian wallet services

Under the AML Act and the Virtual Currency Royal Decree, it is furthermore prohibited for natural or legal persons governed by the law of a third country (non-EEA) to provide or offer on Belgian territory, as an ordinary professional activity or even as an additional or complementary activity, services for the exchange between virtual currencies and fiat currencies, or to offer custodian wallet services. EEA virtual currency providers can, on the other hand, freely provide their services in Belgium on a cross-border basis without being required to register with the FSMA (provided that they do not have a physical presence in Belgium).

Ban on the commercialisation of financial products with financial return solely based on a virtual currency to non-professional customers

As of 1 July 2014, the marketing of products that consist essentially of derivatives based on virtual currencies, such as Bitcoin, to retail clients in Belgium is also banned. The FSMA regulation to this effect was approved by the Royal Decree of 24 April 2014 for the approval of the regulation of the FSMA on the prohibition of commercialisation of certain financial products to non-professional clients. Virtual currency has been defined here as "any form of unregulated digital money without legal payment capacity".

Regulation on advertising for cryptocurrencies

On 19 July 2022, the existing Act of 2 August 2002 on the supervision of the financial sector and financial services (the "Financial Supervision Act") was amended to grant new supervisory powers to the FSMA regarding the promotion of virtual currencies to non-professional investors. The FSMA is currently working on a draft regulation to regulate the advertising and marketing of virtual currencies.

Apart from the prohibitions and limitations set out in the above-mentioned instruments, advertising for cryptocurrency remains in any event subject to the general rules on advertising as included in, for instance, the ELC.

Non-Fungible Tokens (NFTs)

There are currently no particular regulations in Belgium concerning the advertising, marketing, or sale of non-fungible tokens (NFTs). However, advertising and marketing of NFTs should in any event comply with general advertising and online commercial communications regulations applicable in Belgium.

9.2 Metaverse

There are currently no particular regulations in Belgium concerning the advertising of goods and/or services within the metaverse. However, advertising and marketing of such assets should, in any event, comply with general advertising and online commercial communications regulations applicable in Belgium.

9.3 Digital Platforms

There are currently no Belgium-specific regulations that deal with digital advertising platforms and the use of adtech. However, advertising and marketing through such means should comply with general advertising and online commercial communications regulations applicable in Belgium.

10. Product Compliance

10.1 Regulated Products

As mentioned in **1.1 Primary Laws and Regulation**, there are various specific rules and restrictions in Belgium that apply to advertisements of regulated products such as alcohol, tobacco, food, medicines/medical devices and cannabis. The below is not intended to provide an exhaustive overview of such rules, but merely a brief outline of the most important restrictions for each of these regulated products.

Alcohol

Legal framework

Under Belgian law, there is no general prohibition on advertising for alcoholic beverages. However, there are limitations on the broadcasting of alcohol advertising by television broadcasters and/or radio broadcasters. These limitations are included in the Flemish Decree of 29 March 2009 on radio and television broadcasting and the French Decree of 4 February 2021 on audio-visual media services and video sharing services, both containing alcohol advertising and sponsorship restrictions for broadcasters. For instance, broadcasted advertising for alcoholic beverages may not be directed to minors, nor may it make an association between alcohol consumption and better physical performance or driving behaviour.

Self-regulation

Within the Belgian alcohol sector, a number of companies and professional associations signed a covenant regarding advertising and marketing of alcoholic beverages. Under this covenant, advertising may, for instance, not encourage irresponsible, excessive or illegal consumption, or be specifically aimed at minors. The covenant furthermore requires advertising for alcoholic beverages to be accompanied by an educational slogan, such as “beer brewed with love is to be drunk responsibly”.

On an international level, the ICC issued a Framework for Responsible Alcohol Marketing Communications.

Tobacco

The Belgian Act of 24 January 1977 on the protection of the health of users in the field of food and other products explicitly prohibits advertising for and sponsorship of tobacco products and similar products (including electronic cigarettes) in Belgium. Advertising for non-tobacco-related products that are traded under a similar brand as a tobacco product is in principle also prohibited, subject to a few limited exceptions.

Food

Legal framework

Through EU Regulation 1169/2011 on the provision of food information to consumers, the EU legislator imposed a number of restrictions on the advertising of foodstuffs. EU Regulation 1924/2006 of 20 December 2006 on nutrition and health claims made on foods furthermore imposes restrictions on the use of nutrition and health claims. Additional food advertising rules can also be found in other EU food law instruments.

Self-regulation

Self-regulating advertising codes regarding the advertising of foods include, for example, the EU Pledge and the Fevia Code on the Advertising of Foodstuffs. At ICC level, there is also the Framework for Responsible Food and Beverage Marketing Communications.

Medicines (Drugs) and Medical Devices

Legal framework

The legal restrictions on the advertising of medicines applicable in Belgium (ie, the Act of 25 March 1964 on medicines for human use and the implementing Royal Decree of 7 April 1995 on the information and advertising in relation to medicines for human use) are based on EU Directive 2001/83/EC of 6 November 2001 on the community code relating to medicines for human use. These rules require that promotional statements relating to medicines be correct, and they prohibit the promotion of a medicine that has not been registered, for which no marketing licence has been provided or that is subject to a suspension or prohibition. There are also a number of restrictions that depend on the target audience of the advertiser (ie, medical professionals or consumers). Any form of advertising targeted at consumers is in principle prohibited when the advertising relates to prescription drugs, implantable medical devices, or drugs containing psychotropic substances or narcotics within the meaning of the relevant international conventions. Permitted advertising for over the counter medicines must also comply with a range of strict conditions.

Self-regulation

Various self-regulatory codes are also in place to deal with advertising for medicines and medical devices. At the international level, for example, both Medicines for Europe and the European Federation of Pharmaceutical Industries and Associations (EFPIA) have issued such soft-law instruments, which often restate and clarify pre-existing rules. In Belgium, there are several self-regulatory codes, such as the one issued by Pharma.be.

Cannabis

Cannabis (extracts) are not subject to the provisions of the Royal Decree of 6 September 2017 regulating narcotic drugs and psychotropic substances and therefore are not prohibited when the total tetrahydrocannabinol (THC) content is less than 0.2%. However, even if a product's THC content is less than 0.2%, the use and advertising of such product and its derivatives are subject to other rules. For example, products bearing prophylactic or therapeutic indications are subject to the legislative framework on medicines. Advertising for products containing cannabidiol (CBD) intended for smoking is furthermore prohibited under the Act of 24 January 1977 on the protection of consumer health with regard to food and other products. More information can be found here.

10.2 Other Products

In addition to regulations described in **10.1 Regulated Products**, other products may also be subject to advertising regulations. Some examples are listed below.

Weapons

Under Belgian law, companies may not advertise prohibited or licensed weapons without visibly indicating that the possession of a licence is required (Article 19 of the Act of 8 June 2006 regulating economic and individual activities with weapons).

Lotteries and Games of Chance

See **7. Sweepstakes and Other Consumer Promotions** and **8. Sports Betting/Gambling**.

Motor Vehicles

Legal framework

Under Belgian law, advertisements for motor vehicles should include a warning about the driver's responsibility to drive safely. In addition, in Belgium, any printed - or printable - advertising material must contain information about the fuel consumption and CO_2 emissions of passenger cars (Articles 7 and 8 of the Royal Decree of 5 September 2001 concerning the availability of consumer information on fuel consumption and CO_2 emissions upon the placing on the market of new passenger cars).

Self-regulation

In Belgium, the advertising of motor vehicles is also subject to self-regulation (Code on Advertising of Motor Vehicles, their Parts and Accessories).

Regulated Professions

In Belgium, the advertising of regulated professions is also strictly regulated, be it by specific legal provisions (eg, dentists and some economic professions) or deontological codes (ie, on the basis of a mandate expressly obtained by the legislative (eg, lawyers or notaries) or the executive branch (eg, physicians, pharmacists)) in order to protect the honour, modesty, honesty and dignity of the relevant professions.

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Baker McKenzie is one of the few truly global law firms, with 77 offices in 46 countries. Baker McKenzie provides first-class legal and commercial advice to some of the largest national and multinational corporations, international investment banks, private equity firms and other financial institutions. With over 50 years of experience in the local market, the Brussels office provides a full range of legal services, with particular expertise in corporate finance, banking and finance (including regulatory financial services), tax, real estate and construction, employment, IT, commercial, trade, environmental, intellectual property, dispute resolution, food and healthcare law.

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Contents

1. Legal Framework and Regulatory Bodies

1.1 Primary Laws and Regulation

Bosnia and Herzegovina (BiH) is composed of the Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS) – two entities with their own legislation – and the Brčko District (BD) – a special administrative unit. Applicable advertising rules may be adopted on:

- the state level – the BiH, in which case they apply in both the FBiH and the RS, as well as in the BD; or
- the entity or the administrative unit-specific level, in which case the rules apply only in the entity (the FBiH or the RS) or the unit (the BD).

In general, advertising in the BiH is not regulated by a specific act; instead, the advertising rules are found in numerous general and sector specific laws and regulations. The most important ones include:

- the Consumer Protection Law of the BiH (general advertising rules and commercial practices);
- the Consumer Protection Law of the RS (general entity-specific general advertising rules and commercial practices);
- the Law on Prohibited Advertising of the FBiH (general entity-specific prohibited advertising rules);
- the Law on Prohibited Advertising of the RS (general entity-specific prohibited advertising rules);
- the Communications Law of the BiH (general communications principles) and its by-laws specifically including the Code of Commercial Communications of the BiH (specific rules regarding audio-visual and radio services commercial communications);
- Electronic Legal and Commercial Transactions Law of the BiH (general principles of electronic communications);
- the Medicinal Products and Medical Devices Law of the BiH and its by-laws (specific rules regarding advertising medicinal products and medical devices);
- the Food Act of the BiH and its by-laws (specific rules regarding labelling/advertising food);
- the Food Act of the RS and its by-laws (entity-specific rules regarding labelling/advertising food);
- the Internal Trade Act of the FBiH (entity-specific unfair competition principles);
- the Trade Act of the RS (entity-specific unfair competition principles);
- the Trade Act of the BD (administrative unit specific unfair competition principles);
- the Law on Games of Chance of the FBiH and its by-laws (entity-specific rules regarding advertising games of chance);
- the Law on Games of Chance of the RS and its by-laws (entity-specific rules regarding advertising games of chance);
- the Law on Games of Chance of the BD and its by-laws (administrative unit-specific rules regarding advertising games of chance);
- the Law on Copyright and Related Rights of the BiH (intellectual property specific);
- the Trademark Act of the BiH (trade mark specific);
- the Competition Law of the BiH (competition principles);
- the Data Protection Law of the BiH (personal data protection); and
- the Law on Contracts and Torts of the FBiH and the Law on Contracts and Torts of the RS which apply as general acts (lex generalis).

Apart from those noted above, there are other laws and regulations that contain advertising

rules - please see **10.1 Regulated Products** and **10.2 Other Products**.

Additionally, self-regulation is present in the media sector (for more information please see **1.4 Self-Regulatory Authorities**) and there are special public and electoral rules.

Although it is not a member state of the European Union, the BiH intends to join the EU and has entered into the Stabilisation and Association Agreement. Consequently, the BiH is continuously (although slowly) harmonising its laws and regulations with the EU regulations and directives. As a result, most of the above-mentioned laws and regulations are partly harmonised with the older generation of EU legislation.

1.2 Enforcement and Regulatory Authorities

Due to the specific distribution of the advertising rules in the BiH (see **1.1 Primary Laws and Regulation**), compliance with the advertising rules is enforced in different ways.

In principle, the laws and regulations (especially with respect to unfair competition principles and misleading/prohibited/prohibited comparative advertising) are enforced by the competent courts in the BiH; the laws on prohibited advertising (both in the FBiH and in the RS) stipulate special proceeding rules for such cases. In relation to unlawful advertising, consumers, the relevant organisations and authorised entities in general can file a claim against an advertiser and seek an injunction measure. Remedies in court proceedings include:

- a court order to refrain from unlawful conduct;
- an obligation to remedy the negative consequences of the unlawful conduct;
- to compensate the damages; and/or
- to refund the unjustified enrichment.

The parties to the court proceedings may seek a legal remedy against the decisions of the courts as there are both ordinary and extraordinary legal remedies available.

Sector specific laws and regulations are also enforced by administrative bodies (regulatory agencies, ministries, inspection authorities and other bodies). For example:

- the communications-specific laws and regulations are enforced by the Communications Regulatory Agency of the BiH;
- the food-specific laws and regulations are enforced by the Food Agency of the BiH;
- the medicinal products and medical devices laws and regulations are enforced by the Agency for the Medicinal Products and Medical Devices of the BiH; and
- the games of chance laws and regulations are enforced by subject government bodies in the entities and the special administrative unit of the BiH.

Specifically for B2C relationships, the most important factors are the supervision of the inspection authorities and consumers' ability to file a petition with the inspection authorities.

On a case-by-case basis, the administrative bodies may act ex officio or based on a complaint filed by an interested party. Sanctions and remedies in administrative proceedings may include:

- financial penalties (fines);
- an order to withdraw/ban the unlawful advertisement from the market, even without proof of actual loss, damage, intent or negligence from the advertiser's side;

- an order to issue a corrective statement to the public (regarding unlawful advertisements); and
- an order to refrain from further unlawful actions.

In general, the parties (subjects) to the administrative proceedings may seek a remedy against the decisions of the first-instance administrative bodies with second-instance administrative bodies. Against the final administrative decisions, the subjects may initiate an administrative dispute before the competent court.

In addition to the above, in certain cases, an advertiser that breached the advertising rules may become subject to criminal proceedings. Also, self-regulatory bodies may also have competence to enforce the advertising rules (see **1.4 Self-Regulatory Authorities**).

1.3 Liability for Deceptive Advertising

Both natural and legal persons may be held liable for deceptive advertising; sanctions may be imposed on both. However, some violations can only be made by legal persons because of their nature.

In general, advertisers (typically business entities) are primarily responsible and can be held liable for deceptive advertising.

In the BiH, most business entities are incorporated as either limited liability companies (local "doo" companies) or joint-stock companies (local "dd" companies). These companies and their corporate bodies are, in general, solely and directly responsible for breaches of laws and regulations. However, the companies' authorised persons may also be fined in their private capacity; also, in extraordinary circumstances, their owners/shareholders may also be responsible and have liabilities.

In other types of business entities, the owners/shareholders may have personal liability and responsibility.

Together with the advertisers, advertising agencies are also responsible and liable for breach of laws and regulations.

1.4 Self-Regulatory Authorities

The only self-regulatory authority (body) in the BiH with ties to advertising practices is the Press Council in the BiH, which operates in the print and online media sectors.

The Press Code of the BiH states the following.

"It is unethical to present covert advertisements as well as ordered and paid for texts as original journalistic ones."

An interested party may file an appeal against the media subject with the Press Council of the BiH if the Press Code of the BiH has been (allegedly) breached. However, in the procedure, the Press Council of the BiH is limited to suggesting text corrections and denials to the media subject. Consequently, in practice, the Press Council of the BiH has very limited authority on advertising practices in the BiH.

1.5 Private Right of Action for Consumers

Advertising rules in the BiH are found in numerous general and sector specific laws and regulations (see **1.1 Primary Laws and Regulation**). Depending on which law and/or regulation has been allegedly breached, consumers may either take actions with public authorities (administrative bodies) or the competent courts.

If consumers consider any advertising as breaching (consumer-related) advertising laws and regulations, they may file a complaint with the administrative body, which may initiate administrative proceedings and eventually issue sanctions and/or remedies. The authority may issue a financial penalty (fine) to the advertiser and/or its advertising agency. For a list of other sanctions and remedies, please see **1.2 Enforcement and Regulatory Authorities**. Consumer protection associations may also take these actions in the name of the consumers.

Consumers may also take private right of action (file a claim) with the competent court where an advertiser breaches laws and regulations that contain advertising rules. They may claim an adequate financial redress as well as compensation for damages. For a list of other remedies available in court proceedings, see **1.2 Enforcement and Regulatory Authorities**.

1.6 Regulatory and Legal Trends

There have been no specific (publicly known) legal/regulatory trends nor cases regarding deceptive advertising in the BiH in the past 12 months.

The BiH has committed to joining the EU and is in the process of harmonising its legislation (including advertising rules) with the acquis communautaire. However, due to political climate, the harmonisation has been at a standstill in the last 12 months.

Several cases of (alleged) deceptive advertising practices have been mentioned in the media, with no known outcomes. One of the cases involves a youth football team that advertises gambling services on their equipment.

1.7 COVID-19, Regulation & Enforcement

The pandemic has not had a long-term effect on the regulation of advertising and the enforcement of advertising laws and regulations. During the peak of the pandemic, the authorities made some decisions that had a temporary impact on the dissemination of information.

For example, in 2020, the RS and the BD authorities issued acts/commands to prohibit the spread of false information, with sanctions included. This was a consequence of information spreading in media during the peak of the pandemic, and its role was to stop the spreading of misinformation. The text of the acts was formulated generally: any publicly presented and transmitted false news and information in any way related to COVID-19 that may cause fear and panic or otherwise negatively affect the implementation of measures to protect the population from the pandemic was encompassed by the acts. Their interpretation was left to competent authorities and courts.

Specifically for advertising, during the peak of the pandemic, the media was reporting heavily on cases of deceptive advertising and other types of unlawful advertising related to fake medicines, fake medicinal properties, misinformation, etc, but there are no known outcomes. If anything, although there have been no important developments in the long-term, as a result, the advertising rules and practices have gathered attention from the public. Also, the responsibility of the media and online platforms for dissemination of unlawful advertising began to be discussed more frequently among professionals.

1.8 Politics, Regulation and Enforcement

In **1.6 Regulatory and Legal Trends** it is noted that legal/regulatory trends have been at a standstill due to political climate in the BiH. Con-

sequently, there have been no recent changes in jurisdiction that have impacted the regulation of advertising and/or the enforcement of advertising regulations.

2. Advertising Claims

2.1 Deceptive or Misleading Claims

The Consumer Protection Law of the BiH defines deceptive advertising as advertising messages and actions that:

- deceive or may deceive consumers and therefore affect their economic behaviour; or
- harm or may harm other participants in the market, which includes using small letters, numbers, pictures and signs to deceive the consumer on important elements of the offer/placement, especially regarding the price of a product or service.

The law further stipulates that deceptive advertising exploits or may exploit inexperience or ignorance, or divert the attention of consumers from important elements of the offer/placement, for profit-making purposes. Advertising messages and actions that contain ambiguities, untruths, exaggerations or other similar elements that deceive or may deceive consumers are also included in the definition.

The Law on Prohibited Advertising of the FBiH defines misleading advertising as advertising that, in any way (including by its presentation), misleads or may mislead the persons to whom it is directed or whom it reaches, and therefore may affect their economic behaviour, in other words, advertising that for the reasons stated harms or may harm other market participants. The Law on Prohibited Advertising of the RS contains an almost identical definition of misleading advertising.

Both the definitions (deceiving and misleading advertising) are very broad and general. Therefore, in theory, the mere potential to mislead a consumer and affect their economic behaviour may be enough to constitute a breach of the laws.

2.2 Regulation of Advertising Claims

The laws and regulations in the BiH which contain advertising rules (please see **1.1 Primary Laws and Regulation**) stipulate general and broad definitions of unlawful advertising (see also **2.1 Deceptive or Misleading Claims**). So, both express and implied advertising claims are subject to regulation.

The laws and regulations contain a general provision which allows consumers' associations and authorised persons to, at any time, seek an expert opinion from the competent informing body on the lawfulness of an advertising message. The opinions are provided on a case-by-case basis.

Furthermore, in the administrative proceedings, administrative bodies may ask advertisers to submit evidence of claims made in the advertisement. The bodies may deem such claims to be false if the required evidence is not provided or if the provided evidence is deemed insufficient in accordance with the applicable administrative proceedings' rules.

In civil proceedings, generally, the courts decide within the limits of the requests made in a claim and based on the evidence submitted by the parties. According to the applicable principle of free evaluation of evidence, the court will decide which facts will be considered as proved, based

on free evaluation of evidence. The competent court will conscientiously and meticulously evaluate each individual piece of evidence and all evidence as a whole.

2.3 Substantiation of Advertising Claims

The market requires fluidity and a high speed of action; therefore, substantiation is generally not specifically required for making advertising claims, meaning there is no regulatory body in charge of pre-clearing the conformity of advertising.

However, one of the main principles of the consumer protection laws states that "advertising of products and services must not contradict laws and other regulations, must not offend human dignity, and must not violate basic human, economic, social and cultural rights". So, consumers generally have the right to receive true and accurate information on advertised products or services. Advertisers should, therefore, be ready to prove the accuracy of their claims if a competitor and/or a consumer challenges them or if government bodies ask for evidence that supports the advertising claims (please see **2.2 Regulation of Advertising Claims**).

Substantiation is particularly important for comparative advertising claims and advertising claims made in regulated industries. To some regulated industry products, the substantiation correlates to their market authorisation (authorisation to place the product on the BiH market). For example, in line with the Medicinal Products and Medical Devices Law of the BiH and its by-laws:

- advertising of medicinal products must be in accordance with the approved instructions and summarise the main characteristics of the medicinal product;
- advertising of medical devices must be in accordance with the approved instructions; and
- it is prohibited to advertise pharmaceutical products and medical devices that are available on medical prescription only.

The food, supplements and infants formula sectors also have similar special advertising rules (good information practices). According to the food acts and their by-laws, information about food, supplements, etc:

- must not mislead the consumer/customer as to characteristics, effects or properties; and
- must not hint at special characteristics when in fact all similar foods have such characteristics and similar

These also apply to advertising claims.

2.4 Testing to Support Advertising Claims

There are no general testing standards to support the advertising claims. However, it is in an advertiser's best interest to support its claim about products or services with sufficient evidence in case it is challenged by the authorised entities (see **2.3 Substantiation of Advertising Claims**), especially because the definitions of unlawful advertising are general and broad (please see **2.1 Deceptive or Misleading Claims**).

Additionally, the laws on prohibited advertising also provide additional considerations when assessing misleading advertising claims, including the following.

- Characteristics of goods and services such as:
  (a) their nature;
  (b) their composition;
  (c) method and date of production/service

provision;
(d) availability;
(e) quantity.
- The price or the method of price formation, as well as the conditions under which goods are sold or services provided.
- The nature, properties and rights of the advertiser, such as its identity, assets, qualifications, etc.

Therefore, subject testing may include any of the considerations above. For regulated industries (such as medicinal products and medical devices, and food/supplements) which are under special advertising industry rules (see **2.3 Substantiation of Advertising Claims**), the testing may also be, in addition to general standards, connected with such special rules.

2.5 Human Clinical Studies

Only registered medicinal products and medical devices (with the BiH market authorisation) can be placed on the local market. As noted in **2.3 Substantiation of Advertising Claims**, advertising of medicinal products and medical devices must be in line with the instructions, ie, data approved by the BiH regulatory body.

The registration process is formal, costly and long. The competent regulatory body rigorously examines and reviews clinical studies and other documentation, in line with the Law on Medicinal Products and Medical Devices of the BiH and its by-laws, which are sector specific rules.

If certain data has not been approved by the competent regulatory body, it must not be claimed in an advertisement. Specifically, if clinical study data has not been approved, the advertiser must not claim it in an advertisement.

2.6 Representation and Stereotypes in Advertising

There are no special laws or regulations that address stereotyping in advertising, but inclusion, diversity and equity take a special place in the BiH legislation due to its specific organisation (please see **1.1 Primary Laws and Regulation**), history and general political climate.

The Law on Prohibition of Discrimination of the BiH designs a framework for implementation of equal rights and opportunities to all persons in the BiH and defines a system of protection from discrimination.

The law defines discrimination as any different treatment including any exclusion, limitation or preference based on real or perceived grounds towards any person or group of persons, their relatives, or persons otherwise associated with them, on the grounds of:

- race;
- skin colour;
- language;
- religion;
- ethnic affiliation;
- disability;
- age;
- national or social background;
- connection to a national minority;
- political or other persuasion;
- property;
- membership in trade union or any other association;
- education;
- social status and sex;
- sexual orientation;
- gender identity;
- sexual characteristics; and
- any other circumstance serving the purpose of or resulting in prevention or restriction of

any individual from enjoyment or realisation, on equal footing, of rights and freedoms in all areas of life.

The prohibition applies to all public bodies, and all natural and legal persons in the public and private sectors, in all spheres. It directly and indirectly effects advertising and marketing.

2.7 Environmental Claims

The applicable laws and regulations forbid advertisements that contain statements or visible representations that, directly or indirectly, by omission, vagueness, or exaggeration, mislead consumers in relation to impact on the environment of product or service. Generally, any harmful behaviour towards the environment is forbidden.

2.8 Other Regulated Claims

All advertising claims must comply with the general advertising rules, and regulated industry advertising claims must also comply with any applicable industry specific rules. As noted in **2.3 Substantiation of Advertising Claims**, consumers generally have the right to receive true and accurate information on advertised products or services.

Aside from specific regulated claims, there are also special rules regarding trade marks. Namely, a trade mark owner may forbid the use of their trade mark in an advertisement.

3. Comparative Advertising

3.1 Specific Rules or Restrictions

The Consumer Protection Law of the BiH sets forth that comparative advertising is any advertising that explicitly or implicitly identifies a market competitor, or goods or services offered by the market competitor.

Generally, comparative advertising in the BiH is allowed in the interest of public and healthy competition, provided that the principle of fair competition is conformed with. The Consumer Protection Law of the BiH goes into detail and stipulates that comparative advertising is allowed if it:

- compares goods and services that meet the same needs or are intended for the same purpose,
- compares one or more material, relevant, confirmed and representative characteristics of goods and services,
- does not create confusion on the market between promoters and market competitors;
- does not discredit or degrade trade marks, trade names, or other recognisable marks, goods, or services of market competitors;
- does not abuse the reputation of a trade mark, trade name, or other recognisable marks of a market competitor or the indicated origin of the competitor's products;
- does not represent goods or services as imitations or replicas of goods and services bearing trade marks or trade names.

Argumentum a contrario, everything that is not allowed by the above rules constitutes unlawful comparative advertising for which advertisers may be fined/liable for damages in general.

Other laws and regulations (please see **1.1 Primary Laws and Regulation**) also contain definitions of comparative advertising and additional provisions on this type of advertising. For example, the laws on prohibited advertising specify when comparative advertising is unlawful, as opposed to the Consumer Protection Law which

specifies the circumstances in which it is permissible; however, the essence of the rules (provisions) is the same.

Comparative advertising may also be considered a misleading commercial practice, from the perspective of the consumer laws.

3.2 Comparative Advertising Standards

Generally, comparative advertising claims are subject to the same standards as other types of advertising. For special rules regarding comparative advertising, see **3.1 Specific Rules or Restrictions**.

3.3 Challenging Comparative Claims Made by Competitors

The advertiser may challenge claims made by a competitor in the civil law proceedings before the competent court and obtain remedies (please see **1.2 Enforcement and Regulatory Authorities**).

4. Social/Digital Media

4.1 Special Rules Applicable to Social Media

The BiH laws and regulations do not differentiate social media advertising from other types of advertising. Therefore, the (general) advertising rules found in various laws and regulations (see **1.1 Primary Laws and Regulation**), including those covering specific sectors and practices (eg, unfair commercial practices) related to advertising, also apply to social media advertising.

4.2 Key Legal Challenges

As noted in **4.1 Special Rules Applicable to Social Media**, there are no advertising rules specific to social media in the BiH, so marketers face the same challenges as other industries. As such, scattered advertising laws and regulations (see **1.1 Primary Laws and Regulation**), generality of advertising-related provisions (see **2.1 Deceptive or Misleading Claims**) and lack of publicly known practices of authorities and courts in regard to the application of advertising rules lead to further uncertainty and legal insecurity.

There are other challenges arising from social media advertising, both for regulators and marketers. For example, it is difficult to secure evidence about breaches of advertising laws and regulations. Also, the marketers' responsibilities can be unclear: in some cases, marketers cannot stop dissemination via social media even if they have removed the content/claim. Furthermore, it may be hard for advertisers/marketers to research and comply with both:

- local laws and regulations; and
- social media platforms' specific advertising rules.

4.3 Liability for Third-Party Content

The liability of advertisers for third-party content on their social media channels is generally limited, in line with the Electronic Legal and Commercial Transactions Law of the BiH, which is partly harmonised with the E-commerce Directive of the EU. Therefore, damage claims are generally not available against advertisers. However, this does not necessarily exclude advertisers from injunction and/or deletion claims issued by the competent courts/authorities.

Also, if an advertiser is notified about illicit content and does not remove it, the advertiser could become culpable (jointly with the main infringer) for the illicit post. In such a case, a damage claim might be possible.

4.4 Disclosure Requirements

The same disclosure requirements that apply to advertising in general also apply to social media advertising. As noted in **2.3 Substantiation of Advertising Claims**, consumers generally have the right to receive true and accurate information on advertised products or services, and the laws and regulations in the BiH that contain advertising rules (see **1.1 Primary Laws and Regulation**) stipulate general and broad definitions of unlawful advertising (see **2.1 Deceptive or Misleading Claims**), so not making appropriate disclosure may be considered unlawful, although this it would be considered on a case-by-case basis.

Radio and television broadcasting sectors have special advertising disclosure requirements, and these do not explicitly apply to social media. Also, in the RS, the consumer law explicitly stipulates the need to disclose the advertising content as "paid promotion" or similar, otherwise it is considered a breach of commercial practice rules.

4.5 Requirements for Use of Social Media Platform

Please see **4.1 Special Rules Applicable to Social Media**.

4.6 Special Rules for Native Advertising

There are no special rules that apply to "native advertising" on social media. However, general principles apply (see **4.1 Special Rules Applicable to Social Media** and **4.4 Disclosure Requirements**).

4.7 Misinformation

There are no specific rules for misinformation on topics of public importance. However, advertising must not in any way abuse and/or manipulate with superstition, the fears or credulity of individuals or the public. Likewise, advertising must not encourage potentially harmful behaviour.

The COVID-19 pandemic had an impact on the treatment misinformation (see **1.7 COVID-19, Regulation & Enforcement**).

5. Social Media Influencer Campaigns and Online Reviews

5.1 Trends in the Use of Influencer Campaigns

The use of influencers in advertising campaigns has significantly increased in recent years. Many business subjects in the BiH now consider using local (or regional) influencers as a part, or in the spotlight, of their marketing campaigns. The growth and importance of influencers is obvious.

Instagram and YouTube have created an entire new wave of local and regional influencers. As more and more advertisers prefer targeting specific audiences, this has made influencers perfect "tools" to disseminate content.

The absence of a language barrier between some ex-Yugoslavian countries, (eg, the BiH, Croatia, Serbia and Montenegro) and the "diaspora", BiH citizens or ex-citizens living abroad (especially in Germany and Austria), result in the size of the market for local influencers being raised to more than 20 million. For this reason, a company operating, for example, in the BiH, Croatia, Montenegro and Serbia may engage the same influencer to promote their products/services across all those countries. Alternatively, they may start the marketing campaign in one of the countries, but it is still likely to have an impact in other countries via the online platforms or other disseminating tools. This offers numer-

ous possibilities for influencers and those interested in using them.

5.2 Special Rules/Regulations on Influencer Campaigns

Even though influencer-related advertising has become important in recent years (see **5.1 Trends in the Use of Influencer Campaigns**), there are no special rules or regulations that apply to it exclusively.

However, the (general) advertising rules found in various laws and regulations (see **1.1 Primary Laws and Regulations**), including those covering specific sectors and practices connected to advertising, also apply to influencer campaigns.

5.3 Advertiser Liability for Influencer Content

Generally, advertisers are not liable for content posted by their influencers because persons in the BiH have personal liability for their actions and/or omissions. However, if the advertiser has control over an influencer's unlawful actions, then they both may be held (jointly) liable for breach of laws and regulations.

Laws and regulations in the BiH containing advertising rules (see **1.1Primary Laws and Regulation**) stipulate general and broad definitions of unlawful advertising (see **2.1 Deceptive or Misleading Claims**), and also broadly define the responsibility of both advertisers and their agencies (see **1.5 Private Right of Action for Consumers**), so each situation should be examined on a case-by-case basis.

5.4 Misleading/Fake Reviews

The topic of "fake reviews" has not been addressed by the authorities in the BiH, even though it is widely discussed in public.

Notwithstanding, if there is a causal connection between "fake reviews" and consequent damages, the damaged party may file a claim for compensation of damages with the competent court. Such a claim would be considered based on the applicable laws of contracts and torts. However, it is often hard to identify the person who made the "fake reviews" and civil claims cannot be filed against non-identified persons.

If such damages were caused by employees of a company, then their employer could also be liable, as per the following rules:

- if the employer is responsible for the damage that the employee caused to a third party in the course of work or in connection with the work, unless it proves that the employee acted as they should have in the given circumstances;
- the damaged party has the right to demand compensation directly from the employee if the employee caused the damage intentionally; and
- the employer who compensated the damaged party for the damage caused by the employee, intentionally or in gross negligence, has the right to demand compensation from the employee for the amount paid.

6. Privacy and Advertising

6.1 Email Marketing

The general advertising rules apply to email marketing (see **1.1 Primary Laws and Regulation**). In addition, there are specific rules stipulated by the Electronic Legal and Commercial Transactions Law of the BiH and the Data Protection Law of the BiH.

The consumer protection laws set forth the general principle that, without the consumer's prior consent, the trader may not use means of distant communication with the consumer, such as telephone, fax, email, etc. Also, the Consumer Protection Law of the RS stipulates that continuously addressing the consumer via telephone, fax, email, etc, represents an unlawful aggressive commercial practice.

As for the specific rules, the Electronic Legal and Commercial Transactions Law of the BiH defines "commercial communications" as advertising and other forms of communication that promote, directly or indirectly, goods and services, or the reputation of a company (entrepreneur), organisation or person engaged in commercial, industrial or craft activity. That said, email marketing is considered as "dissemination of commercial communications" and according to the law, the commercial communications must clearly and unambiguously:

- be recognisable as such;
- indicate at whose request it has been made;
- indicate promotional offers, such as price reductions, premiums, and prizes, as such, as well as the conditions that must be fulfilled to use them; and
- indicate promotional contests or games as such, as well as the conditions that must be met to participate in them.

The Communications Regulatory Agency of the BiH should keep an opt-out register for email communications.

Additionally, the Data Protection Law of the BiH specifies a general opt-out regime for direct marketing. The law does not differentiate between different forms of marketing and stipulates that data subjects have the right to:

- oppose the data controller's further use or transfer of their personal data for the purpose of direct marketing; and
- be notified before their personal data is transferred for the first time to a third party for direct marketing purposes.

For breaching the above rules, the advertisers may be sanctioned primarily:

- under the consumer protection laws (general rules), with a fine up to (about) EUR4,000;
- under the Electronic Legal and Commercial Transactions Law of the BiH, with a fine up (about) EUR3,000; and
- under the Data Protection Law of the BiH, with a fine up to (about) EUR25,000.

6.2 Telemarketing

The general advertising rules apply to telemarketing (see **1.1 Primary Laws and Regulation** and **6.1 Email Marketing**), as well as specific regulations stipulated by the Data Protection Law of the BiH, which are the same as for email marketing (please see **6.1 Email Marketing**).

Notwithstanding the above, please note that unsolicited telemarketing is not explicitly prohibited in itself and that the authorities in the BiH have not established a "no-call" register, as exists in the EU countries.

6.3 Text Messaging

Please see **6.1 Email Marketing**, as the same applies to text messaging.

Please note that the "no-call" (including SMS/MMS) register has not been established in the BiH.

6.4 Targeted/Interest-Based Advertising

The Data Protection Law of the BiH specifies a general opt-out regime for direct marketing (including if connected with targeted/interest-based advertising). The law does not differentiate between different forms of marketing and stipulates that data subjects have the right to:

- oppose the data controller's further use or transfer of their personal data for the purpose of direct marketing; and
- be notified before their personal data is transferred for the first time to a third party for direct marketing purposes.

For breaching the above rules, the advertiser may be fined up to (about) EUR25,000.

As targeted/interest-based advertising is now mostly connected with "cookies" (tracking technologies), it is worth pointing out that tracking technologies have not yet been regulated in the BiH, but the general data protection principles from the Data Protection Law of the BiH also apply to them. In practice, this means that potential subjects of tracking technologies must give consent for their use and be informed on all aspects of processing of their personal data in connection with the technologies.

6.5 Marketing to Children

In BiH, a child is defined as any person under the age of 18 and, generally, acting in the best interest of children is one of the core principles of the BiH legislation. Both the rules from the general rules and special rules apply to marketing to children.

The consumer protection laws and the laws on prohibited advertising (see **1.1 Primary Laws and Regulation**) in general provide that every advertisement must respect principles protecting minors; therefore, advertising messages must not be unethical, act unworthy, or fraudulent, or contain elements that cause or could cause physical, mental or other harm to children, or contain elements that exploit or abuse, or could abuse, their gullibility or inexperience. Further, the RS laws consider encouragement of children through advertisements to buy or influence parents or other adults to buy for them as (unlawful) aggressive business practices.

Aside from the general principles, special rules related to advertising to children are found throughout various sector-specific laws and regulations (see **1.1 Primary Laws and Regulation**). For example, regarding television and radio broadcasting, the Communications Law of the BiH and its by-laws (Code of Commercial Communications of the BiH) set forth general principles:

- commercial communications that encourage behaviour that could endanger the health, psychological and/or moral development of children are prohibited; and
- commercial communications intended for children or involving children will avoid anything that could endanger their interests and shall be considerate of their special sensitivity.

Code of Commercial Communications of the BiH goes further into specifics and, among other limitations related to children, establishes the "no-broadcast" rules at around children's programmes – 15 minutes before, during, and 15 minutes after a children's programme – for alcoholic beverages, beer, medicines, medical treatments, aids, and devices, including dietary supplements, medical institutions, means of regulating body weight, ignition devices, inflammable and other hazardous substances, religious

messages, and games of chance. Other special rules are found in other sector-specific laws and regulations (please see **8.Sports Betting/Gambling** and **10.1 Regulated Products**).

7. Sweepstakes and Other Consumer Promotions

7.1 Sweepstakes and Contests

Sweepstakes (promotional chance-based games) and contests are generally permissible in the BiH, as long as the games do not qualify as a "gambling game" or "classic games of chance" (eg, games in which the participants are specifically charged for entry), in which case there are other requirements to consider in accordance with applicable laws and regulations.

Registration/filing with the competent authorities is required to offer a chance-based game and their approvals are mandatory to conduct the game. The procedure differs depending on where in the BiH the game is being organised, as all three entities/units in the BiH (the FBiH, the RS, and the BD) have individual laws on games of chance, which cover the promotional games as well. The procedures in the entities/units are separate, and games (including the rules of each individual game) need to be approved in each entity/unit in which they are organised.

There are associated administrative costs:

- in the FBiH and the BD, the organiser must pay 6% of the total prize fund for charitable purposes; and
- in the RS, the organiser must pay 10% of the total prize fund to the competent authority.

The documentation to prove such payment has to be delivered alongside the filing. There may also be other administrative costs connected with the procedure, such as costs for publishing the rules of the promotional chance-based game in a local newspaper.

Organisers must not conduct promotional chance-based games without prior approval, and there are no specific timescales within which the competent authorities must give approvals; it is decided on a case-by-case basis, taking into consideration the specifics of each filing.

7.2 Contests of Skill and Games of Chance

Skill-based games are not specifically regulated in the BiH; therefore, whether they are distinguished from games of chance depends on several factors, such as the specifics of the skill-based game, contractual or other relations between the organiser and the participants, etc.

The applicable laws and regulations do however define games of chance as games in which the participant is given an opportunity to win money, goods or services for a fee, in which the win or loss does not depend on the knowledge or skill of the player, but on chance or some uncertain event.

The question of whether a skill-based game falls into the category of games of chance would have to be considered on a case-by-case basis. If it does, then the applicable laws on games of chance apply and the game has to be organised according to special rules and requirements (please see **7.3 Registration and Approval Requirements**); if not, it is not necessary to get prior approval/register the game and, in general, the civil codes apply.

7.3 Registration and Approval Requirements

Games of chance must be registered and approved by the competent authorities (the organiser must get a licence), while registration and approval are not required for contests of skill in principle (please see **7.2 Contests of Skill and Games of Chance**).

As all the three entities/units in the BiH (the FBiH, the RS, and the BD) have individual laws on games of chance, and as the registration procedures in the entities/unit are separate, approval(s) need to be obtained separately in each of the entities/units where games of chance are to be offered. In the FBiH, the registration procedure is operated by the Ministry of Finance of the FBiH; in the RS by the Ministry of Finance of the RS – Special Games of Chance Department; and in the BD by the Tax Authority of the BD.

