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Switzerland: Law & Practice and Trends & Developments

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SWITZERLAND

Law and Practice

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MLL Legal is one of the most reputable international law firms in Switzerland. The firm's experienced and dynamic lawyers offer innovative and solution-focused services. With offices in Zurich, Geneva, Zug and Lausanne, MLL is present in the key Swiss economic centres. The firm has one of the strongest and largest IP/ICT teams in Switzerland and unites some of the most reputed experts in all legal aspects related to online and offline advertising. Its strong practice in data privacy makes it a first stop for issues around digitalisation and advertising in Switzerland. Both Swiss and international clients, from corporations and banks to private families, appreciate the accessibility and involvement of partners at MLL in representing their interests. The firm's experience in serving clients from across a variety of sectors has given its lawyers a practical understanding of business that ensures delivery of legal advice that works in a commercial context.

Authors

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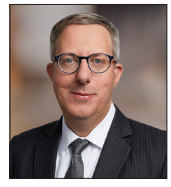

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1. Legal Framework and Regulatory Bodies

1.1 Primary Laws and Regulation

Unfair Competition Law

The primary regulation governing advertising practices is the Swiss Unfair Competition Act. The Unfair Competition Act (UCA) sets out (amongst others):

- the basic applicable rules, such as the general transparency principle in commercial communication;
- the prohibition of inaccurate, deceptive or misleading advertising claims about other companies and their products (Article 3 paragraph 1 littera a, UCA) or one's own products and services (Article 3 paragraph 1 littera b, UCA);
- requirements for comparative advertising (Article 3 paragraph 1 littera e, UCA);
- requirements for below-cost offers and the advertising related thereto (Article 3 paragraph 1 littera f, UCA);
- requirements for offers with premiums and the advertising related thereto (Article 3 paragraph 1 littera g, UCA);
- requirements for email marketing (Article 3 paragraph 1 littera o, UCA);
- certain requirements for sweepstakes and contests (Article 3 paragraph 1 littera t, UCA); and
- requirements for telemarketing (Article 3 paragraph 1 littera u, v and w, UCA).

Advertising-Related Provisions in Other Statutes

Other relevant laws are:

- the Ordinance on Price Declaration (when using price related information in advertising);
- the Trademark Act (when displaying trade marks of third parties in advertising);
- the Copyright Act (when displaying pictures or videos of third parties in advertising); and
- legislation, such as the Data Protection Act (DPA), dealing with personality rights and data protection (when displaying pictures of individuals or processing personal data for marketing purposes).

Rules for specific industries, products or services

The most relevant industry-specific regulations are set out in **10.1 Regulated Products**.

Soft Law and Self-Regulation

Finally, there is soft law created by industry organisations and non-profit organisations.

The most important soft law regarding advertising are the so-called principles of the Swiss Fair Competition Commission (*Lauterkeitskommission*) regarding commercial communication.

These principles include, amongst others, requirements for the use of test results in advertising and requirements for direct marketing. The principles are non-binding and not enforceable like statutes. However, the Commission may render decisions, which are published and may affect the reputation of the offender.

1.2 Enforcement and Regulatory Authorities

Whereas the sector-specific regulations are often enforced by the respective supervisory authorities, the more general advertising regulations are enforced as set out below.

Cantonal Civil Courts

The UCA, and the other regulations mentioned in **1.1 Primary Laws and Regulation**, such as

the Trademark Act and the Copyright Act, provide for civil law remedies, which are enforced by cantonal civil courts.

Article 9 paragraph 1 of the UCA sets out that claimants can request the civil courts to:

- prohibit imminent infringements of the UCA;
- have existing infringements of the UCA removed (eg, by removing promotional materials with illegal claims from the market, including from websites); and
- declare a behaviour illegal if it should continue.

Claimants may also ask for damages (Article 9 paragraph 3, UCA).

It is generally possible to request preliminary injunctions against alleged infringers. However, the requirements for such preliminary injunctions are rather strict under Swiss law.

Cantonal Criminal Authorities

The UCA and the other general regulations mentioned in **1.1 Primary Laws and Regulation** provide for criminal sanctions in the case of an infringement, which are enforced by the cantonal criminal authorities.

