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Advertising & Marketing 2021

Switzerland: Law & Practice and Trends & Developments

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SWITZERLAND

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 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

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. 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 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 (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 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 Articles 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 (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 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

The most relevant industry-specific regulations are set out below.

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 (for example for 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 prize 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.

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, in specific locations (for example close to schools) or on specific products (for example 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.

1.7 Regulatory Trends

There have been no specific legal or regulatory trends regarding deceptive advertising in the past 12 months. However, the following cases are noteworthy as there is not so much case law in Switzerland in that regard.

In its decision of 1 December 2020, the Federal Supreme Court had to decide whether certain marketing claims and activities by the platform Viagogo constituted deceptive advertising in the sense of Article 3 paragraph 1 littera b of the UCA (BGer 4A_235/2020). It must be emphasised that the Federal Supreme Court only assessed the claims, which were brought forward in the appeal. One of the main topics was the determination of the average addressee of the claims (see **2.1 General Standards**). The Federal Supreme Court confirmed that the average addressee is not a specialist, but that they rather act with normal knowledge and diligence. As the purchase of event tickets is a deliberate decision, the level of attention is rather high. Based on this assumption, the Federal Supreme Court denied the existence of misleading or deceptive

claims or behaviour. The Federal Supreme Court denied, in particular, that there exists a general duty of disclosure/information on the part of Viagogo, for example, that the tickets might be personalised and might therefore not always grant access to the event (to persons other than the original purchaser). The Court held that the average addressee is sufficiently aware of the fact that Viagogo is a secondary market platform and that tickets might therefore be personalised. Finally, the Federal Supreme Court held that there is no deceptive or aggressive advertising in connection with "countdowns", "final tickets" or similar claims on the platform. The average addressee is aware that such claims solely relate to the offerings on the platform and not to tickets for the event in general.

In a decision of 26 May 2021, the Swiss Fair Competition Commission had to assess whether the claim "Fair Surf – Surf as much as you want. For all who always want to be online. Starting with CHF 20.- per month" is deceptive/misleading. The issue was that the CHF 20.- was a base price, which solely included 2 GB of data. The Commission decided that the average addressee would understand the claim in the sense that surf volume is unlimited. The claim was therefore deemed to be deceptive.

In a decision of 4 November 2020, the Swiss Fair Competition Commission had to assess whether a retailer has provided deceptive information about the availability of special offers in a sales magazine. The claimant argued that the advertised products were not or were no longer available on the indicated promotion days. The respondent argued that retailers were at that time affected by the COVID-19 measures of the Federal Council and that this had led to supply difficulties. The Commission decided that there was deceptive information about the availability of products and that Article 3 paragraph 1 littera b of the UCA was therefore infringed. The Commission emphasised that this provision can also be infringed without intent.

In a decision of 16 September 2020, the Swiss Fair Competition Commission decided that the claim "XY of the Year Switzerland" in connection with the mentioning of a test was, in the case at hand, deceptive. The claim was deceptive because the winner claim ("XY of the Year Switzerland") was not based on an objective test, but rather on a consumer survey – ie, the participating consumers voted for the winner. The Commission held that a clarification of the nature of the consumer survey must be added to the claim. Furthermore, the Commission recommended that the respondent not mention any test or indicate any test in its communication.

1.8 Impact of the COVID-19 Pandemic

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).

1.9 Political Climate

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 so far not 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 **1.6 Regulated Industries**).

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 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 (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 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 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 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 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 16 September 2020, the Swiss Fair Competition Commission had to assess whether two websites, on which flower delivery services from different providers were compared, infringed Article 3 paragraph 1 littera e of the UCA. The claimant argued that the websites were not independent, because the services of the owner of the website and connected service providers were featured in the first ranks. The Commission emphasised that comparative advertising must be accurate, not misleading and not deceptive. It is for the respondent to provide the respective evidence of this. The Commission stated that claims on the websites render the impression – from the perspective of the average addressee – that the service comparison is objective and follows the criteria for such objective tests. As the respondent did not prove that it has complied with these objective criteria, the Commission accepted the claim and recommended that the operators of the incriminated websites stop displaying the rankings.

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 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 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 Disclosures

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

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 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 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 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. 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

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).

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 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 reputa-

tion, 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.

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 of the current DPA and Article 6 of the 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 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, which a consumer enters into.

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

8. SPORTS BETTING/GAMBLING

8.1 Legality/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 Regulatory Bodies**). 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 does not have to (see **7.3 Regulatory Bodies**).

8.2 Gambling Advertising Regulation

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. CRYPTOCURRENCY AND NON-FUNGIBLE TOKENS (NFTS)

9.1 Legal/Regulatory Framework

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.

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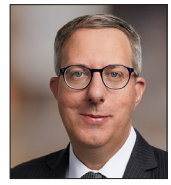

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Trends and Developments

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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 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, the revision of the Telecommunications Act and the reform of the Data Protection Act. Subsequently, two notable new court decisions are presented, which deal with topics such as misleading advertising claims and the correct indication of prices in advertising, as well as the validity period of vouchers.

Current Legislative Changes

Price Indication Ordinance

In May 2021, the Federal Council enacted important simplifications for price advertising. The Price Indication Ordinance requires that products that are subject to a price promotion must be specified in the communication of the price promotion. Prior to this legislative change, the "essential characteristics" (such as brand, type or quality) of the relevant products had to be explicitly mentioned in the advertising material itself. As of 1 July 2021, it will be permitted to refer to a website in print, radio or TV advertising in order to indicate the essential characteristics of the advertised product. It is now sufficient to clearly indicate a website address (URL) or a QR code via which the characteristics are "directly accessible, easily visible and easily readable." With this amendment to the Price Indication Ordinance, the controversial "change of media" (*Medienbruch*) is thus declared permissible – in this restricted scope. Whereas in online advertising it was already sufficient according to regulatory authorities if the mandatory details were no further than one click away, the amendment brings considerable relief, especially for print advertising or on radio and TV.