Games of chance sectors are highly regulated areas and the registration procedures (with the above identified authorities) are slightly different in the FBiH, the RS and the BD, and primarily depend on the type of games of chance that are intended to be organised. Also, the term "games of chance" includes a wide range of games, such as lotteries, raffles, sports forecast, gambling, electronic gambling games, etc.

Notwithstanding the above, the registration procedures can be summarised as follows:

- organisers need to be local companies (limited liability companies or joint stock companies), and the companies may be examined by the authorities regarding their current and prior business activities, creditworthiness, tax and other obligations and similar;
- the approvals/licences are given for each individual game of chance;
- the companies may need to have appropriate share capital in order to get the approval/licence for some of the games;
- technical, security and other similar requirements may be assessed by the competent authorities during the registration procedure;
- issued bank guarantees may be one of the requirements for getting approvals/licences for individual games of chance;
- the approval/licence may be denied if the market/particular game of chance is "overcrowded";
- the approvals/licences are issued for a limited time and the organisers undergo inspections during their operations; and
- companies can lose the approvals if they fail to comply with general requirements and specific requirements for individual games of chance.

Please note that the procedures and requirements may also differ for each individual game of chance.

7.4 Loyalty Programmes

There are no loyalty programme-specific laws and regulation, but the general rules apply – commercial practices, consumer rights and advertising rules (see **1.1 Primary Laws and Regulation**).

General personal data protection rules are very important when considering loyalty programmes. The Personal Data Protection Law of the BiH, and its connected by-laws, contain the key general rules applicable to loyalty programmes in the BiH. The application of the law is furthermore shaped by the opinions and decisions of the Data Protection Agency of the BiH, and the decisions of the courts of the BiH issued in the legal remedy proceedings against the agency's decisions. However, the opinions and decisions

of the agency and the court should not be taken as definitive and final, but rather each situation should be examined on a case-by-case basis.

7.5 Free and Reduced-Price Offers

The BiH laws and regulations contain special rules that apply to free or reduced-price offers.

Firstly, the trader/seller must announce the sale of the product as considered regular for the place of sale and the product in question and there must be correlation between general sale announcement and average sale percentage (if there are several/many products on sale). The product must be clearly and visibly marked with the price before and after the discount. Furthermore, if a short expiration date of the product is the cause of the discount, the expiration date must be marked in a visible way.

7.6 Automatic Renewal/Continuous Service Offers

Automatic renewal/continuous service offers are regulated by:

- the consumer protection laws - general consumer contracts and distance consumer contracts (the BH and the RS); and
- the laws on contracts and torts (the FBiH and the RS).

General consumer contract rules can be summarised as follows:

- the content of the contract must be made available to the consumer; the contract is not binding for the consumer if they were not familiar with it;
- consumer contract provisions must be comprehensible;
- in case of a doubt, consumer contract provisions are always applied in the consumers' favour; and
- unfair contractual provisions (eg, significant inequality between the parties, unjustified expectations, breach of the principle of good commercial practices) or provisions that may cause damage to the consumer are null and void.

Therefore, any unfair automatic renewal/continuous offers could be null and void if against the general contract rules above. Notwithstanding, the consumer laws also go into specifics of automatic renewals/continuous services. The Consumer Protection Law of the BiH stipulates that, regarding standard form contracts, automatic renewals for a one-year period or above are automatically considered as unfair contractual provisions. The Consumer Protection Law of the RS also goes into specifics of automatic renewals/continuous services: it is considered that a contractual provision is unfair if it establishes automatic extension of the contract in case the consumer does not declare they are terminating the contract a certain period after the contract has expired if that period is reasonably considered as short.

Aside from the consumer laws, laws on contracts and torts contain general provisions that apply to all contracts and contractual relationship, unless explicitly stipulated otherwise. The general rule is that silence of the person receiving the offer does not mean the acceptance of that offer, unless the persons are in a permanent business relationship considering goods from the offer, which would be assessed on a case-by-case basis.

8. Sports Betting/Gambling

8.1 Legality & General Regulatory Framework

Sports betting and other forms of gambling are generally permissible in the BiH but are highly regulated. They are considered as "games of chance" and laws on games of chance and their connected by-laws are applicable. Please see **7.3 Registration and Approval Requirements**. The same applies to sports betting and other forms of gambling.

8.2 Special Rules & Regulations

There are special rules that apply to the advertising and marketing of sports betting and gambling, aside from the general rules that apply (see **1.1 Primary Laws and Regulation**).

Generally, the special rules apply to children – persons under the age of 18 (see **6.5 Marketing to Children**). Advertisements related to games of chance may not be broadcast on radio and television shows, nor may they be published in printed material and internet platforms intended for children and young people. Also worth noting is that foreign games of chance may not be advertised in the BiH.

The BD has gone a step further, indicating social responsibility in connection with sports betting and gambling advertisements. Advertisements must underline the prevention of gambling addictions and state that gambling is not a reasonable strategy to acquire financial benefits.

9. Web 3.0

9.1 Cryptocurrency and Non-fungible Tokens (NFTs)

Currently, there is no specific regulation governing the sale or advertising of cryptocurrencies and/or NFTs.

Consequently, advertising of these products is not prohibited and must comply with the general advertising rules and consumer protection laws (see **1.1 Primary Laws and Regulation**).

Also, generally, there is no legislation (even outside of advertising) specifically directed at cryptocurrencies and/or NFTs. The Central Bank of Bosnia and Herzegovina, however, issued an opinion that cryptocurrencies should be viewed as assets (ie, financial instrument) and not as money, until the BiH legislation reaches the point of upgrading its laws and regulations specifically for the subject matter.

9.2 Metaverse

Currently, there are no special laws and regulations that apply to advertising within the metaverse.

Consequently, such advertising is not prohibited and must comply with the general advertising rules and consumer protection laws (see **1.1 Primary Laws and Regulation**).

The authorities in the BiH have not yet publicly considered any issues regarding advertising in the metaverse.

9.3 Digital Platforms

There are no specific laws and regulations that apply to digital advertising platform and the use of adtech, in relation to advertising.

For general rules applicable to digital platforms and adtech, see **1.1 Primary Laws and Regulation**.

Please see **6.4 Targeted/Interest-Based Advertising** for personal data protection rules. Also, please see **4.3 Liability for Third Party Content**.

10. Product Compliance

10.1 Regulated Products

Besides the general rules, the BiH has particular regulations that apply to regulated products (see **1.1 Primary Laws and Regulation**).

Food

The Food Act of the BiH and its connected by-laws, as well as the Food Act of the RS and its connected by-laws, provide special advertising rules regarding food. In general, food advertisements must not:

- mislead the consumer/customer about characteristics, effects or properties;
- attribute medicinal and/or preventive properties;
- hint at special characteristics when in fact all similar foods have the same or similar characteristics

These provisions also apply to advertising claims. Please note that the food sector has many by-laws for specific types of food that further may contain special advertising rules. For example, alcohol advertising is specifically regulated from the advertising perspective, in additional to general rules and special rules for food advertising which also apply. The by-laws relating to alcohol contain a set of highly complex rules that are different for different types of alcohol/alcoholic drinks. Commercial communications related to alcoholic beverages must not:

- be aimed specifically at minors;
- link the consumption of alcohol with improved physical abilities or driving a motor vehicle;
- claim that alcohol has medicinal properties or similar;
- encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;
- put emphasis on the high alcohol content as a positive quality of alcoholic beverages; and/or
- create the impression that consumption of alcohol contributes to social or sexual success.

See also **6.5 Marketing to Children** for details on restrictions in relation to children.

Additionally in the food sector, there are special advertising rules for infant formulas, food for special nutritional uses, food supplements, etc.

Tobacco

Tobacco advertising (tobacco, cigarettes, and similar products) is also specifically regulated in tobacco-related laws (the FBiH, the RS and the BD). Generally, advertising of tobacco and related products is prohibited. Parties are prohibited from engaging in any form of advertising, promotion and other forms prescribed by law that can be considered providing information or suggestions of use in favour of tobacco products. There are several very limited and clearly defined exceptions.

Cannabis

In the BiH, cannabis is illegal and possession of even a small amount may be punished by fines, arrest, and even imprisonment.

Drugs, Medical Equipment, Medicines, etc
Drugs and medical devices are also specifically regulated in the BiH, from the advertising perspective. The specific rules can be summarised as follows:

- advertising of medicinal products must be in accordance with the approved instructions and summarise the main characteristics of the medicinal product;
- advertising of medical devices must be in accordance with the approved instructions; and
- it is prohibited to advertise pharmaceutical products and medical devices that are available by medical prescription only.

See also **2.5 Human Clinical Studies** related to drugs and medical devices.

10.2 Other Products

In addition to those mentioned in **1.1 Primary Laws and Regulation** and **10.1 Regulated Products** and other sections, there are several products and/or services that are subject to special advertising rules.

Weapons, ammunitions, and similar products cannot generally be advertised.

Regulatory authorities overseeing the banking sector have extensive powers and can intervene in advertising practices. The same applies to the insurance sector and brokerage. All of these are considered on a case-by-case basis.

Special advertising practices may also be found in "regulated" professions such as attorneys-at-law (practicing lawyers) and public notaries. For example, public notaries may not advertise at all. Attorneys-at-law, on the other hand, must be members of bar associations, which have the authority to self-regulate the advertising practices for their members.

bh.legal - Law Office Mirna Milanović-Lalić is a full-service commercial law practice with market-leading expertise in advising and representing both multinational and local companies in all aspects of commercial law. Lawyers are experienced in the following practices: M&A, banking and finance, projects and infrastructure, corporate, commercial, employment, tax, real estate and non-profits. The firm specialises in intellectual property, technology, media and advertising and marketing law. The firm's clients include several technology market leaders, for which they provide guidance and representation in complex deals involving financing, privacy, and regulatory. Specifically, regarding advertising and marketing law, the firm is a member of Global Advertising Lawyers Alliance (GALA), through which the firm has gained significant experience and built a reputation in the subject area.

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Contents

1. Legal Framework and Regulatory Bodies

1.1 Primary Laws and Regulation

The principal statutes regulating advertising in Brazil are:

- the Brazilian Federal Constitution;
- the Consumer Defence Code (CDC) (Federal Law No 8,078/90);
- the Statute of the Child and Adolescents (ECA) (Federal Law No 8,069/90);
- Federal Law No 14,181/21, which amends the CDC and the Elderly Statute, to improve the discipline of consumer credit and provide for the prevention and treatment of over-indebtedness;
- Federal Law No 5,768/71 and Decree No 70,951/1972, which regulate commercial promotions and sweepstakes;
- Federal Law No 10,826/03 and its Decrees No 9,845/19 and No 9,847/19, which regulate firearms;
- Federal Law No 9,294/1996, which regulates medicine, tobacco, pesticides and alcoholic beverage advertising;
- Federal Law No 11,265/2006 and Decree No 9,579/2018, which both set forth the rules concerning advertising for childcare products (ie, pacifiers and bottles);
- Federal Law No 13,874 /2019 (the "Economic Freedom Act"), which reinforces the constitutional guarantees of free initiative and freedom of commercial expression, and aims to prevent the abuse of advertising restrictions in any economic sector;
- the Brazilian Advertising Self-Regulation Code (CBAP) of the National Advertising Self-Regulation Council (CONAR);
- Federal Law No 12,842/13, which provides for the practice of medicine, the Code of Ethics (CFM Resolution No 2,145/2016) and regulations;
- Resolution RCD No 96/08 of the National Health Surveillance Agency (ANVISA), which establishes guidelines for advertising, publicity, information and other practices related to the commercial dissemination or promotion of medicines;
- Resolution RDC No 429/2020 and Normative Instruction (IN) No 75/2020, which regulates the new standard on nutritional labelling of packaged foods;
- Federal Law No 11,265/06, which regulates the marketing of food for young children and also related childcare products;
- the Ministry of Agriculture, Livestock and Supply (MAPA), which regulates specific regulatory rules for label claims; and
- Copyright Law No 9,610/98, which amends, updates and consolidates copyright legislation.

1.2 Enforcement and Regulatory Authorities

The bodies responsible for issuing advertising regulations in Brazil are CONAR and the government itself, represented by the House of Representatives and the Senate, besides federal, state or local administrative bodies.

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

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

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

1.3 Liability for Deceptive Advertising

By law in Brazil, companies are responsible for the actions of their owners, shareholders, directors, managers and agents ("representatives"). However, in the event of an abuse of power or misuse of purpose, the administrators themselves may also be held liable for the damages caused by their actions or decisions.

That said, with regard to liability for advertising content, the CDC establishes that the burden of proof regarding the veracity and correctness of advertising rests with those who sponsor it. CONAR, on the other hand, establishes that the liability for advertising rests with the advertiser, the agency and the vehicle (in the final case with reservations, depending on the circumstances).

There is a current doctrine under which the advertiser is solely liable for the damage caused by advertising. A second doctrine provides that agencies and broadcasters/platforms can also be held liable in the case of misconduct or fault. There is also a minority viewpoint that contends that actors/influencers should also be held responsible.

As a rule, the Superior Tribunal of Justice (STJ) understands that the liability lies with the advertiser; however, there are specific precedents where the agency and even the broadcaster were also held liable by the STJ.

1.4 Self-Regulatory Authorities

CONAR is a self-regulatory agency created by representatives of the private sector to regulate, monitor and decide on matters related to advertising.

To conduct its activities and to guide the market, CONAR published the Brazilian Advertising Self-Regulation Code (CBAP), which sets the rules and principles that should guide ethical advertising in Brazil.

The proceedings before CONAR may be filed based on consumers' complaints, on a representation brought by a competitor (the company must be an associate member of CONAR) and by CONAR itself.

CONAR's trial process is composed of three instances and its decisions are rendered in a short period of time, usually 60 days. The first instance is responsible for receiving and judging the case. The court of appeal is responsible for reviewing the decision of the first instance and, if the formal requirements are met, the third and final instance is responsible for solving any conflict of understanding of the second-instance judges or errors contained in the decision.

It is worth mentioning that similarly to judicial procedures, CONAR may grant injunctions to suspend advertising. Notwithstanding this, they are not commonly granted.

Since CONAR is a self-regulatory body, it does not have the authority to impose fines or determine the payment of any indemnifications. The penalties available to CONAR are:

- a warning to the advertiser and its agency, or to an influencer or celebrity who was hired for advertising/marketing purposes;

- a recommendation to modify or correct the advertisement;
- a recommendation to broadcasters to suspend the displaying of the advertisement; and/or
- a public notice to the broadcasters announcing CONAR's position regarding the non-compliance with the steps and measures determined by it.

1.5 Private Right of Action for Consumers

Advertising practices can be challenged by any consumer before the judiciary or CONAR.

If the consumer is interested in repairing the damage caused by the misleading or abusive advertising, the claim must be filed with the judiciary. In cases where the consumer only has an interest in suspending the advertising (not having damages repaired), they can file a simple complaint on the CONAR portal. If CONAR believes that the claim has merit, an investigation will be initiated to examine the irregularity of the advertising questioned by the consumer.

Consumer Protection Bodies

Besides consumers (the general public), advertising can be challenged by consumer defence bodies (eg, the Public Attorney's Office, PROCON, SENACON and CONAR) on behalf of society or individual consumers.

1.6 Regulatory and Legal Trends

The relevant legal and regulatory trends and cases in Brazilian advertising and marketing in the past 12 months are as set out below.

According to the statistics published annually on the CONAR website, in 2021, most of the complaints filed were related to "Alcoholic Beverages" (16.8%) and "Drugs, Cosmetics and Health, other Products and Services" (16.1%).

CONAR also disclosed that 50.4% of the complaints made by consumers were due to non-compliance of the advertisements with the obligation of "True Presentation", while 22.8% were due to failure to comply with the obligation of "Advertising Identification".

Discussions related to advertising of products and services aimed at children and adolescents are frequent; recently, the Bahia State Prosecutor's Office (MP-BA) initiated an inquiry into nine companies to investigate possible illegal advertising aimed at children on YouTube. According to the inquiry, it was verified that these advertisers violated children's rights and the national legislation, by strategically and systematically targeting marketing messages directly to children.

Another topic in vogue is the advertising and sponsorship of betting sites. Recently, a law was enacted authorising sport's betting in Brazil. Since such law is still pending regulation, there is a recurring discussion about the legality of advertising promoted by the betting websites.

1.7 COVID-19, Regulation & Enforcement

CONAR has published a Technical Note in order to regulate advertising of products and services that make reference to the COVID-19 pandemic. The Technical Note was aimed at advertising of pharmaceutical products, food supplements and cleaning products.

Due to the uncertainties related to COVID-19, in summary, the Technical Note recommended companies in the pharmaceutical and food supplement segment not use claims of cure, treatment or prevention until scientifically validated

procedures for such claims had been presented by the authorities.

For cleaning products, the Technical Note establishes that all claims must have technical proof and be aligned with the indications and warnings recommended by the health authorities.

1.8 Politics, Regulation and Enforcement

CONAR and the consumer protection bodies (see **1.5 Private Right of Action**) were quite diligent in combating abusive or misleading advertising that exploited the COVID-19 pandemic, in particular advertisements that exploited the fragility or lack of knowledge of consumers.

2. Advertising Claims

2.1 Deceptive or Misleading Claims

Abusive and misleading advertising are regulated by the Consumer Defence Code.

Abuse advertising is that which:

- has a discriminatory nature;
- incites violence, explores fear or superstition;
- takes advantage of a child's lack of judgment or experience;
- disrespects environmental values; or
- may cause the consumer to behave in a way that will bring harm to their health or safety.

Misleading advertising is any information or public communication that, expressly or by omission, is entirely or partially false or is in any way capable of inducing the consumer to make a mistake regarding the nature, characteristics, quality, quantity, properties, origin, price or any other information about the advertised products and/or services.

2.2 Regulation of Advertising Claims

Not all claims are subject to regulation or empirical evidence. As an example, the concept of puffery is recognised in Brazil: proof is not required for claims that are unquestionably absurd or cannot be proved or measured.

However, due to the considerable quantity of laws and regulations applicable to advertising in Brazil, claims must be always be analysed on a case-by-case basis, considering the whole context of the campaign in order to confirm whether empirical evidence is required.

2.3 Substantiation of Advertising Claims

Advertising claims can be substantiated as follows:

- tests conducted by specialised companies or laboratories (ie, lab tests and consumer perception tests);
- performance surveys carried out by specialised companies (ie, sales volume, points of sale, consumer preference, delivery speed, etc);
- analyses and articles published by magazines, websites, newspapers or specialised media; and
- public information published by competitors.

Tests performed directly by advertisers are valid. However, these tests are often questioned or disregarded by competitors and even by CONAR and judges.

2.4 Testing to Support Advertising Claims

With rare exceptions, there is no pre-established standard for performing tests that support advertisements.

Therefore, it is recommended that advertisers request an expert to confirm, in advance, the substantiation of its claims, as measured against best market practices.

2.5 Human Clinical Studies

There is no specific Brazilian Law that requires human clinical studies for certain types of advertising. Nevertheless, considering that by law every claim must be duly substantiated, in cases where advertising promotes health benefits, the advertiser must have the necessary studies to prove the result highlighted in its campaign, which may involve testing human beings, depending on the case and the sector involved.

2.6 Representation and Stereotypes in Advertising

There are no laws or regulations that address stereotyping in advertising or inclusion, diversity and equity more generally in Brazil.

However, CONAR has been constantly tested in disputes that question the regularity of advertisements whose content promotes inclusion and diversity. CONAR's decisions have been to support advertising that promotes inclusion and diversity, as long as the advertising content is not offensive or illegal.

2.7 Environmental Claims

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

On the other hand, according to the applicable regulation, claims regarding sustainability must respect some specific 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 shall be provided with supporting data and an external source endorsement.

2.8 Other Regulated Claims

The use of words such as "free" and "free trial", or other expressions with the same meaning, in 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, data 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, it is important to highlight that it 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 and expenses (total effective cost), as well as the "original" cost.

3. Comparative Advertising

3.1 Specific Rules or Restrictions

The Comparative advertising is regulated by CONAR (Article 32 of the CBAP) and the Intellectual Property Law.

There is an important debate regarding the right to use a competitor's brand or products in comparative publicity, both protected by the Industrial Property Law.

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

Such precedents allow companies to compare their products/services with their competitors' products/services, even identifying the competitors' brands.

3.2 Comparative Advertising Standards

Comparative advertising is accepted in Brazil provided its main objective is the dissemination of relevant information to the consumer.

Specific conditions must be met for advertising to be ethical and regular: among other requirements, it must be objective and supported by technical data. Subjective or emotional data are not valid to support comparative advertising. The comparison must be made between products that are comparable to each other, of similar value and from the same period of manufacture.

Advertising must also comply with the Intellectual Property Law, especially when it explores competitors' products and brands, and it cannot denigrate the competitor's brand or image.

3.3 Challenging Comparative Claims Made by Competitors

A comparative advertisement can be challenged through both CONAR and the courts.

Disputes before CONAR are faster; however, it is not possible to seek indemnification through its procedure. The penalties applied by CONAR are warning, modification of publicity, suspension of publicity or the disclosure of a public notice announcing that the company does not respect the rules of ethics in advertising.

A lawsuit through the courts is more time-consuming and more costly. However, it also allows indemnification and/or recognition of the practice of unfair competition to be sought (Federal Law No 9279/96).

In both jurisdictions, it is possible to request an injunction for the immediate suspension of the advertising in question.

4. Social/Digital Media

4.1 Special Rules Applicable to Social Media

At the end of 2020, CONAR launched the Digital Influencer Advertising Guidelines, which consist in practical guidelines with best practices for digital influencers on social media.

The Guidelines contain instructions on how to apply the rules of the CBAP to commercial content on social media, in particular, content generated by users known as digital influencers or influencers or even reposts (for more information related to the Guidelines, see **5. Social Media Influencer Campaigns and Online Reviews**).

Also, CONAR has issued a Technical Note establishing that influencers' advertisements must indicate the use of filters in images. The following disclaimer must be inserted, if this is the case: "retouched photograph to modify the physical appearance of a person".

4.2 Key Legal Challenges

By law, the content of any advertising binds the advertiser. Therefore, if the influencer makes an offer with an error – for example, with a price lower than the one actually available in practice – the advertiser will have to comply with the offer.

In this regard, one of the biggest challenges for advertisers is not only to instruct influencers to comply with the applicable law and CONAR's guides and regulations but also to monitor and timely correct any misleading or abusive posts made by contracted influencers, including those made spontaneously (out of scope) during the broadcast of the contracted campaign.

4.3 Liability for Third-Party Content

If an advertiser's platform is an open channel for dialogue with consumers, considering the constitutional right to freedom of expression, there are strong arguments to maintain that the advertiser is not responsible for third-party content.

However, the advertiser must monitor and exclude any illegal content or content that may constitute misleading or abusive information (these limits must be established in the terms and conditions of the platform).

If an advertiser's platform is aimed at advertising its products or services, the third-party content posted there will be interpreted as advertising, making the advertiser liable for the content.

4.4 Disclosure Requirements

The disclosure requirements applied to advertising in traditional platforms also apply to all digital platforms.

If there are space limitations or constraints on the platform, a shortcut must be inserted to direct the consumer to the advertiser's website, where all applicable disclosures must be duly included for the consumer's consultation.

4.5 Requirements for Use of Social Media Platform

The use of social media must comply with the rules and laws in force in Brazil.

The main laws that have an impact on social networks are the Civil Rights Framework for the Internet (Federal Law No 12,965/2014), the General Personal Data Protection Law or LGPD (Federal Law No 13,709/2018), the Civil Code (Federal Law No 10,406/2002), the Penal Code (for crimes of libel, defamation and insult), and the Intellectual Property Law (Federal Law No 9,279/96).

4.6 Special Rules for Native Advertising

Native advertising must comply with the CDC and CONAR's rules. Both regulations establish that "publicity must be shown in a way that the consumer will easily and immediately identify it as such".

Therefore, native advertising shall have a disclaimer or hashtag indicating that the content is publicity.

4.7 Misinformation

The CDC disciplines abusive and misleading advertising.

Therefore, any advertising that promotes abusive or misleading content may be classified as illegal and trigger one of the various penalties provided for by law, such as the imposition of large fines.

Also, there are bills of law in progress that aim to characterise certain conduct as producing fake

news, imposing severe penalties on those who commit such a practice.

5. Social Media Influencer Campaigns and Online Reviews

5.1 Trends in the Use of Influencer Campaigns

Following the best practices worldwide, CONAR has published Digital Influencer Advertising Guidelines in 2020.

After the release of the new rules, there was a significant increase in cases questioning influencers' advertisements. Currently, the influencer has assimilated the rules and the main advertisers have adopted the necessary precautions to ensure compliance with the current rules.

5.2 Special Rules/Regulations on Influencer Campaigns

In accordance with the Digital Influencer Advertising Guidelines published by CONAR, there is a difference between advertising by influencers and activated messages.

Advertising by influencer occurs when the following cumulative elements, which are necessary to characterise an advertisement, exist:

- promotion of the product, service, cause, or other associated sign;
- compensation or a commercial relationship, even if non-financial, with the advertiser and/or agency; and
- the advertiser or agency's interference in the content of the message (editorial control of the influencer's post).

Activated messaging occurs when a user refers to a product, service, cause, or other associated characteristic because of a connection or non-compensatory benefit offered by the advertiser and/or agency, and without that advertiser's or agency's editorial control. For instance, appreciation posts, thanks for products/services ("gifted"/"received"), trips, accommodation, experiences or invitations.

In order to configure a correct and Guidelines-following digital influencer advertisement, and to respect the principle of transparency, it is fundamental to clarify the situation that applies in the relevant posts. The Guidelines set forth the expressions that are recommended (clear expression).

- Influencer advertising: #advertising, #advertisement, #sponsored, #paid content and #paid partnership.
- Activated messages: #gifted/#received (trip/show/event), invited by (brand), thanks to (brand) for (product, trip, invitation), #promotion, #promo (activations upon gifts or prize).

CONAR's guide specifies, in Portuguese, the proper hashtag to be applied.

5.3 Advertiser Liability for Influencer Content

An advertiser may be held liable for the content posted by the influencer when there is a relationship between the parties (influencer and advertiser).

Regarding the duty to monitor, the advertiser does not have an obligation established in law or regulation. However, CONAR and consumer protection bodies have demanded that advertisers proactively inspect content published by contracted influencers and in cases of activated message.

5.4 Misleading/Fake Reviews

Freedom of communication and expression without any censorship is a constitutional right guaranteed to all Brazilians.

However, if employees or contracted third parties post fake news on behalf of the company, the company may be held responsible for the irregular content published.

In this case, if it is proven that the employee or third party exceeded their competence or acted contrary to company policies, the company may seek compensation for the damage caused.

6. Privacy and Advertising

6.1 Email Marketing

With regard to the laws and regulations applicable to advertising, it is legal to send marketing emails to promote a company's products and services. The CDC, however, establishes general consumer protection rules that prohibit abusive marketing.

Furthermore, such activity shall comply with the Self-Regulatory Code for Email Marketing Practices (CAPEM).

It is worth emphasising that the advertiser must also comply with the LGPD, providing the proper channels and tools for the consumer to consult, change or even cancel the use of their personal data for advertising purposes.

Non-compliance with the applicable laws and regulations may lead to the application of substantial fines or indemnifications.

6.2 Telemarketing

Regarding the laws and regulations applicable to advertising, it is legal to perform telemarketing to promote a company's products and services.

It should be borne in mind, however, that the National Telecommunications Agency (ANATEL)'s Resolution No 632/2014 (General Regulation of Consumer Rights of Telecommunications Services) gives telephone, pay TV and internet services consumers the right not to receive advertising messages on their mobiles.

Furthermore, some Brazilian states have enacted local laws whereby the consumer protection bodies have implemented a platform to inform advertisers that a consumer has registered their telephone number to not receive marketing calls. Any call to promote a product or service to a registered consumer will lead to a fine.

Advertisers must also comply with the LGPD, providing the proper channels and tools for the consumer to consult, change or even cancel the use of their data for advertising purposes.

Non-compliance with the applicable laws and regulations may lead to the application of substantial fines or indemnifications, in addition to the other penalties provided for in the CDC.

6.3 Text Messaging

Following the same line of reasoning that applies to telemarketing (see **6.2 Telemarketing**), text messaging for marketing purposes is legal, but must comply with ANATEL's Resolution No 632/2014 (General Regulation of Consumer Rights of Telecommunications Services), which requires the consumer's previous consent.

The advertiser must also comply with the LGPD, providing the proper channels and tools for the

consumer to consult, change or even cancel the use of their data for advertising purposes.

Non-compliance with the applicable laws and regulations may lead to the application of substantial fines or indemnifications, in addition to the other penalties provided for in the CDC.

6.4 Targeted/Interest-Based Advertising

As discussed throughout **6. Privacy and Advertising**, it is legal for advertisers to send advertising material through different formats (principle of legitimate interest).

However, the right to send advertising is different from the right to process consumer data. In order to process data for advertising, it is necessary to obtain the consumer's express consent, as a rule, through an opt-in on the advertiser's platform or by opting into the cookie policies.

The advertiser must provide the appropriate channels and tools to consumers to consult, change or even cancel the use of their data for advertising purposes (LGPD requirements).

Failure to obtain express consent to process the consumer data or to comply with the other LGPD provisions may lead to substantial fines, in addition to the other penalties provided for in the CDC.

6.5 Marketing to Children

The CDC, the Child and Adolescent Statute (ECA) and CONAR have specific provisions for advertising products to children and adolescents.

The ECA establishes that children are considered to be persons under the age of 12, and an adolescent is a person between 12 and 18 years of age.

The LGPD has a specific chapter dealing with the treatment of data of children and adolescents. According to the law, data processing may be carried out with the consent of a parent or legal guardian.

Failure to comply with the laws applicable to children's advertising or the LGPD may lead to significant fines and compensation, in addition to the other penalties provided for in the CDC.

7. Sweepstakes and Other Consumer Promotions

7.1 Sweepstakes and Contests

At the end of 2018, Federal Law No 13,756/2018 was issued, granting exclusive powers to the Ministry of Finance (now known as the Ministry of Economy), specifically to the Brazilian Secretary of Economic Monitoring (SEAE, formerly known as SECAP) to analyse, authorise and supervise commercial promotions (ie, raffles or raffle-like contests, instant win contests and contest-like games), including philanthropic sweepstakes, which powers were previously shared with the Brazilian Central Bank (BACEN).

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

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

In addition, sweepstakes authorised by SEAE can require or request the making of a purchase

in order to participate, depending on the intended mechanism.

7.2 Contests of Skill and Games of Chance

Under Federal Law No 5,768/71, Decree No 70,951/72, the Ordinance of the Ministry of Treasure No 41/2008 (which regulates the free distribution of prizes as advertising) and the Ordinance of the Ministry of Treasure No 422/2013 (which identifies which elements could qualify a promotion as a skill or game contest – without registration) there is a distinction between contests of skill and games of chance.

However, contests of skill – as well as solely cultural, artistic, sporting or recreational contests – are an exception by law and it is not necessary to obtain authorisation from SEAE for them, in accordance with the Ordinance of the Ministry of Treasure No 422/2013.

In this situation, the cultural contest must not promote the sponsor's brand, goods or services in any way, and must fulfil 12 further requirements set forth in applicable regulation. For this reason, it is currently difficult to implement these kinds of contests and it is extremely important to analyse them on a case-by-case basis.

Finally, if a cultural contest does not meet the requirements established by law, it must be preceded by authorisation from SEAE and be converted into a sweepstake.

7.3 Registration and Approval Requirements

All sweepstakes that involve luck, raffles, instant wins with limited stock, contests, or similar operations must be authorised in advance by SEAE through its web portal.

Authorisation must be requested at least ten business days before the sweepstakes starts and the supervisory fee must be collected, according to the value of the promotion prizes.

After the appointed day for announcing the winner set forth in the sweepstakes terms and conditions, income tax (upon the total value of the prizes at a rate of 20%) must be collected.

Finally, the statement of account must be reported to SEAE, in accordance with the following terms:

- delivery of prizes – 30 days after the appointed day for announcing the winner; or
- non-delivery of prizes – 255 days after the appointed day for announcing the winner and, in such cases, it is necessary to hand over the value of the prizes to the Federal Union.

7.4 Loyalty Programmes

There is no specific law nor regulation applicable to loyalty programmes. This type of programme, however, does not need SEAE's authorisation.

7.5 Free and Reduced-Price Offers

Regulation of free or reduced-price offers, such as "buy one, get one free", are set forth in the Informative Note No 11/2018, which establishes that prior registration with SEAE is mandatory when there is a free distribution of prizes with product's stock limitation or a fixed amount of prizes.

7.6 Automatic Renewal/Continuous Service Offers

The CDC establishes that sending or delivering products or providing services to consumers, without prior request, is an abusive practice (Article 39, III, CDC).

Nevertheless, as long as this situation – automatic renewal – is contractually set forth between the parties and there is a possibility for the consumer to waive this obligation, it is allowed.

8. Sports Betting/Gambling

8.1 Legality & General Regulatory Framework

Gambling and betting activities are generally prohibited in Brazil, except for state-run lotteries and horse races. Likewise, games of chance are legally defined as a criminal offence in Brazil (eg, roulette, jackpot and bingo).

Poker, however, is considered to be a sport, not a game of chance, and is therefore legal.

The Federal government has enacted Decree-Law 13,756/2018, with the objective of legalising sports betting. The Decree is still awaiting regulation to establish the rights and obligations of companies that will explore this activity.

8.2 Special Rules & Regulations

There is no specific regulation of the advertising and marketing of sports betting or gambling.

As mentioned in **8.1 Legality & General Regulatory Framework**, the Federal government has enacted Decree-Law 13,756/2018, with the objective of legalising sports betting. The Decree is still awaiting regulation to establish the rights and obligations of companies that will explore this activity.

9. Web 3.0

9.1 Cryptocurrency and Non-fungible Tokens (NFTs)

There is no specific regulation of the advertising and marketing of cryptocurrency or NFTs in Brazil.

Advertisers must comply with general advertising laws and Securities and Exchange Commission regulations, if applicable.

9.2 Metaverse

There is no law or regulation applied to the metaverse in Brazil yet.

So far, the authorities and CONAR have interpreted the metaverse as a new communication channel, demanding that all advertisements promoted in this new environment respect the laws and regulations applicable to advertising in force in Brazil.

9.3 Digital Platforms

There is not yet any applicable law to account for the rise of digital advertising platforms and the use of adtech.

Advertisers must comply with general advertising laws and Federal Law No 12,965/14, which establishes principles, guarantees, rights and duties for the use of the internet in Brazil.

10. Product Compliance

10.1 Regulated Products

There are many laws applied to the advertisements of regulated products. Federal Law No 9,294/96 refers to the advertising of medicine, tobacco, therapies, pesticides and alcoholic beverages. This law establishes how the adver-

tising of these products should be done, including the use of warnings and restrictions on locations and events where they may be displayed, besides establishing specific penalties.

CONAR also has special regulations for regulated products, such as: alcoholic beverages; food and beverages; physicians, veterinarians, masseuse, nurses' activities; medicine; and others.

There are also several resolutions issued by ANVISA to regulate advertising, publicity, information and other practices whose objective is the commercial dissemination or promotion of medicines; advertisements and communication related to lactose, gluten and dietary supplements; and the labelling of products, among others.

10.2 Other Products

CONAR also has special regulations for different category of products, such as, Education, Courses, Teaching; Employment and Opportunities; Real Property: Sale and Lease; Investments, Loans and Securities Market; Stores and Sales Retail; Independent Workers; Tourism, Trips, Tours, Hotels; Automotive Vehicles, among others.

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Trends and Developments

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Children and Teenagers on Social Networks – What Are the Best Practices?

When it comes to protecting minors, Brazil is not a lawless land. Quite the opposite. Following the most modern trends in large markets, in addition to important provisions of the Federal Constitution and the Consumer Defence Code, Brazil has a highly evolved self-regulatory system for regulating children's advertising, the National Council for Advertising Self-regulation (CONAR).

There is also the Statute of the Child and Adolescents (ECA), which very properly regulates the full protection of children and teenagers, establishing the fundamental rights inherent to the human person.

The ECA has as its principle the full protection or the absolute priority of the child (person under the age of 12) and of the adolescent (person between 12 and 18 years of age), recognising them as subjects with rights and duties.

The ECA recognises that it is the "duty of the family, the community, the society in general, and the government to ensure, with absolute priority, the enforcement of the rights to life, to health, to food, to education, to sports, to leisure, to professionalisation, to culture, to dignity, to respect, to freedom, and to family and community life..." (Santos, Elaine Araque dos. *A naturalização do trabalho infantil. Revista TST*, Brasília, v. 72, n. 3, p. 105-122, set./dez. 2006).

The goal of this legal provision is to preserve the potential of children and teenagers, offering basic conditions for their natural, balanced and continuous development, in order for them to enjoy full conditions in adult life. According to Eliana Araque dos Santos (2006), this integral protection is not only aimed at the person, at the preservation of their dignity, but also at society and at the preservation of the quality of life.

Despite all the existing protections, it is common knowledge that with the advent of the internet and advancing technology, information and content started to spread with greater facility and speed. Information that used to be filtered by borders and censorship controls imposed on communication vehicles now reaches all audiences simultaneously and in real time.

This is such a relevant concern that it has mobilised 23 associations, one of which is the Brazilian Association of Licensing of Brands and Characters (ABRAL). From this union came campaigns that have as their central theme the responsible communication of products and services aimed at children and teenagers. The focus on digital content was inspired by the CBAP and by the Advertising Guide for Digital Influencers, recently published by CONAR.

This initiative intended to promote dialogue between various audiences, but one in particular: the communication professional. Nowadays, the digital environment increasingly requires looking beyond the creation of content, demanding its respect for healthy speech practices, ethics and responsibility. For example, if an advertising content is being disseminated by an influencer

in a structured way, this must be clear when it is disseminated. There are some rules for this, and the material constructed by the local entities, such as ABA, ABIA and ABRAL, among others, highlights the main ones.

This immense and tempting offer of content – combined with current conditions in society, where parents work long hours and the streets are no longer safe – is available to children and teenagers, who used to interact with each other and play games, but now spend time indoors consuming digital content on social networks, electronic games and the internet.

A survey from the Brazilian Internet Steering Committee points out that 93% of Brazilians aged 9 to 17 years old are internet users, of which 78% accessed social networks in 2021 (an increase of 10 percentage points over 2019). Among the platforms used, the proportion of internet users in the same age group who have a profile on Instagram increased from 45% in 2018 to 62% in 2021. In addition, for the first time, the study investigated the existence of a profile on TikTok and found that 58% of users in this age group are on the platform.

This new reality leads us to important reflections about what childhood means nowadays. What role does digital content play in the lives of minors? What precautions are necessary when using social networks?

The problem of this rampant access to content is already being challenged. It was recently reported that the father of a child has filed a lawsuit against a social network widely used in Brazil and abroad, whose activity is to make available several types of content through videos created by its users. According to the articles on the subject, the father claims that the social network is responsible for violating the ECA by publishing videos with sensitive content for children and teens (SANTIAGO, Abinoan. Pai acusa Tiktok na Justiça por burlar o ECA; ação pode afetar outras redes. Tilt Uol).

According to news reports, the lawsuit aims to increase the enforcement policy of TikTok, forcing it to display, in all posted content, the indicative rating, as well as to require the verification of identity of users as a way to prohibit access to videos without a registration and login approval, preventing inappropriate content reaching the child audience.

Evaluation of the documents and information posted on the TikTok platform reveals its so-called Community Guidelines, which contain a specific chapter addressing the safety of minors. According to the guidelines, users of the platform must meet minimum age requirements and the platform can remove accounts of minors under the age of thirteen if and when identified.

The platform's guidelines also provide that: "account holders under sixteen years old cannot use direct messages or make lives and their content is not eligible to be displayed in the 'For You' newsfeed (age limits may be higher in some regions). Account holders under eighteen years old cannot send or receive gifts through our virtual gift sending features...".

According to the father's complaint, despite the fact that the provisions of the Community Guidelines provide for rules and restrictions on content, in practice, children and teenagers have easy access to all kinds of content on the platform, especially if we consider that it is possible to access such content without even having an account on the platform, which contradicts the Community Guidelines themselves.

The plaintiff granted an interview to Tilt Uol, claiming that, as a father of two underage children, he has a duty to express his concern about inappropriate content, since there is no effective policy to protect children and teens. He also raised the point that the social network does not completely prevent the search for inappropriate content because, although the platform prohibits the search for some terms such as "sex", it is possible to access such content when searched by synonyms or in code format, such as "s3xo".

Despite the fact that the lawsuit is under secrecy, it is reported in news that the Public Prosecutor's Office of São Paulo has been following the case with great interest.