Article 23 of the UCA sets out that intentional infringement of Article 3 of the UCA (among other provisions) is sanctioned with imprisonment of up to three years or a monetary penalty of up to CHF540,000. There are no decisions available in which a prison sentence was handed down.

The competent criminal authorities are those of the Swiss canton in which the criminal conduct has taken place or where the effect of the criminal conduct arose.

Criminal courts only initiate investigations based upon complaints by competitors, consumer organisations or consumers with the capacity to sue in the sense of Articles 9 and 10 of the UCA.

Swiss Fair Competition Commission

The Commission enforces its own principles (see **1.1 Primary Laws and Regulation**). The proceeding is rather streamlined, including template complaint forms and the absence of oral hearings. It is initiated upon request and ends with a non-binding decision. The decisions are published.

1.3 Liability for Deceptive Advertising

Civil Law Actions

In the case of civil law litigation, the legal entity will be held liable where an employee or director, in the course of the business activities of the entity, committed the infringement.

However, the UCA also permits litigation against individuals if no legal entity is involved or if an employee or director acts outside of their business activity (eg, if a director posts deceptive claims about a competitor on its private Twitter account). This is a grey area.

Civil litigation can also be initiated against third parties. Injunctions and deletion requests are not dependent on culpability. Therefore, a claimant may ask, for example, an advertising agency or hosting provider to cease displaying deceptive advertising. The most important issue in claims against third parties is often whether they are effectively in control of the infringing activities (ie, whether they have the competence to stop, for example, deceptive advertising).

Criminal Law Actions

Criminal law actions are in principle 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 the first investigation phase.

Criminal proceedings are not often directed against third parties, unless the investigations reveal that such third parties might, in effect, be more responsible than the directors or employees of the advertiser. Third parties are sometimes the focus of investigation if the advertiser has its registered seat outside of Switzerland and is therefore outside of the territorial scope of Swiss criminal law enforcement.

1.4 What Is Advertising?

Not all the relevant provisions refer to the term "advertising" and the understanding of advertising or similar terms in the various provisions is not identical. What the provisions have in common is that they are based on a broad understanding of the term. For example, many of the provisions in the law against unfair competition are applicable to any "indications" as long as they are potentially relevant for competition. Similarly, self-regulation of the Swiss Fair Competition Commission applies to "commercial communication". This is defined as any measure that systematically influences a certain number of people in their attitude towards certain products or business relationships for the main purpose of concluding a legal transaction or preventing it.

1.5 Pre-approvals

There is no general rule requiring the pre-approval of advertising. However, there are special provisions in certain highly regulated areas, such as the advertising of certain pharmaceuticals (cf. Art. 23 of the Ordinance on the Advertising of Pharmaceuticals).

1.6 Intellectual Property and Publicity Rights

In addition to the laws on intellectual property, there are, in particular, provisions in the Act Against Unfair Competition, which govern the use of intellectual property or an individual's name, picture, voice or likeness in advertising. The provision in article 3 paragraph 1 lit. d UCA is particularly important in this respect. It prohibits measures that are likely to cause confusion with the goods, works, services or business operations of another party. Furthermore, Article 3 paragraph 1 lit. e UCA is also important in practice. According to this provision, it is unfair to compare oneself, one's goods, works or services in an unnecessarily condescending manner with other people's goods, works or services. In addition, use of a person's name, image or voice in advertising is considered to be an interference with the personality rights of the person concerned and is therefore usually only permitted with their consent. Since the name, voice and images are personal data, the rules of the Data Protection Act must also be observed.

1.7 Self-Regulatory Authorities

As mentioned in **1.1 Primary Laws and Regulation** and **1.2 Enforcement and Regulatory Authorities**, the Swiss Fair Competition Commission is one of the most important self-regulatory organisations governing and enforcing advertising rules.

As the fees for the proceeding with the Commission are generally zero or rather low (compared to court fees), companies and individuals often file their complaints with the Commission instead of civil courts.

Other industry-specific self-regulation is covered in **10.1 Regulated Products**.

1.8 Private Right of Action for Consumers

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

In the case of an infringement of the trade mark or copyright statutes, only the owners of the respective trade mark rights and copyrights have a private right of action. The available remedies are injunctions, removal of infringements or damage claims.

