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Advertising & Marketing

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Law and Practice

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1. Legal/Regulatory Framework

1.1 Source of Regulations

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 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 thereto (Article 3 paragraph 1 littera f UCA);
- requirements for offers with premiums and the advertising 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 trademarks of third parties in advertising);
- the Copyright Act (when displaying pictures or video 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

There are advertising regulations for specific products and services in the respective sector regulations, such as advertising restrictions for tobacco and alcohol products, advertising requirements for chemical substances, foodstuffs, financial services, and medicinal products. (Please refer to **1.6 Regulated Industries** for further discussion.)

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. They 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 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 Source of Regulations**, such as the trademark and 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 (for example, 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 for 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 Source of Regulations**, 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, amongst others, Article 3 of the UCA is sanctioned with imprisonment for up to three years or a monetary penalty of up to CHF540,000. We are not aware of any decision in which a prison sentence was awarded.

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, which have the capacity to sue in the sense of Article 9 and 10 UCA.

Swiss Fair Competition Commission
The Commission enforces its own principles (see **1.1 Source of Regulations**) 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 Scope of Liability

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 (for example, 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 responsible individual. In that case, criminal authorities often investigate the directors or employees who were in charge of marketing decisions in a 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-Regulation

As mentioned in **1.1 Source of Regulations** and **1.2 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 **1.6 Regulated Industries**.

1.5 Private Right of Action

Whether consumers/private citizens have a private right of action depends on the infringed provisions/statutes.

In the case of an infringement of the trademark or copyright statute, only the owners of the respective trademark 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. He or she 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 Regulatory Authorities**).

1.6 Regulated Industries

There are many advertising rules for specific industries, products or services. Consequently, whether specific advertising requirements apply, in addition to the UCA, must be assessed on a case-by-case basis.

The most important regulations are set out below.

Advertising Regulations for Foodstuffs
The regulations are set forth in the Swiss Federal Statute on Foodstuffs and Utility Articles (LMG) and the ordinances thereto.

Deceptive and inaccurate claims are prohibited (Article 18 LMG). Misleading claims are, in particular, any presentation, labelling, packaging and advertising, which are liable to deceive consumers as to the manufacture, composition, condition, method of production, storage life, country of production, ori-

gin of the raw materials or components, particular effects or special value of the product.

It is also prohibited to use health-related claims in connection with foodstuffs (Article 12 paragraph 2 littera c Foodstuff and Utility Article Ordinance, LGV), unless the respective claim is approved by the competent authorities or included in Annex 14 to the Ordinance on Foodstuffs Information.

Advertising Regulations for Medicinal Products

There is a specific ordinance dealing with advertising for medicinal products (Ordinance on the Advertising of Medicinal Products, AWV).

It distinguishes between public advertising for medicinal products and advertising directed to healthcare professionals. For prescribed medicinal products, public advertising is prohibited.

All advertising to the public is deemed unlawful if:

- it is misleading or contrary to public order and morality;
- it may incite an excessive, abusive or inappropriate use of medicines; or
- it is for medicines that may not be placed on the market in Switzerland (Article 31 paragraph 1 littera b and Article 32 Therapeutic Act; Article 14 AWV).

The advertising must be recognisable as such and clearly distinguishable from editorial contributions.

There are certain special provisions for advertising of medicines of categories C and D in electronic media.

Advertising of medicines on the internet without any access restriction is considered to be advertising to the public (see Article 15 littera c AWV). Therefore, the rules applicable to advertising to the public apply.

Swissmedic, the federal agency enforcing the medicinal products regulations, has issued several guidelines dealing with advertising of medicinal products. Most of the documents and information are in German, French, and Italian; only few are also available in English.

Finally, there is some self-regulation containing advertising-related provisions, such as the "Code of Conduct of the Pharmaceutical Industry in Switzerland of December 4, 2003, revised on September 6, 2013".

Advertising Regulations for Alcohol and Tobacco Products

Alcohol

The advertising regulations for alcohol are included in the Federal Statute on Alcoholic Beverages (Articles 42 and 43 Federal Statute on Alcohol). Only spirits, including alcopops, are covered by these regulations; they do not apply to beer and wine.