It is not being questioned whether the access to information is important and salutary to the democratic process of law and even to the development of minors. It is no wonder that freedom of communication and thought is one of our most important constitutional principles.

What is proposed is a pause to reflect on the fact that abuses may exist and, therefore, content providers should be more careful and responsible when relating or offering content to minors, inserting robust access control mechanisms that allow the correct targeting of content to the appropriate audience.

Despite this current moment in history, childhood is and always will be a phase in which human beings are still developing psychologically, which is why, in line with the provisions of the Brazilian Federal Constitution (Art. 227 of the Brazilian Federal Constitution of 1988) and Article 6 of the ECA, members of this audience must be regarded as vulnerable beings, regardless of their reasoning capacity or natural evolution in comparison to previous generations.

This care for the minor does not require more restrictive laws or radical changes to the laws in force. Although the role of educating is primarily up to the parents and, secondarily, to the state, which should guarantee access to quality education, the simple commitment of digital content providers to adopt stricter and more effective control of access to their content, a commitment sought by the father in the lawsuit filed against TikTok, would be sufficient to protect the vulnerability of the minor and ensure a richer and healthier childhood.

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CANADA

Law and Practice

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Contents

1. Legal Framework and Regulatory Bodies

1.1 Primary Laws and Regulation

Advertising in Canada is regulated both federally and provincially/territorially.

Federal Regulation

The primary source of regulation is the federal Competition Act, which contains criminal and civil prohibitions on materially false or misleading advertising in any medium. Criminal prosecution is reserved for the most egregious offences (eg, fraud-like conduct or deliberate breaches), with the civil regime used to deal with all other conduct.

In addition to the general prohibitions against materially false or misleading representations, the civil provisions contain specific prohibitions relating to:

- unsubstantiated performance claims;
- misleading warranties and guarantees;
- bait-and-switch selling;
- false or misleading price claims;
- testimonials; and
- promotional contests.

The criminal and civil provisions are mutually exclusive – once criminal charges have been laid or a civil application has been filed, the regulator cannot switch tracks.

Provincial and Territorial Regulation

Provincial and territorial consumer protection statutes set out prohibitions against deceptive marketing practices, similar to those under the Competition Act. With the exception of Quebec, Canada's only civil law jurisdiction, these prohibitions are relatively similar. Quebec's consumer protection legislation differs in a number of areas, including:

- advertising to children;
- promotional contests;
- credit advertising;
- advertising of premiums; and
- French language requirements for advertising materials.

1.2 Enforcement and Regulatory Authorities

Federal Regulatory Authorities

The Deceptive Marketing Practices Directorate within the Competition Bureau is charged with enforcing the false or misleading advertising provisions of the Competition Act. The Competition Bureau has broad investigative and enforcement powers, including the ability to commence formal inquiries, seek document production, issue subpoenas and search warrants, and order wiretaps.

The Competition Act imposes significant penalties for false or misleading advertising. Criminal violations may involve a prison term for individuals for up to 14 years and an unlimited fine. Civil sanctions may include the following.

- A prohibition order lasting up to ten years (the violation of which is a criminal offence).
- A requirement to publish a corrective notice.
- An administrative monetary penalty that, as of June 2022, now comprises a maximum amount equal to whichever of the following is higher:
  - (a) CAD10 million (CAD15 million for each subsequent violation); or
  - (b) three times the value of the benefit derived from the deceptive conduct (or if that amount cannot be reasonably determined, 3% of the corporation's annual

worldwide gross revenues).
- Restitution to consumers.

Several other federal regulatory authorities are responsible for product or service-specific advertising laws, including:

- Health Canada, which enforces advertising rules for food, drugs, natural health products, tobacco, cannabis, vaping products and certain pre-packaged consumer products;
- the Canadian Food Inspection Agency, which, along with Health Canada, enforces advertising, packaging and labelling requirements for food;
- the Financial Consumer Agency of Canada, which oversees the advertising of financial products and services; and
- the Canadian Transportation Agency, which enforces advertising restrictions related to certain air, marine and land-based transportation.

Violation of product or service-specific advertising laws may attract civil or criminal penalties similar to those under the Competition Act. Breaches of product-specific laws may also result in product recalls and the seizure or detention of goods.

Provincial and Territorial Regulatory Authorities

Consumer protection authorities are responsible for enforcing the advertising and marketing provisions of the applicable statutes (eg, in Ontario, the Director under the Consumer Protection Act and the Ministry of Government and Consumer Services). While available penalties vary by jurisdiction, they typically can include fines ranging from CAD1,000 to CAD300,000 (or three times the amount obtained by the violator as a result of the offence, whichever is greater), terms of imprisonment of up to three years for individuals, and other remedies (eg, prohibition orders, retractions and corrective notices).

1.3 Liability for Deceptive Advertising

Corporations and individuals alike may be held liable for violating federal and provincial advertising and marketing laws.

Generally, both civil and criminal liability for misleading misrepresentations attaches to the person who had control or decision-making authority over the content of the representation. Although individual owners, shareholders and third parties – such as advertising and telemarketing agencies – can technically be liable for misleading advertising, in practice, this is unlikely, as they are not likely to be found to have decision-making authority over the content of representations.

Director and Officer Liability

Although director and officer liability is explicitly codified in only some provisions of the Competition Act dealing with misleading representations, in principle, directors and officers may be liable under both the criminal and the civil prohibitions. As part of a settlement with the Competition Bureau reached in 2021 by an online flight-booking platform in connection with allegedly misleading representations about prices and services, charging of hidden fees and posting false online reviews in violation of the civil misleading advertising provisions, two company directors agreed to penalties of CAD400,000 each.

The Publisher's Defence

The civil misleading advertising provisions of the Competition Act provide for a so-called "publisher's defence", which generally allows persons who merely print or publish, or otherwise disseminate, a representation on behalf of

another person in the ordinary course of their business to avoid liability, assuming certain conditions are met.

Product-Specific Advertising Requirements

While the specific circumstances giving rise to liability vary by statute, generally, as with the Competition Act, individuals will not be liable for misleading advertising unless they have some degree of control or decision-making authority over a misleading advertisement. It should also be noted that the "publisher's defence" may not be available under certain product-specific legislation (eg, the Cannabis Act prohibits a person from publishing, broadcasting or otherwise disseminating, on behalf of another person, prohibited promotions, including misleading advertisements). While not yet interpreted by the courts, this broad provision implies that third parties such as internet platforms and marketing agencies could potentially be liable for non-compliant cannabis advertising.

1.4 Self-Regulatory Authorities

The most significant self-regulatory organisation in the advertising/marketing space in Canada is Ad Standards, the advertising industry's self-regulatory body. Ad Standards administers the Canadian Code of Advertising Standards (Code), which contains 14 clauses and six interpretation guidelines setting out a number of basic principles of acceptable advertising including prohibitions against:

- misleading advertising;
- deceptive price claims;
- disguised advertising;
- false testimonials;
- deceptive comparative advertising;
- unsubstantiated claims;
- depictions of unsafe behaviours;
- unacceptable advertising to children and minors; and
- unacceptable portrayals and depictions (eg, discriminatory, indecent or otherwise objectionable content).

Although adherence to the Code is technically voluntary, in practice, those found to be in violation can be asked to amend or withdraw their advertising and may be publicly identified in a complaints report, and newspapers, broadcasters or digital properties that are members of Ad Standards will not carry an advertisement found to be in contravention of the Code.

Pre-clearance Services

Ad Standards also provides pre-clearance services to advertisers with respect to alcoholic and non-alcoholic beverages, cosmetics, children's advertising, health products and food products. Pre-clearance assesses compliance with relevant Canadian Radio-television and Telecommunications Commission (CRTC) codes and certain product-specific requirements (eg, under the Alcohol and Gaming Commission of Ontario's Liquor Advertising Guidelines, the CRTC Code for Broadcast Advertising of Alcoholic Beverages, the Broadcast Code for Advertising to Children and the Guidelines for the Nonprescription and Cosmetic Industry Regarding Non-therapeutic Advertising and Labelling Claims).

Most Canadian broadcasters require an Ad Standards (or equivalent) approval number before airing broadcast advertisements, and pre-clearance is common or required in certain other circumstances.

Other Self-Regulating Bodies

There are a number of other industry associations and self-regulatory bodies. Some regulate marketers generally (eg, the Canadian Marketing

Association and the Digital Advertising Alliance of Canada) and others (eg, the Canadian Beverage Association, which publishes the Code for the Responsible Advertising of Food and Beverage Products to Children, and the Pharmaceutical Advertising Advisory Board, a pre-clearance agency for drug products) are industry specific.

1.5 Private Right of Action for Consumers

A private right of action (including through class actions) is available for consumers who have suffered loss or damage as a result of a breach of the criminal misleading advertising provisions of the Competition Act (or a prohibition order under the civil provisions). Although this right of action is available irrespective of whether there has been a conviction for the underlying conduct, in practice, private actions are mostly brought following a conviction or a guilty plea. Consumers may recover damages equal to the actual loss suffered, plus investigation and proceeding costs.

Individual or class actions may similarly be brought under most provincial or territorial consumer protection statutes.

1.6 Regulatory and Legal Trends

Recent Trends

Digital advertising and particularly influencer marketing and the collection of consumer data in exchange for "free" online products and services continue to be key areas of concern for the Competition Bureau. These areas have recently been reinforced by the introduction of an express prohibition against drip pricing and significantly increased civil penalties for deceptive marketing.

Drip Pricing Prohibition

In June 2022, Bill C-19, an act to implement certain provisions of the budget tabled in parliament on 7 April 2022 and other measures, came into force. It introduced sweeping amendments to the Competition Act and implemented the most significant changes since the Act's last major amendments in 2009, including a new drip pricing prohibition.

Drip pricing refers to the practice of displaying one price to consumers but ultimately charging a higher price through the incorporation of additional fees (other than government sales taxes) added incrementally during the purchase process.

Although the Competition Bureau has routinely enforced against drip pricing conduct as a form of misleading advertising in the past (targeting furniture retailers, concert ticket retailers, airlines and others that have charged hidden fees), drip pricing will now become an expressly prohibited practice under both the criminal and civil misleading advertising provisions of the Act, lowering the evidentiary burden on the Bureau.

Increased Penalties for Deceptive Marketing

Amendments to the Competition Act have also introduced significantly increased civil administrative monetary penalties for deceptive marketing practices (which the Competition Bureau had suggested were no longer a sufficient deterrent). Previously, penalties were capped at CAD10 million for a corporation's first violation and CAD15 million for subsequent violations. Maximum penalties will now be increased to either CAD10 million (CAD15 million for each subsequent violation) or three times the value of the benefit obtained from the deceptive conduct (or if that amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues), whichever is greater.

Notable Recent Actions

Notable Competition Bureau enforcement actions over the past 12 months include the following.

- An investigation into a subscription trap scam led to a company pleading guilty to operating a deceptive free trial offer scheme for health and dietary supplements, which was found to have trapped consumers into monthly subscriptions. The penalties include a CAD15 million fine and a ten-year court order prohibiting the company from any direct or indirect involvement in promoting deceptive trial offers. The Bureau concluded that the company left the false impression on its websites that consumers were ordering free trials without further obligations, using claims such as "risk-free trial", and failing to disclose the real cost and nature of the offers, including the obligation to pay significant ongoing subscription fees.
- A Canadian company that markets and sells natural health products entered into a consent agreement with the Competition Bureau, upon a finding by the Bureau that the company's marketing claims gave a false and misleading impression of proven ability to cause weight loss, an impression that was not supported by adequate and proper testing. While the company's products were licensed by Health Canada to make certain claims, they were not authorised to make weight loss claims. As part of the consent agreement reached, the company and its founder agreed to pay a penalty of CAD100,000, are required to remove or change all weight loss claims made about their products, and must establish a corporate compliance programme to prevent future deceptive marketing violations.

1.7 COVID-19, Regulation & Enforcement

While protecting consumers has always been a key priority of the Competition Bureau, this focus intensified in the first few months of the pandemic, when it prioritised enforcement of deceptive claims related to various COVID-19 "cures", and other novel claims arising from the pandemic and government-related relief initiatives. For example, the Competition Bureau is currently investigating an accounting company for false or misleading representations made when promoting its services to persons applying for government benefit programs implemented in response to the COVID-19 pandemic.

Various public health laws put in place to combat the pandemic have prompted an increase in consumer advertising complaints, in particular with respect to advertisements designed to play upon consumers' fears, such as those related to health, the environment, personal finances and consumer product availability. In addition to enforcement actions, this has led to guidance from various regulatory and self-regulatory bodies, including Ad Standards, which issued guidance encouraging advertisers to consider their messaging in light of the current public health crisis.

1.8 Politics, Regulation and Enforcement

Although the current Liberal government secured a victory in the last federal election in 2021, its minority win resulted in the incumbent government entering into a coalition with the New Democratic Party, strengthening its ability to pass legislation, but also bringing change in the political agenda.

Following the coalition, the Liberal government has proceeded to re-introduce various bills, such as Bill C-11, a bill to regulate online broadcasters, as well hastily introducing and passing Bill

C-19, the 2022 budget bill, which included significant amendments to the Competition Act without public consultation. Amendments to the Competition Act were a response to a mandate letter from the Prime Minister instructing the Minister of Innovation, Science and Industry of Canada to review and modernise the Competition Act, particularly to adapt to the growing digital economy.

In 2021, the Liberal government also announced that it had taken steps to increase the Competition Bureau's budget by more than a third (CAD96 million over five years and thereafter CAD27.5 million annually), which the Competition Bureau intends to use to strengthen its enforcement team and investigations, particularly in digital markets. Overall, the increased budget and amendments to the Act seem likely to foreshadow more regular and active enforcement by the Bureau.

2. Advertising Claims

2.1 Deceptive or Misleading Claims

To be actionable, an advertising claim must be made to the "public" and must be false or misleading in a "material" respect. The elements of the offence are substantially similar under both the civil and criminal provisions of the Competition Act, with the latter further requiring that a deceptive representation have been made "knowingly or recklessly".

Representations to the Public

While only representations directed to the public are actionable, it is not necessary to show that:

- any person was actually deceived or misled;
- a member of the public to whom a representation was made was within Canada; or
- a representation was made in a place to which the public had access.

Materiality

Materiality depends on both the literal meaning and the general impression of the representation in question. Generally, the test is whether a representation influenced a person to make a purchase. However, when advertising is disseminated through certain electronic means (eg, email or SMS text message), there is no materiality requirement for representations contained in the sender information, subject matter information or locator information (eg, URL and metadata) of the electronic message.

Similar materiality standards apply under provincial and territorial consumer protection legislation and the Canadian Code of Advertising Standards.

2.2 Regulation of Advertising Claims

All advertising claims, whether express or implied, are regulated and all provable advertising claims that may reasonably be taken as true by consumers must be substantiated.

Claim Substantiation

Any type of performance claim, whether express or implied, must be supported by an "adequate and proper test", as discussed in **2.3 Substantiation of Advertising Claims**. The substantiation required for other types of claims will depend on the circumstances, including the type of claim and the audience for which it is intended.

Hyperbole

If a claim is so clearly an exaggeration that a consumer would not reasonably believe it to be true or if a claim is clearly the opinion of the advertiser, generally no substantiation is required. Ad Standards has published guidance on the appli-

cation of the elements of humour and fantasy in assessing the general impression conveyed by an advertisement.

2.3 Substantiation of Advertising Claims

There are no statutory criteria for what constitutes an adequate and proper test of a performance claim, and the adequacy of any given test largely depends on the circumstances, such as the nature of the claim, the product itself or the availability of any standard testing procedures. While an adequate and proper test does not need to be the best available test or meet the standard typically required for studies published in peer-reviewed journals, it must be appropriate for the product, its material features and performance, and the claim being tested, as well as being valid in the market where the claim is made. Canadian courts have generally interpreted the term "proper" to mean suitable, fit or as required by the circumstances.

Any testing done to substantiate a performance claim must be done before the claim is made. It is not permissible to wait until the claim is challenged to test it. Even if testing later proves the claim to be true, the claim would not have met the substantiation requirements.

2.4 Testing to Support Advertising Claims

Standards largely depend on the circumstances, such as the nature of the claim, the product itself or the availability of any standard testing procedures. While there are generally no requirements prescribing how testing must be conducted or minimum sample sizes, when assessing whether a test is adequate and proper, courts will generally consider, among other things, the following factors:

- the test is reflective of the risk the product is designed to prevent;
- the test is carried out under controlled circumstances;
- the test is conducted on more than one independent sample wherever possible;
- test results are reasonable, given the nature of the harm at issue and demonstrate that the product causes the desired effect and the effect is material; and
- subjectivity in the test is eliminated as much as possible.

Standardised industry testing will generally be considered a reasonable benchmark for adequate and proper testing. Research and/or consumer survey data will generally be necessary to support any comparative claim.

In a recent enforcement action against a hockey equipment manufacturer claiming the use of its helmet reduced the risk of concussion, the Competition Bureau concluded that despite testing having been conducted prior to making the claim, it was not adequate and proper as the manufacturer relied on injury studies focused on sports with significantly different injury patterns to those suffered while playing ice hockey.

2.5 Human Clinical Studies

Therapeutic claims – ie, claims regarding a product's safety, effectiveness and/or use – are subject to a high degree of scrutiny. Manufacturers of health products must ensure they have robust clinical evidence to substantiate any therapeutic claim. Typically, evidence comes in the form of clinical studies that often result in published, peer-reviewed, controlled and double-blind human studies with demonstrated clinical and statistical significance. In some circumstances, unpublished data may be sufficient, if independently reviewed. Importantly, the studies should

directly test and support the approved indications of the advertised product in the intended population, as specifically authorised by Health Canada; this is especially true for drug products. Therapeutic claims related to food products must also be substantiated by human clinical studies and certain food-related therapeutic claims must be pre-approved by Health Canada and the Canadian Food Inspection Agency, depending on the health condition addressed in the claim.

2.6 Representation and Stereotypes in Advertising

Although there are no laws specifically addressing inclusion, diversity, representation and stereotyping in advertising, such issues are generally addressed through Ad Standards' self-regulatory framework and the interpretation of the Canadian Code of Advertising Standards. For example, Clause 14 of the Code (as discussed in **1.4 Self-Regulatory Authorities**) prohibits advertising material that condones any form of personal discrimination, including discrimination based upon race, national or ethnic origin, religion, gender identity, sex or sexual orientation, age, or disability.

Most recently, the government of Canada has also proposed amendments to the Broadcasting Act which, among other things, would update federal broadcasting policy to be more inclusive of all Canadians from various racialised communities and diverse ethno-cultural backgrounds, sexual orientations and gender identities, including providing opportunities and support for indigenous programming.

2.7 Environmental Claims

Environmental claims, such as those related to sustainability, recycling, safety or environmental impact (including "free of" claims), are subject to marketing and advertising laws of general application. While these claims were historically subject to detailed and extensive regulatory guidance jointly prepared by the Competition Bureau and the Canadian Standards Association, this guidance was recently archived by the Bureau on the basis that it no longer reflects the Bureau's current policies or practices or the relevant standards and evolving environmental concerns. Although the guidance is therefore no longer recognised and has not been replaced by new guidance, environmental claims remain among the Competition Bureau's main priorities.

A Recent Case on Environmental Claims

Last year, the Competition Bureau investigated a manufacturer well known for its hot beverage brewing system and accompanying coffee pods, as a result of certain recyclability claims and related instructions associated with its single-use coffee pods. These claims were found to be false or misleading in certain municipalities and provinces where the coffee pods were not accepted for recycling by municipal recycling programmes without further pre-recycling processing steps which were not disclosed to consumers. The manufacturer entered into a consent agreement, and agreed to:

- pay a CAD3 million penalty;
- donate CAD800,000 to a Canadian charitable organisation focused on environmental causes;
- pay an additional CAD85,000 to cover the Competition Bureau's investigation costs;
- change its recycling claims and coffee pod artwork;
- publish corrective notices; and
- enhance its corporate compliance programme.

2.8 Other Regulated Claims

Many types of claims are subject to specific regulatory guidelines and requirements, including "free", "natural", "Made in Canada", "Product of Canada", and therapeutic claims.

"Free" Claims

To advertise a product as "free" of charge, there should not be any required or implied cost to obtain it, whether the product is provided on its own or as part of a bundle where the consumer is required to pay for the other bundled item (in the latter case, there should be no cost recovery to offset the cost of the "free" product).

Canadian Origin Claims

"Product of Canada" and "Made in Canada" claims are subject to detailed regulatory guidelines for both food and non-food products. These guidelines outline conditions that must be satisfied to allow the claims, including factors such as the percentage of the product's total direct costs that must have been incurred in Canada. As the "general impression" test used to assess all advertising claims is similarly applicable to origin claims, it might be possible for an origin claim to be conveyed through a combination or words and visual elements even where the specific words "Product of Canada" or "Made in Canada" are not displayed.

"Natural" Claims

Whether a "natural" claim may be used depends on the product. "Natural" claims related to food are permitted only where food has not been processed in such a way that would alter its chemical, physical or biological state. Although a health product's therapeutic action can never be advertised as "natural", given that health products alter the body's physiological function, individual ingredients may be described as "natural" only where they meet specific criteria (ie, where the ingredient is obtained from a natural source material, is in a form found in nature and has undergone only minimal processing – eg, drying, grinding, powdering, chopping or encapsulating).

Therapeutic and Health Claims

Therapeutic and health claims are regulated by Health Canada and must be substantiated with human clinical evidence, as discussed in **2.5 Human Clinical Studies**. Any product that claims to have a medical effect or purpose brings the associated product within Health Canada's jurisdiction and must be specifically approved for that claim.

3. Comparative Advertising

3.1 Specific Rules or Restrictions

There are no statutory rules or restrictions specifically applicable to comparative advertising claims. Such claims are, however, subject to specific provisions under the Canadian Code of Advertising Standards and related guidelines that require that a comparison must not, among other things, unfairly disparage or discredit a competitor or its products or exaggerate the nature or importance of differences. While advertisers are permitted to mention a competitor by name, they may only do so in compliance with intellectual property laws and must not infringe third-party intellectual property rights (see **3.3 Challenging Comparative Claims Made by Competitors**).

There are additional, stricter guidelines for comparative advertising in the healthcare/pharmaceutical context (eg, comparative claims in drug advertising should be supported by direct head-to-head human clinical studies - see **2.5 Human Clinical Studies**).

3.2 Comparative Advertising Standards

Like non-comparative advertising claims, comparative advertising must not be materially false or misleading, based on both the literal meaning and the general impression created by the comparative claim.

3.3 Challenging Comparative Claims Made by Competitors

Challenge through Ad Standards

An advertiser can challenge a comparative claim under the Canadian Code of Advertising Standards through Ad Standards' Advertising Dispute Procedure. The procedure is confidential and subject to a partially refundable filing fee. If a challenge is successful, the advertiser will be asked to withdraw or amend the advertisement and failure to do so may result in Ad Standards publishing its decision and in appropriate cases notifying the Competition Bureau, which can take further enforcement action.

Challenges under the Copyright Act and Trademarks Act

Comparative advertising referring to a competitor's name, logo, label or pictures may attract liability under federal intellectual property laws. Specifically, advertisers may challenge a competitor's advertisements under the federal Copyright Act where an advertisement reproduces a work or any part without the consent of the copyright owner. An advertiser may also have a cause of action under the Trademarks Act if its competitor:

- reproduces a trade mark (registered or unregistered) in a manner that is considered likely to depreciate the goodwill attached to the mark;
- makes false or misleading statements discrediting an advertiser's business, goods or services; or
- passes off the advertiser's goods or services, or otherwise causes confusion as to the source of the goods or services being advertised.

Determining whether comparative claims warrant challenge on intellectual property grounds requires a case-by-case analysis. Recent case law has held that mere overstatements are not always considered false or misleading, and using competitor marks for the purposes of distinguishing goods/services may be acceptable, if supported by evidence. If a challenge is successful, remedies may include injunctions, damages and the removal of infringing advertising material.

4. Social/Digital Media

4.1 Special Rules Applicable to Social Media

Advertising on social media is subject to the same requirements as advertising claims generally: it must be true and not materially false or misleading, based on both the literal meaning and the general impression created by the advertisement. If social media advertising is conducted through testimonials or influencer marketing, additional requirements apply, including a requirement to disclose any material connection with a business, product or service in each social media post.

4.2 Key Legal Challenges

The Competition Bureau takes the position that both influencers and brands are responsible for ensuring proper disclosures of sponsored posts and compliance with the Competition Act and regulatory guidance requirements. Brands must be vigilant in monitoring social media advertising, as they may be held accountable for representa-

tions made by consumers or other individuals about their products. However, in the circumstances where individuals with whom brands have no contractual relationship make misleading representations in social media, brands may have no (or limited) ability to control the content of the representations, which may present compliance challenges.

4.3 Liability for Third-Party Content

In principle, an advertiser may be held liable for content posted on its website or social media channels if individuals posting the content fail to disclose a material connection with the advertiser.

4.4 Disclosure Requirements

In addition to being subject to the same disclosure requirements applicable to traditional media, social media advertising is subject to additional disclosure requirements set out in regulatory guidance. Among other things, social media disclosure must be inseparable from the posted content, able to travel with the message when shared and independent of any particular social media platform (ie, not reliant on platform-specific built-in disclosure mechanisms that are not part of the post (eg, a "paid partnership" header)).

Similarly, regulatory guidance provides examples of acceptable hashtags that are commonly used as a way of ensuring disclosure due to word count limitations (and timing requirements for videos) that exist under most social media platform rules.

4.5 Requirements for Use of Social Media Platform

While no special rules exist under general advertising and marketing laws, special considerations do apply under privacy and anti-spam laws and guidance issued by Ad Standards addresses medium-specific disclosure, including disclosure on video-based platforms.

4.6 Special Rules for Native Advertising

"Native advertising" is subject to the same general rules as other advertising, including the requirement to disclose a material connection with the advertiser in cases where an advertiser influences editorial content by, for example, offering free products or services for reviews.

4.7 Misinformation

Presently, there are no Canadian laws or industry guidance that regulate or prohibit misinformation on topics of public importance. Previously, however, the Canada Elections Act prohibited the making or publishing of false statements about a political figure's citizenship, place of birth, education, membership in a group, legal offences or professional qualifications, if made with the intention of affecting results of an election. This provision, however, was found to be unconstitutional in 2021 and is no longer in force.

Despite this, the increasing ubiquity of social media platforms as a source of information, together with the COVID-19 pandemic, has fuelled an increase in misinformation on topics of public importance, ranging from politics to false narratives about COVID-19 and vaccination campaigns. The issue is of growing relevance to advertising and marketing campaigns that involve current affairs, and those that engage third party influencers or invite consumer/user-generated materials.

5. Social Media Influencer Campaigns and Online Reviews

5.1 Trends in the Use of Influencer Campaigns

Although influencer marketing has been steadily growing over the past decade, in recent years, advertisers have increasingly favoured influencers with smaller profiles – but a large, engaged following – over mega celebrities. Not only are these influencers more active on traditional social media channels such as Instagram or Facebook, but a growing number are using streaming services and video-based platforms, which are particularly popular among the younger demographic, for whom they have become a key source of information when making product choices.

Canadian regulators have taken note and have increased enforcement in this area, publicly announcing the regulation of influencer marketing as one of the key ongoing priorities, with influencer marketing being a key focus of the Competition Bureau's enforcement efforts. Increased enforcement of influencer marketing is expected to continue.

5.2 Special Rules/Regulations on Influencer Campaigns

In addition to the general requirements applicable to all marketing campaigns, influencer marketing campaigns may be subject to the provisions of the Competition Act applicable to testimonials. The Competition Bureau has also issued guidance pertaining to testimonials and influencer marketing.

Testimonials

Testimonials must reflect the true opinion of the person giving them, and must be based on the person's actual experience with the advertised product. Regulatory guidance sets out the following obligations for influencers when posting reviews and opinions:

- disclosing all material connections (ie, any relationship or arrangement that would cause consumers to re-evaluate their opinion about the truthfulness of the advertising) regardless of perceived magnitude;
- using clear and contextually appropriate words and images;
- using unambiguous references and abbreviations to communicate an influencer relationship;
- ensuring that disclosures are inseparable from the specific content that it pertains to (ie, a blanket disclosure would not be acceptable);
- basing reviews and opinions on actual experience; and
- making disclosure visible and accessible.

5.3 Advertiser Liability for Influencer Content

Advertisers may in principle be held liable for content posted by influencers if an influencer makes a false or misleading claim or fails to disclose a material connection with the advertiser.

Regulatory guidance encourages advertisers to ensure all influencer contracts contain "compliance with laws" clauses and impose obligations on influencers to disclose any material connection with the brand, and to actively monitor their influencers' activities to ensure statements influencers make about their products and/or services are not false or misleading and that material connections are properly disclosed.

5.4 Misleading/Fake Reviews

Astroturfing, the practice of creating commercial representations that masquerade as the

authentic experiences and opinions of impartial consumers, such as fake reviews, remains high on the Competition Bureau's list of priorities. In its first enforcement action against astroturfing in 2015, the Competition Bureau imposed a CAD1.25 million penalty on a telecommunication company that encouraged its employees to post positive reviews and ratings on the company's apps. The company's employees failed to disclose their relationship to the company, which the Competition Bureau found to constitute false and misleading advertising, as they created a general impression that the reviews were made by independent and impartial consumers. While reviews by employees of a company (or employees of a firm hired by a company) are permitted, any such reviews must be accompanied by a disclosure of the material connection between the company and the employees in order not to contravene the general deceptive marketing laws under the Competition Act.

6. Privacy and Advertising

6.1 Email Marketing

Any form of electronic marketing (eg, through email, text messaging/SMS, instant messaging or messaging over social media) is generally subject to Canada's Anti-Spam Legislation (CASL), which applies to any "commercial electronic message" (CEM) and prescribes specific consent and form requirements. A CEM is defined very broadly to include any electronic message that encourages participation in a commercial activity.

Consent Requirement

A CEM cannot be sent without the recipient's express opt-in consent, unless the sender can rely on an exemption or is able to establish a valid basis to imply consent. Consent must be confirmed prior to the sending of a CEM; an email requesting consent is itself considered a CEM.

Identification Requirements

A CEM must identify the sender and anyone on whose behalf it is sent. This includes their identities, contact information, and mailing addresses. If sent on behalf of multiple persons, all parties must be identified in the CEM. In general, however, only persons who play a material role in the content of the CEM and/or the choice of the recipients must be identified. If it is not practical to include this information in the CEM itself, a hyperlink to a webpage with the information is acceptable, provided it is accessible without additional cost and the link is clearly and prominently set out in the CEM.

Unsubscribe Mechanism Requirement

A CEM must provide an unsubscribe mechanism which must be readily accessible, easy to use and remain active for 60 days after a CEM is sent. Unsubscribe requests must be given effect within ten business days.

Exemptions

CASL contains two broad categories of exemptions: one that exempts certain electronic messages from the statute's application entirely and the other that exempts certain messages from the consent requirements, while still applying the form requirements.

Misleading Representations

CASL also introduced amendments to the Competition Act that establish specific prohibitions for misleading representations in individual elements of electronic messages, including the sender information, subject line, and locator information such as URLs or metadata.

Enforcement

Corporations found in violation of the CASL may be subject to an administrative monetary penalty of up to CAD10 million. Individual directors and officers may also face individual liability of up to CAD1 million if they had a significant role in the violation.

6.2 Telemarketing

Inbound and outbound telemarketing are subject to the Unsolicited Telecommunications Rules (UTRs) of the Canadian Radio-television and Telecommunications Commission (CRTC).

Telemarketing Rules

Telemarketers are prohibited from initiating unsolicited telemarketing calls on their own behalf (or on behalf of a client) to consumers unless the telemarketer (if initiating telemarketing calls on their own behalf) or their clients (if initiating telemarketing calls on their client's behalf) have registered with and provided information to the National Do Not Call List (DNCL) operator and paid all applicable fees. The UTRs also impose certain obligations and restrictions on telemarketers and their clients, including record keeping requirements.

National DNCL

Telemarketers are prohibited from initiating telemarketing calls:

- to consumers whose telephone numbers are on the DNCL, unless a consumer has provided express consent to be contacted;
- on their own behalf unless they are registered subscribers of the DNCL and have paid all applicable fees to the DNCL operator; or
- on behalf of a client unless the client is a registered subscriber of the DNCL and the applicable fees to the DNCL operator associated with the client's subscription have been paid.

Telemarketers must also maintain their own internal do not call lists and update them when consumers ask not to be contacted.

The DNCL rules do not apply to exempt telemarketers, including registered charities raising funds, newspapers, political parties and their candidates, and business-to-businesses marketers. Companies that make telemarketing calls to consumers with whom they have an existing business relationship are also exempt from the application of the DNCL rules, provided they meet the prescribed requirements.

Being an exempt telemarketer does not eliminate the telemarketer's responsibility to maintain its own internal do not call list.

ADAD Rules

Automatic dialling-announcing devices (ADAD) are subject to additional rules under the UTRs, including requiring that each call begins with a clear message identifying the person or group on whose behalf the call is being made; describing the purposes of the call; limiting the days and time period when calls can be made; and ensuring that appropriate caller ID is established.

Enforcement

Violations of the UTRs can result in administrative monetary penalties of up to CAD15,000 for corporations, subject to a due diligence defence.

6.3 Text Messaging

Text messaging is subject to CASL. See **6.1 Email Marketing** for further details.

6.4 Targeted/Interest-Based Advertising

Regulation under PIPEDA

Data collected for interest-based advertising is generally considered personal information and requires consent under Canada's Personal Informational Protection and Electronic Documents Act (PIPEDA), and substantially similar provincial legislation in certain provinces. Personal information may generally be collected for interest-based advertising on the basis of implied consent, provided:

- consumers are made aware of the purpose of the practice and are provided with information about the parties involved before the time of collection;
- consumers can easily opt out, with the opt-out being immediate and persistent;
- collected information is not sensitive; and
- collected information is destroyed as soon as possible or de-identified.

The Office of the Privacy Commissioner of Canada (OPC) has actively encouraged advertisers to avoid knowingly targeting children for interest-based advertising.

Enforcement

Enforcement under PIPEDA is carried out by the OPC, either on its own initiative or on behalf of an individual complainant. While the OPC does not have the independent power to issue binding compliance orders or administrative monetary penalties, other than in limited circumstances, it may bring an action in Federal Court, which has the power to award sanctions against the organisation or award damages to complainants.

Self-regulation

The Digital Advertising Alliance of Canada (DAAC), a non-profit consortium of trade associations, administers AdChoices, a self-regulatory programme for interest-based advertising. To encourage increased notice, transparency, and accountability from the advertising sector online to consumers, AdChoices has issued a number of recommendations, for example, advising that advertisers provide consumers with an ability to choose whether data is collected and used, and that they do not collect personal information from children under the age of 13 or sensitive information from anyone without consent.

6.5 Marketing to Children

There are no federal statutes of general application that specifically regulate advertising to children.

The federal Cannabis Act and the Tobacco and Vaping Products Act (TVPA) prohibit advertising to children under the age of 18 (some provinces have increased this age restriction to 19 or 21) or advertising to adults in any form where there is a risk it may be accessed by children. The TVPA further prohibits the use of certain forms of advertising, such as lifestyle advertising, sponsorship promotion, testimonials and endorsements, or promotions that would be appealing to youth or feature any prohibited ingredients or flavours. The TVPA's Vaping Products Promotion Regulations also prohibit advertising and point of sale promotion of vaping products or a vaping product-related brand element to persons under the age of 18.

Violations may be subject to:

- a maximum fine of CAD1 million or imprisonment for a term of up to two years, or both, for a manufacturer; and
- a maximum fine of CAD500,000 for all persons other than a manufacturer.

The CRTC Code for broadcast advertising of alcoholic beverages (the Broadcast Code), administered by the CRTC, contains several provisions restricting alcohol marketing to children or those under the legal drinking age. While the Broadcast Code in principle applies only to television and radio broadcasts, many provinces have incorporated the Broadcast Code by reference into their alcohol regulations and apply them to advertising in any medium. Under the Broadcast Code, advertisers cannot:

- direct advertisements to anyone under the legal drinking age;
- associate their product with youth or youth symbols;
- portray persons under the legal drinking age or persons who could reasonably be mistaken for such persons in a context where any such product is being shown or promoted;
- portray the product relating to an activity that is primarily attractive to people under the legal drinking age; or
- use an endorsement by a person, character or group who is likely to be a role model for minors.

Child-directed broadcast advertising is also regulated through the Broadcast Code for Advertising to Children (the Children's Broadcast Code), which defines a child as anyone under the age of 12. As a practical matter, all child-directed advertising must comply with the Children's Broadcast Code before it airs.

The Children's Broadcast Code deems any advertising during children's programming, as well as any child-directed advertising during other programming, to be children's advertising, and sets out strict criteria for acceptable forms of child advertising, including:

- prohibitions on pressuring a child to buy or use a product;
- exaggerated demonstrations;
- endorsements by cartoon or fantasy characters (unless specifically created for the product); and
- excessive repetition (for example, a child-directed commercial can only be broadcast once each 30-minute time slot).

Restrictions on Advertising to Children under the Canadian Code of Advertising Standards

The Canadian Code of Advertising Standards prohibits advertising directed at children from:

- exploiting their credulity, lack of experience or their sense of loyalty; and
- presenting information or illustrations that might result in their physical, emotional or moral harm.

The Children's Advertising Initiative

Ad Standards also administers the Children's Advertising Initiative, developed by the food and beverage industry and designed to address childhood obesity. The Children's Advertising Initiative requires participating companies to, among other things, promote healthy dietary choices in children's advertising and not to advertise food or beverage products in elementary schools. Advertisers will be expected to comply with the guidelines by mid-2023. While participation is currently voluntary, Health Canada has announced its intention to amend federal food advertising laws to restrict commercial marketing of food/beverages to children, particularly food products that contribute to excess consumption of sodium, sugars and saturated fat.

Advertising to Children in Quebec

Advertising to children under the age of 13 is expressly prohibited in Quebec pursuant to the Quebec Consumer Protection Act, subject to limited exceptions where strict conditions have been met. Violations are subject to fines of CAD2,000–100,000 for a corporation.

Collection of Personal Information from Children

The OPC has taken the position that, under PIPEDA, the consent of a parent or guardian is required for the collection and use of personal information for children under the age of 13. However, certain provinces, including British Columbia, Alberta, and Quebec, have not set a specific age threshold, but instead consider whether the individual understands the nature and consequences of the exercise of the right or power in question. Where a child/minor is unable to do so, parental or guardian consent is required.

However, Quebec's newly amended private sector privacy legislation provides that parental consent will become mandatory for the collection, use and disclosure of personal information concerning a minor under 14 years of age, as of 21 September 2023.

The Canadian Marketing Association's Code of Ethics and Standards of Practice (CMA Code) also addresses the collection and use of the data of children and teenagers. Like the OPC's position under PIPEDA, the CMA Code stipulates that the collection of data from children under the age of 13 requires parent or guardian consent. For teenagers, defined as individuals between the ages of 13 and the age of majority, parental consent is only necessary where the teenager is younger than 16 and the information being collected is personal information, that is, any general information other than contact information (ie, name, address, email address, and home and mobile telephone numbers). The CMA enforces the CMA Code through internal or external mediation or through a hearing before an independent panel, which results in a resolution and/or corrective action being recommended.

7. Sweepstakes and Other Consumer Promotions

7.1 Sweepstakes and Contests

The Criminal Code

Canada's Criminal Code prohibits the conduct of contests where winners are determined solely by chance. To avoid this, contests other than those of skill (see **7.2 Contests of Skill and Games of Chance**) typically include a mathematical skill-testing question.

Contests based on skill alone or mixed chance and skill are allowed provided they comply with certain requirements, including that participants are not required to pay money or give other valuable consideration to participate in a contest of mixed chance and skill. As a result, Canadian contest rules typically provide for an alternative and equally acceptable means of entry that does not require a "purchase" or any other type of consideration.

The Competition Act

The Competition Act contains specific provisions applicable to contests, including adequate and fair disclosure of, among other things, the number, regional allocation and approximate retail value of prizes, as well as any fact that materially affects the chances of winning. The Competition Act also requires that the ultimate distribution of prizes not be unduly delayed.

Provincial Requirements

The province of Quebec imposes extensive requirements for contests open to Quebec residents (see **7.3 Registration and Approval Requirements**).

7.2 Contests of Skill and Games of Chance

While contests in which winners are determined solely by chance are prohibited under the Criminal Code, those based solely on skill are generally permitted, although what constitutes pure skill or mixed skill and chance has been subject to some debate. Although Canadian courts have held that an element of chance in a game does not necessarily make it a game of mixed chance and skill, to be considered a game of pure skill participants must be able to exercise sufficient skill to compensate for any element of chance.