In the case of an infringement of data privacy laws, the data subject has a private right of action. They can ask to have the data processing prohibited or blocked, or to have personal data deleted (see Article 32 DPA).

In the case of an infringement of the UCA, consumers/citizens have a private right of action if their economic interests are threatened or damaged by unfair behaviour (Article 9 paragraph 1, UCA). Remedies would mainly be injunctions, deletion requests and damage claims (see **1.2 Enforcement Regulatory Authorities**).

1.9 Regulatory and Legal Trends

Developments in the area of price declaration are worth highlighting. Already in 2021, the rules for price advertising were loosened by allowing the essential criteria of the advertised products to be disclosed by means of a a clearly visible reference to a website, instead of being stated in the advertising material itself (cf. article 14 paragraph 2bis Ordinance on Price Declaration). In response to the unclear reasoning of the Swiss Federal Court in the Viagogo rulings (4A_235/2020 and 4A_314/2021), the Federal Council adopted another amendment in 2022. This confirmed that prices displayed must always include all surcharges that are not freely selectable. Thus, since the amendment of the ordinance, it is explicitly stipulated what, according to the correct interpretation, already was the case prior to the amendment; it is not sufficient if price surcharges that cannot be freely selected are only indicated at the end of an checkout or ordering process. Rather, all prices displayed must always contain such surcharges.

In June 2023, the National Council adopted a Motion that demands a simplification of the rules in the Ordinance on Price declaration regarding advertising with price reductions (Motion Nr. 21.4161). The motion aims to allow companies to compare their own prices, especially for "seasonal goods such as clothing, shoes, sporting goods", etc, without time restrictions, if the goods have actually been offered at the higher price for at least four weeks immediately prior to the advertising containing the comparison was launched. It is now up to the Council of States to vote on the motion.

In addition, the accumulation of cases before the Fair Competition Commission in the area of greenwashing, which was noted last year, continues. This year, the prominent case of the complaint against FIFA, which advertised the 2022 World Cup in Qatar with the claim "climate neutral" or "CO2 neutral", is particularly noteworthy. The commission upheld the complaints and recommends FIFA to refrain from using the contested claims in the future, in particular, that

the 2022 FIFA World Cup in Qatar is climate-neutral or CO2-neutral. Unless, at the time of communication, FIFA can provide full proof of the calculation of all CO2 emissions causally caused by the tournament according to generally accepted methods on the one hand and proof of the full compensation of these CO2 emissions on the other hand.

1.10 Taste and Cultural Concerns

A special feature and challenge are the three different language regions in Switzerland, all of which also entail different cultural perceptions. From our experience, advertising in Switzerland appears reserved and is generally not very aggressive. In our opinion, this is more likely to be due to cultural aspects than to legal practice. After all, the courts in Switzerland tend to be liberal and advertising-friendly compared to other countries, especially Germany. This can also be explained by the tendency to assume that the average addressee of an advertisement (see for details **2.1 Deceptive or Misleading Claims**) is reasonable and not in need of protection.

1.11 Politics, Regulation and Enforcement

The political climate has not directly impacted the regulation of advertising or enforcement. However, due to the current political climate, environmental claims have become an important topic as companies try to emphasise the environmental or eco-friendly features of their products or services. At the same time, the risk of being blamed for "greenwashing" has increased.

The Swiss legislature has not yet reacted to this development. Environmental or ecological claims are legally assessed using the existing provisions, in particular the general provisions on inaccurate, misleading, or deceptive claims or certain provisions for specific products, such as chemical substances (see **1.1 Primary Laws and Regulation**).

It is therefore suggested that companies consider the recommendations set out in the ICC Framework for Responsible Environmental Marketing Communications (2019) when planning and implementing environmental marketing.

2. Advertising Claims

2.1 Deceptive or Misleading Claims

According to the case law and literature, how the advertiser itself understands or interprets the claims made in an advert is not decisive. Rather, it is the content or meaning attributed to a claim by the average addressee, taking into account all the circumstances of the case.