It should be noted, however, that the amended provision only applies to price advertising, and only to the obligation to provide specifications with regard to products and services being advertised. The exemption does not apply to the effective offerings and the respective price declaration in-store or on the website. Furthermore, the amendment does not exempt advertisers from the general prohibition against misleading advertising and is thus likely to raise questions in the assessment of eye-catching advertising. Finally, it is explicitly stated that the provisions from other areas of law remain applicable, in particular product law (eg, regarding the energy efficiency of passenger cars).

Even if the present amendment does not have a substantial influence, it is likely to further consolidate the already widespread practice of using QR codes and similar means in advertising. The use of QR codes and similar means will become even more common in advertising than they already are.

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 Septem-

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ber 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 which 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. After finalisation of the implementing regulations, the Federal Council will decide on the entry into force of the revised rules, although it is not expected that they will come into force before the end 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 a revision of the Swiss Telecommunications Act and the new provisions entered into force at the beginning of 2021. 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.

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No use of anonymous or unlisted phone numbers 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 following a proposal of 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 the 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 two interesting rulings with regard to Swiss advertising and marketing law.

Lawfulness of advertising claims on a ticket platform

In a recent judgment (BGer 4A_235/2020), the Federal Supreme Court commented on the ban on misleading information on the Viagogo ticket platform. The decision was awaited with particular interest as the authorities considered it to be a precedent. However, these high expectations were disappointed. A large proportion of the plaintiffs' claims had already failed for procedural and formal reasons. As a result, the Federal Supreme Court unfortunately did not have to comment on several interesting aspects in any great depth.

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 catchphrase 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 slogan was admissible.

In contrast, the court confirmed that advertising that promised "no queues" was 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.

Validity period of vouchers

A court of first instance in the canton of Solothurn recently dealt with the question of whether the validity of vouchers may be limited. The legal dispute arose between a consumer who had purchased tickets for hot air balloon rides and the balloon ride provider. The latter refused to refund the price after the consumer was unable to go on the flight for health reasons and referred to the two-year validity period of the tickets, which had already expired.

The court concluded that the two-year validity period was in violation of the mandatory provision that provides for a limitation period of ten years, and that the tickets were therefore still valid. According to the court, the period of validity of vouchers or tickets must therefore generally be at least ten years, unless there is a case with a different statutory limitation period. The consumer's claim for reimbursement of the purchase price was therefore upheld in its entirety.

This ruling has revived the legal discussion as to whether the limitation of the validity period of vouchers is permissible and the "opponents" camp has received further support. It should be noted, however, that this decision from the canton of Solothurn is a ruling by a court of first instance only. The issue is therefore not yet settled (and will not be for a long time). This is all the more true as the court did not deal with numerous other important aspects, such as the legal qualification of the ticket or voucher and its acquisition. The discussion will therefore

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probably only be concluded when the Federal Supreme Court takes a position on the matter. After the legislature failed to provide clarity in the recent revision of the statute of limitations, a certain degree of legal uncertainty will continue to exist.

Companies that continue to adhere to a limited validity period for vouchers, and are unable to note this on the voucher and/or in the order process, should therefore pay all the more attention to ensuring that the general terms and conditions (GTCs) are included in an effective and verifiable manner. In addition to the validity period, it is usually advisable to include further requirements and modalities for the redemption of the vouchers. Since the court in the present case considered an amendment of the limitation period (by means of GTCs) to be inadmissible anyway, it did not have to deal with the question of whether the GTCs had become part of the contract at all. In any case, this would require a clear indication of the validity of the GTCs as well as a reasonable opportunity to take note of the content of the GTCs before the consumer accepted an offer or placed an order. The implementation of these requirements in connection with vouchers is not always easy in practice and should be carefully examined.

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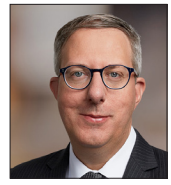
Lukas Bühlmann heads MLL's ICT & Digital practice group. He has wide-ranging experience in assisting with contractual and regulatory implementation of cross-border transactions and business concepts in the digital economy. Lukas is also a member of the IBA (Past-Chair Product Law & Advertising Committee) as well as ITechLaw. He serves as a board member of the Swiss Direct Marketing Association responsible for regulation, self-regulation and data protection, legal counsel to the Swiss Distant Selling Association as well as a media expert with the Swiss Commission for Fair Advertising. He has particular experience in luxury goods, new technology, advertising, healthcare, media and retail.



Michael Reinle is a partner and a member of MLL's ICT & Digital practice group. He is particularly experienced in advising clients with regard to the protection of their IP in the context of the digital economy. In addition, Michael is an expert on internet-related advice in e-commerce and advertising, including direct marketing and digital advertising, with a special focus on regulated industries. He advises clients regarding sweepstakes and contests on a regular basis. Michael Reinle is a regular speaker on data privacy and advertising law as well as new technologies.

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Michael Schüepp has been a member of Lukas Bühlmann's team at MLL since 2009 and has sound experience in advising companies on issues related to unfair competition and advertising on the internet. He is also an expert on data protection in the e-commerce, advertising, health and public transport industries. Furthermore, Michael is regularly involved in advice related to the e-commerce activities of manufacturers and retailers and has particularly strong know-how in the legal aspects of the cross-border online trade of consumer goods. He regularly publishes regarding legal trends and developments in his fields of interest.

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