Advertising for spirits may only contain information and illustrations in word, picture and sound, which directly relate to the product and its properties (Article 42b paragraph 1 Federal Statute on Alcohol). The presentation of the spirit drink, its production and its characteristics are permitted. However, the presentation of the consumption of spirits is not permitted. In particular, any form of advertising, which is intended to convey a particular attitude to life (lifestyle) is prohibited. Glasses filled with spirits or drink preparations (eg, cocktails) may be displayed. Illustrations of appetisers and snacks consumed with spirits are also permitted.

The Federal Custom Agency has published a guideline for alcohol advertising.

Furthermore, it is prohibited to direct advertising to minors (ie, individuals under 18 years).

Tobacco products

Advertising regulations regarding tobacco products are set out in the Tobacco Ordinance (Article 17 Tobacco Ordinance).

It is, for example, prohibited to deceive consumers about the damaging effect of tobacco consumption. Deceptive advertising is prohibited in general.

Furthermore, the ordinance also prohibits tobacco advertising in certain locations or communication channels. Advertising for tobacco products must also not be directed to minors.

There is advertising-related self-regulation for tobacco products in the form of the agreement between Swiss Cigarette and the Swiss Fair Competition Commission on self-regulation of the tobacco industry regarding advertising, dated 1 February 2018; available only in German and French.

In connection with the advertising for tobacco products cantonal administrative law must also be taken into account. Many cantons have issued specific provisions (in particular prohibitions) regarding tobacco advertising addressing minors and tobacco advertising in public spaces.

Finally, some cantons have also published advertising restrictions regarding e-cigarettes. There is also a self-regulation dealing with the advertising for e-cigarettes, the Swiss Trade Vape

Association's CODEX for manufacturers and distributors for the marketing of electric steam appliances and liquids; only available in German and French.

2. Advertising Claims

2.1 General Standards

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 (age, social position, geographically);
- clarifying the knowledge and skills of the average addressee represented by the target group (education, language skills, previous knowledge or understanding, low level of knowledge (eg, among young people or children) and attention (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 Actionable 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 General Standards**) 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 claim in the sense of Article 3 paragraph 1 littera b of the UCA. However, whether the value judgement does not contain any factual statements at all must be assessed. The understanding of the average addressee is, again, decisive.

2.3 Claim Substantiation

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 General Standards**, 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

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 Clinical Studies

Whether human clinical studies are required depends on the type of claim. If advertising refers to clinical studies (for exam-

ple 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 Regulated Claims

There are types of claim that are subject to specific rules or regulations. However, the respective regulations are incorporated into different statutes and ordinances. Whether specific regulations apply to a 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.

Bio-claims

These 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).

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 that the claim does not apply to the entire product.

Swissness Provisions

The so-called Swissness provisions in the Trademark Act (Articles 47 et seq Trademark Act) 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 General Requirements

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, misleading, 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 UCA. However, identification of a competitor may affect the assessment of whether a comparison is inaccurate, misleading, etc.

Article 3 paragraph 1 littera e 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 General Standards**) of the comparative advertising is decisive.

3.3 Challenging Advertising Claims

Comparative advertising claims are, pursuant to principle B.3 of the Swiss Fair Competition Commission, inaccurate if the compared products or services are not comparable (ie, too different, if non-identical or non-similar features of a product or service

are compared) or if it is wrongly indicated that the comparison is comprehensive.

Again, it should be mentioned that the assessment is conducted in an objective manner by the courts; there are no "misleading or inaccuracy rates" used under Swiss law.

3.4 Challenging Comparative Claims

Remedies Against Comparative Advertising

As discussed in **1. Legal/Regulatory Framework**, 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 the case of 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.

Trends and Major Cases in the Last 12 Months

In a decision of 2 December 2019 (4A_381/2019), the Swiss Federal Court had to decide on whether the claim of a company that its product consumes much less energy than those of its competitors was inaccurate and infringed Article 3 paragraph 1 littera e of the UCA. If an advert claims that a supplier is better than the overall competition with a particular offer (superlative advertising) or that there are no competing products with comparable characteristics (unique selling proposition advertising), the claim must be true. The cantonal court only assessed whether a product with an electric servo drive results in 95% lower electricity costs than the use of compressed air. It did not, however, assess whether there were any competing products also using an electric servo drive. The claimant argued that it also offered products with an electric servo drive. The respondent claimed that, in this case, the claimant was not affected by the advertising. However, according to the Federal Court, the advertising claim had to be interpreted in the light of the impression of the average addressee; which was that all competitors used compressed air and that the products of all competitors therefore had worse energy consumption.