The understanding of the average addressee is determined in three steps:

- determining the addressees to whom the information is directed (eg, age, social position or location);
- clarifying the knowledge and skills of the average addressee represented by the target group, including their education, language skills, previous knowledge or understanding, low level of knowledge (eg, among young people or children) and attention (eg, type of claim, place of claim, advertising medium and advertising situation); and
- assessing how the average addressee (an artificial construct) understands the claims.

Because the assessment of whether a claim is misleading, deceptive, or inaccurate requires an objective understanding, "misleading or inaccuracy rates", which are calculated empirically or

by means of surveys, are not used under Swiss law.

Furthermore, the understanding of the average addressee cannot be proven by means of representative surveys. This also results from the fact that the determination of the objectified understanding is a legal question. However, surveys submitted by the claimant may nonetheless affect the assessment by the judges.

2.2 Regulation of Advertising Claims

The Unfair Competition Act, in particular Article 3 paragraph 1 littera b, may cover both express and implied claims.

Whether an implied communication is a claim in the sense of the UCA must be assessed based on the understanding of the average addressee (see **2.1 Deceptive or Misleading Claims**) in the instance in question.

In terms of content, the claim should contain a verifiable factual statement, which is assessable with evidence. Statements that cannot be objectively measured do not constitute a claim in the sense of Article 3 paragraph 1 littera b of the UCA.

Pure value judgements do not qualify as claims in the sense of Article 3 paragraph 1 littera b of the UCA. However, it must be assessed whether the value judgement does not contain any factual statements at all. The understanding of the average addressee is, again, decisive.

2.3 Substantiation of Advertising Claims

Claim substantiation depends on the nature of the claim in question. Substantiation for misleading claims is different than substantiation for inaccurate claims.

As mentioned under **2.1 Deceptive or Misleading Claims**, it is decisive whether the (hypothetical) average addressee is deceived or misled, or whether a claim is inaccurate. The standard is therefore, for example, not whether a substantial part of the addressees might be misled.

In ordinary proceedings, the court must be convinced, based on the evidence submitted, that an infringement is highly probable (almost 100% probability). The courts assess all evidence with full discretion. There is no hierarchy of evidence under Swiss law.

In cases of preliminary injunctions, the claimant must convince the court that an infringement is plausible. However, Swiss courts tend to apply a rather high standard (ie, it must also be highly probable).

2.4 Product Demonstrations

The same standards apply as in the assessment of other advertising methods (see **1.1 Primary Laws and Regulation**). Therefore, it is particularly significant that the product actually has the characteristics presented and that the product demonstration does not mislead about characteristics of the product. In addition, provisions specific to the product must also be observed. There are some specific regulations regarding product demonstrations for regulated products, such as medicinal products, to be considered on a case-by-case basis.

2.5 Endorsements and Testimonials

The same standards apply as in the assessment of other advertising methods (see **1.1 Primary Laws and Regulation**). The Fair Competition Commission has specified these standards (see Principle B.7) and considers testimonials to be unlawful if the testimonials are not limited to information about the product and cannot be

substantiated as to their content and originator. References to fictional persons must also be avoided in commercial communication even if there can be no ambiguity about the fiction. In addition, there are specific regulations for regulated products, such as medicinal products.

2.6 Disclosures

The key question is whether an advertisement is recognisable as a commercial communication without disclosure. In its Principles (see Principle B.15), the Fair Competition Commission declares commercial communication without disclosure to be unfair if the commercial communication is not clearly identifiable as such. If content is not clearly recognisable as a commercial communication, the relationship with the third party must be disclosed. This applies in particular if the third party provides sponsoring services or comparable or similar payments or contributions in kind. In (more recent) case law, however, the Commission is relatively liberal and often assumes, especially in the case of very prominent advertisers (eg, Roger Federer), that the commercial character is recognisable and thus no disclosure is required.

2.7 Representation and Stereotypes in Advertising

There are no special laws in that regard. The same general provisions as mentioned under **1.1 Primary Laws and Regulation** apply.

2.8 Environmental Claims

Environmental or ecological claims are legally assessed using the existing provisions, in particular the general provisions on inaccurate, misleading, or deceptive claims or certain provisions for specific products, such as chemical substances (see **1.1 Primary Laws and Regulation**).