7.3 Registration and Approval Requirements

With the exception of Quebec, Canada does not have any contest registration or approval requirements. Quebec's Act respecting lotteries, publicity contests and amusement machines and the Rules respecting Publicity Contests impose an advance registration requirement and additionally require the inclusion of certain statutory language in contest rules, payment of prize duties and a security bond in certain cases, reporting and record-keeping.

7.4 Loyalty Programmes

There are no federal laws that apply directly to loyalty programmes. To date, Ontario and Quebec are the only Canadian provinces that specifically address loyalty programmes as part of consumer protection legislation.

In both provinces, legislation generally prohibits the expiry of loyalty points based on the passage of time alone. Additional key requirements in Quebec include:

- merchant disclosure obligations prior to entering into a loyalty programme agreement;
- notice obligations where a loyalty programme agreement will be unilaterally amended; and
- restrictions on increasing the number of points to obtain a good or service.

7.5 Free and Reduced-Price Offers

The Competition Act prohibits advertisers from misleading the public about the prices at which products are ordinarily sold and requires any reduced-price offer to meet one of the tests set out below.

Volume Test

A substantial volume of sales must occur at or above the reference price within a reasonable period of time before or after making the representation. The "substantial volume" requirement is met if more than 50% of sales are at or above the reference price. The "reasonable period of time" is the 12 months immediately before or after the representation, although it may be shorter depending on the nature of the product.

Time Test

The product must be offered for sale in good faith at or above the reference price for a substantial period of time before or after making the representation. The "substantial period of time" is six months immediately before or after the making of the representation, although it may be shorter depending on the nature of the product.

Clearance Sales

Clearance sales are not subject to either the volume or time test. However, a supplier promoting a clearance sale is subject to specific requirements, including demonstrating that:

- the sale was clearly marked as a clearance sale;
- markdowns are permanent and inventory is not replenished;
- the price representations refer to the original price and any subsequent interim prices; and
- the original price was offered in good faith.

Free and Bonus Claims

Free or bonus offers cannot include any attempt to recover the cost of the free item. In a recent settlement with a social media platform, the Competition Bureau signalled its position that the prohibition in the Competition Act against making false or misleading claims about a product or service to promote a business interest applies to "free" digital products the same way it applies to regular products or services purchased by consumers. This is a growing area of enforcement. For further information, see **1.6 Regulatory and Legal Trends**.

7.6 Automatic Renewal/Continuous Service Offers

Automatic Renewal

Provincial and territorial consumer protection statutes generally allow automatic renewal of consumer contracts, provided prescribed conditions are met. A number of provinces, however, are considering changes to their regulatory regimes to address automatic renewals. Proposed amendments to the Ontario Consumer Protection Act, if enacted, will only permit automatic agreement renewals if:

- the consumer is able to cancel at no additional cost; and
- the renewal is made with express consent or by a renewal process that provides advance notice and renews the agreement for an indefinite term.

Continuing Service Offers

British Columbia's Consumer Protection Act specifically limits the duration of continuing services contracts and gives consumers the right to cancel the contract either ten days after receiving a copy of the contract or at any time due to a material change, and it imposes requirements on the supplier once a contract has been cancelled. These requirements include refunding the customer within 15 days and returning all negotiable instruments executed by the consumer within 30 days.

Other provinces provide rules for the renewal of consumer service contracts, but do not specifically address continuous contracts. These typically require that the supplier provide the customer with a notice of renewal within a certain period of time prior to the expiry of the existing contract. Customers and suppliers have the option of refusing the renewal by providing notice to the other party. In certain provinces, these rules only apply to particular contracts, such as personal development or travel club contracts, and often exclude indeterminate contracts.

Unsolicited Goods or Services

Several provinces specifically regulate unsolicited goods and services by allowing recipients to refuse them and prohibiting suppliers from demanding payment. Where the suppliers receive payment for unsolicited goods or services, consumers are typically permitted to demand a refund within a stipulated time period.

8. Sports Betting/Gambling

8.1 Legality & General Regulatory Framework

Subject to limited exceptions, the federal Criminal Code prohibits all types of gambling and

betting. Prohibited activities include provision of in-person or online casinos, bingo, ticket lotteries, betting, poker and other card games, and electronic games.

The main exception to this prohibition applies to provincial and territorial governments, which are permitted to supply gambling facilities or services and regulate any legal gambling activities taking place within the province. Other exceptions may apply in limited circumstances to charitable and religious organisations, boards of fairs or exhibitions and their concession operators, and public places of amusement.

Sports Betting

Although certain forms of sports betting, such as parlay betting, have historically been legal in Canada, until recently, betting on the outcome of a single sporting event was prohibited by the Criminal Code. The Safe and Regulated Sports Betting Act, which decriminalises single-event sports betting and allows provincial governments to regulate single-event sports betting within a province, came into effect in August 2021.

Since then, nine of the ten Canadian provinces have made single-event sports betting available through online platforms and land-based facilities (retail) while all three territories have limited single-event sports betting to retail platforms. The final province, Saskatchewan, has announced plans to launch an online platform for sports betting in November 2022.

8.2 Special Rules & Regulations

Legal gambling operations (ie, those that are authorised by a provincial government), including licensed lotteries, can be advertised so long as they comply with provincial requirements and promote responsible gambling. For example, the Ontario standards require that advertising and marketing of gambling does not target underage or self-excluded individuals and that it is not misleading as to the gambling services offered. Other provinces, such as British Columbia, require that operators provide the factual odds of winning in a clearly stated and accessible way.

9. Web 3.0

9.1 Cryptocurrency and Non-fungible Tokens (NFTs)

Although there are no rules or regulations directly applicable to the advertising and marketing of cryptocurrency and/or NFTs, provincial securities regulators have indicated an intention to regulate in this space. The Ontario Securities Commission, for example, has brought a number of proceedings requiring crypto-asset trading platforms to comply with provincial securities laws and the regulatory framework proposed by the Canadian Securities Administrators (CSA).

Recently, the CSA and the Investment Industry Regulatory Organization of Canada (IIROC) published guidance on the application of securities legislation and IIROC rules to the advertising, marketing and social media activities of crypto trading platforms (CTPs). The guidance highlights prohibitions on false or misleading statements in advertising materials, which for registered or prospective CTPs may apply to the following.

- False suggestions that a CTP is registered under securities legislation.
- Suggestions that a securities regulatory authority or regulator has approved:
  (a) the CTP;
  (b) products offered on the CTP; or
  (c) any disclosures made by the CTP.

- Statements that are untrue about a matter that a reasonable investor would consider relevant or important in deciding whether to enter into a trading or advising relationship with the CTP.

The guidance also sets out obligations that registered CTPs have to their clients, including:

- treating clients fairly, honestly and in good faith, particularly with respect to advertising or marketing strategies that may encourage excessively risky trading;
- knowing the client, product, and suitability assessments; and
- identifying and responding to any conflicts of interest.

The CSA and IIROC have also warned CTPs that using social media to promote their products does not absolve them of certain applicable requirements and provided guidance on policies and procedures that CTPs must adopt for the governance of social media marketing, including:

- reviewing, supervising, retaining and retrieving all advertising and marketing materials on social media sites;
- designating a responsible individual for the supervision or approval of marketing communications; and
- implementing a system to monitor compliance with such policies and procedures.

9.2 Metaverse

To date, there are no laws or regulations that specifically address advertising in the metaverse given its nascent nature. However, marketing and advertising laws of general application apply to advertising within the metaverse, including the overarching prohibition against false and misleading advertising under the Competition Act.

9.3 Digital Platforms

The Competition Bureau has expressly highlighted its intention to strengthen its enforcement activities in today's increasingly digital economy, including issuing guidance and enforcement priorities against specific digital advertising practices such as astroturfing (see **5.4 Misleading/Fake Reviews**), influencer marketing (see **5.2 Special Rules/Regulations on Influencer Campaigns**), free digital products, drip pricing (see **1.6 Regulatory and Legal Trends**), and targeted advertising (see **6.4 Targeted/Interest-Based Advertising**).

10. Product Compliance

10.1 Regulated Products

Canada has a number of federal and provincial/territorial laws, regulations and guidelines that apply to the advertising of specific categories of products including food, drugs, medical devices, alcohol, cannabis and tobacco/vaping products.

Food Products

The marketing and advertising of food products is, for the most part, federally governed, pursuant to the Food and Drugs Act (FDA) and the Safe Food for Canadians Act (SFCA), and enforced by the Canadian Food Inspection Agency. Under the FDA and SFCA, all information provided in food advertising and labelling must not be false, misleading or likely to create an erroneous impression regarding the food product's character, value, quantity, composition, merit or safety (as well as its origin, method of manufacture, or preparation). Any food product that is not labelled or advertised as required by applicable food laws is deemed to be false, misleading or likely to create an erroneous impression.

Generally, mandatory information or claims that are permitted on food packaging may also be used when advertising that food product, and information and/or claims that are prohibited on product packaging are also generally prohibited in advertising of the food product.

Further, voluntary claims (or representations including any text, descriptions or visual representation or combination thereof) made about various aspects or characteristics of a food must be truthful and accurate. Certain claims, including those relating to nutrient content, organic ingredients, being "free from" a substance (negative claims), or health benefits are subject to specific regulatory requirements. Claims of treating, preventing or mitigating certain serious diseases, disorders or abnormal physical states are generally prohibited.

Although the rules for marketing and advertising of food are primarily contained in federal laws, there are additional provincial laws that govern advertising and labelling requirements for specific food products such as dairy, livestock, meat, oil products and agricultural products, as well as, in certain cases, advertising and disclosure requirements for menu items in restaurants and food service establishments.

Drugs and Medical Devices

In Canada, the advertising of prescription and non-prescription drugs (including natural health products), cosmetics and medical devices is regulated under the FDA, with Health Canada having jurisdiction over administration and enforcement.

Distinct from cosmetics (see **10.2 Other Products**), drugs and medical devices may only be advertised in Canada if they are authorised for sale by Health Canada. Pursuant to the FDA and applicable regulations, where a standard has been prescribed for a drug or medical device, it is prohibited to label or advertise a product that is likely to be mistaken for a particular drug or medical device unless the product complies with the standard in question. As with food products, the FDA prohibits advertising that is false, misleading, deceptive or likely to create an erroneous impression about the character, value, quantity, composition, merit or safety of a drug or medical device.

Health Canada also distinguishes advertising requirements and restrictions based on the target audience. Consumer-directed advertising of any prescription drugs that make claims to treat, prevent or cure certain serious diseases, or of narcotic and controlled drugs are generally prohibited, subject to limited exemptions. For example, consumer-directed advertising of prescription drugs may be permitted where only the name, price and quantity of the prescription drug are indicated in an advertisement with no reference to its therapeutic use and/or benefits. Conversely, advertising of prescription drugs directed to healthcare professionals is not subject to such a restriction. However, the FDA prohibits manufacturers from advertising a drug to healthcare professionals for a use other than the indications approved by Health Canada (ie, off-label use). The Pharmaceutical Advertising Advisory Board's Code of Advertising Acceptance also provides guidance on acceptable advertising to healthcare professionals. Additionally, each province may also impose its own additional restrictions on healthcare provider advertising.

The Guideline for Consumer Advertising of Health Products by Ad Standards also applies to the advertising of non-prescription (over-the-counter) drugs, natural products, and medical devices directed to the general public. Pre-clearance of advertising material for drugs (except for opioids)

and medical devices directed to consumers is voluntary and can be obtained from pre-clearances agencies or Ad Standards. For opioids, pre-clearance is mandatory. The Pharmaceutical Advertising Advisory Board pre-clears advertising material directed to healthcare professionals.

Alcohol

Alcohol promotion is highly regulated under provincial/territorial liquor licensing control acts, regulations and guidelines, as well as under advertising industry self-regulation.

The CRTC Code For Broadcast Advertising of Alcoholic Beverages contains several restrictions, which are also reflected in provincial and territorial regulations and/or related guidelines in a number of Canadian provinces and territories. Notable prohibited advertising elements and themes include:

- advertising that appeals to persons under the legal drinking age (see **6.5 Marketing to Children**);
- depictions of alcohol with any activity that requires a significant degree of skill, care or mental alertness, or involving an obvious element of danger;
- condoning of irresponsible or excessive consumption;
- any suggestions that alcohol is essential for enjoyment of a situation or takes precedence over other activities; and
- any suggestions that imply (directly or indirectly) that social acceptance, social status, achievement or personal success would be enhanced through consumption of alcohol.

Currently, Quebec also mandates pre-clearance from the province's liquor and gaming authority for all advertising materials relating to alcoholic beverages.

Tobacco and Vaping Products

The marketing and advertising of tobacco and vaping products is regulated by the Tobacco and Vaping Products Act, and is generally prohibited subject to limited exemptions. Notably, the following advertising activities are generally permitted:

- brand preference advertising (ie, advertisement of a specific tobacco or vaping brand) that is mailed directly to a specifically named adult; and
- advertising signs in locations where young persons are not permitted by law (ie, adult-only venues). However, further limitations exist under these exemptions. For example, the use of terms such as "light" or "mild" are prohibited and the advertisement of sponsorships by tobacco companies is prohibited. See also **6.5 Marketing to Children** regarding prohibition against advertising of tobacco products to minors.

Cannabis and Cannabis Accessories

The Cannabis Act regulates the advertising or promotion of cannabis and cannabis accessories. It prohibits marketing of cannabis that is false, misleading, deceptive or likely to create an erroneous impression about its characteristics, value, quantity, composition, strength, concentration, potency, purity, quality, merit, safety, health effects or health risks (or design, construction, performance, intended use, characteristics, value, composition, merit, safety, health effects or health risks for cannabis accessories). Additionally, the Act generally prohibits the promotion of cannabis and cannabis accessories, subject to limited exemptions. The various advertising prohibitions include:

- communicating information about price or distribution;

- appealing to young persons (see also **6.5 Marketing to Children**);
- displaying or communicating a testimonial or endorsement;
- using real or fictional depictions of a person, character or animal;
- presenting cannabis products or any brand elements in a manner that evokes a positive or negative emotion or image of a way of life, such as glamour, recreation, excitement, vitality, risk or daring (ie, lifestyle advertising);
- sponsorship promotion;
- using celebrity-affiliated advertisements; and
- providing or offering inducements that may encourage non-users or users to either begin using cannabis or engage in heavy consumption.

10.2 Other Products

There are several other categories of products that are specifically regulated by different federal and/or provincial and territorial laws, regulations and guidance, including cosmetics, textiles, and financial products.

Cosmetics

While the marketing and advertising of cosmetics are generally federally regulated under the FDA and the Cosmetic Regulations, cosmetics are also subject to additional advertising rules under Ad Standards' Guidelines for the Nonprescription and Cosmetic Industry Regarding Nontherapeutic Advertising and Labelling Claims. In brief, cosmetic products are generally restricted from making claims indicating or implying therapeutic or physiological effect (eg, in most cases, by using words such as "restores", "repairs", "stimulates", "heals", etc). Further, cosmetic advertisements intended for television or radio broadcast must be pre-cleared by Ad Standards.

Textiles

Federally, the Textile Labelling Act (TLA), which is administered and enforced by the Competition Bureau, regulates the advertising and marketing of textile articles. False or misleading representations related to textile fibre products are prohibited under the TLA. While fibre content declaration is mandatory for textile labelling purposes, it is not required for advertising purposes. However, any representation as to the fibre content of a textile in an advertisement, if included, must be made in accordance with requirements under the TLA. Additionally, textile products advertised in Canada are also subject to health and safety requirements under the Canada Consumer Product Safety Act (CCPSA) as only those articles that are compliant with the CCPSA are permitted to be advertised and sold in Canada.

Financial Products

While specific rules and standards vary depending on the applicable federal and/or provincial/territorial laws, the supplying entity and the type of financial product in question, most provinces and territories require the advertising of financial products:

- to be clear and easy for consumers to understand;
- to be truthful;
- to include applicable disclosures of fees and interest charged or cost of credit; and
- to include key terms and conditions, and the associated risks of obtaining the financial product in question.

Provincial consumer protection laws of general application are also an important source of advertising rules relating to financial products.

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The authors thank Baker McKenzie articling student Milinda Yimesghen for input in the 2022 update of the Canada Guide and associate Daniel Gao for input in prior updates.

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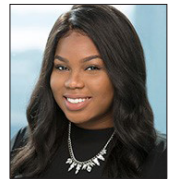

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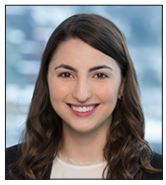

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Trends and Developments

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Developments in Canadian Advertising and Marketing Law

The Competition Bureau (the Bureau), the independent law enforcement agency that administers the federal Competition Act (the Act) – which is Canada's principal consumer protection statute – together with Ad Standards, the Canadian advertising industry's self-regulatory body, are Canada's primary barometers of regulatory priorities in marketing and advertising. Together, they set the tone for trends and developments in this area, supplemented by initiatives by other federal and provincial authorities with responsibility for consumer protection, privacy and product compliance.

Over the past year, as Canadian consumers and advertisers have emerged from the pandemic and begun to rediscover pre-pandemic levels of activity, the Bureau has increasingly directed its enforcement efforts towards regulating the growing digital economy and combatting false and misleading environmental and sustainability claims.

Digital economy

Over the course of the last few years, and apart from its efforts to counter COVID-19-related misleading advertising claims, the Bureau has increasingly directed its efforts at the Canadian digital economy, with a particular focus on digital services and online marketing. This is particularly notable given that a 2022 study conducted on behalf of Ad Standards found that the digital economy, despite the pervasiveness of online channels for commerce, learning, entertainment and social interaction, is now perceived as the least trusted mode of advertising in Canada.

Key challenges in the digital economy on which the Bureau has been focused include:

- influencer marketing;
- false online consumer reviews (astroturfing);
- misleading ordinary selling prices and "fake discounts"; and
- drip pricing.

Influencer marketing

Influencer marketing remains a top enforcement priority, with the Bureau continuing to send letters to marketing agencies and brands in sectors identified as having been impacted by deceptive influencer marketing. In late 2021, the Assistant Deputy Commissioner of the Deceptive Marketing Practices Directorate at the Bureau announced the Bureau's intention to make further updates to its already robust influencer marketing guidance, a clear indication of the Bureau's commitment to regulating advertising and marketing in the digital economy.

False online consumer reviews (astroturfing)

Discouraging the practice of facilitating false and misleading online consumer reviews, also known as astroturfing, through various methods, such as encouraging employees to review a company's products and services without disclosing their employment relationship or providing customers with undisclosed incentives to leave positive reviews, remains a key part of the Bureau's enforcement approach to the digital economy. Although not a new area of concern, the Bureau

has reiterated its intention to strictly enforce this practice where it is identified, given its inherent potential to mislead and harm consumers.

Proposed recommendations

In a February 2022 submission to the federal government entitled "Examining the Canadian Competition Act in the Digital Era", the Bureau made numerous recommendations to amend the Act to strengthen its enforcement capabilities in an increasingly diverse and expansive digital economy in which advertising and marketing are dynamic and the potential for deceptive and misleading practices requires heightened regulatory attention.

For example, the Bureau recommended amending the "ordinary selling price" provisions (which prohibit promoting a price as discounted when, in fact, the advertised price is the ordinary price of the product according to statutory tests) to reverse the burden of proof. Presently, the Bureau bears the burden of establishing that advertised discounts are not genuine. Under the proposed recommendation, advertisers would bear the burden of proving that advertised discounts are, in fact, truthful.

While this recommendation remains a proposal, two other recommendations were incorporated into Canada's 2022 budget legislation and now form part of the Act:

- an amendment to explicitly recognise drip pricing (ie, the practice of concealing mandatory fees until later in the purchasing process) as an express prohibition under the Act; and
- significant increases in administrative monetary penalties to provide a wider range of remedies to counteract deceptive practices.

Greenwashing and environmental claims

In a departure from its focus on the digital economy as such, in January 2022, the Bureau issued a CAD3 million civil administrative monetary penalty against a coffee machine and coffee pod manufacturer in connection with its environmental claims, cementing the Bureau's position against greenwashing claims, while effectively overturning existing guidance. The Bureau concluded that the manufacturer had misled consumers as to the recyclability of its single-use coffee pods in areas where they are not accepted for recycling, as the coffee pods were not widely accepted in municipal recycling programmes outside of two Canadian provinces. Further, the Bureau found that the coffee pods gave consumers the impression that they could prepare the pods for recycling by simply peeling the lids off and emptying out the coffee grounds, even though certain municipal recycling programmes required additional steps to be followed before they would accept the pods for recycling.

Through the settlement, and in addition to the significant civil fine, the manufacturer was also ordered to:

- donate CAD800,000 to a Canadian charitable organisation focused on environmental causes;
- change its recyclable claims and the packaging of its coffee pods;
- publish corrective notices about the recyclability of its product on its websites, on social media, in national and local news media, on the packaging of all new brewing machines and via email to its subscribers; and
- enhance its corporate compliance programme.

Although the Bureau, in collaboration with the Canadian Standards Association, issued detailed guidelines on environmental claims in 2008 and has actively regulated and enforced greenwashing claims since then, the Bureau has made it clear to consumers and advertisers alike that it intends to pursue greenwashing claims with renewed vigour and with an updated approach to evaluating when such claims may be misleading.

This is evidenced in the Bureau's conclusion that its environmental claims guidance published in 2008 no longer reflects the Bureau's current policies or practices, or the latest standards and evolving environmental concerns. This resulted in the guidance being archived in late 2021, just prior to the enforcement decision noted above. The guidance document has not been replaced, and no timeline to issue an updated version has been announced. The decision is both a reflection of the extent to which changes in environmental technologies, recycling programmes and consumer sensibilities in an era of global climate change can render considered guidance inapplicable over time, and a warning to businesses of the risk of enforcement action in an evolving marketing landscape.

Drip pricing

Drip pricing, the practice of displaying one price to consumers but ultimately charging a higher price through the incorporation of additional fees added incrementally during the purchase process, has long been deemed false or misleading under the Act's deceptive marketing provisions, with multiple historical examples involving a variety of consumer-facing industries, including retail furniture, event tickets and airlines.

In February 2021, the Bureau entered into a CAD5 million settlement (the highest of all drip pricing cases to date) with an online travel booking marketplace for, among other offences, allegedly misleading consumers in relation to prices and generating significant revenue from hidden fees.

Given the prevalence of this practice, as seen through the extent of enforcement over the years, the Canadian government adopted the Bureau's recommendation to make drip pricing an expressly enumerated practice under both the criminal and civil misleading advertising provisions of the Act. In contrast to prior drip pricing cases, the introduction of the new drip pricing provisions will effectively remove the Bureau's burden to prove that such representations are false and misleading, an implementation of the Bureau's recommendation that advertisers and brands increasingly bear the burden of proving that advertising is, in fact, truthful.

Increased penalties

Through changes included in the amendments to the Act implemented through 2022 budget legislation, the Bureau has also strengthened its enforcement of deceptive marketing through significantly increased penalties and fines.

Previously, the maximum penalty for individuals (such as company directors) was capped at CAD750,000 (CAD1 million for subsequent violations). The new maximum penalty for individuals is whichever of the following is higher:

- CAD750,000 (CAD1 million for each subsequent violation); and
- three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined.

For corporations, penalties were previously capped at CAD10 million (CAD15 million for sub-

sequent violations). The new maximum penalty for corporations is whichever among the following is the highest:

- CAD10 million (CAD15 million for each subsequent violation);
- three times the value of the benefit obtained from the deceptive conduct; or
- if that amount cannot be reasonably determined, 3% of annual worldwide gross revenues of the corporation.

Looking ahead

Throughout the last few years, the Bureau has repeatedly emphasised that active enforcement against deceptive marketing practices is, and will continue to be, a key priority, and therefore an important focus for advertising and marketing legal compliance.

Deceptive marketing, particularly in the digital economy, is likely to continue to be a central focus of the Bureau's enforcement, and we expect to see further momentum from both the Bureau and the Canadian government to amend the Act to ensure that consumer protection remains at the forefront and the Bureau continues to be equipped with adequate enforcement tools.

Additionally, with ever-changing technologies, we expect to see a shift in priorities to newly emerging themes of the digital economy, such as advertising in augmented reality and virtual reality (the precursor to the metaverse), as well as the use of non-fungible tokens (NFTs) in marketing and advertising. As has been seen with other regulators, such as the United States Federal Trade Commission, it will not be surprising to see new or amended guidance pertaining to the digital economy.

Further developments are also expected in enforcement and interpretation affecting the digital economy through the Bureau's newly created Digital Enforcement and Intelligence Branch, which is anticipated to become a centre of expertise on technology and data, also acting as an early-warning system for potential deceptive marketing issues in the digital economy impacting consumers and businesses in Canada.

As the Bureau has previously identified greenwashing as an area for increased enforcement moving forward, rises in complaints, investigations and enforcement actions are expected, particularly due to increased consumer awareness of greenwashing, the global significance of environmental choices and the archiving of the environmental claims guidance document.

Legal developments in this area in Canada will undoubtedly remain frequent over the coming years and will warrant ongoing close attention by advertisers and marketers.

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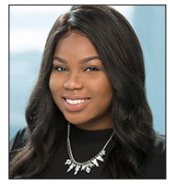

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Contents

1. Legal Framework and Regulatory Bodies

1.1 Primary Laws and Regulation

The Advertising Law of the PRC ("Advertising Law") sets forth the legal framework in connection with advertising and marketing practices in the PRC. The law has been amended three times in the last decade in response to the rapid development of the advertising industry. Provisions regulating advertising and marketing activities are found in various national laws and administrative regulations, including, but not limited to:

- the Civil Code;
- the Anti-Unfair Competition Law;
- the Food Safety Law;
- the Drug Administration Law;
- the Law on Protection of Rights and Interests of Consumers ("Consumer Protection Law");
- the Administrative Measures for the Broadcasting of Advertisements on Radio and Television; and
- the Provisional Administrative Measures for Internet Advertising ("Provisional Internet Advertising Measures").

1.2 Enforcement and Regulatory Authorities

The State Administration for Market Regulation (SAMR), and a local counterpart to the SAMR, an administration for market regulation (AMR), is the primary regulatory authority that enforces both the Advertising Law and the Anti-Unfair Competition Law.

While the SAMR is the key government authority responsible for overall market regulation, the Advertising Law also empowers other regulatory bodies to work with the SAMR to supervise advertising activities in specific industries. For instance:

- advertisements for medical treatment will be examined by the competent health administrative authority;
- internet advertising activities will be examined by the cyberspace administrative authority and industry and information technology administrative authority;
- advertisements for NFTs and the metaverse will be examined by the banking and insurance regulatory commission and securities regulatory commission; and
- advertisements for medical-related products will be examined by the drug supervision and administrative authority.

1.3 Liability for Deceptive Advertising

Under PRC laws and regulations, the persons or entities that can be held liable for false advertising include advertisers, advertising agencies, the publishers of adverts, and also, in certain circumstances, those who endorse products. Administrative penalties resulting from violation of the Advertising Law and the Anti-Unfair Competition Law range from fines, forced cessation of illegal acts, confiscation of illegal proceeds and revocation of business licences. Criminal liability for false advertising, when the violation amounts to a crime, may apply to advertisers, advertising agencies and the publishers of adverts (Article 222, the Criminal Law).

Advertisers

The advertiser, as the provider of the product/service, is in principle liable for false advertising with limited exceptions. The advertiser may be subject to fines or confiscations in an administrative ruling and compensations in a civil proceeding. If the false advertising constitutes a criminal offence and the advertiser (being a legal person) is found guilty of false advertising under the Criminal Law, the directly responsible individual or the individual taking primary

responsibility for that false advertising may be held chargeable (Article 231, the Criminal Law).

Agencies and Publishers

Both the advertising agent and the publisher of an advertisement must take responsibility for verification in connection with an advertisement. They shall verify, among other things, the certificates and other types of files provided by the advertiser and also the content of the advertisement to ensure consistency between the claims therein and the qualification of the product. Liabilities similar to those applicable to the advertiser may also apply to an advertising agent and/or publisher if they knowingly produce or publish a false advertisement.

Endorsers

A person who endorses a product may be held liable for promoting falsely advertised products, if the endorser is, or should have been, aware of the fact of false advertising but they still recommended or otherwise endorsed the product or service. In such cases, the AMR may confiscate the illegal income and impose a fine on the endorser. In addition, if the subject product or service of a false advertisement concerns the life or health of consumers and causes injury or damage to the consumer, the endorser shall take joint liability with the advertiser, advertising agent, and advert publisher.

Third Parties

Other participants involved in a false or misleading advertisement may also be held liable. For example, the law requires that an administrator of a public place, an operator of a telecommunications business, or an internet information service provider shall stop the sending or publishing of illegal advertisements if such entity knows or should have known about the illegality relating to the advertisements in question (Article 45, the Advertising Law). Through the operation of this provision, the law essentially imposes liability for verification on these third parties.

1.4 Self-Regulatory Authorities

The Advertising Law outlines self-regulation rules in the advertising and marketing sector. The main responsibility of self-regulatory bodies is to assist the government authority to regulate the industry, set up industry standards and develop an industry self-regulation system. The key self-regulatory bodies, the China Advertising Association (CAA) and the China Association of National Advertisers (CANA), have adopted certain ethical codes to help maintain order in the advertising market and strengthen self-regulation in the industry. Violations of these ethical codes may result in admonishment or a circulated notice of criticism within the organisation.

1.5 Private Right of Action for Consumers

A private right of action is available for consumers and private citizens to challenge advertising practices. When the content of an advertisement infringes the legitimate interest of a consumer or private citizen, the latter may have a cause of action and claim for remedies based on applicable laws, such as the Civil Code, the Advertising Law, the Consumer Protection Law, etc. The Advertising Law specifically provides for a cause of action for consumers against the advertiser if the advertisement is fraudulent, deceptive or misleading and the consumer's interest is harmed after the purchase of products or receipt of services. The remedies available for private actions include, in general, damages, rescission and apologies.

1.6 Regulatory and Legal Trends

The past 12 months have seen heightened regulatory efforts in the advertising industry continue, including in relation to:

- online adverts and live-streaming e-commerce – the Administrative Measures for Internet Advertising (in draft form soliciting public comments); Opinions concerning the Further Normalization of Online For-Profit Live-Streaming Marketing Activities to Promote the Healthy Development of the Industry;
- targeted push and use of algorithm – the Personal Information Protection Law; the Administrative Provisions on Algorithm Recommendation for Internet Information Services; and
- medical cosmetology – the Administrative Guide on Medical Cosmetology Advertising.

On the law enforcement front, the areas worth noting include:

- as the 20th Party Congress will be held in the fall of 2022, regulatory efforts are carried out against behaviours such as taking advantage of the 20th Party Congress for commercial publicity purposes (See **1.8 Politics, Regulation and Enforcement**);
- the role of the people's procuratorates being increasingly recognised in initiating public interest litigation cases regarding deceptive advertising in areas closely related to people's well-being, the Supreme People's Procuratorate was admitted as a member of the Inter-Ministerial Joint Meeting on Rectifying False and Illegal Advertisements in March 2022; and
- actions against deceptive advertising in important areas continued to be emphasised, including medical treatment, medicines, dietary supplements, medical cosmetology, finance, and emerging areas such as NFTs and the metaverse (See **9. Web 3.0**).

1.7 COVID-19, Regulation & Enforcement

Ever since the beginning of the COVID-19 pandemic, regulatory attention has been focused on sanctioning false advertising by companies seeking to capitalise through mentions of the virus in their advertising and marketing efforts. In February 2020, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice jointly clarified that false advertising related to the prevention or control of the COVID-19 emergency falls within the scope of the crime of false advertising (Article 2.5, Opinion on Cracking Down Illegality and Crime that Jeopardise the Prevention and Control of the Coronavirus Pneumonia Epidemic, February 2020). Following this Opinion, court rulings and administrative penalty decisions have shown a tendency to impose penalties at the heavier end permitted by law on cases related to COVID-19. In a case decided in 2021 by a Shanghai court, two individuals were found guilty of criminal false advertising for falsely asserting that a certain kind of disinfectant they were promoting "could completely prevent the spread of COVID-19 virus" and so on, and bother were sentenced to imprisonment for several months.

1.8 Politics, Regulation and Enforcement

As the 20th Party Congress will be held in the fall of 2022, one of the government's focuses this year is to maintain a steady public opinion environment in order to avoid negative impact on the upcoming Party Congress, or to "purify market environment and social atmosphere to welcome the 20th Party Congress". In April, the SAMR issued the Development Plan of the Advertising Industry for the 14th Five-Year Plan, of which the first "major task" is the regulation from the per-

spective of correct political orientation. The local AMRs have published guidelines for marketers in this regard. For example, the Remind Letter on Regulating Commercial Advertising and Promotions issued by the local AMR of Beijing specifically prohibits taking advantage of the 20th Party Congress for commercial publicity purposes.

On another side, regulatory authorities, together with government-backed industry associations, have continued efforts in regulation on celebrities and moral issues. For example, endorsement by the so-called "talents with lapsed morals" is another category specifically prohibited in the Remind Letter issued by the local AMR of Beijing. In addition, for the guidance of the participants in the advertising industry to strengthen the sense of social responsibility and ethics and form a self-regulatory mechanism on ethic issues in compliance with laws and regulations, the Commission on the Advertising Ethics was established on 10 September 2021 under the supervision of the Inter-Ministerial Joint Meeting as a consulting institution within the China Advertising Association. As a result of the enhanced regulation and change of public atmosphere, a heavier burden is imposed on advertisers to conduct thorough background due diligence checks on potential endorsers, and advertisers have been encouraged to enhance the moral clauses in their endorsement agreements to better cope with the potential moral risks of their endorsers.

2. Advertising Claims

2.1 Deceptive or Misleading Claims

According to Article 28 of the Advertising Law, any advertisement that defrauds or misleads consumers with any false or misleading content will be a false advertisement. Furthermore, the law specifies a list of scenarios where a false advertisement will be deemed to exist, including where:

- the advertised product or service does not exist;
- in connection with the product's performance, functions, place of production, uses, quality, specification, ingredients, price, producer, term of validity, sales condition, and honours received, among others, or the service's contents, provider, form, quality, price, sales condition, and honours received, among others, or any commitments, among others, made regarding the product or service, there is any inconsistency with the actual circumstances that has a material impact on purchase decisions;
- any scientific research result, statistical data, investigation result, excerpt, quotation, or other information, which is fabricated or forged or cannot be validated, has been used as certification material;
- the results of using the product or receiving the service are fabricated; and
- consumers are otherwise defrauded or misled with any false or misleading content.

Per the Supreme People's Court, in determining whether it is misleading and false publicity, the courts shall consider factors such as daily life experiences, the general attention of the relevant public, the facts causing misunderstanding and the actual circumstances of the subject of the publicity, etc.

2.2 Regulation of Advertising Claims

The scope of advertising claims subject to the regulation of the Advertising Law is broad, including both express claims and implied claims regarding products and services. Any product or service-related information that can have a material effect on a consumer's decision-making

is regulated by the Advertising Law, including introduction of the scale, location and environment of the advertiser, as well as claims having to do with business goodwill and the history of the advertiser.

The Advertising Law does not set forth how to distinguish express and implied claims; instead, the court and administrative regulator would have substantial discretion to determine whether there is an actionable implied claim. The key to determining whether there is an actionable advertising claim is whether the advertisement has any false or misleading content or defrauds or misleads consumers. The misrepresentation made by an advertisement may be any information relating to product quality, composition and ingredients, function and use, expiry date and place of origin. To avoid being challenged, an advertising claim should be truthful and precise and an "implied claim" is not a safe harbour.

2.3 Substantiation of Advertising Claims

Advertising claim substantiation is largely achieved by verification of the certifications of the advertiser/advertised products. The Advertising Law requires the advertising agent and advertisement publisher to examine the relevant certification documents, and to verify the content of an advertisement under laws and administrative regulations. According to the Administrative Regulations for Advertising, the following certification documents need to be provided respectively in connection with the corresponding types of advertisements:

- for a commodity advertised as meeting quality standards – the certificate of inspection issued by the competent standardisation administrative department or by a quality inspection body;
- for a commodity advertised under the title of a high-quality product – the certificate of a high-quality product issued by the government;
- for a commodity advertised as under patent protection – the certificate of grant of patent;
- for a commodity advertised as bearing a registered trade mark – the certificate of trade mark registration;
- for cultural, educational or public health advertisements – the certificate issued by the competent administrative department; and
- the certificate issued by the competent authority, or its authorised institution, in the case of other types of advertisements for which certificates are required.

In addition, the Advertising Law also requires advertisements in highly specialised industries, such as medical treatment, medicine, medical devices, dietary supplements, etc, be subject to review by applicable authorities of the claims therein.

2.4 Testing to Support Advertising Claims

The Advertising Law does not specifically provide for standards generally applicable to testing that is conducted to support advertising claims. There have been some judicial findings indicating that an advertising claim is more vulnerable to being challenged if the statistics used in the claim are research results of institutes owned or sponsored by the advertiser itself.

2.5 Human Clinical Studies

According to the Drug Administration Law, prior to the launch of any new drug, three rounds of clinical trials are required to verify the safety and effectiveness of that drug. After the launch, the drug manufacturer shall collect information and look into safety incidents according to the clini-

cal treatment of patients. Therefore, for advertisements of such pharmaceutical products, the requirement for clinical trials is in fact included in the supporting documents (such as relevant permits) required to be submitted. Advertisements for medical drugs are subject to content censorship review by the drug supervision and administrative authority.

2.6 Representation and Stereotypes in Advertising

Article 9 of the Advertising Law generally prohibits content "hindering public order or violating social morality or involving ethnic, racial, religious, and gender discrimination", among other types of content. Though there are no detailed rules at state or local level in this regard, non-compulsory guidelines are being made. In December 2020, the government of Shenzhen released the first official guidebook on gender equality in advertisement, which aimed to identify and prevent gender discrimination in advertising practices. In the Administrative Guide on Medical Cosmetology Advertising ("Medical Cosmetology Advertising Guide") issued by the SAMR in November 2021, advertisements that may create "appearance anxiety", improperly associate undesirable appearance with negative remarks such as "laziness" and "poverty" or improperly associate outstanding appearance with positive remarks such as "diligence" and "success", are deemed to violate the good social moral and thus are closely watched.

Administrative cases have taken place regarding advertisements involving stereotyping or discrimination. For example, in a case handled by Shanghai local AMR, a bra advertisement with descriptions including "a piece of equipment enabling easy success for women" was found to violate social morality and involve gender discrimination, and the AMR confiscated the publisher's illegal income and fined the publisher CNY200,000.

2.7 Environmental Claims

To date, there have been no laws and regulations under PRC law specifically targeting the ads conveying misleading information about the environmental impact of a product, also referred to as "greenwashing" ads. "Greenwashing" is generally understood as a form of deceptive advertising or marketing strategy to persuade the public that certain products, aims and policies are environmentally friendly, which may include two typical types of behaviours.

The first type of greenwashing involves direct false descriptions of the environment-friendly features of a product or misappropriation of certain environment-related certification marks (eg, the organic food or green food certifications). This type of greenwashing constitutes false advertisement and therefore is subject to the regulation relating to false advertising.

The second involves a marketing strategy that focuses only on a few specific features of a product that can be beneficial to the environment without referencing the other features or the product as a whole or intentionally omitting defects in its products that could harm the environment. By meticulous choice of terms used in the advertisement, this type of greenwashing manages to escape from the regulation because what is contained in the advertisement can hardly be deemed false or misleading and thus is more difficult to catch as a matter of law.

2.8 Other Regulated Claims

Advertising claims in connection with all the following types of products and services are subject to special rules as stipulated in the law: education and training, real estate, dietary sup-

plements, medical treatments, drugs, medical devices, pesticides, veterinary drugs, feed and feed additives, tobaccos, spirits, commodity or services with an expected return on investment, crop seeds, tree seeds, grass seeds, breeding livestock and poultry, aquatic seedling and species breeding, etc (Articles 15-27, the Advertising Law).

In addition, certain expressions are specifically prohibited in an advertisement relating to a regulated industry. For instance, according to the Interim Administrative Measures for the Review of Advertisements for Drugs, Medical Devices, Dietary Supplements and Formula Food for Special Medical Purposes ("Interim Measures for Review of Medical-Related Advertisements"), advertisements on drugs, medical devices, dietary supplements and formula food for special medical purposes shall not contain any commitment-related language, such as "safe", "no toxic side effect", "refund if found ineffective", or "non-addictive".

3. Comparative Advertising

3.1 Specific Rules or Restrictions

Comparative advertising is, with certain exceptions and constraints, permitted by the Advertising Law, provided, however, that no advertisement shall disparage the goods or services of any other producer or trader, and the advertiser, advertising agent, and advertisement publisher shall not conduct any form of unfair competition in their advertising activities. Notwithstanding the foregoing, with respect to certain categories of products – such as medical drugs, medical devices and dietary supplements – comparative advertising is not allowed.