In a decision of 20 November 2019, the Swiss Fair Competition Commission had to decide a claim regarding comparative advertising in which tests results were used in order to compare the products of the respondent with those of the claimant and other competitors. The Swiss Fair Competition Commission came to the conclusion that the comparative advertising was misleading in the sense of Article 3 paragraph 1 littera e UCA. The respondent carried out its own "test" according to criteria it had set itself, with the result that its own product emerged as the test winner and was presented as such in commercial communications. The Commission held that this kind of test does not comply with its guidelines regarding the communication of test results in advertising. Consequently, the claim "test winner" is misleading in the sense of Article 3 paragraph 1 littera e of the UCA.

4. Social/Digital Media

4.1 General Requirements

There is no specific statute dealing with advertising in social media.

The general provisions, mentioned in **1. Legal/Regulatory Framework**, 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 General Standards**). This was emphasised by the 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 himself which persons or companies he wants 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, his 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 Issues

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 in what context 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

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

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 Platform Requirements

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 Native Advertising**).

4.6 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.

5. Influencer Campaigns

5.1 Trends

Current decisions of the Swiss Fair Competition Commission regarding influencer marketing reveal a more liberal approach than in previous decisions. 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 Marketing 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

There is no case law in respect to advertisers being held responsible for content posted by their advisers. 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**), the respondent was always the influencer.

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 of the 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 a 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 we are focusing, in this chapter, on Swiss law, we will not further evaluate 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 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 – 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**). 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 his or her mail address from the mailing list (Article 9 UCA). Damage claims are rare, as the claimant has to prove effective financial damage. We are not aware of any such civil litigation. 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; 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 case of internet-based telemarketing, the same rules as for email marketing apply (see **6.1 Email Marketing**).

For other 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 commu-

nication 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 of the 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 in any case 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 the 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

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 sweepstake/contest, in particular about eligibility for participation, the participation period, how to participate, the prize, etc.

Trademark and copyright laws
Trademark and copyright laws must be considered if third-party trademarks 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. An 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

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).

Approval for Money Games
Money games, including contests of skill and games of chance, are subject to an approval or licence (see Article 4 of the Swiss Gambling Act).

However, and as mentioned in **7.1 Sweepstakes**, 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 Regulatory Bodies

General Information
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 **7.2 Contests of Skill**).

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 intercantonal money game authority (Article 21 Swiss Gambling Act). Currently, the intercantonal authority is the Comlot. However, a new authority will soon be established, the intercantonal money game supervisory authority (GESPA).

Approval is subject to certain requirements, such as a registered seat in Switzerland, good reputation, financial stability, etc (Article 22 and Articles 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.

It must be assessed on a case-by-case basis, which provisions in the Unfair Competition Act apply.

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 Unfair Competition Act requires that information about prices must not be inaccurate, deceptive, or misleading.

Furthermore, Article 18 of the Unfair Competition Act sets forth that the declaration of price reductions in a misleading manner is unfair.

Ordinance on Price Declaration
Article 18 of the Unfair Competition Act 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 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, which a consumer enters into.

Currently a Parliamentary initiative is pending to restrict automatic renewal of service contracts.

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Trends and Developments

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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 many interesting developments in Swiss advertising and marketing law recently. This article will start by highlighting a selection of important legislative changes. These include the new Gambling Act, the revision of the Telecommunications Act and the reform of the Data Protection Act. Subsequently, several notable new judgments are presented, which deal with topics such as customer ratings, misleading advertising claims and the correct indication of prices in advertising.

Current Legislative Changes

Swiss Gambling Act

Explicit definition of permissible lotteries

The controversial Swiss Gambling Act finally came into force on 1 January 2019. During the legislative process, the public debate focused on the introduction of the blocking of unauthorised foreign money game websites. However, the regulation of lotteries for sales promotion, which is central to the marketing industry, was also highly controversial. According to the newly adopted statute, the following lotteries are therefore explicitly permitted in Switzerland by the new Swiss Gambling Act:

- "lotteries and games of skill conducted for a short period of time for the purpose of promoting sales, which do not entail any risk of excessive gambling and in which participation is exclusively possible by way of the purchase of goods or services offered at prices not exceeding market rates"; and
- "lotteries and games of skill conducted by media companies for a short period of time for the purpose of promoting sales, which do not entail any risk of excessive gambling and in which participation is free of charge and subject to the same access and participation conditions as if a monetary stake had been placed or a legal transaction concluded".