It is therefore suggested that companies consider the recommendations set out in the ICC Framework for Responsible Environmental Marketing Communications (2019) when planning and implementing environmental marketing.

However, certain environmental claims are specifically regulated in connection with foodstuffs. According to the Ordinance on Organic Farming and the Labelling of Organically Produced Products and Foodstuffs, products and foodstuffs may only be claimed as “bio” or ecological if they are produced under the requirements set out in the ordinance. For bio-claims in connection with other products, the general rules of the Unfair Competition Act apply (ie, the claims must not be deceptive, misleading or inaccurate).

In addition, Article 60 of the Ordinance on Chemical Substances prohibits the use of general, vague and undefined statements about the health or environmental friendliness of a chemical substance such as “non-toxic”, “not harmful to health”, “not harmful to the environment”, “environmentally friendly”, “without emissions”, “ozone-friendly”, “biodegradable”, “ecologically safe”, “ecological”, “environmentally safe”, “nature-friendly” or “water-friendly” without any further explanation. Claims regarding biodegradability must contain information regarding the testing method used and the percentage of degradability. Furthermore, it must be indicated which part of the product is degradable in case the claim does not apply to the entire product.

In its supervisory communication 05/2021 on preventing and combating greenwashing, the Swiss financial market authority (FINMA), provides information on the main features of its expectations and the current state of practice in the management of collective investment schemes with a sustainability focus at the fund

and institution level. In addition, it draws the attention of financial service providers offering sustainability-related financial products to the potential greenwashing risks in the advisory process and at the point of sale.

2.9 Dark Patterns

There are no special laws or guidance and, therefore, the same standards apply to dark patterns in advertising as in the assessment of other advertising methods (see **1.1 Primary Laws and Regulation**).

2.10 Children

In general, the same standards apply as in the assessment of other advertising (see **1.1 Primary Laws and Regulation**). However, as explained in **2.1 Deceptive or Misleading Claims**, advertising must be assessed based on the understanding of the average addressee. It follows from this that a stricter standard generally applies to advertising to children. In addition, for certain products, special laws have been enacted that prohibit or restrict advertising specifically directed at children (eg, for alcohol and tobacco products).

2.11 Sponsor ID and Branded Content

In general, the same rules apply as to other advertising methods. Therefore, the commercial nature of the content as well as all sponsors must be clearly recognisable (see **2.6 Disclosures**). The principles of the Fair Competition Commission explicitly state that the sponsoring of editorial contributions is unlawful if it is not recognisable for the audience which parts of the publication are sponsored and who the sponsor is (Principle B.15a). In addition, detailed sector-specific regulations apply to advertising on TV and radio (see in particular article 20 of the Radio and Television Ordinance). For example, they stipulate that every mention of a sponsor must establish a clear link between the sponsor and the programme. The sponsor's name must not directly encourage the conclusion of legal transactions for goods or services. During the broadcast of a television programme, a brief reminder of the sponsorship relationship may be provided (an insert). One insert per sponsor is permitted per ten minutes of broadcasting time. Inserts are not permitted in children's programmes.

2.12 Other Regulated Claims

There are types of claims that are subject to specific rules or regulations. However, the respective regulations are incorporated into different statutes and ordinances. Whether specific regulations apply to concrete types of claims must therefore be assessed on a case-by-case basis.

Examples of such regulations are set out below.

The Tobacco Ordinance

Article 17 paragraph 3 of the Tobacco Ordinance prohibits claims that give the impression that a particular tobacco product is less harmful than others (eg, "light", "ultra-light" or "mild"). A new Federal Statute on Tobacco Products is intended to replace the Tobacco Ordinance in 2024. The new statute will include rather restrictive advertising provisions for all categories of tobacco products (eg, cigarettes, e-cigarettes or oral tobacco products). It will, for example, be prohibited to promote tobacco products with price comparisons, free samples or raffles.

Health-Related Claims

These are generally prohibited for any products other than medicinal products. However, Annex 14 of the Ordinance on Foodstuffs Information includes specific permitted health-related claims for foodstuffs.