For products and services not prohibited by the law from comparative advertising, on the basis that there is scientific evidence and/or proof that the products/services being compared are of the same categories and are comparable in nature, comparative advertising is allowed, and identifying a competitor by name is not prohibited by the law per se.

3.2 Comparative Advertising Standards

Generally speaking, all advertising claims must be truthful, objective and provable. The law does not stipulate a specific standard for comparative advertising claims. However, the non-disparaging requirement discussed in **3.1 Specific Rules or Restrictions** is closely related to comparative advertising.

There is a general understanding that has developed regarding comparative advertising claims. The products or services being compared must be comparable in nature. A comparison between products of a different nature to distinguish the advertiser's own product/service may be misleading to consumers and disparaging to the product/service with which it is being compared. An advertisement is not required to disclose the disadvantages of the subject product or service. However, in the case of comparative advertising, if the advertiser excessively emphasises the disadvantages of the compared product, while remaining silent about the disadvantages of its own product, such claims may mislead the consumer to believe that the product being advertised has no disadvantages. In such case, a comparative advertisement lacking complete information may be viewed as a false advertisement.

3.3 Challenging Comparative Claims Made by Competitors

An advertiser may challenge claims made by a competitor based on different causes of action, including false advertising and unfair competition. If the advertiser exaggerates its own products and disparages the competing products, or publishes false advertisements that contain non-truthful or misleading information, the advertiser may be found to have conducted false advertising and commercial disparagement, and consequently be subject to administrative sanction and civil liabilities for violating the Advertising Law and/or the Unfair Competition law. The liabilities include damages, fines, cessation of the illegal act, elimination of effects and revocation of the business licence.

4. Social/Digital Media

4.1 Special Rules Applicable to Social Media

Digital advertising has seen tremendous development in China over recent years. Forms of digital advertising range from advertising on social media to search engine advertising, e-commerce retail advertising, and in-feed advertising. All such advertising activities are primarily regulated by the Advertising Law and the Provisional Internet Advertising Measures, although the latter is reportedly undergoing amendments and is expected to be superseded by the contemplated draft Administrative Measures for Internet Advertising published by the SAMR for public comments in November 2021.

4.2 Key Legal Challenges

Defining "Advertising"

Determining what counts as an advert and the role of players in digital advertising can be difficult. The Provisional Internet Advertising Measures require all online advertising to be conspicuously marked with the word "advertising", regardless of its form. In practice, however, a significant quantity of "soft advertising", which does not appear as traditional advertising, exists and can be effective in driving consumer interest. Prior to placing promotional content online, marketers should assess whether their marketing activity will be subject to any advertising rules and their own role in that activity, as the Advertising Law imposes different liabilities on different actors involved in advertising activities.

Ensuring Content Originality

Given the tremendous resources and information available online, marketers must ensure the originality and quality of their advertising content and prevent copying from other resources without proper licensing or permission, which may lead to severe copyright issues.

Local Regulation

Becoming aware of the various applicable regional rules is a key marketing challenge. Each of the AMRs, the primary government agencies regulating advertising activities, has its particular scope of authority, based on regional territories, yet social media advertising often transcends regional boundaries.

Data Protection

Marketers may have to play it safe with regard to data utilisation. If the marketer chooses to advertise on a less sophisticated social media platform, as opposed to a strong and sophisticated network, the marketer needs to be more careful about the rules protecting user data before it uses the data provided by the platform.

4.3 Liability for Third-Party Content

As to the liability of the advertiser for content posted by others on the advertiser's site or

social media channels, as long as advertising is deemed to be in existence and the advertiser is deemed as an "advertiser" within the meaning of the Advertising Law, that advertiser is required to "be responsible for the truthfulness of the advertisement". Bona fide reliance by consumers may be found, which could render the host advertiser liable due to content posted by others on its website or social media. The law does not distinguish the identity of the publisher to determine the liability of the advertiser. To avoid being held liable, advertisers are advised to conduct regular reviews of the content on its site or social medial channels, and to remove any undesirable content.

4.4 Disclosure Requirements

In principle, the same disclosure requirements apply to social media advertising and traditional media advertising. Meanwhile, it is noteworthy that Article 7 of the Provisional Internet Advertising Measures provides that internet advertising shall be identifiable and clearly marked with a recognisable "advertising" label. The current law does not provide for any exceptions for social media ads that have space limitations or constraints. As discussed in **4.2 Key Legal Challenges**, however, there are grey areas of advertising on the internet that the current laws and rules do not seem to have fully caught up to yet. See also **4.6 Special Rules for Native Advertising**.

4.5 Requirements for Use of Social Media Platform

At this time, there appear to be no unique laws or regulations that specifically apply to the use of major social media platforms, such as WeChat or Weibo. Meanwhile, major social media platforms in China have developed their own editorial and content guidelines and verification procedures with which the advertisers must comply on top of the existing laws.

4.6 Special Rules for Native Advertising

Native advertising is a type of advertising that matches the form and function of the platform upon which it appears. It can take the form of in-feed ads, search and promoted listing, content recommendation, Weibo posts, WeChat articles, etc. The reason for it being called "native" is that such advertising integrates with the original content of a website or app and is designed with a focus on user experience. As such, native advertising does not look like other advertising, but more like part of the overall website or app content.

However, if it is a marketing activity to promote a product or service, it should still be subject to the disclosure requirements as provided for in **4.4 Disclosure Requirements**. As mentioned, the Advertising Law and the Provisional Internet Advertising Measures both require that advertising be clearly identifiable. In practice, however, due to the blurred lines between editorial and sponsored claims, native advertising is usually not marked with an "advertising" label as required by law. As such, in the event that native advertising infringes on consumers' rights and interests or "interrupts the order of the advertising market", its well-hidden form could bring more uncertainty as to how it should be regulated.

4.7 Misinformation

There is no legal definition of "misinformation" in current PRC laws and regulations. However, misinformation on the topics of public importance, if they disrupt the public order, may be subject to administrative penalties and even criminal liabilities in certain circumstances. The Law on Administrative Penalties for Public Secu-

rity provides that detention of up to ten days and a fine of up to CNY500 may be imposed where a person intentionally disrupts the public order by spreading rumours, making false reports of dangerous incidents and epidemic incidents or otherwise raising false alarms, while a criminal charge of fabricating and intentionally spreading false information may result in public surveillance, criminal detention or imprisonment of up to seven years. As referenced in **1.7 COVID-19, Regulation & Enforcement**, with respect to the impact of the pandemic, the Opinion on Cracking Down Illegality and Crime that Jeopardise the Prevention and Control of the Coronavirus Pneumonia Epidemic specifies that fabricating false information about the pandemic and spreading such online or on other media, or knowingly spreading false information about the pandemic online or in other media which severely disrupts the public order shall constitute the crime of fabricating and intentionally spreading false information pursuant to the Article 291 of the Criminal Law.

5. Social Media Influencer Campaigns and Online Reviews

5.1 Trends in the Use of Influencer Campaigns

Popular types of influencers include celebrities, entrepreneurs, professional streaming hosts or key opinion leaders. Influencers have recently been put under even closer watch by the government. Incidents involving influencers, such as tax evasion, infringement of trade mark rights and false publicity, have been reported. Supervision by platforms of influencers has levelled up as a result.

China's rather unique social media landscape has led to an ecosystem for influencer campaigns, resulting in two main business models: social media advertising and e-commerce retail advertising. Said models have not changed much during the past 12 months.

Social Media Advertising

The first model involves numerous popular social media platforms in China (WeChat, Weibo, Douyin, Kuaishou, Little Red Book, etc), whereby the influencer posts promotional content for soft-sell advertising. Successful influencers take more creative approaches, such as sharing personal experience or offering competitive discounts, instead of reciting overwhelming product descriptions to persuading their audience.

E-commerce Advertising

In the second model, platforms (eg, Taobao Live Streaming, JD, Pinduoduo, etc) set up direct sales channels for various business owners to promote and sell their merchandise. Influencers who promote their own brand/products may be the business owner themselves, or a business owner may hire an influencer to create a post or/and conduct a live-stream to promote products online.

5.2 Special Rules/Regulations on Influencer Campaigns

An influencer campaign that promotes a brand or product and influences the purchasing decision of a consumer would be viewed as advertising and, as such, be regulated by the Advertising Law, the Provisional Internet Advertising Measures and other regulations applicable to online activities in general.

If an influencer campaign is carried in the form of live-streaming marketing, the relevant parties – including the platform, live-streaming operators, marketing personnel and the influencer – shall abide by the following regulations and rules:

- the Opinions concerning the Further Normalization of Online For-Profit Live-Streaming Marketing Activities to Promote the Healthy Development of the Industry (March 2022);
- the Measures for the Administration of Live Streaming Marketing (for Trial Implementation) (May 2021);
- the Notice of National Radio and Television Administration on Strengthening the Administration of Live-Streaming Shows and E-commerce (November 2020); and
- the Guiding Opinions of State Administration for Market Regulation on Strengthening the Regulation of Online Live-streaming Marketing Activities (November 2020).

Among the live-streaming marketing participants, live-streaming marketing platforms take primary responsibilities in connection with the marketing activities. Such responsibilities include going through filing formalities, obtaining necessary permits and approvals, and conducting security evaluation in accordance with applicable laws and regulations.

For live-streaming studio operators and marketing personnel, qualification review and real-name authentication are required. They shall perform the duties and obligations of advertisement publishers, advertisement agents or advertisement endorsers, as applicable, if the live-streaming content constitutes a commercial advertisement.

Authorities are taking actions jointly to tighten regulations and tackle disorders. In April 2022, the Cyberspace Administration of China, the SAMR and the State Taxation Administration jointly launched a nationwide campaign to rectify misconduct in live-streaming and short videos, including misconduct of false or improper marketing, etc.

5.3 Advertiser Liability for Influencer Content

An advertiser's liability under the Advertising Law for the content posted by its influencer is determined mainly by two factors: whether the influencer's activity is advertising under the Advertising Law, and the relationship between the advertiser and the influencer. When advertising is deemed to have taken place, the influencer may be viewed as the advertising publisher where the influencer is presenting the advertising content, or as the endorser where the influencer personally certifies the product or service.

The Advertising Law imposes strict liability on the advertiser with respect to the truthfulness of the content of the advertisement. In a scenario where the influencer (being the advertising publisher or endorsement person) is conducting advertising activity, the advertiser may be held liable if the content posted by the influencer is deceptive or misleading.

5.4 Misleading/Fake Reviews

At this time, there appear to be no rules that explicitly prevent employees of a company or a hired firm from posting reviews online of the company's own products. That said, the Anti-Unfair Competition Law prohibits business operators from making false or misleading commercial promotions regarding the performance, function, quality, sales, user reviews, awards, etc, so as to defraud or mislead consumers. Likewise, business operators are not allowed to arrange fictitious transactions to assist other business operators to carry out false or misleading commercial promotions. A violation of such rules may result in a fine of up to CNY2 million and revocation of a business licence.

6. Privacy and Advertising

6.1 Email Marketing

The Civil Code generally prohibits disturbing the peace and privacy of an individual by phone calls, text messages, instant messengers, emails, leaflets, etc, without such individual's express consent. Specifically, email marketing is also regulated under the Advertising Law, the Measures for the Administration of Internet Email Services and the Provisional Internet Advertising Measures.

Electronic advertising must clearly indicate the real identity and contact information of the sender, and must provide to the recipient the means to unsubscribe.

Legal liabilities for violation of such rules include confiscation of illegal proceeds, rectification of wrongdoings, and a fine up to CNY100,000 as applicable.

6.2 Telemarketing

Telemarketing is governed by the Advertising Law and certain other administrative rules. According to the Proposal for Special Action against Unsolicited Telemarketing Calls and its supporting work plan issued in 2018, for commercial outbound telemarketing calls:

- the consent of users shall be obtained;
- a white list of users shall be established; and
- the time and conduct of telemarketing calls shall be regulated.

In summary, the user's consent is essential for permitted telemarketing, alongside other factors, including that the content of telemarketing, must be lawful (eg, solicitation of gambling is strictly prohibited in any event). There are no express legal liability provisions under the relevant rules governing telemarketing, but the authority may apply the Advertising Law for illegal advertising activities and the Consumer Protection Law for infringement of consumers' rights.

6.3 Text Messaging

Advertising by text messaging is regulated by, in addition to the Advertising Law, specifically the Provisions on the Administration of Short Message Services Communications ("SMS Provisions"), as well as the administrative regulations and rules promulgated by local governments.

In summary, the general requirements for SMS advertising are that:

- the recipient shall be informed and have given consent, as commercial short messages can only be sent after informing the recipient of the type, frequency and time limit of such messages and obtaining the consent of recipients;
- the identity and contact information of the SMS content provider shall be included; and
- a convenient and effective way to unsubscribe shall be provided along with the SMS.

The SMS Provisions provide no specific liability provisions. However, the Measures for the Supervision and Administration of Online Transactions ("Online Transaction Measures") provide for rectification of wrongdoings and a fine of up to CNY30,000 as liabilities. In addition, the law enforcement body may also rely on the Advertising Law to enforce the prohibition against illegal SMS advertising and the Consumer Protection Law for infringement of consumer rights.

6.4 Targeted/Interest-Based Advertising

In connection with the use of consumer data for purposes of targeting or retargeting consumers with advertising, the Personal Information

Protection Law (PIPL) provides that, in the case of a targeted push and commercial marketing to individuals by means of automatic decision-making, the option to not be targeted by their characteristics (eg, the option to refuse tailored recommendation) or convenient opt-out options shall be provided at the same time.

Moreover, the newly promulgated Administrative Provisions on Algorithm Recommendation for Internet Information Services provide that algorithm recommendation service providers must provide users with the choice of selecting services not targeted at a user's personal characteristics, or refusing services based on such user's personal characteristics. In addition, algorithmic recommendation service providers shall not unreasonably differentiate between consumers in terms of prices and other transaction conditions based on and taking advantage of each consumer's preferences, transaction habits and other characteristics.

As for self-regulation, a nationwide industry standard Personal Information Security Specification provides for restrictions on the use of personal information. It provides that, in using personal information, clear identity directionality shall be eliminated to avoid identifying any individuals directly, unless otherwise necessary for the realisation of the purpose of the use approved by the subject of personal information upon authorisation.

6.5 Marketing to Children

The Advertising Law introduced a set of restrictions on advertising that targets minors under the age of 18, as well as certain additional restrictions on advertising targeting minors under the age of 14. In connection with minors under the age of 18, the following restrictions apply:

- tobacco ads are prohibited;
- no advertising activity shall be conducted in kindergarten, primary and middle schools, as well as on textbooks, school uniforms, stationery, etc; and
- no adverts for medicine, drugs, cosmetics, etc, shall be published in mass media targeted at minors.

In connection with minors under the age of 14, the advertisement shall not contain:

- any inducement for the minors to ask parents to purchase the advertised goods or services; or
- any unsafe activity that may cause imitation by minors.

If an advertiser violates the Advertising Law by sending advertisements to minors, the advertiser may be subject to sanctions including recall of illegal advertisements, fines, non-approval of future advertisements in a one-year term, confiscation, revocation of business licence, etc.

Collection of personal information of minors is also covered by the PIPL, the Laws on the Protection of Minors ("Minors Protection Law") and the Provisions on the Cyberspace Protection of Children's Personal Information. Consent from parents or other guardians of minors under the age of 14 shall be obtained for processing such minors' personal information. Personal information of minors is categorised as, among other things, a kind of "sensitive personal information" under the PIPL. As such, heightened requirements regarding the collection and processing of sensitive personal information shall apply and separate processing rules shall be made specifically for processing minors' personal information.

Violation of the Minors Protection Law may result in, among other things, confiscation of illegal turnover and relevant fines, a fine of up to CNY1 million if there is no illegal income, and shutdown of the website in question. In addition, if such action violates the PIPL, heavier penalties, such as a fine of no more than CNY50 million or 5% of the perpetrator's business income from the previous year, may be triggered.

7. Sweepstakes and Other Consumer Promotions

7.1 Sweepstakes and Contests

"Sweepstakes" does not have a corresponding legal term under existing Chinese laws. Likewise, there are no specific rules governing sweepstakes as marketing activities. That said, sweepstakes can be loosely interpreted as prize-attached sales, which are subject to certain rules and may trigger different legal issues. According to the Interim Provisions for Regulating Promotional Activities, prize-attached sales refer to the activities of business operators to provide consumers with prizes, articles or other benefits to sell commodities or obtain competitive advantages, such as lucky draws, gift giving and the like.

Anti-Unfair Competition Law

Laws and regulations such as the Anti-Unfair Competition Law and the Certain Regulations on Prohibiting Unfair Competition in Prize-Attached Sales promulgated by the State Administration of Industry and Commerce (SAIC) impose regulations on prize-attached sales. The regulatory focus includes unclear information on prize-attached sales, internally determined prizes, rigged winning results, inferior products with high prices, and the amount of the highest prize exceeding the statutory limit.

Lottery Management Regulations

If any person issues lottery tickets in the guise of prize-attached sales in order to seek profits and to earn the price difference from the sale of commodities by setting prices much higher than the actual commodities under the lure of large prizes, this act shall be deemed illegal and may even constitute a crime. According to the Lottery Management Regulations, where anyone violates these regulations by illegally issuing or selling lottery tickets, or issuing or selling foreign lottery tickets within the territory of the PRC, they may be subject to criminal liability; where no crime is constituted, they may be subject to a public security penalty.

Advertising Rules

If sweepstakes are used as marketing promotions to reward consumers and to draw attention to products or services, then they shall be subject to all advertising law requirements as a form of advertising campaign.

7.2 Contests of Skill and Games of Chance

The existing Chinese law has not defined what constitutes a "contest of skill" or a "game of chance", nor does it provide for a distinction between them. Gambling disguised as a contest of skill or game of chance is strictly prohibited, yet the law has not provided the criteria to distinguish contests of skill and games of chance (as forms of marketing activity) from those regarded as prohibited gambling.

7.3 Registration and Approval Requirements

As "contests of skill" and "games of chance" are not defined legal terms, they are, in principle, subject to particular registration or approval requirements only if the concrete activity falls into the scope of defined activities for which

such requirements exist. For example, if the contests or games constitute sports competitions, they are regulated by the sports administrative department under the State Council, soon in accordance with the newly promulgated Sports Law which will come into effect in January 2023. This new law provides that sports events are subject to graded and classified management by the sports administrative authority.

7.4 Loyalty Programmes

There are no special laws or regulations for loyalty programmes in the PRC. Similarly, the term "loyalty programme" does not have a corresponding legal definition under the existing Chinese law. A typical "point-based" loyalty programme involves a business setting up an account for a customer and offering points for each purchase, which accumulated points may be redeemed for discounts or gifts from the business or connected stores. Though no special laws or rules in this regard, there are rules to be borne in mind if a business owner intends to launch a loyalty programme, including the following.

- If the loyalty points are deemed as virtual currency for online games, specific rules would apply, including the Provisional Measures for the Administration of Online Games, the Notice of the Ministry of Culture and the Ministry of Commerce on Strengthening the Administration of Virtual Currency in Online Games, and the Notice on Regulating the Operation Order of Online Games and Prohibiting the Use of Online Game Gambling.
- Loyalty programmes may not be used as a disguised commercial bribe.
- When a loyalty programme involves prepaid membership, the business owner shall observe relevant rules specifically for prepaid cards.

7.5 Free and Reduced-Price Offers

Generally speaking, the Chinese Anti-Monopoly Law prohibits operators in the market that have a dominant position from selling commodities at a price below cost without justifiable reasons. In addition, the Price Law forbids dumping sales for the purpose of crowding out competitors and dominating the market, or implementing hidden price decrease by way of increasing the grade of merchandise or services. A marketer's offer of free or reduced-price products or services is not illegal per se, but regulators may, in certain circumstances, deem such activities as unfair methods to gain advantages over competitors and impose rectification proactively. The Interim Provisions for Regulating Promotional Activities require business operators to clearly indicate the benchmark for discount or price reduction, the conditions attached to the discount, and the time period for the promotion.

7.6 Automatic Renewal/Continuous Service Offers

According to the Online Transaction Measures, online transaction operators shall notify the consumers in a prominent manner for consumers' selection five days before a consumer accepts relevant services or the date of automatic renewal. During the service period, operators shall also provide convenient and instant opt-out or change options without charging unreasonable fees. Violation may result in an order of rectification of the misconduct and a fine of up to CNY30,000.

8. Sports Betting/Gambling

8.1 Legality & General Regulatory Framework

Under the PRC regulatory framework, betting and gambling activities, including those related

to sports, are generally prohibited. Where there is a violation, the threshold for administrative liability could be as low as, for organisers, accumulating a profit of CNY300 and, for participants, personal gambling of amounts of CNY200, under different enforcement rules promulgated by local provincial authorities. Criminal liabilities may be incurred if one engages in gathering people to gamble for profit, engaging in gambling as one's profession, operating casinos, or organising PRC citizens to gamble outside China involving large amounts.

8.2 Special Rules & Regulations

According to the Advertising Law, advertising is prohibited from including gambling content. For the avoidance of doubt, the China Sports Lottery issued by the General Administration of Sports and the China Welfare Lottery issued by the Ministry of Civil Affairs, are not deemed "gambling". Advertisements for such lottery tickets are managed by their respective issuer authority and supervised by the PRC Ministry of Finance and the SAMR.

9. Web 3.0

9.1 Cryptocurrency and Non-fungible Tokens (NFTs)

To date, there has been no official definition of cryptocurrency or NFT at the legislative level in China. Regulatory bodies emphasise upholding the Renminbi as the statutory currency, and cracking down on illegal financial activities of illegal fundraising (such as initial coin offerings), financial fraud, pyramid schemes and money laundering through cryptocurrency. The Initiative to Prevent NFT-Related Financial Risks, jointly issued by the China National Internet Finance Association, the China Banking Association and the Securities Association of China in April 2022 as a non-compulsory initiative, affirms that NFTs may be utilised to enrich the digital economy and promote the development of the culture and creativity industry. However, it reiterates that financialisation, money-laundering and securitisation in connection with the NFTs are still strictly forbidden.

So far, there does not seem to be specific statutory rules governing NFT activities or the advertising thereof. In September 2021, a notice issued by high level authorities including the People's Bank of China, the Office of the Central Cyberspace Affairs Commission and the Supreme People's Court stressed the prohibition on providing commercial display and marketing for virtual currency-related business activities.

9.2 Metaverse

The metaverse is commonly understood as an integrated network of 3D virtual worlds facilitated by the use of virtual reality and augmented reality technologies. This concept became popular in China in 2021, but it is yet to be officially defined by the legislators or regulators. There are no special laws or regulations that apply to advertising within the metaverse, nor are there any administrative or judicial cases in this regard, given its youth as a concept. Nevertheless, there are notices alerting the public against illegal fundraising and fraud wrapped under the cover of the metaverse, and the existing advertising laws and regulations will apply where applicable.

9.3 Digital Platforms

The digital advertising platforms and the use of advertising technology (adtech) are mainly regulated by the Provisional Internet Advertising Measures. Under the Provisional Internet Advertising Measures, the internet advertisements may be published in a well-targeted manner by utilising, for example, the information integra-

tion and data analysis services provided by the advertising demand-side platforms, media-side platforms and advertising information exchange platforms.

In connection with the use of adtech, the following activities are expressly forbidden under the Provisional Measures:

- intercepting, filtering, covering, fast-forwarding or implementing other restrictions on the advertisements duly operated by others;
- disrupting the normal transmission of advertising data, falsifying or blocking advertisements duly operated by others, etc; and
- inducing false quotes, seeking unlawful interests or undermining others' interests by utilising false statistical data, communication effects, etc.

In addition, the Administrative Provisions on Algorithm Recommendation for Internet Information Services regulate the use of algorithmic technologies, including generation and synthesis, personalised push, sorting and selection, retrieval and filtering, scheduling decision-making, etc, all of which may be considered as different types of adtech. Among other things, the algorithm recommendation service providers are required to inform the users in a noticeable way with respect to the provision of algorithm recommendation services, and to publicise the basic principles, purposes and main operating mechanisms of algorithm recommendation services in an appropriate way.

10. Product Compliance

10.1 Regulated Products

Specific rules and restrictions that apply to the advertisements of regulated products and services can be found in the Advertising Law and the regulations governing the advertising of products and services in special sectors, including the following.

- Food – From the perspective of advertising regulation, food can be categorised as "dietary supplements", "formula food for special medical purposes" and ordinary food. The Advertising Law and the Food Safety Law provide for specific restrictions on the presentation in the advertisements of dietary supplements and food. For instance, advertisements of dietary supplements and food may not claim that such products can be used for prevention or treatment of diseases, and that advertisements of baby dairy products, beverages and other food claiming to be full or partial substitute for breast milk are prohibited from distribution in mass media or public places, etc. Besides, advertisements in connection with the former two categories are subject to prior censorship pursuant to the Interim Measures for Medical-Related Advertisements. According to the Food Safety Law, formula food for special medical purposes shall be subject to regulations applicable to drugs.
- Medical Devices and Drugs (including formula food for special medical purposes) – Advertisements in connection with medical devices and drugs are subject to prior censorship pursuant to the Interim Measures for Review of Medical-Related Advertisements. Restrictions under the Advertising Law include, without limitation, that:
  (a) advertisements for special drugs (including narcotics, psychotropics, toxic drugs for medical purposes, radioactive drugs, etc), pharmaceutical precursor chemicals, drugs, medical devices and treatment methods for drug abuse rehabilitation are

prohibited, as well as drugs for special use by the army and preparations made by medical institutions;
(b) prescription drugs other than those set out as being prohibited from advertising, as well as certain full-nutrition formula food as a kind of formula food for special medical purposes, may only be advertised in specialised pharmaceutical or medical journals jointly designated by both the health and drug administrative departments of the State Council; and
(c) advertisements of drugs, medical devices, and medical treatments may not include content such as assertions or guarantee about efficacy or safety, statement on the recovery or response rate, etc.

- Alcohol – Article 23 of the Advertising Law provides that advertisements for alcohol may not include contents of inducement or instigation of alcohol consumption, promotion of immoderate drinking, depiction of drinking actions, depiction of driving cars, boats, airplanes, etc, or explicit or implicit expression that alcohol consumption would ease tension and anxiety and enhance physical stamina, etc.
- Vaping/tobacco – Article 22 of the Advertising Law and related regulations provide that advertisements for tobacco may not be published in mass media, in public places, outdoors, or on the internet, and that no tobacco advertisement of any kind may be sent to minors. Advertising in connection with vaping shall be subject to the regulations applicable to tobacco.
- Cannabis – Cannabis is deemed to be a kind of narcotic drug and is strictly restricted in the PRC. Only very limited usage of cannabis, including for the purpose of medical use, education and research, is permitted under the supervision of applicable authorities. Correspondingly, the advertising of related products and services is also prohibited.

10.2 Other Products

Beyond the specific products listed in **10.1 Regulated Products,** there are other products or services for which advertisements are regulated, including the following.

- Medical treatments – Similar to drugs and medical devices, advertisements for medical treatments are also subject to prior censorship. Standards and procedures for the review of such advertisements are provided in Administrative Measures on the Advertising for Medical Treatments, as well as the newly-issued Medical Cosmetology Advertising Guide.
- Education and training – Article 24 of Advertising Law prohibits advertisements for education and training from including contents of:
  (a) explicit or implicit guarantees for successful enrolment, passing certain examinations, obtaining certain degree qualifications or certificates, or the effect of education or training, etc;
  (b) explicit or implicit expression of the advertiser involving relevant examination institutions or its personnel, or writers of the examination questions in the education or training;
  (c) recommendation or endorsement using the name or image of scientific research or academic institutes, etc.
- Real estate – Article 26 of Advertising Law provides certain specific restrictions on advertisements of real estate, including that information of the property listed shall be true; information as to the area shall be the floor area or the usable area; such advertisements shall not include contents of commit-

ment on increases in property value or investment return, etc. Provisions on the Release of Real Estate Advertisements, issued by the SMAR, include more detailed regulations on the advertising of real estate.

- Investment solicitation/fundraising/internet financing/personal financing – As financing is closely related to the security of private assets, advertising in connection with various kinds of fundraising or financing services is heavily regulated. Generally speaking, such advertisements are required to include reasonable risk warnings, and are prohibited from including explicit or implied statements of guarantee for future earnings, or recommendation or endorsement by using the name or image of academic institutions or industry associations, etc.
- Other products or services – Advertising of the following products or services are also regulated under applicable laws or regulations: pesticides, veterinary drugs, feed and feed additives, crop seeds, tree seeds, grass seeds, breeding livestock and poultry, aquatic seedling and species breeding, wild animals and the relevant products, products relating to stamp collection, souvenir medals, Renminbi, insurance, and services of certified public accountants and lawyers, etc.
- Advertisements other than those of medical treatment, drugs and medical devices – Any other advertisement claims shall not involve the function of treatment of diseases or include medical terms or terms that may mislead the readers to confuse the promoted product with drugs or medical devices.

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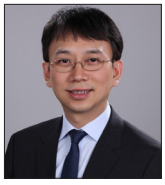

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Trends and Developments

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Overview

The past 12 months have seen the continuation of the heightened regulatory efforts in the advertising industry. The main reasons, as with the preceding 12 months examined last year, are two-fold: the political environment and market development. On the political side, the 20th Party Congress will be held soon in autumn of 2022. The government needs to ensure that public opinion remains in order to prevent any potential negative impacts on the upcoming Party Congress. Current challenges in the economic sector, as well as in other sectors, may have also contributed to the government's position. On the market development side, restrictions on offline activities due to COVID-19 have continued to stimulate the development of online business activities. The online business sector has continued to grow in complexity and sophistication, requiring the regulatory side to catch up. The growth in this sector has also brought problems that must be addressed promptly, according to the government. In addition, issues in the protection of personal data as well as issues related to the metaverse/NFTs have continued to impact the advertising industry.

Guidance on "Correct Orientation" as a Matter of Ideological Requirement

The State Administration of Market Supervision (SAMR) issued the Development Plan of the Advertising Industry for the 14th Five-Year Plan ("十四五"广告产业发展规划) which was put into implementation on 22 April 2022. The plan identified ten "major tasks". Ranked first is regulation from the perspective of correct political orientation. Shortly before the implementation date, the SAMR convened a nationwide videoconference with its local counterparts to, among other reasons, emphasise the task of implementing, throughout the year, Secretary General Xi's instruction (initially reported in 2016) that advertisements must also have correct ideological orientation. The theme of "purifying the market environment and social atmosphere to welcome the 20th Party Congress" was put in a prominent position. Regulatory efforts are required to be carried out in pursuit of these goals.

As identified last year, the government published categorical descriptions of the content that would be prohibited from a regulatory perspective. This year, local governments published such guidelines as well. For example, the Beijing municipal government published a "reminder letter" on the regulation of commercial advertisements, specifically prohibiting, among other things, taking advantage of the 20th Party Congress for commercial publicity purposes. The "reminder letter" enumerated such prohibited items that can be seen elsewhere, including the party's flag or emblem, the use or disguised use of the national flag, the national emblem, the national anthem, or use of the flag, emblem, or theme song of the armed force (the People's Liberation Army).

Entertainers with lapsed morals

The "reminder letter" of the Beijing government has identified a prohibited category that is especially noteworthy. That is the endorsement by the so-called "entertainers with lapsed morals". During the past few years, there have been many incidents where entertainers – including

actors, actresses and musicians – were found by the government and/or society to have "lapsed morals". During the 12 months in question, there were also quite a few incidents of such entertainers making headlines due to the nature of their behaviour, the amount of money involved (eg, hundreds of millions of Renminbi for tax evasion). The types of conduct of such entertainers which have incurred punishment/disciplinary measures reportedly include drug taking, prostitution, tax evasion, domestic violence, inappropriate public comments, etc. Dozens of entertainers have reportedly been added to lists of those with "lapsed morals" put together by TV stations, platforms and industry associations. The government has also issued notices to prevent such entertainers from re-emerging or at least make it difficult for them to do so. Advertisements of certain entertainers who were subject to disciplinary measures have had to be taken down shortly after their launch.

There have been discussions/controversies with respect to whether entertainers who have previously been punished for having "lapsed morals" should be given a second chance. For businesses in need of entertainers for endorsements, or for other less significant associations, it is advisable to check the history of the "moral" aspects of such entertainers. The market practice is that businesses now include rather stringent clauses in their contracts with entertainers concerning the appropriateness of their off-screen conduct, subject to extensive indemnification. Such clauses have, at times, become heated negotiation points with respect to the scope and extent of their application. From a regulatory perspective, it is likely that the high-pressure stance of the government, including the reluctance to allow entertainers a "second chance", will continue.

Online Adverts

Online adverts have continued to grow. It is believed that the restrictions on offline advertising and marketing activities, largely due to the COVID-19, have provided more opportunities for online adverts to develop. On 26 November 2021, the SAMR published, in draft form soliciting public comments, the Administrative Measures for Internet Advertising (互联网广告管理办法) (the "Draft Measures"). The Draft Measures are meant to modify and replace the Provisional Administrative Measures for Internet Advertising (互联网广告管理暂行办法)(the "Provisional Measures"). The Draft Measures are intended to, as identified in the beginning of this article, cope with the development of online advertising activities, including in the "forms, operation models, and ad serving methods" of online adverts. In the explanations that the SAMR provided for the amendment of the rules, it is noted that the Provisional Measures "were not fully compatible with the new situations and new requirements concerning the regulation of internet advertisements", because of the "variety, diversity, and extensiveness" of online adverts, especially with the expansion of online adverts from computers to mobile devices.

The Draft Measures have included specific provisions in light of the above to cope with the new developments and new challenges.

For example, the Draft Measures have further emphasised the identifiability of online adverts by:

- requiring that "soft adverts" in forms including news reports, experience sharing, consumer assessments and incorporation of shopping links to be labelled with the word "advertisement" conspicuously;

- further strengthening consumers' ability to close pop-up adverts by just "one touch" by requiring such adverts to show the "close" sign conspicuously;
- strengthening the supervision over ad endorsers, including the expansion of local governments' jurisdiction over such ad endorsers; and
- strengthening the requirements on the responsibility to be shouldered by relevant entities such as internet platforms as internet adverts operators.

Live-Streaming E-commerce

During the past 12 months or so, in the online adverts space, live-streaming e-commerce appears to be a sector in which new challenges have tended to cluster together. On 25 March 2022, several ministerial-level agencies (the Cyberspace Administration, the General Administration of Tax, and the SAMR) jointly published Opinions concerning the Further Normalization of Online For-Profit Live-Streaming Marketing Activities to Promote the Healthy Development of the Industry (关于进一步规范网络直播营利行为促进行业健康发展的意见). The Opinions impose more supervisory responsibilities on the online live-streaming platforms, requiring them to adopt a series of measures to strengthen regulation. Such measures include requiring the platform to:

- report information of live-streaming accounts to the provincial-level cyberspace administrations and local tax authorities including the ID, account, online nickname, category of revenue, and profit information;
- adopt a system of disciplinary measures corresponding to the extent of rule-breaking by live-streaming accounts;
- withhold and deduct individual income tax on the revenues of the live-streaming broadcasters, etc.

In connection with the Opinions, the above-mentioned three agencies launched a regulatory campaign that ran for two months from 15 April 2022 to address "disorderly behaviours" in the live-streaming and short video areas. "Disorderly behaviours" have included:

- content that has excessive sex, vulgarity, or oddness;
- false advertising in the sale of products during live-streaming sessions;
- evasion of tax;
- using specified groups of people, such as minors, people with a disability or people suffering from illness, to attract attention, especially the attention of the elderly; and
- malicious advertising and marketing (false public persona, etc).

The campaign reportedly disciplined 563,000 live-streaming rooms, cleared 2.35 million short videos, closed 120,000 consumer accounts, and disciplined 218,600 hosts' accounts and short videos.

Targeted Push and Use of Algorithm

The new Personal Information Protection Law came into effect on 1 November 2021. This law provides, among others, restrictions on the advertiser's ability to conduct targeted push of adverts to individuals through algorithm/automated decision-making. For example, the law provides that, to push information to individuals through the method of automated decision-making, the advertiser needs to provide consumers concurrently with options not targeted at such consumers, or with easy-to-operate methods to decline such push.

On 1 March 2022, the Cyberspace Administration, the Ministry of Industry and Information Technology (MIIT), the Ministry of Public

Security, and the SAMR jointly published the Administrative Provisions on Algorithm Recommendation for Internet Information Services (互联网信息服务算法推荐管理规定). These new provisions are aimed at, inter alia, curbing the abusive use of algorithm in advertising and marketing. Among the uses that have been identified by the new provisions include, without limitation, using algorithms to screen information, making excessive recommendations, manipulating topic lists or the order of search results, controlling top trending searches, and similar activities used to interfere with the presentation of information. The Cyberspace Administration also published, in early March 2022, a draft regulation to solicit public comments on the push of information by way of pop-up windows. This new regulation prohibits, for example, the abusive use of individualised pop-up window services and pushing content that may affect the health of body and mind of minors.

At the enforcement level, the government has been conducting campaigns against apps that are considered to infringe on the legitimate interests of customers. On 2 June 2022, the MIIT published a notice on apps found to be infringing on customer interests. A total of 368 apps were announced to have infringed on customer interests. The main problems found included the collection of personal information in excess of the appropriate scope and the forced use of targeted push functions.

NFTs and Metaverse

The government has continued to keep a close watch, from financial security and supervision perspectives, on activities involving NFTs and the metaverse. Multiple regulations have been rolled out in the past 12 months. On 15 September 2021, ten high-level government agencies, including the central bank of China (the People's Bank of China - PBOC), the Supreme People's Court, the Supreme People's Prosecutorate, and several ministries with regulatory responsibility for different aspects of the financial market jointly published a notice calling for further prevention and punishment in connection with the transaction of virtual currencies. The notice announced that transactions using virtual currencies are considered illegal financial activities. Such activities include exchanges between the legal currency and virtual currencies, exchanges between different virtual currencies and the provision of intermediary and pricing services for the transaction of virtual currencies.

In addition, the notice aims to crack down on activities in relation to securities and futures. Notably, the notice states that the provision of services by a virtual currency exchange located outside the PRC to residents in the PRC through the internet will constitute illegal financial activities under PRC law. In addition to the government agencies, key industry associations in the financial sector also published an announcement on 13 April 2022 calling for their members to prevent financial risks potentially brought about specifically by NFTs (Initiative to Prevent NFT-Related Financial Risks, in Chinese 关于防范NFT相关金融风险的倡议). Among other provisions, the Initiative calls for members:

- not to include financial assets (such as securities, insurance, rare metal) as underlying commodities of the NFT products;
- not to split the ownership of NFT products to conduct fundraising through initial coin offers (ICOs);
- not to provide the type of transaction venues known as "securities exchange".

The Initiative also requires real-name authentication of parties engaged in offering, selling, and

buying activities. In fact, ICOs have long been considered prohibited by the PBOC. The continued measures against ICOs appear to suggest that this method of fundraising may have been emerging in some way.

Fundraising based on the concept of the metaverse is a new form of challenge for regulators, who have reacted swiftly to prohibit such activities. On 18 February 2022, the China Banking and Insurance Regulatory Commission (CBIRC) published a "risk reminder" in the wake of illegal (and even criminal) fundraising activities selling "metaverse investment projects", "metaverse blockchain games", etc. According to the risk reminder, perpetrators go as far as to openly publicise super high investment return rates. Given the continued attention on the metaverse, the government may be expected to continue to emphasise the illegal activities taking advantage of the metaverse, especially those that may reach the general public and challenge the stability of society, such as fundraising from the general public.

Summary

In certain other fields examined last year, the government has continued its regulatory and supervisory efforts. Such fields include cosmetology adverts, adverts on subject-based off-campus training and celebrity endorsements. With new challenges emerging, the government is adjusting its priorities and using legislation to remain up to date. The upcoming 20th Party Congress will set the direction of the country as a whole. The effects of this important meeting on the market remain to be seen, including the effects on the advertising industry in terms of control and innovation.

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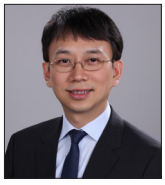

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JAPAN

Law and Practice

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Contents

1. Legal Framework and Regulatory Bodies

1.1 Primary Laws and Regulation

In Japan, advertising practices are primarily regulated under the Act against Unjustifiable Premiums and Misleading Representations (AUPMR), which is now classified as consumer protection law but was originally a special law of the Anti-monopoly Act.

In addition to setting certain limitations on providing premiums (as discussed in **7.1 Sweepstakes and Contests**), the AUPMR also prohibits false labelling, deceptive advertising and misleading representations with the capacity to mislead consumers into believing that the nature (that is, the quality or manufacturing standards) and/or trade terms (price or quantity) of a product or service are substantially better than they are in reality or than those of competitors' products.