Admissibility of "coupling" and open questions

Thus, the "coupling" or "tying" of the participation in the lottery to a purchase of products was declared permissible in principle. This was justified, inter alia, with the fact that the purchase of a product is not becoming more expensive because of the participation and in this respect no direct stake is made. However, how this should be interpreted was subject to controversy in Parliament. The Council of States initially requested that tying should only be permitted if "no stakes" are paid "with which the organiser or third parties associated with the organiser finance the game or generate a profit". Ultimately, Parliamentary Councils agreed on the requirement that the products to be purchased for participation in the lottery must be offered at "prices not exceeding market rates".

With regard to lotteries run by media companies, a compromise proposal of the National Council also ultimately prevailed. According to the original resolution of the Council of States, the widespread practice of offering a way to participate free of charge (eg, via online form) as well as participation by call or SMS to a premium rate number would no longer have been permissible. In contrast, the version now adopted "only" requires that a free participation option with equally good access and participation conditions be provided.

However, due to a lack of published case law, various questions still remain unclear. This concerns the requirement that no "danger of excessive gambling" may emanate from the lotteries and that only "short-term" lotteries should be explicitly permitted. The same applies to the question of who is to be considered a "media company" and is therefore subject to the stricter regulation.

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 a next step, the Federal Council will draft the implementing regulations and decide on the entry into force of the revised rules, although it is not expected that they will come into force before the beginning of 2022.

Several new duties and stricter sanctions

The Data Protection Act is central to 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 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 be obtained in principle 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.

Swiss Telecommunications Act

In March 2019, the Parliament also passed the revision of the Swiss Telecommunications Act, although the entry into force of the provisions has still not been determined. The revision is intended to take into account the rapid technological changes in telecommunications. A further core concern is to strengthen consumer protection under the revised law. In particular, users of telecommunications services shall be protected from unfair advertising and from abusive value-added services.

As part of the revision, the Unfair Competition Act (UCA) has also been partially revised. The proposals of the Federal Council regarding the revision of the UCA were passed by Parliament without discussion, with the exception of the controversial ban on the use of information from unfair advertising calls.

Stricter opt-out regulation for advertising calls

In 2011, a special "opt-out" regulation for promotional calls was introduced in the UCA. It expressly prohibits advertising calls in disregard of an opt-out in the form of the so-called asterisk (star symbol) next to a person's entry in the telephone directory. According to the prevailing view in the literature on the law still in force, advertising calls are permissible despite this asterisk if a business relationship exists between the caller and the recipient. This has now been recognised and introduced explicitly into the revised UCA. However, the revised law is still silent about the question of when such a business relationship exists. The definition of the term "business relationship" is thus left to the authorities and courts.

A further change associated with this provision results in significantly stricter requirements for advertising calls: persons without a telephone directory entry are to be treated as if they had requested the display of an asterisk next to their entry in a telephone directory. The reason behind this is that owners of cell phones often do not publish their numbers in a telephone directory in order to protect their privacy. These persons would not have the possibility to explain their opt-out for advertising calls by means of a simple asterisk, which is why they must be protected according to the legislator.

No use of anonymous or unlisted phone numbers used for advertising calls

In order to reduce unwanted telemarketing, another advertising method is newly defined as unfair and therefore prohibited. Under the revised UCA, it is unfair if advertising calls do not display a telephone number that is listed in the telephone directory and which the caller is authorised to use. This results in the obligation for advertisers to use and display phone numbers that are registered and recognisable as being used for such purposes. In particular, this is intended to take account of the fact that callers can sometimes define their telephone numbers arbitrarily via the Internet (Voice over IP or VoIP) and can thus also choose numbers from uninvolved third parties in order to conceal their identity (so-called spoofing).