Ordinance on Chemical Substances

Article 60 of the Ordinance on Chemical Substances prohibits the use of general, vague and undefined statements about the health or environmental friendliness of a chemical substance such as "non-toxic", "not harmful to health", "not harmful to the environment", "environmentally friendly", "without emissions", "ozone-friendly", "biodegradable", "ecologically safe", "ecological", "environmentally safe", "nature-friendly" or "water-friendly" without any further explanation. Claims regarding biodegradability must contain information regarding the testing method used and the percentage of degradability. Furthermore, it must be indicated which part of the product is degradable in case the claim does not apply to the entire product.

Swissness Provisions

The so-called Swissness provisions in the Trademark Act (Articles 47 et seq) and the ordinances thereto govern the use of Swiss claims, Swiss symbols and other Swiss indications of origin. The use of the Swiss flag is further regulated in the Coat of Arms Act.

The use of Swiss indications of origin must, in general, not be deceptive. Consequently, the Swissness rules set out when a product is considered to have been manufactured in Switzerland or when a service is sufficiently "Swiss". With regard to foodstuffs, 80% of the content must be of Swiss origin. There are, however, exceptions. Regarding industry products, at least 60% of the manufacturing costs must arise in Switzerland. The ordinance clarifies how to calculate the manufacturing costs.

3. Comparative Advertising and Ambush Marketing

3.1 Specific Rules or Restrictions

Comparative advertising is generally permitted as it improves market transparency and therefore competition.

However, comparative advertising is prohibited where it is executed in an inaccurate, 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 of the UCA. However, identification of a competitor may affect the assessment of whether a comparison is inaccurate, misleading, etc.

Article 3 paragraph 1 littera e of the UCA even applies if no specific competitor is mentioned (indirect comparison). It is sufficient that the advertiser's own products and services are compared, even implicitly, with other specified or specifiable products and services.

3.2 Competitor Copyrights and Trade Marks

As long as the aforementioned requirements are met (see **3.1. Specific Rules or Restrictions**), the use of competitors' names, trademarks or packaging will regularly be allowed.

3.3 Challenging Comparative Claims Made by Competitors

As discussed in **1. Legal Framework and Regulatory Bodies**, advertisers or competitors affected by comparative advertising may challenge claims in civil litigation, criminal law pro-

ceedings, 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 (Article 23, UCA).

In proceedings before the Swiss Fair Competition Commission, the Commission may decide that the advertising is illegal and should therefore cease or be removed. The Commission has no authority over damage claims.

3.4 Ambush Marketing

There are no special rules and, therefore, the same rules apply to ambush marketing as in the assessment of other advertising methods (see **1.1 Primary Laws and Regulation**). Therefore, in the case of ambush marketing, Article 3, paragraph 1, littera e of the UCA is of particular importance and it must be assessed to what extent the advertising company compares itself, its goods, works or services in an unnecessarily condescending manner with the goods, works or services of other companies. The interpretation of the term "compare" is very broad and therefore other measures are prohibited, which unnecessarily aim to transfer the image of someone else to oneself or to one's own products.

4. Social/Digital Media

4.1 Special Rules Applicable to Social Media

There is no specific statute dealing with advertising in social media. The general provisions, mentioned in **1.1 Primary Laws and Regulation**, apply.

Furthermore, principle B.15 paragraph 1 of the Swiss Fair Competition Commission requires that advertising for third parties in posts on social media platforms must be recognisable as advertising.

It should be noted that the addressees of advertising on digital media might differ from the addressees of advertising on other communication channels (see the discussion regarding the average addressee in **2.1 Deceptive or Misleading Claims**). This was emphasised by the Swiss Fair Competition Commission in decisions regarding influencer marketing on Instagram. It mentioned that the addressees of the respective posts were the followers of the Instagram account of the respondent. The average addressee was described as follows: "a follower decides for themselves which persons or companies they want to follow. It can be assumed that the average Swiss followers of the respondent's account are interested in the respondent's sports history and life. A follower wants to learn more about the respondent, their career and life by following the Instagram account. They are more interested in and better informed about the respondent than someone who is not a follower of the account". See, for example, appeal decision of 6 May 2020 (No 154/19 and 159/19), reference No 14.

Finally, the understanding of the average addressee is dependent on the context of the advertising claim. The Swiss Fair Competition Commission explicitly mentions this consideration: "when assessing a commercial communication, the Commission takes particular account of the understanding of the relevant target group,

the overall impression and the character of the medium" (principle A.1 (3)).