Claiming that a product is superior to the equivalent one of a competitor's is permitted as long as the statement is truthful, while a false statement of superiority is unlawful under the AUPMR.

The second relevant regulation for advertising practices is the Unfair Competition Prevention Act, which prohibits several specific types of unfair competitive practices, for example:

- causing goods or services to be confused with those of another party;
- using an indication in connection with goods or services that is identical or similar to a famous indication of another party; and
- misleading consumers about the quality of goods or services.

1.2 Enforcement and Regulatory Authorities

The Consumer Affairs Agency (CAA) is the national regulator enforcing the AUPMR. If someone contravenes the provisions of the AUPMR on either the misleading representation or the unjustifiable amount of premium, the CAA can issue a cease-and-desist order requiring the violator to:

- cease committing the breach;
- take measures necessary to prevent its recurrence; and
- take any other necessary measures, including public notification specifying the implementation of said measures.

In addition, for an infringement of the AUPMR on misleading representation, the regulator can also order the violator to pay the National Treasury a surcharge equivalent to 3% of the proceeds from its sales of goods or services transacted during the period when the alleged misrepresentations were committed ("surcharge payment order").

If the alleged conduct would only affect the market of a particular prefecture, the local government of that prefecture can investigate the case. While the local government can, like the CAA, issue a cease-and-desist order, it has no authority to issue a surcharge payment order.

1.3 Liability for Deceptive Advertising

Both cease-and-desist orders and surcharge payment orders are issued against the business operator who committed the alleged misleading advertising, rather than any individual who belongs to the corporation involved.

1.4 Self-Regulatory Authorities

The Japan Advertising Review Organisation (JARO) is not a governmental authority but

a private organisation established in 1974 to achieve appropriate standards for advertising and representation. The JARO provides advice to its member companies on how their proposed advertising can be improved so as not to be misleading to consumers and, when it receives complaint about any advertising, examines the complained-about advert and issues recommendation to revise it if it is found to be misleading.

1.5 Private Right of Action for Consumers

If there is misleading representation prohibited under the AUPMR or the threat of it, the "qualified consumer organisation" designated under the Consumer Contract Act is entitled to file for an injunction with a court to get the defendant to stop making such representation.

Consumers themselves cannot directly file the action, but can provide information on the suspected misrepresentation to the qualified consumer organisation, followed by the organisation sending to the prospective defendant a written advance notice providing a summary of the claim, the essential points of the dispute, and other particulars specified by Cabinet Office Order.

The action may not be filed until after one week has passed from the time that the written notice has been received; provided, however, that this does not apply if the prospective defendant refuses to accept the claim for injunction.

1.6 Regulatory and Legal Trends

Due to the COVID-19 pandemic and the prolonged work-from-home situation, there has been an increase in health-related advertising and demand for health foods in the Japanese market, and the increasing number of food manufacturers have been making health claim for their products, not only traditional health foods such as nutritional supplements but also general foods made from healthy ingredients.

In response to this trend, the CAA has focused its investigations against misleading advertising of food products with "good for health"-type claims that may mislead consumers as to the real benefits (if any) of the products.

1.7 COVID-19, Regulation & Enforcement

Since the COVD-19 pandemic, the CAA has vigorously investigated misleading advertising of health foods, health appliances or sterilisation sprays claiming a preventive effect on the transmission of the virus on suspicion of violation under the AUPMR.

The CAA has not published any regulation specific to the advertising of claims that a product prevents or lessens the effects of COVID-19, but on 19 February 2021, it announced that, considering the nature and characteristic features of COVID-19 were still not fully understood, any product claiming a preventive effect on COVID-19 was likely to be misleading to consumers and 45 businesses received the CAA's call for improvement of their advertising in this regard.

1.8 Politics, Regulation and Enforcement

On 7 June 2022, the Basic Policy on Economic and Fiscal Management and Reform 2022 was endorsed by the Japanese Prime Minister Fumio Kishida and his cabinet. The policy included development of institutions to prevent digital advertising that misled consumers as to the quality of the goods or services. To that end, the CAA established a panel of experts to discuss possible legal issues arising from stealth marketing and plans to publish a comprehensive report on the outcome of the discussion by the end of 2022.

2. Advertising Claims

2.1 Deceptive or Misleading Claims

Whether advertising claims are misleading is determined based on how general consumers would be affected by the advertising. To find the impression of general consumers, the CAA considers the entire content of an advert, rather than an individual sentence, chart or picture contained therein, as the basis of judgement.

Moreover, the CAA has recently tended to use marketing research or surveys on what impression consumers have received from an advertising claim in order to identify the impressions of general consumers.

2.2 Regulation of Advertising Claims

In Japan, all advertising claims are subject to the AUPMR, except for some advertising methods that do not claim any specific benefits of a product or would not give an impression of any such benefits. Such adverts are known as image advertisements or "puffery", which aims at improving the abstract image of products such as name recognition or popularity.

2.3 Substantiation of Advertising Claims

Under the AUPMR and its related regulation, when any advertising is suspected of misleading customers as to the quality of a product or service, the CAA or local government is entitled to give a seller or provider of the advertised product or service a notice requiring the recipient to submit sufficient substantiation of the advertising within 15 days after the receipt of the notice. Upon a failure to provide the required substantiation, including where submitted documents are not considered to be sufficient substantiation by the CAA, the advertising shall be deemed as a misrepresentation in violation of the AUPMR.

Under the CAA's guideline concerning substantiation of advertising, the advertised claim must be substantiated by objectively proven methods (as explained in **2.4 Testing to Support Advertising Claims**) and the outcome of the substantiation is required to properly correspond to the advertised claim.

2.4 Testing to Support Advertising Claims

As stated in **2.3 Substantiation of Advertising Claims**, in order for the testing to sufficiently support advertising claims, it must be done by an "objectively proven method", which is required to be either of the following:

- research or experiments based on generally recognised methods in the relevant section of academia or industry, or approved by most experts in the relevant field; or
- generally recognised professional opinion or academic literature where an expert in the relevant field objectively assesses the claimed benefit in the advertising.

2.5 Human Clinical Studies

Human clinical studies are not necessarily required for substantiation. However, as stated in **2.3 Substantiation of Advertising Claims**, the outcome of the substantiation must properly correspond to the advertised claim. Thus, if general consumers would be given the impression, on the basis of the advertised claim, that the claimed benefit to the human body had been proven, it would require human clinical studies to substantiate the claimed benefit.

2.6 Representation and Stereotypes in Advertising

In Japan, there are no special laws or regulations that address stereotyping in advertising or issues of inclusion, diversity and equity.

2.7 Environmental Claims

So far, there are no special laws or regulations that apply to environmental claims in advertisements or "greenwashing" in Japan. However, the AUPMR prohibits deceptive advertising or misleading representations that would mislead consumers as to the nature of product or service. As such, it is possible that conveying misleading information about the environmental impact of a product would constitute a violation of the AUPMR, so long as general consumers would be given the impression, by the advertised claim, that the environmentally friendly nature of a product was being claimed as a benefit of that product.

2.8 Other Regulated Claims

There is a government pronouncement that provides special rules for claims concerning country of origin. The pronouncement specifies the following examples that would fall within misrepresentation in violation of the AUPMR when it would make it difficult for the general customers to recognise a product's real country of origin.

- A representation on a product made in Japan that consists of:
  - (a) the name of any foreign nation or any place in foreign nation, foreign national flag or national emblem, or something similar to them;
  - (b) the name or trademark of a foreign business operator or designer; or
  - (c) foreign language that accounts for all or the majority of the letters in the representation.
- A representation on a product made in a foreign nation that consists of:
  - (a) the name of any other nation or any place in other nation, national flag or national emblem of any other nation, or something similar to them;
  - (b) the name or trademark of a business operator or designer of any other nation; or
  - (c) Japanese language that accounts for all or the majority of letters in the representation.

3. Comparative Advertising

3.1 Specific Rules or Restrictions

The CAA has published its guidelines concerning comparative advertising claims, where specific examples of claims that would fall within misrepresentation in violation of the AUPMR are given, as stated in **3.2 Comparative Advertising Standards**.

Moreover, comparative advertising claims may constitute violation of the Unfair Competition Prevention Act when they are found to be misleading representations about the quality of goods or services, or false advertising that causes damage to a competitor's credit.

3.2 Comparative Advertising Standards

Under the CAA's guideline concerning comparative advertising claims, in order for the claim not to constitute violation of the AUPMR, it is required to meet the following standards:

- the claim must have been substantiated through an objective method;
- the substantiated number or fact must be accurately cited in the advertising; and
- the method of comparison must be fair.

3.3 Challenging Comparative Claims Made by Competitors

Any business operator who has suffered from damage caused by comparative claims made by competitors can file action with the courts under the Unfair Competition Prevention Act seeking

damages, an injunction for the cessation of the advertising and the publication of an apology.

4. Social/Digital Media

4.1 Special Rules Applicable to Social Media

There are no special rules or regulations that apply to advertising on social media in Japan.

4.2 Key Legal Challenges

While there are not yet any specific rules for advertising on social media in Japan, this kind of advertising is also subject to regulation under the AUPMR as with any other form of advertising. Furthermore, as stated in **1.8 Politics, Regulation and Enforcement**, the Japanese government has recently focused on developing institutions to prevent digital advertising that could mislead consumers as to the quality of the goods or services advertised. For example, by the end of 2022, the CAA plans to publish a comprehensive report on possible legal issues arising from stealth marketing, which can be made thorough social networking services. As such, it is likely that the CAA will vigorously investigate misleading advertising on social media in the near future.

4.3 Liability for Third-Party Content

The AUPMR regulates sellers or providers of an advertised product or service who have, directly or indirectly, committed misrepresentation of the product or service. Therefore, whether there is liability for the advertiser for content posted by others on the advertiser's site or social media channels depends on how the advertiser is involved in making the advertising.

Taking stealth marketing as an example, under the CAA's guidelines concerning internet advertising, it could be construed as a violation of the AUPMR for a seller or provider of an advertised product or service to instruct the owner of a rating site to manipulate the rating of its product or service as that would lead to consumers being misled into believing that the quality of the product or service was better than it was in reality. As in this example, if the advertiser is found to have indirectly committed to making the advertising, it could be construed that the advertising has been made by the advertiser in violation of the AUPMR.

4.4 Disclosure Requirements

In Japan, there is no specific rule on media disclosure requirements for social media ads.

4.5 Requirements for Use of Social Media Platform

So far, there are no special rules or regulations that apply to the use of social media platforms in Japan.

4.6 Special Rules for Native Advertising

So far, there are no special rules that apply to "native advertising" (ie, advertising that has the look and feel of editorial content). While the AUPMR prohibits deceptive advertising or misleading representations that would mislead consumers as to the nature of product or service, it is unlikely that native advertising would constitute a violation of the AUPMR just because it pretends to be editorial content, unless it misleads consumers into believing that the advertised product or service was substantially better than it was in reality.

4.7 Misinformation

In Japan, there is no special law that specifically covers misinformation on topics of public importance.

5. Social Media Influencer Campaigns and Online Reviews

5.1 Trends in the Use of Influencer Campaigns

With the growth of social networking services (SNS), it is reported that an increasing number of companies are using influencer campaigns through SNS to market their products or services. Recently, Japan has seen a number of famous YouTubers being used to promote products or services.

5.2 Special Rules/Regulations on Influencer Campaigns

While there is no specific rule for the use of influencer campaigns in Japan, they are also subject to regulation under the AUPMR as with any other way of advertising. For advertiser's liability, please see **5.3 Advertiser Liability for Influencer Content**.

5.3 Advertiser Liability for Influencer Content

As stated in **4.3 Liability for Third-Party Content**, if a seller or provider of an advertised product or service instructs owner of a rating site to manipulate the rating of its product or service such that consumers are misled into believing that the quality of the product or service is better than it is in reality, this could constitute violation of the AUPMR.

The same would apply where an influencer is instructed by a seller or provider of the advertised product or service to give an endorsement of the product or service to the public with false or misleading information. In this case, the seller or provider of the product or service could be construed as the advertiser and the provider of the false or misleading information and therefore be liable for the same under the AUPMR.

5.4 Misleading/Fake Reviews

As stated in **4.3 Liability for Third-Party Content** and **5.4 Misleading/Fake Reviews**, manipulating a rating or review of a product or service through any other people could constitute a misleading representation by the product or service provider in violation of the AUPMR.

As also addressed in **1.8 Politics, Regulation and Enforcement**, the CAA has established a panel of experts to discuss possible legal issues arising from stealth marketing and plans to publish a comprehensive report on the outcome of the discussion by the end of 2022. Following this, it is likely that more specific rules on "fake reviews" will be established.

6. Privacy and Advertising

6.1 Email Marketing

Under the Specified Commercial Transaction Act, it is prohibited to send email advertising for mail-order sales to customers unless each customer requests the email or consents to receiving the email in advance.

6.2 Telemarketing

Under the Specified Commercial Transaction Act, it is required for a telemarketing operator to disclose in advance the name of the company and the individual who is calling, the type of product or service to be sold, and that the purpose of the call is to solicit for engaging agreement. Upon receipt of an offer from, or the completion of agreement with, a customer, the operator is also required to provide notice to the customer specifying the type of product or service to be sold, its price, payment term, etc.

6.3 Text Messaging

While there is not a specific rule applicable to text messaging, the same rules as discussed in **6.1.Email Marketing** apply.

6.4 Targeted/Interest-Based Advertising

Under the Private Information Protection Law, when an advertiser gets a customer's personal information in the course of targeted or interest-based advertising, it is generally required to notify the customer of the purposes for which that information will be used, and when the information is to be transferred to a third party, it is also required in general to obtain consent from the customer in advance.

Moreover, since the latest amendment of the Private Information Protection Law, which came into force in April 2022, cookie data, IP address data and web-browsing history data are also subject to protection under the law. In other words, even if this information has insufficient connection to an individual customer to constitute personal information, it could still be protected as "related personal information." As a result, if, after being transferred in the process of targeted/interest-based advertising, the information could be treated as personal data by its recipient, it is required for the advertiser to obtain explicit consent from the customer about transfer of the information.

6.5 Marketing to Children

In Japan, there are no mandatory rules applicable to marketing to children. However, some industries have self-regulatory standards for the purpose of protecting the rights of children. For example, the Japan Commercial Broadcasters Association has a broadcasting standard providing that commercials shall not unduly instigate children's desire for gains or to buy.

7. Sweepstakes and Other Consumer Promotions

7.1 Sweepstakes and Contests

In general, selling lottery tickets is permissible only for local authorities under the Public Lottery Tickets Act in Japan. Lotteries are usually defined as games of luck where participation is subject to payment of a financial contribution by the participant. For private firms or individuals, selling lottery tickets constitutes a criminal offence punishable with a prison sentence of up to two years or a fine of up to JPY1.5 million under the Japanese penal code.

In contrast to lotteries where premiums are provided in exchange for financial considerations, providing premiums associated with sales of products or services for inducing customers to purchase the products or services is not prohibited so long as the value of offered prize does not exceed a certain limit. The AUPMR stipulates this limit separately for two different types of premium offers:

- prize competitions (PCs), which are defined under the relevant government notice as providing premiums in a way of determining winners by chance (generally called a prize draw) or through superiority or correctness in a particular performance (generally recognised as a prize competition); and
- premium offers to general consumers (POGCs), which are defined as providing premiums by any other means than PCs, a typical example of which is providing premiums to every customer who visits a store.

The AUPMR prohibits business operators from providing premiums associated with their selling products or providing services by way of a PC

if the value of prize to be provided to the winner exceeds the following limits.

- Maximum value – the maximum amount of the premium to be provided to each winner must not exceed:
  (a) for regular prize competitions run by a single business operator, 20 times the unit price of the relevant product or service where the unit price is less than JPY5,000 or JPY100,000 where the unit price is JPY5,000 or higher; and
  (b) for prize competitions jointly operated by several business operators, the maximum amount of the premium to be provided to each winner must not exceed JPY300,000.
- Total value – the maximum total premium permitted for:
  (a) regular prize competitions is 2% of the estimated sales amount of the relevant products or services associated with the premium to be sold while the premium campaign is undertaken; and
  (b) joint prize competitions is 3% of the estimated sales amount of the relevant products or services.

The AUPMR sets separate limitations on the maximum amount of the premium to be provided to each customer in a POGC, which is JPY200 (when the unit price is less than JPY1,000) or 20% of the unit price (when the unit price is JPY1,000 or higher).

Apart from the general rules set out above, the government notice provides special standards on provision of premiums in certain industries (that is, newspapers, magazines, real estate, medicines and medical devices).

7.2 Contests of Skill and Games of Chance

Japanese law does not distinguish between contests of skill and games of chance. Both of them are categorised into the PC as provided in **7.1 Sweepstakes and Contests**.

7.3 Registration and Approval Requirements

It is not required in Japan to pursue registration or obtain approval for implementing the games of chance or contests of skill.

7.4 Loyalty Programmes

While there is not a special rule that applies to loyalty programmes in Japan, they are subject to regulation around providing premiums as stated in **7.1 Sweepstakes and Contests**, if applicable.

7.5 Free and Reduced-Price Offers

Discounting the price of products or services will not constitute a provision of premiums under the AUPMR and is therefore free from the limitation on value of premium.

The use of free offers is generally allowed. It is common for customers who purchase a certain product to be given a coupon which entitles them to an extra one free or a discount. In this case, as long as the product to be provided through the use of the coupon is virtually identical to the product originally sold to the customer, it will not be a "premium" regulated under the AUPMR.

On the other hand, providing a coupon in cross-couponing (where customers who purchased product A are given a coupon which entitles the customer to a free offer or discount of a different product B) can be construed as "providing a premium" under the AUPMR and therefore be subject to the limitations set out in **7.1 Sweepstakes and Contests**.

In value promotion, the price display must not be misleading under the AUPMR.

Further, if the price of a product goes below the cost attributable to manufacturing and selling the product, and where this may make it difficult for competitors to continue businesses in the relevant market, that pricing can violate the Antimonopoly Act as unfair price-cutting.

7.6 Automatic Renewal/Continuous Service Offers

Under the Consumer Contract Act, the automatic renewal or continuous service offers under which a marketer can continue to ship and bill for products and services on a recurring basis until the consumer cancels could be unlawful if the automatic recurrence would unilaterally harm the interest of a consumer.

Normally, the automatic recurrence benefits a customer by saving steps to renew contract so long as the terms of a contract do not change, so in that case, a contract with automatic renewal clause would be valid.

However, in cases where the terms of a contract changes with automatic renewal in a way that harms the interest of the consumer, for example, shifting from a charge-free to an onerous contract, that may be invalid unless the business operator provides the customer with a sufficient explanation on the change of condition in advance.

8. Sports Betting/Gambling

8.1 Legality & General Regulatory Framework

In Japan, any form of gambling is generally prohibited and criminally sanctioned under the Japanese Penal Code unless otherwise permitted under each special act. For example, as discussed in **7.1 Sweepstakes and Contests**, selling lotteries in general are permissible only for local authorities under the Public Lottery Tickets Act. It is also permissible for the National Agency for the Advancement of Sports and Health to sell sports lottery tickets under the Sports Promotion Lottery Law.

8.2 Special Rules & Regulations

As discussed in **8.1 Legality & General Regulatory Framework**, selling sports lottery tickets is permissible only for the National Agency for the Advancement of Sports and Health under the Sports Promotion Lottery Law. Other than that, there are no special rules or regulation that apply to the advertising and marketing of sports betting.

9. Web 3.0

9.1 Cryptocurrency and Non-fungible Tokens (NFTs)

Depending on its nature, cryptocurrency or NFTs could fall within the regulatory scope of securities or crypto-assets under the Financial Instruments and Exchange Act. If that is the case, advertising, marketing or sale of cryptocurrency or NFTs are strictly regulated under the same law, for example, requiring registration as a financial instruments business or a crypto-asset exchange service.

9.2 Metaverse

While there is not specific rule applicable to advertising within the metaverse so far, it is also subject to the AUPMR.

9.3 Digital Platforms

Since March 2021 when the Act on Transparency of Transaction through Digital Platforms was enforced, the Ministry of Economy, Trade and Industry has designated several online mall operators, app store operators and major digital platform operators as targets of restriction under the Act. These digital platformers have been required to disclose terms and conditions, establish systems for enhancing transparency of transactions and regularly report to the Ministry on measures taken.

10. Product Compliance

10.1 Regulated Products

In Japan, apart from the AUPMR, there are some rules or restrictions that apply to the advertising of regulated products.

For example, as to drugs and medical devices, it is prohibited under the Pharmaceutical Affairs Act to publish exaggerated and false claims regarding products or advertise the products before obtaining approval.

10.2 Other Products

Apart from regulated products, there are specific rules that apply to the advertisement of certain categories of product in Japan.

Taking foods as an example, the Pharmaceutical Affairs Act also prohibits manufacturers or sellers of health foods from claiming medical efficacy in advertising their food products. It is also prohibited for food companies to make health claims on food products that are considered to be exaggerated and false under the Health Promotion Act.

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Trends and Developments

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Introduction

In Japan, information/data about individuals is regulated by the Act on Protection of Personal Information (APPI), which was amended in June 2020, with the amendments coming into effect on 1 April 2022. This article outlines the use of personal information in the advertising industry in Japan and explains the practical influences of the amendment of the APPI on the use of personal information in the advertising industry.

Use of Personal Information in the Advertising Industry in Japan

Recently, there has been a growing trend towards utilising individuals' data for marketing and other business activities in Japan; for example, Data Management Platforms (DMPs), which collect, store, and analyse data on internet users, have become popular. Typically, a DMP provider places tags on a company's website and provides the company with data on visitors identified by online identifiers such as cookies and web beacons; the company then uses the data for various purposes, such as advertising and Customer Relation Management (CRM). The other often seen use is targeted advertising, in which the client company sends advertising identifiers such as Apple's Identifier for Advertisers (IFDA) or GoogleAdvertisingID to a DMP provider, and the DMP provider then cross-matches the advertising identifiers with the data it owns to select the target IDs to which they will show the advertisement.

In such transactions, the third-party transfer regulations under the APPI are often an issue. Under the APPI, a personal information processing business operator (data controller) is required to obtain prior consent from a data subject when personal data is to be transferred to any third party. Furthermore, the transferring party must make a record of the transfer; and the transferred/receiving party must confirm the background of the acquisition of the relevant personal data and make a record of transfer.

In this respect, it is important to know whether an online identifier in question amounts to "personal data", to which the third-party transfer regulations apply. Personal data is personal information which constitutes a "personal information database and the like". If personal information is used in a database which is systematically organised in such a way that specific personal information can be retrieved using a computer or similar means, then such personal information usually constitutes personal data.

The APPI defines "personal information" as information that falls into one of the following categories.

- Information that can be used to identify a specific individual due to its inclusion of a name, date of birth, or another description contained in such information (this includes any information that can be cross-checked against other information and thereby used to identify that specific individual).
- Information which contains personal identification codes. Personal identification codes are codes designated by government ordinance or written on a card or other document that is converted from some feature

of the body for use in computers, such as fingerprints, DNA, facial skeletal structure, or a code assigned to each subject for use of services or purchase of goods that includes physical characteristic data, for example "my number" (individual number), social security numbers and passport or driver's licence number.

In general, an online identifier by itself does not identify a specific individual and does not constitute personal data to which the third-party transfer regulation applies. Nonetheless, if it can be combined with other information by which an individual may be identified (eg, an email address containing an individual's name) to make it possible to identify an individual, it can constitute personal information and therefore personal data to which the third-party transfer regulations apply.

However, when using personal data accumulated in the past, it may be difficult to obtain consent from the relevant data subject, especially when a large volume of data is involved. In addition, to comply with the requirement to record transfers as explained above, it is sometimes necessary to make adjustments to relevant systems to automatically make logs, which will result in increased costs. Therefore, except where these obligations can be fulfilled without practical difficulties, data controllers usually structure a data processing scheme so that third party transfer regulations do not apply in full or in some cases, such as:

- transfer of only non-personal data, including anonymised processed data;
- application of limited exceptions to third-party transfer restrictions when a transfer is based on specific law and regulations, such as public need;
- using schemes such as delegation of processing and comprehensive succession, including merger or joint use; and
- applying other exceptions explained in guidelines issued by the personal information Protection Commission (PPC) (the primary regulator under the APPI).

Amendment of the APPI

In Japan, when a company transfers online identifiers to DMP providers, two schemes have often been used in practice.

- transferring of online identifiers as non-personal data; and
- transfer of online identifiers in relation to delegation to a data processor – however, the amended APPI and the revised guidelines and QA issued by the PPC impose significant restrictions on the use of online identifiers in Japan, requiring changes to these schemes for advertisements using online identifiers.

First, regarding transferring of online identifiers as non-personal data, it may be necessary to understand the means of deciding whether data being transferred amounts to personal data. For example, the question is whether data that is capable of being used by the transferor to identify a specific individual but the recipient is not capable of using the data to identify any individual constitutes third-party transfer of personal data. In this regard, the PPC has adopted the "transfer-based theory" that the third-party transfer regulation is only applicable to data in which specific individuals can be identified by the transferor. Under this theory, even when the recipient can identify a specific individual from transferred data, such transfer is not subject to the third-party transfer regulations as long as the transferor cannot identify the specific individual.

Therefore, in order to avoid the application of the third-party transfer regulations, a scheme has often been used under which the transferor provided the recipient with an identifier, such as a cookie, that cannot identify a specific individual but the recipient then identified the individual by matching the cookies with the data it owns to use it as personal data. However, under this scheme, the recipient is still utilising personal data by using the data provided by the transferor, and there was concern that this scheme inappropriately exempts the recipient from the third-party transfer regulations.

Person-related information

To deal with such concern, under the amended APPI, the new concept of "person-related information" was established, and restrictions were imposed on the handling of online identifiers. Person-related information refers to "information about living individuals that does not fall under any of the categories of personal information, pseudonymised information, and anonymised information". A typical example is an online identifier, such as a cookie, which cannot identify a specific individual by itself. However, it should be noted that if the online identifier is stored in a form that can be easily matched with other personally identifiable information, the online identifier comprises personal information, and thus does not fall within the definition of person-related information.

When a transferor intends to provide person-related information to a third party, the transferor is obliged to confirm that the recipient has the consent of the individual to allow the provision of the person-related information to be acquired as personal data if the recipient "is expected to acquire the information as personal data", ie, by mixing that person-related information with data it owns to constitute personal data. In addition, when providing personal information to a third party located in a foreign country, it is necessary that information on the system concerning the protection of personal information in the foreign country and the measures taken by the third party to protect personal information, as well as any other information that would be helpful to the individual concerned, are provided to that individual in advance when obtaining consent.

Therefore, due to the amendment of the APPI, it is no longer possible to use a scheme in which a transferor transfers an online identifier that does not constitute personal information in and of itself but the recipient (DMPs provider) processes it as personal data.

However, it should be noted that the fact that data received by the recipient becomes personal data and the fact that the data is "assumed to be acquired as personal data" are not necessarily synonymous. In other words, as mentioned above, under the APPI, data treated as personal data includes:

- data which itself can identify a specific individual; or
- data that can be easily matched with other data to identify a specific individual.

Obtaining consent

On the other hand, the wording "is expected to be acquired as personal data" only looks at whether the data itself can identify a specific individual, but not whether it can be matched with other information to do so. In other words, even if a recipient receives an online identifier which does not have personal identifiability by itself, but the online identifier can be easily matched with other personal information, such as a cookie, this is personal information but is not "assumed to be acquired as personal data"

if the online identifier is not matched with other personal information. Therefore, in practice, it must be noted that consent is not always necessary even when such data may be handled as personal information by the recipient, and the transferor should always consider how the data will be handled by the recipient before concluding that it is necessary to obtain consent.

Second, for the transfer of online identifiers in relation to the delegation of data processing, PPC guidelines revised in accordance with the amendment of the APPI clearly state that the processor is not permitted to cross-match the personal data or person-related information with data it receives from the transferor for the purpose of processing. Therefore, it is no longer possible in practice to carry out a scheme under which a client company sends advertising identifiers such as the IFDA or GoogleAdvertisingID to a DMP provider and the DMP provider cross-matches such advertising identifiers with the data it owns to select the target IDs to which they will show the advertisement. To deal with the change in circumstances, it is becoming common to obtain prior consent from data subjects when collecting data, not only in relation to third-party transfers of personal data but also to third-party transfers of person-related information.

Conclusion

This article outlines the practical influence of the amendment of the APPI on the use of personal information in the advertising industry. The handling of personal information is a highly specialised field of law in Japan which requires not only an understanding of law, but also an understanding of the relevant guidelines, public comments and technologies involved, and the data processing scheme suitable for any circumstances could vary depending on the business conducted in Japan. It is therefore strongly advisable to consult with local counsel if there is any uncertainty over the handling of personal information.

Atsumi & Sakai is a full-service Tokyo-based law firm. It operates as a foreign law joint venture, which enables it to admit foreign lawyers as partners and offer its clients a combination of Japanese expertise and real international experience, all with the quality of service that the modern international business community demands. The firm provides services around the clock through its offices in Tokyo, New York, London, and Frankfurt. Its media lawyers combine in-depth knowledge of the media and advertising industries with a leading international law firm's deal flow and deal size. The firm also handles cross-border and domestic data protection and data loss matters on a weekly basis with a highly experienced team of expert Japanese lawyers and foreign lawyers familiar with the nuances of Japanese data protection law.

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MEXICO

Law and Practice

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1. Legal Framework and Regulatory Bodies

1.1 Primary Laws and Regulation

In the past year, Mexico has seen the introduction of two important new regulations regarding advertising: the Law on Transparency, Prevention and Combat of Improper Practices in Advertising Contracting; and the Outdoors Advertising Law of Mexico City. However, there are many other pieces of legislation which may encompass advertising and marketing, such as:

- the Federal Consumer Protection Law;
- the General Health Law;
- the Industrial Property and Copyrights Law;
- the Civil Code;
- the Criminal Code;
- the Mexican Data Protection Act;
- the Mexican Norm for e-commerce NMX-COE-001-SCFI-2018; and
- the rules for advertising derived from the Health Act.

1.2 Enforcement and Regulatory Authorities

With its recent laws, the Mexican jurisdiction added authorities that help to oversee advertising and marketing practices. Depending on the case, lawyers have to encompass the same with a specific authority. Below is a list of the regulators that could deal with cases related to advertising and marketing issues in Mexico.

- The Consumer Protection Agency (PROFECO): in charge of regulating B2C schemes and arbitrating between consumers and product/service providers; procedures are of an administrative nature.
- The Mexican Industrial Property Agency (IMPI): in charge of industrial property filing and intellectual property litigation from an economic/industrial perspective; procedures are of an administrative nature.
- The Mexican FDA (COFEPRIS): in charge of regulating and protecting the population from health risks – all products that somehow are related to sanitary and health fields are a matter of interest for this entity so as to ensure safety, efficacy and security to humans; procedures are of an administrative nature.
- The Attorney General's Office (FGR): in charge of investigating and prosecuting crimes of federal level.
- The Federal Civil Tribunals: in charge of disputes and litigations of a civil and commercial nature.
- The Federal Institute for Access to Public Information and Data Protection (INAI): in charge of data protection procedures and complaints – it regulates the relationship between data holders and those that manage such data; procedures are of an administrative nature.
- The Federal Economic Competition Commission (COFECE): in charge of applying and executing the Law for the Transparency, Prevention and Combat of Improper Practices in Advertising Contracting (LCMP).
- The Federal Telecommunications Institute (IFT): in charge of regulating and supervising compliance with the provisions set forth in the Federal Telecommunications and Broadcasting Law (LFTR) – the IFT will monitor and sanction media owners who do not respect the maximum time established for advertising and holds powers of surveillance regarding the rights of public audiences.
- The Ministry of Interior: in charge of authorising and supervising the promotion of gambling, contests, and raffles in their different modalities.
- The Ministry of Health: authorises the transmission of advertising related to:

(a) the practice of medicine and its related activities; and
(b) food supplements, biotechnological products, alcoholic beverages, medicines, herbal remedies, medical equipment, cosmetics, pesticides, plant nutrients and toxic or dangerous substances.

- The Advertising Consultive Council: emanates from the health government entity and addresses advertising related to:
  (a) health services;
  (b) food, food supplements and non-alcoholic beverages;
  (c) infant formula;
  (d) alcoholic beverages and tobacco;
  (e) health supplies, drugs, herbal remedies, medical equipment, and surgical and healing supplies;
  (f) hygiene products;
  (g) cleaning products;
  (h) perfumes, lotions, cosmetics and beauty products;
  (i) pesticides, plant nutrients and toxic or dangerous substances; and
  (j) biotechnological goods.

1.3 Liability for Deceptive Advertising

The scope for deceptive advertising is limited depending on the case. Unfortunately, the Mexican jurisdiction is underdeveloped regarding this type of matter and cases are usually seen casuistically. For example, if there is a misleading advertising issue, this can be seen before the Mexican Consumer Protection Agency (PROFECO); but if there is unlawful competition in the matter or a third party's trade mark is discredited, it can be addressed to the Mexican Industrial Property Agency (IMPI). In Mexico, these kinds of cases must be analysed and prosecuted before the authority it is believed can provide the best approach to the case. Either way, those government entities are empowered to sanction individuals or companies. Shareholders will only be held liable if their individual participation in the illegal conduct can be proved.

Third parties who provide services to the advertiser, are generally not liable for deceptive advertising. However, the parties may agree that the service provided is held responsible for the contents of the publicity and, therefore, it could be possible to pursue civil actions to obtain damages for any penalties imposed by the authorities.

Concerning criminal matters, there is a short list of felonies for which a company can be held responsible as such, addressing the case against its legal representative.

1.4 Self-Regulatory Authorities

In Mexico there is a non-binding self-regulatory association, the Self-regulation and Advertising Ethics Council AC (CONAR). CONAR's mission is to exercise advertising self-regulation among its affiliates and establish the legal framework throughout the industry to promote fair competition and defend each Mexican consumer by ensuring that they receive accurate and timely advice through responsible advertising. CONAR is frequently used to enlighten and guide Mexican authorities regarding day-to-day cases that are related to advertising matters.

1.5 Private Right of Action for Consumers

There are two proceedings available before the Mexican Consumer Protection Agency (PROFECO), in which private parties may challenge advertising practices.

- Complaint – any individual may file a complaint denouncing the existence of unlawful advertising practices. This complaint may

lead to an investigation and to penalties against the advertiser.
- Arbitration – in this case, the parties seek to conciliate before the authority, with the purpose of reaching an agreement to solve the matter; terms of agreement usually include a reimbursement of any prices paid by the consumer, indemnification for damages caused by the unlawful practice, or granting of additional goods or services.

If there is not an agreement between the parties, the consumers may file a civil action obtaining damages from the advertiser that may have been caused by the unlawful advertising.

1.6 Regulatory and Legal Trends

There are some special rules that apply to specific types of products. For instance, the rules for advertising derived from the Health Act provide specific guidelines and limitations for advertising on various categories of sensitive goods (see the bullet point on the Advertising Consultive Council in **1.2 Regulatory Authorities** for a list of such goods). For some of them, special authorisation is required in order to advertise the product; for other industries, a notice given to the authority is enough. Moreover, when the COVID-19 pandemic took hold, social media grew by 1,000% as a publicity venue. The actions of social media users, especially influencers, gave rise to many cases that were prosecuted by competent authorities in Mexico due to misleading advertising, unlawful competition and lack of publicity permits (regulatory).

1.7 COVID-19, Regulation & Enforcement

The pandemic has clearly been an eye opener for the advertising industry. Advertising in social media platforms has been exploding since the pandemic started. One of the key elements of advertising in social media platforms are brands using influencers, and this has been a "trending topic" throughout COVID-19. The massive use and growth of influencers and social media have put a lot of pressure on the system of advertising and marketing regulation in Mexico, highlighting the urgent need for further regulation. Private industry participation is key in this regulation; otherwise, the government's unilateral work may cause things to be done without the benefit of a thorough legal and technical advertising perspective.

In the past year, Mexico has seen the introduction of two important laws regarding advertising. However, these laws are focused on transparency in advertising contracting and outdoors advertising, and not on the content of advertising materials.

1.8 Politics, Regulation and Enforcement

Despite the urge to say "no comment", it is certainly the case that Mexico's current administration is trying to modify the advertising industry – targeting the agencies, rather than protecting consumers – and a clear example is the introduction of new laws relating to transparency in advertising contracting and outdoors advertising.

2. Advertising Claims

2.1 Deceptive or Misleading Claims

According to the Federal Consumer Protection Law, misleading advertising or abusive information is understood to be that which refers to characteristics or information related to any goods, product or service that may or may not be true, or that could mislead or confuse the consumer by the inaccurate, false, exaggerated, partial, artificial, or tendentious way in which it is presented.

2.2 Regulation of Advertising Claims

In principle, all advertising claims are subject to regulation. The Federal Consumer Protection Law (FCPL) states that advertising must be truthful; subject to substantiation; clear; and lacking texts, dialogues, sounds, images, trade marks, denominations of origin or other descriptions that induce or may induce error or confusion, due to their misleading or abusive nature.

Claims that may not be objectively measured might be acceptable and not subject to substantiation, provided that they do not violate the legal principles mentioned above.

Implied claims will be analysed on a case-by-case basis to determine if they comply with the principles of the FCPL mentioned above, and empirical evidence is frequently used as a means for their substantiation.

2.3 Substantiation of Advertising Claims

Empirical evidence is frequently used for substantiating advertising claims and the specific type of substantiation will depend on the nature of the claim.

For example, if a claim states that liquid soap kills 99% of bacteria, a laboratory study will be an acceptable means to substantiate that claim. If another claim states that 8 out of 10 individuals prefer hamburgers from Restaurant "X", then a survey which follows scientific criteria will be an acceptable means for substantiating this claim.

2.4 Testing to Support Advertising Claims

A first aspect to consider is determining whether the product or service shown in the ad is regulated by a mandatory technical standard or not. If the answer is yes, testing must be based on the rules, methods and procedures established in the applicable technical standard. If the answer is no, there will be more flexibility on the testing to be conducted, although it will be important that this testing is based on scientific standards.

2.5 Human Clinical Studies

The Federal Consumer Protection Law does not specifically mention human clinical studies as the basis for certain types of claims. However, whether human clinical studies are indeed an adequate means for substantiating the claim will depend on the type of claim involved. The characteristics and requirements of the human clinical studies will be determined, if applicable, by a mandatory technical standard or otherwise must be based on scientific standards.

2.6 Representation and Stereotypes in Advertising

There is no current federal regulation that addresses stereotyping in advertising or inclusion, diversity and equity.

However, some local laws do address this topic, as in some states the dissemination of advertising containing harmful prejudices and stereotypes is prohibited. For example, local laws in Mexico City prohibit the use of sexist stereotypes in advertising, which are deemed to associate denigrating, exclusionary, submissive, racist or derisive messages with women, or to present women, their bodies, or parts thereof as mere objects.

It is claimed that the purpose of these laws is to avoid the violation of the dignity or rights of individuals.

2.7 Environmental Claims

There is no current regulation regarding green marketing/sustainability claims/greenwashing. The government implemented different pro-

grammes in order to encourage companies to apply green marketing measures.

The most relevant programme implemented by the Government was called "Plan Verde", a campaign containing the strategies and actions to put Mexico on the road to sustainable development. This programme, however, did not include binding regulations, and was only implemented by Mexico City Government. Therefore, it is not applicable in other states of the country.

2.8 Other Regulated Claims

The Industrial Property Law stipulates that signs, phrases, image elements, sentences, advertisements or trade names susceptible to deceiving or misleading the public may not be registered. Additionally, using trade marks with these characteristics may be considered an infringement.

Likewise, the law contemplates that signs that are identical or confusingly similar to geographical areas, whether proper or common, maps, town names or adjectives, when these indicate the origin of the goods or services and may cause confusion or error as to their origin, cannot be registered. Likewise, unregistered use of these signs can also constitute an infringement.

This type of case includes signs that are accompanied by expressions such as "genre", "type", "manner", "imitation", "produced in", "with manufacture in" or other similar ones that create confusion in the consumer or imply unfair competition.

3. Comparative Advertising

3.1 Specific Rules or Restrictions

The Federal Consumer Protection Law allows for the public comparison between products or services, as long as the information is not false, misleading or abusive; or presented in an inaccurate, false, exaggerated, partial, artificial or tendentious way. In the same vein, the Industrial Property Law (LFPPI) excludes the lawful comparison between products or services from being considered as potentially trade mark discrediting, as long as it is done with informative purposes.