Ban on the use of information from unfair advertising calls

A new provision introduced by the Council of States could have a particularly far-reaching impact on the companies concerned. According to this provision, anyone who relies on information obtained in connection with unfair calls within the meaning of the provisions described above is acting unfairly and may be criminally prosecuted. This is intended to address the problem that unfair advertising calls often did not entail any consequences because call centres located abroad could hardly ever be prosecuted by the competent authorities. This is because, on the one hand, it is difficult to identify the call centres and, on the other, because the authorities, due to the international nature of the matter, had to approach other countries with requests for legal assistance, which is a complicated and lengthy process.

Often, however, according to the majority in Parliament, such foreign call centres are likely to have a client or "beneficiary" (eg, a health insurance company on whose behalf telemarketing campaigns are conducted) in Switzerland. In particular, the provision is also aimed at the practice in the insurance sector, according to which call centres abroad win customers for a consultation appointment and then sell the appointment to insurance companies domiciled in Switzerland. Only if such a "beneficiary" domiciled in Switzerland also has to expect a penalty, can these practices be effectively addressed, according to the opinion of the majority in Parliament.

Revocation or blocking of domain names and telephone numbers in case of UCA violations

Another new UCA provision is of particular importance for companies beyond the telemarketing industry. It allows prosecuting authorities and courts to revoke or block domain names or telephone numbers for certain violations of the UCA in order to prevent new offences. The Federal Council justified this proposal by stating that, in the case of violations of the UCA, it is essential to block or revoke the domain name or telephone number used as soon as possible in order to prevent damage to consumers. This would at least temporarily remove the basis for the unfair activities. The measures should also enable more effective enforcement against providers based abroad. However, because these measures restrict fundamental rights, a legal basis had to be created.

The blocking or revocation can be ordered not only in the case of unfair behaviour in the field of telemarketing discussed above, but also for all unfair advertising and sales methods, such as misleading advertising or particularly aggressive sales methods. Furthermore, these measures can also be taken in case of violations against the rules on price display/indication. In this context, the Federal Council explicitly mentions the frequent case of an e-shop provider using a ".ch-domain" stating its prices (illegally) only in euros.

However, these measures should only be permitted if they are "necessary to prevent new violations". Furthermore, the measure must be proportionate. The authorities will therefore have to assess the severity of the violation in qualitative and quantitative terms and weigh it up against the intended measure.

Important Court Decisions

In recent months, the courts have also handed down numerous interesting rulings with regard to Swiss advertising and marketing law. A selection of these judgments is discussed below. It is worth noting that the judgments delivered were rather generous and in most cases the prohibitions sought by the plaintiffs were not imposed. It should be noted, however, that the decisions were made based on the specifics of each individual case and can therefore only be used as a guide to other cases with caution.

When do online customer reviews constitute criminal offences?

In a recent decision, the High Court of the Canton of Zurich assessed whether writing a negative customer review about a Zurich Gault Millau restaurant on Tripadvisor could constitute a criminal offence. Specifically, the question arose as to whether a customer's review was to be considered an unfair degradation within the meaning of the UCA. The court denied this with the reasoning that the restaurant had an excellent reputation and was rated "very good" or "excellent" on Tripadvisor by the

majority of users. In view of the large number of ratings on Tripadvisor and other platforms, a single review "in the area of the city of Zurich" was therefore not relevant to competition.

For similar reasons, in the opinion of the High Court, the threat to publish a negative rating also lacked a so-called "serious disadvantage". The threat of a negative evaluation in the event that the cost of the meal is not reimbursed does not therefore constitute an act of blackmail against the Gault-Millau restaurant concerned.

Leaving aside this blackmailing aspect, the reasoning of the court does certainly not correspond to the purpose of the relevant legal provisions in the UCA. The reasoning of the court seems therefore highly questionable. It would mean that in the case of companies with a good reputation and excellent ratings, all misleading, incorrect or unnecessarily degrading ratings would always be permissible.

Permitted advertising claims for cryptocurrencies

In a judgment of 18 April 2019 (6B_99/2019, 6B_148/2019), the Federal Supreme Court examined, for the first time, the promotion of cryptocurrencies and decided in favour of the advertiser. The cryptocurrency in question was allowed to be advertised with the slogans "worldwide easy and independent payment" or "known from [media]". In the opinion of the Federal Court, the slogans did not violate the Swiss Unfair Competition Act.