In addition, the Federal Consumer Protection Law gave powers to PROFECO to issue guidelines for comparative advertising, with the purpose of avoiding said comparative advertising inducing consumers into error or confusion. Up to the present day (September 2022), PROFECO has only issued one set of Guidelines dealing exclusively with the procedure and requirements for the comparison of prices of identical goods or services which are commercialised by different providers. The guidelines were published back in 2009.

3.2 Comparative Advertising Standards

There are some specific requirements that must be taken into account with regard to comparative advertising claims in addition to the ones applicable to general advertising claims. In this sense, the Federal Consumer Protection Law states that the information or advertising that compares products or services, from the same brand or from different brands, shall not be misleading or abusive as said terms are defined in the law (see **2.1 Deceptive or Misleading Claims**).

With regard to the comparison of prices of goods or services, the specific requirements established in the Federal Consumer Protection Agency's 2009 Guidelines must be observed. These requirements include that:

- the goods or services must be identical;
- the prices must be supported with the proof of purchase or with a certification issued by a notary public/commercial notary public; and
- the documents mentioned above must include the identity of the provider with whom the comparison is made and its domicile.

Comparative information will be valid for five days counted from the date of purchase or the date of certification of a notary public/commercial notary public.

3.3 Challenging Comparative Claims Made by Competitors

The Federal Consumer Protection Law allows any individual or company to denounce a violation of that law before PROFECO, for example if an ad violates the principles established in said law (eg, that all advertising shall be truthful and not misleading). PROFECO will initiate an investigation of the denouncement and if it considers that the ad violates the law, it may order its suspension and/or impose a fine on the advertiser.

The Advertising Self-Regulation and Ethics Council (CONAR) also has a procedure to settle disputes between its members or between parties that, without being members, agree to submit themselves to CONAR's procedure regarding advertising claims.

Comparative advertising is not as frequent in Mexico as it is in other countries (eg, the USA). The most common practice in Mexico is price comparison which can be seen directly by the consumers in supermarkets, and which is a useful means for them to be sure that they are paying a lower price than the one available in other establishments.

4. Social/Digital Media

4.1 Special Rules Applicable to Social Media

Unfortunately, there are no specific rules or regulations that apply to social media in Mexico. To enforce the same, we would have to go to the basic rules of Mexican advertising legal enforcement as explained in **1. Legal Framework and Regulatory Bodies**.

4.2 Key Legal Challenges

The lack of legislation is a major challenge for marketers advertising in social media.

4.3 Liability for Third-Party Content

There are no strong precedents on advertiser liability that indicate a settled position on this issue. There are divergent opinions on the level of responsibility that social media and site administrators hold for the content posted on their platforms by third parties (users). The adoption of best practices, such as removal of content procedures and "notice & take down" techniques, immediate reaction from the site administration to remove problematic ad content, or policies to suspend user accounts that do not comply with the terms and conditions of the site, may protect those social network or advertisers' administrators from legal responsibility under a safe harbour regime. The foregoing will apply only if the social network or advertiser did not directly participate in the illegal act.

4.4 Disclosure Requirements

As there are no specific rules or regulations that apply to social media in our jurisdiction, the same rules that apply to traditional media advertising would also apply to marketing through social media. It would mostly depend on the nature of the product or service, rather than the channel of disclosure.

4.5 Requirements for Use of Social Media Platform

There are no regulations specifically addressed to the use of social media platforms in force. However, if any of these social media platforms involve activities related to e-commerce or marketplaces operations (eg, Facebook), there are specific regulations for this activity in particular; mostly, for the sellers, rather than the users.

In addition, it shall be analysed if there are other activities of the platform that could imply regulations of other nature: eg, money reward programmes based on number of views or likes when the performer/user is a minor.

4.6 Special Rules for Native Advertising

There are no special rules regarding "native advertising", other than complying with the regulations for regular publicity.

4.7 Misinformation

There are no special rules regarding misinformation on topics of public importance, other than complying with the regulations for regular publicity.

5. Social Media Influencer Campaigns and Online Reviews

5.1 Trends in the Use of Influencer Campaigns

Due to the COVID-19 pandemic, the use of influencer campaigns has been a "trending topic" for trade marks and brands all over the Mexican market. As a result of the lack of legislation, the benefits of marketing using influencers is being taken advantage of. For example, the Mexican Health Law prohibits medical professionals from publicising on any type of platform without a permit issued by the Mexican FDA. Due to the time of issuance of the permit and because these campaigns are time sensitive, brands use influencers in the maternal product space (eg, to promote milk formula in the different platforms). This is one of the examples of how the lack of legislation permits brands to use different strategies that permit a new way of marketing products.

5.2 Special Rules/Regulations on Influencer Campaigns

Unfortunately, as mentioned in **4.1 Special Rules Applicable to Social Media**, we do not have any type of legislation nor guidelines specifically established to regulate the use of influencer campaigns in the Mexican jurisdiction.

5.3 Advertiser Liability for Influencer Content

Due to the lack of legislation regarding the day-to-day activity of influencers in our jurisdiction, everything related to the same emanates from a private contract between the influencer, the brands and sometimes the agencies.

5.4 Misleading/Fake Reviews

There is no current regulation addressing fake reviews or banning employees or companies from posting online reviews of their own products. However, these activities are considered as improper practices and should be discouraged, as they could lead to commercial consequences or bad reputation.

6. Privacy and Advertising

6.1 Email Marketing

The use of any personal data must be done with a verifiable consent from the data owner and, in order to obtain such consent, it is necessary to notify the type of data processing through a

privacy notice which must be available to the data owner prior to such processing. Where the personal/contact data has been obtained indirectly, the privacy notice must be made available to data holders in the first contact with the data controller, which means in the very first marketing email.

The privacy notice used in marketing emails is a short one version and must contain at least (i) the controller's name and address, and (ii) the purposes and means to access and consult the full version of the privacy notice. If after receiving/reviewing the above-mentioned information, the data holder does not oppose the processing of their personal data for marketing purposes, then the company can continue to send them emails. However, to cater for those who do not wish to receive this type of communication, the use of opt-out mechanisms is highly recommended, and these should be enabled in every email sent.

For violations of privacy or data security law, the law provides a list of actions that are grounds for sanction. Fines range from 100 to 320,000 times the current minimum daily wage (approximately USD5.38). For recurring infringements, an additional fine may be imposed and may be doubled when the case involves sensitive data. Sanctions may be imposed without prejudice to any civil or criminal liability that could arise.

6.2 Telemarketing

As in many of the existing privacy legal frameworks, opposition is one of the rights considered in privacy and data protection regulation in Mexico. This right is mainly focused on non-core purposes and, as marketing is always considered as being for secondary purposes, the data owner can exercise this right at any moment. The data controller must act accordingly in order to comply with the local regulation; otherwise, one of the sanctions mentioned in **6.1 Email Marketing** may be imposed.

Telemarketing is aligned with privacy regulation if:

- a short version of the privacy notice is available at the beginning of the call;
- there is a consent from the data owner; and
- an opt-out mechanism or an unsubscribe list option is enabled.

6.3 Text Messaging

As mentioned, the use of personal data is allowed for secondary purposes (in this case through text messaging) if a data holder grants their consent after having been informed about the personal data processing and does not object to the use of their data for the informed purposes. Unsubscribe lists and opt-out mechanisms must be enabled too.

Non-compliance with these requirements could lead to sanctions considered in the Mexican privacy legal framework.

6.4 Targeted/Interest-Based Advertising

Although most of targeted/interested-based advertising currently depends on the use of AI, cookies, bacons, and similar technologies, the local legal frame only considers informing the data owner of the use of this type of technology (if any) and the way to disable it as a statutory requirement. As with the other elements of data processing, this information must be part of the privacy notice.

Fortunately, awareness of privacy and data protection is rising and the use of tools/mechanisms for easy customisation of this type of technology is increasing.

6.5 Marketing to Children

Unfortunately, the local privacy legal framework does not consider special rules/requirements for processing children's personal data. Thus, the criteria for processing the data of this community are the same as those applied to adults' data processing.

Notwithstanding the above, Mexican privacy law considers children to be a "special" sector, and it establishes that data processing must be carried out without the use of misleading or fraudulent means. Thus, any abusive use of children's data shall be prosecuted and punished, and potentially increases the sanctions that may be imposed by the authority.

Having said this, it is highly recommended that the privacy notice be consented to using a checkbox as well as the implementation of plug-ins for age verification.

7. Sweepstakes and Other Consumer Promotions

7.1 Sweepstakes and Contests

If the sweepstakes or chance-based contests are carried out within Mexican territory (eg, if the draw will take place in Mexico), there will be a need to obtain a prior permit from the Ministry of the Interior.

Consumers may be required or requested to make a purchase in order to participate, but in this type of promotion, the organiser must file a notice before PROFECO at least 72 hours prior to the start of the relevant promotion.

7.2 Contests of Skill and Games of Chance

Mexican law distinguishes between contests of skill and games of chance. In accordance with the applicable legal framework, games of chance are based upon randomness and the result of the game is totally outside the player's control. A game of skill, on the other hand, implies that its result is not based upon randomness and that the player's skills will determine the outcome of the game.

7.3 Registration and Approval Requirements

The organiser of a game of chance to be carried out in Mexico (eg, if the draw will take place in Mexico) must obtain a prior permit from the Ministry of the Interior. This procedure may take from four to six weeks to be concluded. The authority will analyse on a case-by-case basis the mechanics of the game to ensure its fairness. The organiser will be asked to hire a bond to guarantee the payment of the prizes.

If the game of chance includes a purchase requirement, the organiser must additionally file a notice before PROFECO at least 72 hours prior to the start of the game of chance.

Contests of skill do not require a permit from the Ministry of the Interior. Nevertheless, if these contests include a purchase requirement, the organiser must file a notice before PROFECO at least 72 hours prior to the start of the contest.

7.4 Loyalty Programmes

Although there are no special laws or regulations that apply to loyalty programmes, the general provisions of the Federal Consumer Protection Law (FCPL) are applicable. In this sense, whatever terms and conditions are presented by the goods/services provider to the consumer, said

terms and conditions must be honoured. Non-compliance in this regard will be deemed as a violation of the FCPL.

7.5 Free and Reduced-Price Offers

In the case of offers, the Federal Consumer Protection Law (FCPL) establishes the following specific rules.

- Advertising of offers must include the conditions, as well as the term or available quantity of the offered goods/services.
- The available quantity of the offered goods/services will be subject to verification, if and when required by PROFECO.
- If there is no information on the offer's term or available goods/services, it will be presumed that they are indefinite, up until the moment that the offer is publicly finalised through the same means of communication in which it was advertised.
- Each and every consumer that complies with the applicable requirements for the offer, will have the right to acquire the applicable goods/services during the term of the offer or as long as there is availability of the relevant goods/services.
- There is a prohibition of carrying out offers in which the advertised monetary value of the goods/services is clearly superior to the one normally available in the market.

If the offering party does not comply with its offer, the consumer may opt for:

- requesting compliance;
- accepting other equivalent goods/services; or
- terminating the contract.

In all three cases the consumer will have the right to receive a monetary payment representing the difference between the offer price for the goods/services and the regular price. In addition, the consumer will have the right to a monetary compensation equivalent to 20% of the price paid by the former.

7.6 Automatic Renewal/Continuous Service Offers

The Federal Consumer Protection Law (FCPL) and its Regulations establish that automatic renewal/continuous service offers under which a marketer can continue to ship and bill for products and services on a recurring basis until the consumer cancels may be carried out, provided that the consumer has previously authorised the charges or that said charges derive from a related contract. If these requirements are not met, the above-mentioned offers would violate the FCPL and its Regulations.

8. Sports Betting/Gambling

8.1 Legality & General Regulatory Framework

In Mexico, sports betting and other forms of gambling are in all cases subject to heavy regulation under the Federal Law on Betting and Gambling (FLBG), and its Regulations.

Companies intending to engage in the business of sports betting and gambling require a prior permit from the Ministry of the Interior.

The above-mentioned permits may only be granted to companies incorporated under the Mexican laws (although foreign investors may be shareholders of said Mexican companies).

The permits' term may run from one to 25 years. The permits may be renewed for subsequent terms of 15 years each, as long as the permit holder is in full compliance with the terms and

conditions established in the permit and the obligations established in the FLBG and its Regulations.

Consumers of sports betting and other forms of gambling may only be individuals of legal age (18 and above).

8.2 Special Rules & Regulations

The Regulations to the Federal Law on Betting and Gambling establish some specific rules that apply to the advertising and marketing of sports betting and gambling.

- This type of advertising may only be published/broadcasted once the Ministry of the Interior has granted the permit for the operation of the relevant company.
- Advertising must be clear and precise in order to avoid inducing the public into error, or misleading or confusing them with regard to the services to be rendered.
- The ad must display the permit number.
- The ad must include information stating that betting and gambling are prohibited for minors.
- The ad must include messages inviting individuals to bet/gamble in a responsible manner and with the main purpose of entertainment and fun.

9. Web 3.0

9.1 Cryptocurrency and Non-fungible Tokens (NFTs)

As referred in **4.1 Special Rules Applicable to Social Media**, there are no specific rules or regulations that apply to advertising, depending on the broadcasting channel, but only general provisions. For their part, Mexican e-commerce policies are still in constant development. As of today, e-commerce is largely regulated by three norms and a tool to enable "good practice":

- the Consumer Protection Act;
- the Code of Commerce; and
- the Mexican Norm for e-commerce NMX-COE-001-SCFI-2018 (non-binding).

The Ethics Code and digital seal implemented by PROFECO are voluntary and considered as a basis of good practice. In addition, cryptocurrency is not recognised as a legal tender in Mexico, nor recommended to consumers/users. Non-fungible tokens (NFTs) are slowly gaining recognition, with no specific regulations to be issued in the near future, but concerns remain relating to basic offers and civil norms and copyrights. Unfortunately, the Mexican legal system is not particularly forward-thinking in regard to developments in information and communication technologies (ICT).

9.2 Metaverse

There are no laws or regulations addressed to the metaverse, nor ruled cases, whether related to advertising or any other subject. First of all, jurisdiction urgently needs to be established: to what extent Mexican authorities are entitled to act in a virtual world that has no physical borders. In light of this issue, Mexican authorities may only intervene when the advertiser is a Mexican company, the server that holds the virtual space is located in Mexico, or if the affected consumer is Mexican or physically located in Mexican territory, despite its avatar.

9.3 Digital Platforms

Mexico has not issued any law or regulation addressed to digital advertising platforms or the use of adtech, so all related cases have to be grounded on standard advertising regulation, unless they involve issues related to cybersecu-

rity (eg, phishing, fraud), which will require the assessment of possible criminal law application.

10. Product Compliance

10.1 Regulated Products

Advertising related to food supplements, alcoholic beverages, medicines, herbal remedies, medical equipment, and toxic or dangerous substances must have a permit from the Ministry of Health. Depending on the specific case, some products must contain in their advertising a message of social responsibility regarding the consumption of such products.

10.2 Other Products

Advertisement is not permitted where consumption of products is prohibited in Mexico: eg, vapers, cannabis (with exceptions for personal use but not advertising), and cryptocurrency operations. In addition, specific authorisation from the Central Bank (Banxico) and the National Banking and Securities Commission (CNBV) must be obtained before the advertisement of financial services, with permits granted to operate on specific financial/monetary activities.

Moreover, all advertising related to special events must be careful not to infringe sponsorship spaces and/or commit activities that may amount to ambush marketing. Private entities, such as FIFA, yearly issue their own guidelines to avoid advertising misconduct during their soccer events. Cases of this nature may be addressed to the Federal Economic Competition Commission (COFECE).

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Arochi & Lindner (A&L) is one of the most respected and recognised names in Latin American intellectual property protection, handling all aspects of IP including trade mark, patent, copyright, IP litigation and dispute resolution, IP rights enforcement, life sciences, domain names, trade secret protection, as well as advertising, marketing, data privacy, blockchain, web 3.0 and metaverse, civil and commercial litigation, corporate and regulatory law. A&L's IP portfolio includes IP rights holders from the following sectors: information technologies, entertainment, food and non-alcoholic beverages, alcoholic beverages, pharmaceutical, automobile, apparel, luxury brands, video games, fast-moving consumer goods, sports, retailers, and advertising agencies, among others. A&L has a comprehensive coverage against piracy and counterfeiting, and, in general terms, of IP rights observance. The firm handles more than 40% of the IP litigation cases in Mexico. Since 1994, A&L has distinguished itself with its legal expertise and exceptional understanding of business needs, expanding its areas of expertise over the years.

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Trends and Developments

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Arochi & Lindner see p.186

Recent Trends in Legislation Related to Advertising in Mexico

In the last few years, Mexican lawmakers and authorities (both federal and local) have made efforts to regulate different practices in advertising which have been present in the industry for years but had not been addressed in the past.

This brief article seeks to explain some key points regarding two specific laws that were approved in 2021 and 2022, and which have caused some controversy in the Mexican advertising community.

Law for Promoting Transparency and Preventing and Combating Malpractice in the Contracting of Advertising. One year later, where are we and what can we expect?

Summary of the law

In September 2021, a new federal law was introduced in the Mexican legal system, heavily inspired by the French "Sapin Law", with the purpose of regulating the activities of media agencies, and their relationships with both advertisers and media outlets.

The law is entitled the Law for Promoting Transparency and Preventing and Combating Malpractice in the Contracting of Advertising (LTMCA), and some of its main points include the following.

- Agencies are prohibited from acquiring, on their own right, inventories of media spaces with the purpose of reselling them to clients at a later date. Specifically, the LTMCA requires that agencies only acquire ad spaces once they have been instructed to do so by clients.
- Agencies cannot receive any additional compensation other than the fee charged to the advertiser. Essentially, these prohibitions have the intention of outlawing rebates paid by media outlets.
- Invoices issued by media outlets for the sale of ad spaces are more strictly regulated. The provisions are aimed at strengthening the tax controls of the advertising industry.
- Media owners are barred from granting discounts to agencies. Particularly, any discount offered by the media owner to the agency must be carried over to the advertiser or final client.
- The LTMCA prohibits a single entity from providing services both to media owners and to clients seeking to advertise their goods or services, with the purpose of avoiding conflicts of interest. As an alternative, the LTMCA allows separate companies belonging to agency's economic group to engage in these activities.
- Finally, the penalties for non-compliance with these provisions include fines of 2% or 4% of the infringing revenue. However, the concept of revenue is ambiguous and not precisely defined, which creates some uncertainty (for example, the authority could impose a fine of 2% of monthly revenue, yearly revenue, or revenue related to a specific project).

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Where are we now?

It is arguable that the LTMCA was a well-intentioned but badly executed effort to tackle improper practices in the advertising industry, and it has stirred controversy since its inception. Consequently, its enforcement has been essentially non-existent, one year since it formally came into force.

Initially, some entities involved in the advertising market in Mexico claimed that (i) the LTMCA was drafted without taking into consideration important elements of the industry, (ii) it was approved without significant discussion in Congress or with representatives of the relevant agents, and (iii) that certain provisions are unclear and ambiguous, among other criticisms.

These controversies increased when it was later determined that the enforcement authority would be the Mexican Commission of Economic Competence (COFECE), a government body whose purpose is to enforce antitrust regulations.

COFECE itself issued press releases in which it was pointed out that the regulations included in the LTMCA were not actually related to antitrust laws, and that COFECE was not the ideal authority to enforce it. Eventually, COFECE even filed a constitutional challenge of the LTMCA before the Supreme Court, based on these arguments.

Additionally, another authority, the Federal Institute of Telecommunications (IFT) filed a similar challenge to the LTMCA, claiming that some provisions of this law should be administered by it, as the government agency responsible for regulating the activities of media outlets across different topics.

Presently, both challenges await resolution pending the Supreme Court's decision, and, as a result, neither authority has been active in carrying out investigations relating to compliance with the LTMCA.

Moreover, approximately 300 constitutional injunctions were filed against the LTMCA. The plaintiffs of these legal actions were mostly agencies, but advertisers and media agencies also filed some of the lawsuits. In these proceedings, it was claimed that the LTMCA should be deemed unconstitutional and non-enforceable, as it was argued that its regulations were not justified or proportional, that several fundamental rights were violated (including the right to free commerce and freedom of expression) and that the ambiguity in some provisions created legal uncertainty for the relevant participants in the advertising industry.

The majority of rulings issued so far have determined that the LTMCA is indeed unconstitutional, based on the claims made by agencies, advertisers and media outlets. It should be emphasised that these decisions are not yet conclusive and final, as they have been challenged by Senate, Representatives Chamber and even the Mexican President, and the proceedings are currently under prosecution before Federal Courts.

What can we expect for the future?

Presently, there is uncertainty regarding the future of this law: considering the judicial challenges that have been filed against the LTMCA, the issue is whether this version of the statute will be enforced at all, or it will be necessary to amend the statute before the authorities begin enforcing it.

However, as the LTMCA is still valid and – theoretically – enforceable, the industry has attempted to adapt and change, to avoid liability. Consequently, most major agencies and media outlets

in Mexico have dedicated the last fifteen months to reviewing and changing agreements, renegotiating deals to avoid incurring illegal activities, and creating new commercial projects, aimed at compensating the losses they could suffer from the activities they are no longer allowed to carry out.

In any case, it is considered very unlikely that the Mexican government will back down in its efforts to regulate this aspect of the advertising industry. Therefore, it is almost certain that, eventually, some version of the LTMCA will be fully enforced – although the questions of which authority will oversee these activities, and to what extent, remain unanswered.

In view of these circumstances, consulting experienced counsel is recommended for parties interested in engaging in activities related to media agencies or the acquisition of ad spaces in Mexico, as it is extremely important to ensure compliance with all applicable regulations, as well as to be aware of the status of laws, authorities and legal challenges related to the LTMCA.

Outdoors Advertising Law of Mexico City: a revamped version of older regulations

Summary of the law

On 7 June 2022, a local law entered into force in Mexico City, with the purpose of regulating the installation, maintenance, permanence and removal of advertising media outdoors. This piece of legislation, entitled Outdoors Advertising Law in Mexico City (OAL-CDMX), is an updated version of previous rules enacted by the local government, and it now regulates some practices that had not been expressly addressed in the past.

Additionally, the OAL-CDMX creates a complex system of authorisations and permits required to install advertising in Mexico City and includes increased penalties and stricter measures to ensure compliance.

Some of the main goals of this new regulation are as follows:

- protection of public space and the urban landscape;
- prevention of the abusive use of architectural elements that generate visual overstimulation;
- restrictions on the placement of advertising elements; and
- creation of rules regarding content and specific messages used in advertising, to guarantee gender equality perspective and to contribute to the eradication of discrimination, among other social causes.

Moreover, the law prohibits or strictly limits the installation and use of certain types of advertising which were not expressly regulated in the past, such as the following:

- advertising media with sound;
- advertising media using drones;
- inflatable advertising media, whether fixed or suspended in the air;
- figurative or abstract media, with volume or in three dimensions; and
- projection mapping and other technology-based media.

While a significant part of the OAL-CDMX does not include new rules, some sections have caused controversy, as they have been considered disproportionate or excessively strict. Consequently, several constitutional injunctions have also been filed by different parties, with the purpose of invalidating or avoiding the enforcement of certain sections of the law.

Arguments made in these challenges include (i) claiming that the OAL-CDMX creates unjustified barriers and impediments in commercial practices and in the activities of advertisers, media agencies and owners of premises where advertising media is installed, (ii) claiming that regulations are disproportionate and excessively strict, and (iii) claiming that the law undermines freedom of speech, since it seeks to limit the flow of information and the type of messages than can be used in advertising.

Additionally, the law has been challenged before the Supreme Court by certain local official entities, claiming that Mexico City's government is invading the activities of other authorities. Presently, all these proceedings are still under prosecution before the Mexican courts.

What can we expect for the future?

Although the OAL-CDMX was less controversial than LTMCA, it has still created uncertainty in the advertising industry, particularly among agencies and companies engaged in innovative advertising practices that were not regulated in the past, and which are now significantly limited or restricted.

It is considered very unlikely that this law will be fully overturned in the Courts, but certain sections may be invalidated or modified due to the challenges that have been filed.

Nevertheless, it is very important for companies engaged in advertising activities in Mexico City to be aware of the implications of this law, the required permits and authorisation, and the status of the injunctions, to ensure that their practices will be compliant with the law.

Additionally, while this is a local law which is currently only enforceable in Mexico City, it is considered likely that similar regulations may be enacted in other states of the country, in the near future. Indeed, in the context of Mexico, the laws of Mexico City have always been regarded as the most innovative and trendsetting of the nation. Therefore, when new legislation is passed by Mexico City's congress, it commonly spearheads similar efforts in other parts of Mexico.

Additionally, it should be emphasised that all states already have some type of regulation regarding outdoors advertising, which supports the prediction that other local jurisdictions may simply "update" their regulations in similar terms to those included in the OAL-CDMX, rather than create a completely new law.

In view of the foregoing, consulting a local counsel with relevant experience in the advertising industry is recommended before commissioning the installation of outdoors advertising, to diminish legal risks and ensure compliance with all applicable local regulations.

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1. Legal Framework and Regulatory Bodies

1.1 Primary Laws and Regulation

Unfair Competition Law

The primary regulation governing advertising practices is the Swiss Unfair Competition Act. The Unfair Competition Act (UCA) sets out (amongst others):

- the basic applicable rules, such as the general transparency principle in commercial communication;
- the prohibition of inaccurate, deceptive or misleading advertising claims about other companies and their products (Article 3 paragraph 1 littera a, UCA) or one's own products and services (Article 3 paragraph 1 littera b, UCA);
- requirements for comparative advertising (Article 3 paragraph 1 littera e, UCA);
- requirements for below-cost offers and the advertising related thereto (Article 3 paragraph 1 littera f, UCA);
- requirements for offers with premiums and the advertising related thereto (Article 3 paragraph 1 littera g, UCA);
- requirements for email marketing (Article 3 paragraph 1 littera o, UCA);
- certain requirements for sweepstakes and contests (Article 3 paragraph 1 littera t, UCA); and
- requirements for telemarketing (Article 3 paragraph 1 littera u, UCA).

Advertising-Related Provisions in Other Statutes

Other relevant laws are:

- the Trademark Act (when displaying trade marks of third parties in advertising);
- the Copyright Act (when displaying pictures or videos of third parties in advertising); and
- legislation dealing with personality rights and data protection (when displaying pictures of individuals or processing personal data for marketing purposes).

Rules for specific industries, products or services

The most relevant industry-specific regulations are set out in **10.1 Regulated Products.**

Soft Law and Self-Regulation

Finally, there is soft law created by industry organisations and non-profit organisations.

The most important soft law regarding advertising are the so-called principles of the Swiss Fair Competition Commission (*Lauterkeitskommission*) regarding commercial communication.

These principles include, amongst others, requirements for the use of test results in advertising and requirements for direct marketing. The principles are non-binding and not enforceable like statutes. However, the Commission may render decisions, which are published and may affect the reputation of the offender.

1.2 Enforcement and Regulatory Authorities

Whereas the sector-specific regulations are often enforced by the respective supervisory authorities, the more general advertising regulations are enforced as set out below.

Cantonal Civil Courts

The UCA, and the other regulations mentioned in **1.1 Primary Laws and Regulation**, such as the Trademark Act and the Copyright Act, provide for civil law remedies, which are enforced by cantonal civil courts.

Article 9 paragraph 1 of the UCA sets out that claimants can request the civil courts to:

- prohibit imminent infringements of the UCA;
- have existing infringements of the UCA removed (eg, by removing promotional materials with illegal claims from the market, including from websites); and
- declare a behaviour illegal if it should continue.

Claimants may also ask for damages (Article 9 paragraph 3, UCA).

It is generally possible to request preliminary injunctions against alleged infringers. However, the requirements for such preliminary injunctions are rather strict under Swiss law.

Cantonal Criminal Authorities

The UCA and the other general regulations mentioned in **1.1 Primary Laws and Regulation** provide for criminal sanctions in the case of an infringement, which are enforced by the cantonal criminal authorities.

Article 23 of the UCA sets out that intentional infringement of Article 3 of the UCA (among other provisions) is sanctioned with imprisonment of up to three years or a monetary penalty of up to CHF540,000. There are no decisions available in which a prison sentence was handed down.

The competent criminal authorities are those of the Swiss canton in which the criminal conduct has taken place or where the effect of the criminal conduct arose.

Criminal courts only initiate investigations based upon complaints by competitors, consumer organisations or consumers with the capacity to sue in the sense of Articles 9 and 10 of the UCA.

Swiss Fair Competition Commission

The Commission enforces its own principles (see **1.1 Primary Laws and Regulation**). The proceeding is rather streamlined, including template complaint forms and the absence of oral hearings. It is initiated upon request and ends with a non-binding decision. The decisions are published.

1.3 Liability for Deceptive Advertising

Civil Law Actions

In the case of civil law litigation, the legal entity will be held liable where an employee or director, in the course of the business activities of the entity, committed the infringement.

However, the UCA also permits litigation against individuals if no legal entity is involved or if an employee or director acts outside of their business activity (eg, if a director posts deceptive claims about a competitor on its private Twitter account). This is a grey area.

Civil litigation can also be initiated against third parties. Injunctions and deletion requests are not dependent on culpability. Therefore, a claimant may ask, for example, an advertising agency or hosting provider to cease displaying deceptive advertising. The most important issue in claims against third parties is often whether they are effectively in control of the infringing activities (ie, whether they have the competence to stop, for example, deceptive advertising).

Criminal Law Actions

Criminal law actions are always directed against individuals. The individual who is responsible for the criminal conduct will be liable.

If criminal conduct is committed in the course of the business activities of a legal entity, it is often not that easy to determine the responsi-

ble individual. In that case, criminal authorities often investigate the directors or employees who were in charge of marketing decisions in the first investigation phase.

Criminal proceedings are not often directed against third parties, unless the investigations reveal that such third parties might, in effect, be more responsible than the directors or employees of the advertiser. Third parties are sometimes the focus of investigation if the advertiser has its registered seat outside of Switzerland and is therefore outside of the territorial scope of Swiss criminal law enforcement.

1.4 Self-Regulatory Authorities

As mentioned in **1.1 Primary Laws and Regulation** and **1.2 Enforcement and Regulatory Authorities**, the Swiss Fair Competition Commission is one of the most important self-regulatory organisations governing and enforcing advertising rules.

As the fees for the proceeding with the Commission are generally zero or rather low (compared to court fees), companies and individuals often file their complaints with the Commission instead of civil courts.

Other industry-specific self-regulation is covered in **10.1 Regulated Products**.

1.5 Private Right of Action for Consumers

Whether consumers/private citizens have a private right of action depends on the infringed provisions/statutes.

In the case of an infringement of the trade mark or copyright statutes, only the owners of the respective trade mark rights and copyrights have a private right of action. The available remedies are injunctions, removal of infringements, or damage claims.

In the case of an infringement of data privacy laws, the data subject has a private right of action. They can ask to have the data processing prohibited or blocked, or to have personal data deleted (see Article 15, DPA).

In the case of an infringement of the UCA, consumers/citizens have a private right of action if their economic interests are threatened or damaged by unfair behaviour (Article 9 paragraph 1, UCA). Remedies would mainly be injunctions, deletion requests and damage claims (see **1.2 Enforcement Regulatory Authorities**).

1.6 Regulatory and Legal Trends

The case law of the Swiss Fair Competition Commission reveals a significant increase in cases dealing with green marketing.

A new approach can be seen regarding the enforcement against deceptive advertising in connection with foodstuff and cosmetics. Article 18 of the Federal Statute on Foodstuffs and Utility Articles prohibits the use of deceptive claims in advertising. As foodstuff and cosmetics are regularly sold online, there is a trend that users of the respective platforms or online-shops are invited to submit comments on products. There is a debate on whether the seller of these products is responsible for deceptive statements in such comments. Swiss law does not know a general liability of platform operators or online-shop operators. However, certain cantonal authorities decided that such a responsibility cannot entirely be excluded. In case that this opinion would be accepted by higher courts, it would substantially affect the platform and online-shop operators. The operators would be forced to control the content of comments.

The following cases are noteworthy.

Viagogo II

In its decision of 27 October 2021, the Federal Supreme Court had to decide whether certain marketing claims and activities by a ticket exchange platform constituted deceptive advertising in the sense of Article 3 paragraph 1 littera b of the UCA (BGer 4A_314/2021). It must be emphasised that the Federal Supreme Court did only assess the claims which were brought forward in the appeal. The case dealt with tickets for a circus show. The claimant was the operator of the circus for which the tickets were offered on the ticket exchange. The Federal Supreme Court upheld the decision of the lower court that the ticket exchange platform infringed Article 3 paragraph 1 littera b of the UCA in several ways. The ticket exchange platform infringed the UCA by claiming that certain shows of the circus were already or almost sold out even though there were still tickets in the official sales channels. The court held that the claim "sold out" could be understood by the users in the specific situation in the way that tickets are not only sold out on the ticket exchange, but also in official sales channels. The Court considered the other advertising claims of the ticket exchange in the same way, such as the claim that it sells tickets that can no longer be purchased in other sales channels. In addition, the high prices for the tickets on the ticket exchange also communicated a scarcity of the respective tickets. Furthermore, the ticket exchange infringed the UCA by using price category descriptions and by publishing seating plans which did not correspond to the ones used by the circus itself. The ticket exchange claimed that the respective information was not provided by the ticket exchange, but rather by the sellers of the tickets. The Court rejected this argument and decided that it was the ticket exchange that determined the information to be provided by the sellers and to be displayed on the platform to a rather extensive degree. Moreover, the ticket exchange violated the UCA by increasing the price for the tickets gradually during the order process without displaying the effective total price in a transparent manner and without granting the user more than three minutes to take the purchase decision. In that regard the Court held that the UCA was also infringed by the displaying of claims and pop-up banners that suggested a substantial demand or a rare offer ("there are two other users in the waiting list for these tickets") without mentioning that these statements only apply to the ticket exchange and not to other sales channels. Finally, the countdown displayed to finalise the order process was less than ten minutes.

Swiss Meat

In a decision of 23 March 2022, the Swiss Fair Competition Commission had to assess whether the campaign "*Schweizer Fleisch – der feine Unterschied (Swiss Meat – the fine difference)" contained claims that constituted deceptive green marketing. Please note that an appeal against this decision is pending. The statement*"cattle in Switzerland eat 91.5% domestic feed" is misleading in the Commission's view. The average reader assumes that "feed" refers to the totality of all feed fed to cattle in Switzerland. However, the so-called dry matter, to which the percentage figure referred, only covers a part of all feedstuffs. Moreover, this unit of measurement is not known to the average addressee. The link between feed and the percentage figure given is therefore misleading.

Biodiversity Claim

In a decision of 19 January 2022, the Swiss Fair Competition Commission had to assess a biodiversity claim in connection with milk products. The claim was "XY fosters and loves biodiversi-

ty". The Commission rejected the complaint. The respondent was able to credibly demonstrate that the grazing of meadows by dairy cows contributes to the promotion of biodiversity. The average addressees could correctly place this statement in context and would also be aware that dairy farming, if intensively practiced, can also have negative effects on nature.

CO2 Emissions Claim

In a decision of 15 September 2021, the Fair Competition Commission had to decide whether advertising claims related to CO2 emissions were deceptive. The claim was "thanks to our modern fleet and efficient flight procedures, we have reduced our CO2 emissions by more than a third since 2000". The complainant claimed that the average addressee would understand the statements to mean that total CO2 emissions had been reduced by ⅓ when comparing the years 2000 and 2001. However, the statement referred to passenger kilometres. The Commission rejected the complaint. It was declared sufficiently clearly that the statement of the reduction of CO2 emissions referred to passenger kilometres. There was therefore no danger of misleading the public.

The decisions of the Swiss Fair Competition Commission regarding green marketing are in line with the rather liberal understanding of Swiss case law as to the understanding of advertising claims by the average addressee.

1.7 COVID-19, Regulation & Enforcement

The pandemic has generally not affected the regulation of advertising and the enforcement of advertising regulations.

However, Article 12 paragraph 1bis of the Ordinance on Foodstuff was implemented due to the pandemic and sets out that, by way of derogation from paragraph 1, indications on foodstuffs may deviate from the facts if the deviating claim is demonstrably due to supply shortages as a result of the COVID-19 pandemic (and if certain other requirements are met).

1.8 Politics, Regulation and Enforcement

The political climate has not directly impacted the regulation of advertising or enforcement. However, due to the current political climate, environmental claims have become an important topic as companies try to emphasise the environmental or eco-friendly features of their products or services. At the same time, the risk of being blamed for "greenwashing" has increased.

The Swiss legislature has not yet reacted to this development. Environmental or ecological claims are legally assessed using the existing provisions, in particular the general provisions on inaccurate, misleading, or deceptive claims or certain provisions for specific products, such as chemical substances (see **1.1 Primary Laws and Regulation**).

It is therefore suggested that companies consider the recommendations set out in the ICC Framework for Responsible Environmental Marketing Communications (2019) when planning and implementing environmental marketing.

2. Advertising Claims

2.1 Deceptive or Misleading Claims

According to the case law and literature, how the advertiser itself understands or interprets the claims made in an advert is not decisive. Rather, it is the content or meaning attributed to a claim by the average addressee, taking into account all the circumstances of the case.

The understanding of the average addressee is determined in three steps:

- determining the addressees to whom the information is directed (eg, age, social position, location);
- clarifying the knowledge and skills of the average addressee represented by the target group, including their education, language skills, previous knowledge or understanding, low level of knowledge (eg, among young people or children) and attention (eg, type of claim, place of claim, advertising medium and advertising situation); and
- assessing how the average addressee (an artificial construct) understands the claims.

Because the assessment of whether a claim is misleading, deceptive or inaccurate requires an objective understanding, "misleading or inaccuracy rates", which are calculated empirically or by means of surveys, are not used under Swiss law.

Furthermore, the understanding of the average addressee cannot be proven by means of representative surveys. This also results from the fact that the determination of the objectified understanding is a legal question. However, surveys submitted by the claimant may nonetheless affect the assessment by the judges.

2.2 Regulation of Advertising Claims

The Unfair Competition Act, in particular Article 3 paragraph 1 littera b, may cover both express and implied claims.

Whether an implied communication is a claim in the sense of the UCA must be assessed based on the understanding of the average addressee (see **2.1 Deceptive or Misleading Claims**) in the instance in question.

In terms of content, the claim should contain a verifiable factual statement, which is assessable with evidence. Statements that cannot be objectively measured do not constitute a claim in the sense of Article 3 paragraph 1 littera b of the UCA.

Pure value judgements do not qualify as claims in the sense of Article 3 paragraph 1 littera b of the UCA. However, whether the value judgement contains any factual statements at all must be assessed. The understanding of the average addressee is, again, decisive.

2.3 Substantiation of Advertising Claims

Claim substantiation depends on the nature of the claim in question. Substantiation for misleading claims is different than substantiation for inaccurate claims.

As mentioned under **2.1 Deceptive or Misleading Claims**, it is decisive whether the (hypothetical) average addressee is deceived or misled, or whether a claim is inaccurate. The standard is therefore, for example, not whether a substantial part of the addressees might be misled.

In ordinary proceedings, the court must be convinced, based on the evidence submitted, that an infringement is highly probable (almost 100% probability). The courts assess all evidence with full discretion. There is no hierarchy of evidence under Swiss law.

In cases of preliminary injunctions, the claimant must convince the court that an infringement is plausible. However, Swiss courts tend to apply a rather high standard (ie, it must also be highly probable).

2.4 Testing to Support Advertising Claims

There are requirements for tests set out by the Swiss Fair Competition Commission.

The Swiss Fair Competition Commission sets forth in its guidelines for tests the following important requirements (only available in German, French and Italian).

- Independence – the testing institute must be independent from the claimant/advertiser and other third parties.
- Competence – the testing institute must have the necessary skills and experience to execute the tests.
- Objectivity – the tests must not be deceptive, misleading or inaccurate; it is, for example, prohibited to ignore important data in the test result.

Only consumer-relevant properties should be tested; the test criteria should be weighted appropriately.

2.5 Human Clinical Studies

Whether human clinical studies are required depends on the type of claim. If advertising refers to clinical studies (eg, in advertising for medicinal products or cosmetics), respective studies must have been executed according to the rules of good clinical practice.

The Federal Statute on Research with Human Beings, and the ordinances thereto, set out further requirements for such clinical studies.

2.6 Representation and Stereotypes in Advertising

There are no special laws in that regard. The same general provisions as mentioned under **1.1 Primary Laws and Regulation** apply.

2.7 Environmental Claims

Environmental or ecological claims are legally assessed using the existing provisions, in particular the general provisions on inaccurate, misleading, or deceptive claims or certain provisions for specific products, such as chemical substances (see **1.1 Primary Laws and Regulation**).

It is therefore suggested that companies consider the recommendations set out in the ICC Framework for Responsible Environmental Marketing Communications (2019) when planning and implementing environmental marketing.

However, certain environmental claims are specifically regulated in connection with foodstuffs. According to the Ordinance on Organic Farming and the Labelling of Organically Produced Products and Foodstuffs, products and foodstuffs may only be claimed as “bio” or ecological if they are produced under the requirements set out in the ordinance. For bio-claims in connection with other products, the general rules of the Unfair Competition Act apply (ie, the claims must not be deceptive, misleading, or inaccurate).

In addition, Article 60 of the Ordinance on Chemical Substances prohibits the use of general, vague and undefined statements about the health or environmental friendliness of a chemical substance such as “non-toxic”, “not harmful to health”, “not harmful to the environment”, “environmentally friendly”, “without emissions”, “ozone-friendly”, “biodegradable”, “ecologically safe”, “ecological”, “environmentally safe”, “nature-friendly” or “water-friendly” without any further explanation. Claims regarding biodegradability must contain information regarding the testing method used and the percentage of degradability. Furthermore, it must be indicated which part of the product is degradable in case the claim does not apply to the entire product.

In its supervisory communication 05/2021 on preventing and combating greenwashing, the Swiss financial market authority (FINMA), provides information on the main features of its expectations and the current state of practice in the management of collective investment schemes with a sustainability focus at fund and institution level. In addition, it draws the attention of financial service providers offering sustainability-related financial products to the potential greenwashing risks in the advisory process and at the point of sale.

2.8 Other Regulated Claims

There are types of claims that are subject to specific rules or regulations. However, the respective regulations are incorporated into different statutes and ordinances. Whether specific regulations apply to concrete types of claims must therefore be assessed on a case-by-case basis.

Examples of such regulations are set out below.

The Tobacco Ordinance

Article 17 paragraph 3 of the Tobacco Ordinance prohibits claims that give the impression that a particular tobacco product is less harmful than others (eg, "light", "ultra-light" or "mild").

Health-Related Claims

These are generally prohibited for any products other than medicinal products. However, Annex 14 of the Ordinance on Foodstuffs Information includes specific permitted health-related claims for foodstuffs.

Ordinance on Chemical Substances

Article 60 of the Ordinance on Chemical Substances prohibits the use of general, vague and undefined statements about the health or environmental friendliness of a chemical substance such as "non-toxic", "not harmful to health", "not harmful to the environment", "environmentally friendly", "without emissions", "ozone-friendly", "biodegradable", "ecologically safe", "ecological", "environmentally safe", "nature-friendly" or "water-friendly" without any further explanation. Claims regarding biodegradability must contain information regarding the testing method used and the percentage of degradability. Furthermore, it must be indicated which part of the product is degradable in case the claim does not apply to the entire product.

Swissness Provisions

The so-called Swissness provisions in the Trademark Act (Articles 47 et seq) and the ordinances thereto govern the use of Swiss claims, Swiss symbols and other Swiss indications of origin. The use of the Swiss flag is further regulated in the Coat of Arms Act.

The use of Swiss indications of origin must, in general, not be deceptive. Consequently, the Swissness rules set out when a product is considered to have been manufactured in Switzerland or when a service is sufficiently "Swiss". With regard to foodstuffs, 80% of the content must be of Swiss origin. There are, however, exceptions. Regarding industry products, at least 60% of the manufacturing costs must arise in Switzerland. The ordinance clarifies how to calculate the manufacturing costs.

3. Comparative Advertising

3.1 Specific Rules or Restrictions

Comparative advertising is generally permitted as it improves market transparency and therefore competition.

However, comparative advertising is prohibited where it is executed in an inaccurate, mislead-

ing, unnecessarily disparaging or unnecessarily imitating manner, or favours third parties in competition in a corresponding manner (Article 3 paragraph 1 littera e, UCA).

It is generally permitted to identify a competitor by name in the advertising – as long as the advertising complies with Article 3 paragraph 1 littera e of the UCA. However, identification of a competitor may affect the assessment of whether a comparison is inaccurate, misleading, etc.

Article 3 paragraph 1 littera e of the UCA even applies if no specific competitor is mentioned (indirect comparison). It is sufficient that the advertiser's own products and services are compared, even implicitly, with other specified or specifiable products and services.

3.2 Comparative Advertising Standards

There are no different standards for comparative advertising. The understanding of the average addressee (see **2.1 Deceptive or Misleading Claims**) of the comparative advertising is decisive.

3.3 Challenging Comparative Claims Made by Competitors

As discussed in **1. Legal Framework and Regulatory Bodies**, advertisers or competitors affected by comparative advertising may challenge claims in civil litigation, criminal law proceedings, or with a complaint to the Swiss Fair Competition Commission.

In civil litigation, the claimant can request injunctions, deletion or removal of illicit claims, and damages (Article 9, UCA).

In criminal proceedings, the criminal authorities will investigate and impose sanctions, which are imprisonment for up to three years or a monetary penalty of up to CHF540,000 (Article 23, UCA).

In proceedings before the Swiss Fair Competition Commission, the Commission may decide that the advertising is illegal and should therefore cease or be removed. The Commission has no authority over damage claims.

4. Social/Digital Media

4.1 Special Rules Applicable to Social Media

There is no specific statute dealing with advertising in social media.

The general provisions, mentioned in **1. Legal Framework and Regulatory Bodies**, apply.

Furthermore, principle B.15 paragraph 1 of the Swiss Fair Competition Commission requires that advertising for third parties in posts on social media platforms must be recognisable as advertising.

It should be noted that the addressees of advertising on digital media might differ from the addressees of advertising on other communication channels (see the discussion regarding the average addressee in **2.1 Deceptive or Misleading Claims**). This was emphasised by the Swiss Fair Competition Commission in decisions regarding influencer marketing on Instagram. It mentioned that the addressees of the respective posts were the followers of the Instagram account of the respondent. The average addressee was described as follows: "a follower decides for themselves which persons or companies they want to follow. It can be assumed that the average Swiss followers of the respondent's account are interested in the respondent's

sports history and life. A follower wants to learn more about the respondent, their career and life by following the Instagram account. They are more interested in and better informed about the respondent than someone who is not a follower of the account". See, for example, appeal decision of 6 May 2020 (No 154/19 and 159/19), reference No 14.

Finally, the understanding of the average addressee is dependent on the context of the advertising claim. The Swiss Fair Competition Commission explicitly mentions this consideration: "when assessing a commercial communication, the Commission takes particular account of the understanding of the relevant target group, the overall impression and the character of the medium" (principle A.1 (3)).

4.2 Key Legal Challenges

One of the main challenges facing advertising on social media is the fact that claims tend to be shorter than in other communication channels. This increases the risk of an infringement of the general transparency principle. It also increases the risk of inaccurate, deceptive or misleading advertising.

In addition, it is a challenge that the advertiser cannot control the context in which its claims are further distributed in social media.

Another challenge is the so-called "separation principle" (ie, that commercial communication must be recognisable as such and separated from other communication).

4.3 Liability for Third-Party Content

Injunction and deletion claims are generally independent of the culpability of the advertiser. Consequently, an infringed individual or legal entity may initiate litigation against the advertiser and ask them to stop the posting of third-party content on the advertiser's website or social media channels, and to have it removed.

In contrast, damage claims are generally not available against an advertiser for illicit third-party content. However, if the advertiser was notified about the illicit content and did not remove it, the advertiser could become culpable (jointly with the main infringer) for the illicit post. In that case, a damage claim might be possible.

4.4 Disclosure Requirements

There are generally no special requirements for disclosure regarding advertising on social media as opposed to traditional media. However, the implementation of the disclosure requirements may differ. These must be assessed on a case-by-case basis.

4.5 Requirements for Use of Social Media Platform

There are no unique rules or regulations that apply to the use of the major social media platforms.

However, principle B.15 of the Swiss Fair Competition Commission makes concrete certain general principles as set out in the UCA for social media platforms (see **4.6 Special Rules for Native Advertising**).

4.6 Special Rules for Native Advertising

Principle B.15 of the Swiss Fair Competition Commission sets out special rules regarding the separation of commercial communication from editorial content. Commercial communication must be recognisable as such and must be strictly separated from editorial content. Commercial communication must be flagged as sponsored/advertising or similar.

The Swiss Fair Competition Commission has applied principle B.15 in cases of native advertising.

4.7 Misinformation

There are no laws that specifically apply to misinformation on topics of public importance. However, the following regulations may cover certain aspects of misinformation/fake news.

- If fake news or misinformation includes defamatory or libellous statements, the criminal code provisions dealing with the reputation of individuals can be triggered (see Articles 173 and 174, Criminal Code). However, one of the difficulties regarding criminal law actions is the fact that often social bots are used for misinformation campaigns. It is difficult to identify the person responsible for operating the social bots.
- The Unfair Competition Act does generally not deal with influencing the political climate. The UCA is only applicable if the misinformation is directed against specific market players.
- Social media content is generally not subject to the Federal Statute on Radio and Television (RTVG). However, social media appearances of certain media companies, such as the Federal Television Company (SRG), can be subject to the provisions of the RTVG (see Article 5a, RTVG).
- Fake news and misinformation in radio and television infringes the principle of proper presentation of facts and events (see Article 4 paragraph 2, RTVG).

In a report of 10 May 2017, the Federal Communication Agency (BAKOM) came to the conclusion that there is an increased risk of misinformation, fake news and hate speech on social media. BAKOM held that the existing legislation is not sufficient to deal with these increased risks and suggested legislative actions to the Federal Council.

In November 2021, BAKOM issued a new report on the activities of platform operators in the field of public communication and opinion-forming. The report explored the question of how the behaviour and use of platforms by the public affects public communication in Switzerland and the formation of opinion among the Swiss population. The report concludes that existing regulation in Switzerland is hardly up to the new trends. The Federal Council has instructed the relevant Federal Department to show in a debate paper by the end of 2022 whether social media platforms can and should be regulated, and, if so, how to regulate it. A broad discussion is then planned on the question of the social integration and governance of intermediaries in Switzerland.

5. Social Media Influencer Campaigns and Online Reviews

5.1 Trends in the Use of Influencer Campaigns

Decisions of the Swiss Fair Competition Commission regarding influencer marketing reveal a rather liberal approach. The Commission decided that no specific disclaimer (“ad”, “sponsoring”, etc) is needed if the nature of a post as commercial communication is recognisable without such a disclaimer (see, for example, appeal decision of 6 May 2020 (No 154/19 and 159/19), reference No 14; decision of the second chamber of 6 May 2020, No 201/19).

However, the Commission emphasised that a case-by-case approach is needed. The mentioned decisions dealt with the posts of famous athletes and a famous influencer. According to

the Commission, users are aware that posts of such individuals contain commercial communication.

5.2 Special Rules/Regulations on Influencer Campaigns

Principle B.15 paragraph 2 of the Swiss Fair Competition Commission specifically deals with influencer marketing.

In addition to the general separation and transparency principle, it sets out that it is unfair to use social media accounts in order to facilitate commercial communication in favour of third parties, unless the commercial nature of such posts is made transparent. Individuals who receive sponsor donations or similar compensation for posts must make this commercial relationship transparent.

5.3 Advertiser Liability for Influencer Content

There is no case law in respect to advertisers being held responsible for content posted by their influencers. However, the applicable rules in cases of influencer marketing are generally directed against the immediate infringer, (ie, the influencer). In the cases decided by the Swiss Fair Competition Commission (see **5.1 Trends in the Use of Influencer Campaigns**), the respondent was always the influencer.

5.4 Misleading/Fake Reviews

There is currently no case law regarding misleading/fake reviews in Switzerland. The topic is, however, discussed in the legal literature.

The main provision dealing with misleading/fake reviews is Article 3 paragraph 1 littera b of the UCA. The provision sets forth that anybody who "makes false or misleading statements about themselves; their company; their business name; their goods; works or services; their prices; the quantity in stock; the type of sales event; or about their business relationships, or in a corresponding manner favours third parties in competition (highlighted by the authors)", acts in an unfair manner.

An employee of a company or an influencer or agency who makes deceptive, misleading or inaccurate claims in product reviews favours the company in competition.

6. Privacy and Advertising

6.1 Email Marketing

Data Privacy Laws

The collection of email addresses is subject to the Swiss Data Protection Act (DPA). According to Article 4 of the current DPA (Article 6, revised DPA), the data collection must be transparent (ie, it must be recognisable to the data subject that email addresses are collected and processed for marketing purposes).

Information or notices are therefore required. Unless the general data processing principles (transparency, purpose limitation, proportionality) are infringed, no extra conditions, such as consent, need to be met based on data privacy laws (see below, however, regarding the UCA). Consent is needed if email addresses are disclosed to third parties for marketing purposes in favour of that third party.

Please note that the General Data Protection Regulation (GDPR) might apply to entities with a registered seat in Switzerland (Article 3 paragraph 2, GDPR). The GDPR might therefore affect data collection and processing for email marketing. As this chapter focuses on Swiss law,

there will be no further evaluation of the GDPR requirements for email marketing.

Unfair Competition Act

Article 3 paragraph 1 littera o of the UCA deals with email marketing. It generally requires an opt-in of the recipient for email marketing. The recipient must also be informed about the option to unsubscribe. Finally, the sender must indicate its correct name and address.

There is an exemption from this general rule with respect to existing customers. Opt-in is not necessary for email marketing to recipients in cases where they have been informed prior to the first marketing mail about the opt-out right, and in cases where the emails contain information about the company's own products or services, which are similar to the ones purchased or ordered by the respective recipient.

Sanctions

The current Swiss Data Protection Act does not provide for monetary sanctions in the case of an infringement; however, exceptions exist in a few instances, which are not that relevant in connection with email marketing. However, the Federal Data Protection and Information Commissioner (FDPIC) may investigate data processing activities upon request and render non-binding recommendations, such as to cease the data processing. If the data controller is not willing to accept the recommendation, the FDPIC may file a complaint with the Swiss Federal Administrative Court. Data subjects may also initiate civil litigation and ask for injunctions (see Article 15, current DPA; Article 32, revised DPA and **1.5 Private Right of Action for Consumers**). As the court fees may be quite substantial, data subjects tend to file complaints to the FDPIC.

In case of an infringement of Article 3 paragraph 1 littera o of the UCA, the affected individual may file a complaint with the civil court and ask for an injunction and for removal of their mail address from the mailing list (Article 9, UCA). Damage claims are rare, as the claimant has to prove effective financial damage. No such civil litigation is on record. There are a few criminal proceedings dealing with infringement of the UCA. Intentional infringement of Article 3 paragraph 1 littera o of the UCA is sanctioned with imprisonment for up to three years or a monetary penalty of up to CHF540,000 (Article 23, UCA). Prison is not realistic for such infringements, but penalties might be awarded. However, in the published case law, the criminal authorities have followed a rather liberal approach.

Swiss Fair Competition Commission

Principle C.4 paragraph 2 No 5 and paragraph 3 repeat Article 3 paragraph 1 littera o of the UCA. Consequently, complaints against illicit email marketing can also be filed to the Swiss Fair Competition Commission. The Commission acts upon the request of competitors, recipients of the marketing communication or consumer organisations. It can decide that the marketing is illegal and must be stopped.

The Swiss Fair Competition Commission decides more cases of alleged illegal email marketing than the civil courts and criminal authorities.

6.2 Telemarketing

In relation to internet-based telemarketing, the same rules as for email marketing apply (see **6.1 Email Marketing**).

For other types of telemarketing, Article 3 paragraph 1 littera u of the UCA sets out that telemarketing to recipients with a respective opt-out notice in the telephone registry is prohibited.

Sanctions for this infringement are the same as explained in **6.1 Email Marketing**).

It is, however, permitted to address recipients with an opt-out in the registry if they have opted-in for specific telemarketing. An informed consent is needed.

Similar rules are included in the principle C.4 paragraph 2 No 4 of the Swiss Fair Competition Commission. The Commission has to deal with illicit telemarketing on a regular basis.

6.3 Text Messaging

Marketing communication spread by means of text messaging is subject to the same rules as email marketing. See **6.1 Email Marketing**.

6.4 Targeted/Interest-Based Advertising

General Remarks

The general rules for targeted/interest-based advertising are set out in the Data Protection Act. Whether additional rules apply must be assessed on a case-by-case basis. If the effective communication should take place in the form of (personalised) email marketing, the specific regulations regarding email marketing would apply as well (see **6.1 Email Marketing**).

Data Privacy Law

The FDPIC has decided that web tracking or retargeting tools generally include data processing even though the tools only process IP addresses. The general data processing principles as set out in Article 4 of the current DPA (Article 6, revised DPA) apply.

- The data subjects must be informed of the data processing (ie, the collected data and the purpose of the processing).
- The data processing must be proportional (ie, only as much data as is necessary for the purpose may be collected and processed).
- Purpose limitation.

Consent is not needed. It is solely necessary if the personality of the data subject is infringed (Article 13, current DPA and Article 31, revised DPA).

6.5 Marketing to Children

Advertising Regulations

Marketing to children is prohibited with regard to certain products (alcohol, tobacco, etc). Otherwise, there are no specific rules. Yet, it should be taken into account that, for advertising that applies to children, the standard for review will be the average understanding of children.

Data Privacy Laws

With regard to the processing of personal data of children, there are no specific regulations. However, the fact that the personal data of children is collected must be taken into account in connection with the transparency principle. Information provided to children about data processing must be written in a way that is understood by children. If consent is needed for data processing, not only is consent from the children needed, but also approval from the parents in the case of minors.

7. Sweepstakes and Other Consumer Promotions

7.1 Sweepstakes and Contests

General Requirements

The following requirements must be complied with regarding the conduct of sweepstakes and contests.

Data privacy laws
The processing of personal data in connection with sweepstakes or contests must comply with the data privacy laws. If personal data submitted by participants shall also be used for purposes other than the conduct of the sweepstake/contest, the participants must be informed about this other purpose and consent might be necessary – in particular for email marketing.

Unfair competition laws
Unfair competition laws require transparent information about the sweepstakes/contest, in particular about eligibility for participation, the participation period, how to participate, the prize, etc.

Trade mark and copyright laws
Trade mark and copyright laws must be considered if third-party trade marks and pictures are used, for example, for the description of the prize if it is a third-party branded product.

Swiss Gambling Act (Geldspielgesetz)
Sweepstakes and contests are most likely to be qualified as money games. The statute generally requires money games to have an approval/licence. However, certain sweepstakes and contests are excluded from the Gambling Act (see below).

Swiss Gambling Act
Sweepstakes and contests with free participation are most likely not within the scope of the Swiss Gambling Act. Approval is therefore not needed. However, the free participation option must provide the participants with an equal winning chance to that of paid participants. There is, however, so far, no decision in this respect.

Even if participation in a sweepstake or contest were not free (ie, if the participants had to purchase a product or conclude another contract in order to participate) the respective sweepstakes and contests could be exempted from the approval obligation. Short-term promotional lotteries and games of skill that do not involve the risk of excessive gambling, and where participation is exclusively through the purchase of goods or services offered at no more than market price, are exempted from the Swiss Gambling Act (Article 1 paragraph 2 littera d, Swiss Gambling Act).

7.2 Contests of Skill and Games of Chance

The Swiss Gambling Act distinguishes between contests of skill and games of chance (lotteries).

Contests of skill are defined as money games in which the winning chance depends entirely or mainly on the skill of the player (Article 3 littera d Swiss Gambling Act). Money games are defined as games in which there is the prospect of a monetary gain or other monetary advantage in return for a monetary stake or the conclusion of a legal transaction (Article 3 littera a, Swiss Gambling Act).

Games of chance or lotteries are defined as money games which are open to an unlimited or at least a high number of people and where the result is determined by one and the same random draw or by a similar procedure (Article 3 littera b, Swiss Gambling Act).

Money games, including contests of skill and games of chance, are subject to an approval or licence (see Article 4, Swiss Gambling Act).

However, and as mentioned in **7.1 Sweepstakes and Contests**, money games with free participation and certain sweepstakes and contests are exempted from these obligations. It is advisable

and common practice to design promotional sweepstakes and contests in a manner that exempts them from the approval and licence duty.

7.3 Registration and Approval Requirements

Games of chance and contests of skill for promotional purposes must generally not be registered or approved if designed in a proper manner (see **7.1 Sweepstakes and Contents** and **7.2 Contests of Skill and Games of Chance**).

If such games or contests are not exempted from the Swiss Gambling Act, an approval or licence is needed.

With respect to the approval process, the statute distinguishes between large money games and small money games. Large money games are games of chances or contests of skill, which are executed in an automated manner, not only in one Swiss canton or online. Other contests and games of chance are small money games.

Large Money Games

Large money games must be approved by the inter-cantonal money game authority (Article 21, Swiss Gambling Act). Currently, the inter-cantonal authority is the Comlot. However, a new authority will soon be established, the inter-cantonal money game supervisory authority (GESPA).

Approval is subject to certain requirements, such as a registered seat in Switzerland, good reputation, financial stability, etc (Articles 22 and 24 et seq, Swiss Gambling Act). The main issue is that the cantons may determine the maximum numbers of organisers for money games. This means that an organiser might not receive an approval even if it complies with all requirements.

Small Money Games

Approval for small money games is granted by the cantonal authority in the canton in which the money game is executed (see Articles 32 et seq, Swiss Gambling Act).

Sanctions

The execution of money games without the necessary approval is subject to criminal sanctions. Articles 130 et seq of the Swiss Gambling Act distinguishes between large and small money games.

The intentional illegal execution of large money games is sanctioned with imprisonment for up to three years or a monetary penalty of up to CHF540,000.

The intentional execution of small money games without approval is sanctioned with a monetary penalty of up to CHF500,000.

7.4 Loyalty Programmes

Unfair Competition Laws

There is no special statute dealing with loyalty programmes. Such programmes must therefore comply in general with the Unfair Competition Act.

Which provisions in the Unfair Competition Act apply must be assessed on a case-by-case basis.

Data Privacy Laws

Data processing in connection with loyalty programmes must comply with the Swiss Data Protection Act, in particular with the general principles on data processing (Article 4, current DPA and Article 6, revised DPA).

7.5 Free and Reduced-Price Offers

Prohibition against Deceptive or Misleading Price Declarations

Article 3 paragraph 1 littera b of the UCA requires that information about prices must not be inaccurate, deceptive or misleading.

Furthermore, Article 18 of the UCA sets forth that the declaration of price reductions in a misleading manner is unfair.

Ordinance on Price Declaration

Article 18 of the UCA is concretised by the Ordinance on Price Declaration (PBV).

Reduced-price offers are subject to several requirements as set out in Articles 16 et seq of the PBV.

The ordinary price, as well as the reduced one, must be indicated.

It must be specified for which products the reduced price is applicable. However, specification is not needed if the reduced price applies to several products, product groups, or entire assortments. In that case, it must solely be specified for which categories of groups the reduced price applies (eg, "50% off on all coffee capsule products").

The duration of the reduced-price campaign is limited. A reduced-price campaign may only last for a maximum of two months. The campaign period is calculated in the following way: in the case that the ordinary price prior to the reduced price was charged for two months, the reduced price may last for one month (50% of the period for which the ordinary price was charged prior to the campaign). This also means that a new reduced-price campaign for the same product cannot immediately follow another one.

Additional Requirements

Reduced-price campaigns must also comply with Article 3 paragraph 1 littera f of the UCA. Products and services must not be offered under the cost price repeatedly and in a manner that deceives the consumer about the performance of the advertising company or competitors.

Finally, free offers must comply with Article 3 paragraph 1 littera g of the UCA if it is a premium offer – purchase one product X and receive another product for free (ie, as premium). The premium must not deceive the consumer about the effective value of the offer. There is no deception if the value of the main product and the premium are known or declared

7.6 Automatic Renewal/Continuous Service Offers

Generally, such provisions are subject to contractual freedom.

Mandatory legal provisions and the following restrictions must, however, be observed.

Contractual relationships between a marketer and a consumer are often governed by general terms and conditions. Based on Article 8 of the UCA, general terms and conditions can be subject to ex post judicial control. This control applies the so called "rule of unusuality": a clause, the content of which the approving party did not expect and could not reasonably have expected under the circumstances, shall not be valid. This can be the case if a clause is unusual and unrelated to the business. According to the Federal Court, automatic contract renewals are not unusual per se. However, whether a provision is unusual is determined from the point of view of the approving party at the time of the contract conclusion.

Furthermore, Article 27 of the Swiss Civil Code and Articles 19 and 20 of the Code of Obligations must be taken into account for both general terms and conditions and individual agreements. These provisions prevent an excessive contractual binding of a contractual party. This could become relevant in the event of continued renewal of a contract and the associated obligation that a consumer enters into.

A parliamentary initiative to restrict automatic renewal of service contracts has been debated in the parliament. However, the Council of State rejected an amendment of the Swiss Civil Code.

8. Sports Betting/Gambling

8.1 Legality & General Regulatory Framework

Sports betting, as well as other forms of gambling, are permitted under rather restrictive requirements.

The Swiss Gambling Act distinguishes between large and small money games (see **7.3 Registration and Approval Requirements**). Large money games include sports betting and games of skill that are automated, inter-cantonal or online. Small money games are, for example, sports betting and small poker tournaments (with small stakes and winning possibilities).

Large sports betting may in principle only be offered by Swisslos and Lotterie Romande.

Small sports betting, provided it is held on the same premises as the sports event in question, may also be offered by clubs and companies. In addition, sports betting must be organised locally according to the totalisator principle; this means the bettors bet among themselves. The stake may not exceed CHF200. The total of all bets per day is limited to CHF200,000. The organiser requires a cantonal permit. There is no entitlement to these licences, the cantonal authority can grant them, but it does not have to (see **7.3 Registration and Approval Requirements**).

8.2 Special Rules & Regulations

Advertising must not be intrusive or misleading (Article 74, Gambling Act). This applies, in particular, to advertising messages that create and reinforce a false impression in the minds of players, and to advertising in a form or at a time that is chosen in such a way that the player cannot think about it in peace.

Furthermore, it is prohibited to direct advertising to minors or barred persons or to advertise a money game that is not licensed in Switzerland – this is, in particular, important for the advertising of foreign sports betting offers to Swiss recipients. Advertising directed personally to players via electronic channels (eg, email, SMS, and messaging systems in certain applications or social networks) must offer an easy way to opt out of the advertising or to unsubscribe from the address list.

9. Web 3.0

9.1 Cryptocurrency and Non-fungible Tokens (NFTs)

There are no specific rules or regulations regarding advertising, marketing or sale of cryptocurrency and/or NFTs, but rather the application of rules and regulations depends on the legal qualification of the crypto-asset in question. In particular, if a crypto-asset qualifies as a security, the rules regarding offering and advertising of the Financial Services Act (FinSA) and the

Financial Service Ordinance (FinSO) have to be observed, specifically Articles 35 et seq and Article 68 of the FinSA. In certain special cases, if a crypto-asset would qualify as a unit of a collective investment scheme, then the specific rules of the Collective Investment Scheme Act (CISA) apply.

However, in any case, the rules of the UCA have to be adhered to.

9.2 Metaverse

There are no specific rules or regulations regarding advertising within the metaverse. However, the regulations which apply to advertising in general, also apply to advertising activities in the metaverse. In this regard, the UCA and the guidelines on fairness in commercial communication provided by the Swiss Commission for Fairness (SCF) are particularly relevant.

According to the UCA and the above-mentioned guidelines, commercial communication (advertising) shall not:

- disparage or deliberately ridicule other companies, persons, products or commercial activities;
- present a person or organisation as more favourable (than others) by communicating inaccurate or misleading representations or statements;
- imitate other (pre-existing) products or services in a way that might lead to confusions with said pre-existing products or services;
- use inaccurate or unobjective test results in order to promote a product or service;
- use inaccurate or unlawful indications of origin (eg, Swiss cross for products that do not originate from Switzerland); and
- disguise the commercial purpose of advertising (eg, if an influencer receives a remuneration for the promotion of a product, but their followers are led to believe that it is a personal recommendation or an objective product review).

Furthermore, the UCA entails rather strict provisions on promotional raffles/lotteries (eg, Article 3 paragraph 1 littera t, UCA) and aggressive product marketing activities, which also apply to the metaverse.

Even though advertising in the metaverse is widely discussed in legal articles, it has not been discussed by the authorities or the legislature. This might change if the metaverse transitions from a topic of discussion to a more concrete trend. According to trend barometers, this might happen in the course of 2023.

9.3 Digital Platforms

Switzerland has not implemented any specific marketing or advertising laws to account for the rise of digital advertising platforms and the use of adtech. However, the provisions of the UCA are worded rather broadly and cover many of the issues associated with new forms of advertising.

In addition to the UCA, the DPA is relevant to personalised marketing activities. The new DPA, which is in many aspects similar to the EU GDPR, will enter into force on 1 September 2023. In contrast to the EU GDPR, there is no need for a specific legal basis (eg, consent) for all processing activities. This also applies to profiling (by private companies or persons) if the profiling does not constitute a “high risk” for the rights and freedoms of the data subject. Even if the data subject’s consent is not required in all circumstances, many requirements of the DPA must be respected when processing personal data for marketing activities. For instance, information and data security requirements, purpose

limitation, data minimisation requirements and the requirement of keeping records of processing activities. Moreover, transfers of personal data to countries with an inadequate level of data protection (such as the USA) are critical and their legal compliance must be assessed on a case-by-case basis.

The Federal Data Protection and Information Commissioner has not yet had to decide on adtech solutions. In other assessments regarding advertising and data protection laws, the Federal Data Protection and Information Commissioner had the tendency to follow decisions by EU Data Protection Authorities (for example, regarding the use of cookies and tracking tools).

10. Product Compliance

10.1 Regulated Products

The Ordinance on Beverages sets forth the criteria to be complied with by specific beverages – ie, it determines when a beverage may be marketed as mineral water, fruit water, alcohol-free beer, etc. It also sets out certain restrictions for the design of the labels, marketing materials, and for the use of geographic origins (eg, whiskey).

The Federal Statute on Spirits (Alcohol Statutes) contains two provisions dealing with (and restricting) the marketing and advertising of spirits. Article 41 sets out that spirits may not be sold and marketed to consumers under 18 years, that below-cost prices are prohibited, that free samples to an unspecified consumer circle is prohibited, etc. Article 42b contains direct advertising restrictions, such as the requirement that advertising for spirits must only contain information, which directly relates to the product or its features – it is, for example, prohibited to include in advertising for spirits pictures of an attractive sandy beach. It is also prohibited to display spirit ads in specific locations, such as on public transport. Finally, it is also prohibited to distribute spirits as prizes in a sweepstake.

Article 1 of the Federal Statute on Banking Institutes sets out that the term “bank” or “banking institute” must only be used in the advertising (and commercial correspondence in general) of institutes, which are subject to the statute and supervised by the Swiss Financial Services Supervisory Authority. Article 4quater prohibits misleading or intrusive advertising by the Swiss seat of a banking institute. Article 3 of the Ordinance on Banking Institutes sets out that only institutes with a banking licence are permitted to advertise the acceptance of deposits from the public.

Article 20 of the Federal Statute on Chemical Substances sets out that the advertising for dangerous chemicals or chemical mixtures must not mislead the public about the danger of the products or lead to an improper use. Article 45 of the Ordinance on Chemicals prohibits the use of specific terms, such as “non-toxic”, “eco-friendly”, in the advertising for such products. Article 75 of the Ordinance contains further advertising restrictions, in particular regarding bio-claims.

Article 31 of the Federal Statute on Medicinal Products and Medical Devices sets out as a principle that it is permitted to advertise all types of medicinal products if the advertising is directed exclusively at persons who prescribe or dispense them. It is also permitted to advertise non-prescription medicinal products to the general public. Article 32 deals with unlawful advertising for medicinal products. Further details on the advertising of medicinal products are included in the Ordinance on Advertising of Medicinal Products. The Ordinance differentiates between

advertising to specialists and advertising to the public.

Article 12 of the Ordinance on Foodstuffs stipulates a general prohibition against misleading and deceiving consumers in the advertising of foodstuffs. Article 12 paragraph 3 of the Ordinance prohibits the use of specific claims and information in advertising, such as health-related claims (with certain exceptions), deceptive claims about the origin of a foodstuff, etc.

Since the individual substances of cannabinoids as well as hemp extracts containing cannabinoids have historically not been consumed to any significant extent in connection with foodstuffs, products constituted in this way are regularly to be qualified as novel food. Advertising for novel food is subject to the same requirements as set out for other foodstuff above. Please note that certain products containing CBD (permitted are only products with less than 1% THC) can also be qualified as utility articles, such as pouches (*snus*) with CBD or cosmetic articles. For such utility articles, the advertising must not be deceptive, misleading or inaccurate and the advertising must not contain any health claims (Article 18, Federal Statute on Foodstuff and Utility Articles).

Articles 17 et seq of the Ordinance on Tobacco Products prohibits the use of misleading or deceptive claims in advertising. Furthermore, it prohibits advertising tobacco products to consumers under 18 years old, in specific locations (eg, close to schools) or on specific products (eg, on advertising material which is distributed to minors). In addition, the industry has established its own advertising guidance, which expand on the advertising restrictions set out in the Ordinance. Such advertising self-regulations also exist regarding e-cigarettes as well as oral tobacco or nicotine products. Advertising of tobacco products and e-cigarettes is further restricted by some cantonal laws.

A new Federal Statute on Tobacco Products, which is expected to enter into force in the summer of 2023, will cover e-cigarettes, oral products with tobacco or with nicotine only, and "heat not burn" products. The new statute contains advertising restrictions for all of these products, such as no advertising and sale to minors, no deceptive claims, etc. Certain sales activities, such as price-offs and raffles, shall be prohibited. The advertising related provisions are the most contested provisions in this new statute.

10.2 Other Products

The most relevant specific rules for products have been mentioned. Advertising for other products or services must be assessed on a case-by-case basis.

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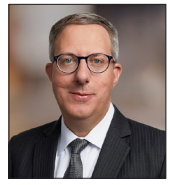

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Trends and Developments

Contributed by:
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Overview

Even though the Swiss authorities and the Swiss legislature are less active than their counterparts in the EU, there have been interesting developments in Swiss advertising and marketing law recently. This article will start by highlighting a selection of important legislative changes. These include an important revision of the Price Indication Ordinance and the reform of the Data Protection Act. Subsequently, a notable new court decision is presented, which deals with the topic of misleading advertising claims.

Current Legislative Changes

Price Indication Ordinance

On 1 July 2022, a revision of the Price Indication Ordinance entered into force. The revision clarifies certain topics, which are relevant for the online price indication.

Each price announcement must always include all surcharges that cannot be freely selected and thus correspond to the actual price to be paid. The indication of such surcharges (eg, service fees) only at the end of the ordering process is not permitted. Surcharges that cannot be freely selected must be integrated into the stated price from the outset.

It has also been clarified that shipping costs still do not have to be integrated into the stated price. They may continue to be shown separately.

Swiss Data Protection Act

Following the adoption of the EU General Data Protection Regulation (GDPR) in 2016, the Swiss government launched a legislative process to revise the Swiss Data Protection Act (DPA) and published a draft at the end of 2016. After controversial debates, the Parliament passed the final version of the future DPA at the end of September 2020. One of the issues that remained controversial right until the end was the regulation of profiling, which is of considerable relevance to marketing. In June 2021, the Federal Council published a draft of the implementing regulations. The draft has been the subject of considerable debate, in particular the provisions that should provide guidance regarding the data security measures to be implemented by data controllers. Non-compliance with the required data security measures can be sanctioned with a penalty. Interested industry associations and companies can currently file their comments on the draft to the Federal Council. The Federal Council announced on 31 August 2022 that the revised DPA will enter into force on 1 September 2023. It is important to mention that there will be no implementation period, which means that all new provisions will be immediately in force and enforceable on 1 September 2023. It is therefore important that companies start the implementation project early enough.

Several new duties and stricter sanctions

The Data Protection Act is significant for all companies in the marketing sector and will continue to have a very wide scope of application. However, one of the most remarkable new features is the introduction of direct criminal sanctions against natural persons responsible for data processing activities up to a maximum amount of CHF250,000. This is provided instead of administrative sanctions against corporations and

legal persons, as is the case in EU law. Together with the extension of the powers of the Federal Data Protection Commissioner, this intimidating sanctions regime is intended to improve enforcement. In addition to the expansion of the rights of the data subjects, numerous duties established by the EU GDPR have also been adopted, such as the duties to keep a record of data processing activities, to notify data breaches and to conduct data protection impact assessments. For companies domiciled abroad, it should also be emphasised that, under certain conditions, there is an obligation to appoint a legal representative in Switzerland.

Stricter information requirements

The extension of information duties is certainly of great practical importance for the implementation of advertising campaigns and interaction with data subjects for marketing purposes. In addition to the identity and contact details of the controller, information must, at least, be provided on the purpose of the processing and, in the case of the transfer of data, the categories of recipients and any foreign countries to which the data is transferred. This also applies in the case of obtaining data from the databases of other companies or publicly accessible sources. In the case of such indirect collection of data, information must also be provided on the categories of data and it must be noted that in many cases it will not be sufficient to simply display a privacy policy on the website. Rather, the data subjects will have to be actively informed. Although the new law also contains exceptions to the information requirements, careful consideration must be taken when invoking these exceptions, because the violation of the information duties is subject to criminal sanctions.

New rules for profiling

As mentioned in the introduction to this section on the Swiss data protection landscape, the regulation of profiling was particularly controversial in Parliament. In the future, the definition of profiling will be the same as under the EU GDPR, although there are special requirements for high-risk profiling. Thus, in the future, Swiss data protection law will define profiling as follows: "any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements".

The revised DPA qualifies as high-risk profiling "profiling which involves a high risk to the personality or fundamental rights of the data subject, by creating a link between data that allows an assessment of essential aspects of the personality of a natural person".

The debates in Parliament have led to some uncertainty as to whether high-risk profiling can still be permitted without consent. Even if the question will probably still lead to discussions in the literature and jurisdiction, as things stand at present, it can be assumed that Parliament does not want to deviate from the established principles with regard to (high-risk) profiling. For private controllers, consent or other justification will therefore only be required in the case of data processing that violates personality rights. However, depending on the type and scope of (high-risk) profiling, this may be the case relatively quickly, and thus consent or other justification may be required. Since there is often great uncertainty about any justification based on an overriding interest, obtaining consent is likely to

be recommended in many cases in the future as well. This will apply all the more if profiling is related to email marketing, where, due to the special regulation in the law against unfair competition, consent (opt-in) must, in principle, be obtained anyway. In order for consent to serve as a safeguard and justification in the case of high-risk profiling, consent must be explicit under the revised DPA. This means that higher standards apply with regard to the validity of consent, although the details are controversial.

Important Court Decisions

In recent months, the Federal Supreme Court has handed down the following ruling with regard to Swiss advertising and marketing law.

Lawfulness of advertising claims on a ticket platform

Viagogo II

In its decision of 27 October 2021, the Federal Supreme Court had to decide whether certain marketing claims and activities by a ticket exchange platform constituted deceptive advertising in the sense of Article 3 paragraph 1 lit b of the UCA (BGer 4A_314/2021). It must be emphasised that the Federal Supreme Court did only assess the claims which were brought forward in the appeal.

The case dealt with tickets for a circus show. The claimant was the operator of the circus for which the tickets were offered on the ticket exchange. The Federal Supreme Court upheld the decision of the lower court that the ticket exchange platform infringed Article 3 paragraph 1 lit b of the UCA in several ways.

The ticket exchange platform infringed the UCA by claiming that certain shows of the circus were already or almost sold out even though there were still tickets available in the official sales channels. The Court held that the claim "sold out" could be understood by the users in the specific situation to mean that tickets are not only sold out on the ticket exchange, but also in official sales channels. The Court considered the other advertising claims of the ticket exchange in the same way, such as the claim that it sells tickets that can no longer be purchased in other sales channels. In addition, the high prices for the tickets on the ticket exchange also communicated a scarcity of the tickets.

Furthermore, the ticket exchange infringed the UCA by using price category descriptions and by publishing seating plans that did not correspond to the ones used by the circus itself. The ticket exchange claims that the respective information was not provided by the ticket exchange, but rather by the sellers of the tickets. The Court rejected this argument and decided that it is the ticket exchange that determines the information to be provided by the sellers and to be displayed on the platform to a rather extensive degree.

Moreover, the ticket exchange violated the UCA by increasing the price of the tickets gradually during the order process without displaying the effective total price in a transparent manner and without granting the user more than three minutes to take the purchase decision. In that regard, the Court held that the UCA was also infringed by displaying claims and pop-up banners which suggested a substantial demand or a rare offer (eg, "there are two other users in the waiting list for these tickets") without mentioning that these statements only apply to the ticket exchange and not to other sales channels. Finally, the countdown displayed to finalise the order process was less than ten minutes.

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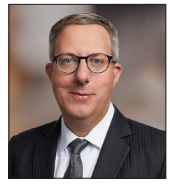

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