Regarding the first claim, the Federal Court held that it is possible for each user to pay with this cryptocurrency worldwide, if the seller likewise has an account of the cryptocurrency in question and the parties agree on the payment by means of this cryptocurrency. According to the Federal Supreme Court, this corresponds to the perception of the average consumer, because despite the statement "worldwide easy and independent payment", the average consumer does not assume that the cryptocurrency will be accepted everywhere, for example at the next hotel booking, as a means of payment. The advertising slogan was thus neither qualified as incorrect nor misleading.

Regarding the second claim the plaintiff considered that this gave the (incorrect) impression that the media mentioned had published positive articles about this cryptocurrency. However, the Federal Supreme Court regarded the claim as a statement open to evaluation, which suggests neither positive nor negative reporting in the media mentioned. The ambiguity that the claim could be understood as reference to a paid advertisement or as reference to an editorial contribution was immediately recognisable and the assessment of the claim also did not have to be based on the interpretation that would be less favourable to the advertiser.

The ruling illustrates that Swiss practice is rather liberal compared to other countries. In Germany in particular, ambiguous slogans have been, in many cases, interpreted to the disadvantage of the advertiser and declared inadmissible.

Leasing interest is not a price

In a landmark ruling of 27 June 2019 (BGE 145 IV 233), the Federal Supreme Court clarified the requirements of the Ordinance on Price Declaration in the case of advertising for the leasing of used cars. Specifically, it had to be assessed whether a specific advertising billboard at a railroad station was permissible. This billboard featured the advertisement "0.9% LEASING PLUS" whereas the relevant specification, especially rate per month, duration, number of instalments, cash price, effective annual interest rate, etc, were not readable due to a very small font and the distance between reader and billboard due to the tracks.

In its judgment, the Federal Supreme Court first of all noted that in advertising, unlike in offers, there is no general obligation to always indicate prices. However, if prices are indicated in advertising, they must correspond to the price actually to be paid and this price must therefore include all surcharges that cannot be freely selected by the customer. Furthermore, in this case the products must be specified in such a way that it is clear to what the price actually refers. In the present case, the violation of this duty to specify was subject to dispute.

The Federal Supreme Court concluded that the advertised interest rate for the leasing did not represent a price in the sense of the Ordinance. While it is not generally excluded that interest or insurance premiums are considered prices, the Federal Supreme Court decided that the advertised interest rate only represented an essential parameter for the calculation of the price actually to be paid rather than a price in itself. According to the Federal Court, the consumer knows that the pricing of a leasing transaction is also dependent on other factors. A comparative price evaluation by a consumer based solely on the advertised interest rate is not possible.

Consequently, in the opinion of the Federal Supreme Court, no protection of consumers is required in such cases to achieve the purpose of the Ordinance. The advertising therefore did not have to comply with the special provisions of the Ordinance for advertising with prices. Thus, this ruling also shows that the Swiss courts assume that consumers are reasonable and relatively attentive. The margins of tolerance for advertisers tend, therefore, to be greater than in other countries.

Lawfulness of advertising claims on a ticket platform

In a recent judement (HG170194), the Zurich Commercial Court commented on the ban on misleading information on the Viagogo ticket platform. The decision was awaited with par-

ticular interest, as the authorities considered it to be a precedent. However, these high expectations were disappointed. A large proportion of plaintiffs' claims have already failed for procedural and formal reasons. As a result, the Commercial Court unfortunately did not have to comment on several interesting aspects in greater depth. However, since the case has been referred to the Federal Supreme Court, a more in-depth discussion of the details of the case may still be possible.

In any case, the court's assessment of three advertising claims is worth highlighting. With regard to the slogan used by Viagogo, "100% Guarantee", the court concluded that it was a mere catch phrase used in a blatant manner. The plaintiff complained that contrary to the claim, buyers of tickets were often denied entry at the respective events because the tickets were invalid or issued to a different person. In the court's opinion, however, the slogan did not contain any message that would be open to proof and did not trigger a concrete, rational idea of the validity of the tickets. Therefore, the claim was admissible.

In contrast, the court judged the advertising with "no queues" to be misleading. This is because it was proven that online queues existed on the website. Furthermore, the advertising as "Official XY site" was also judged inadmissible because the tickets on Viagogo were in many cases only resales and the slogan would therefore lead to a false impression.

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