4.2 Liability for Third-Party Content

Injunction and deletion claims are generally independent of the culpability of the advertiser. Consequently, an infringed individual or legal entity may initiate litigation against the advertiser and ask them to stop the posting of third-party content on the advertiser's website or social media channels, and to have it removed.

In contrast, damage claims are generally not available against an advertiser for illicit third-party content. However, if the advertiser was notified about the illicit content and did not remove it, the advertiser could become culpable (jointly with the main infringer) for the illicit post. In that case, a damage claim might be possible.

4.3 Disclosure Requirements

There are generally no special requirements for disclosure regarding advertising on social media as opposed to traditional media (see **2.6 Disclosures**). However, the implementation of the disclosure requirements may differ. These must be assessed on a case-by-case basis.

4.4 Requirements for Use of Social Media Platforms

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 concretises certain general principles in the UCA for social media platforms (see **4.1 Special Rules Applicable to Social Media** and **5.1 Special Rules/Regulations on Influencer Campaigns**).

4.5 Special Rules for Native Advertising

There is no specific statutory provision dealing with native advertising. The general provisions, mentioned in **1.1 Primary Laws and Regulation**, apply. However, Principle B.15 of the Swiss Fair Competition Commission concretises the general provisions and 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. Social Media Influencer Campaigns and Online Reviews

5.1 Special Rules/Regulations on Influencer Campaigns

There is no specific statutory provision dealing with influencer campaigns. The general provisions, mentioned in **1.1 Primary Laws and Regulation**, apply. However, Principle B.15 paragraph 2 of the Swiss Fair Competition Commission solidifies the general provisions and 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.

5.2 Advertiser Liability for Influencer Content

There is no case law in respect to advertisers being held responsible for content posted by their influencers. However, the applicable rules in cases of influencer marketing are generally directed against the immediate infringer, (ie, the influencer). In the cases decided by the Swiss Fair Competition Commission (see **5.1 Trends in the Use of Influencer Campaigns**), the respondent was always the influencer.

5.3 Consumer Reviews

There are no specific rules that apply to the collection and use of consumer ratings and therefore, the same standards as in the assessment of other advertising methods (see **1.1 Primary Laws and Regulation**). So, for example, when collecting customer reviews by email, the guidelines for email marketing must be observed (see **6.1 Email marketing**) and the advertising with customer reviews must be true and not misleading (see **2.1 Deceptive or Misleading Claims**).

5.4 Liability for Consumer Reviews

Yes, anyone who advertises with customer reviews that, for example, violate the provisions of the UCA, can be held liable. There is no explicit obligation to monitor the ratings. However, if a company wants to avoid being held liable for violations related to advertising with customer reviews, it should regularly review them.

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). This means in particular that the general data processing principles (fairness, proportionality, transparency, purpose limitation, storage limitation, accuracy, integrity and confidentiality, cf. Articles 6 and 8) must be complied with and information must be provided about the data processing (cf. Article 19-21). Unless the general data processing principles are violated and no special categories of personal data (eg, health data, see Article 5 littera c) are disclosed to third parties, no legal basis, such as consent, is required under Swiss data privacy laws (see below, however, regarding the UCA).

Please note that the General Data Protection Regulation (GDPR) might apply to entities with a registered seat in Switzerland (Article 3 paragraph 2, GDPR). The GDPR might therefore affect data collection and processing for email marketing. As this chapter focuses on Swiss law, there will be no further evaluation of the GDPR requirements for email marketing.

Unfair Competition Act

Article 3 paragraph 1 littera o of the UCA deals with email marketing. It generally requires an opt-in by the recipient for email marketing. The recipient must also be informed about the option to unsubscribe and such an opt-out must be possible in an easy manner. Finally, the sender must indicate its correct name and address.

There is an exemption from this general rule with respect to existing customers. Opt-in is not necessary for email marketing to recipients in cases where they have been informed prior to the first marketing mail about the opt-out right, and in cases where the emails contain information about the company's own products or services, which are similar to the ones purchased or ordered by the respective recipient.

Sanctions

The Swiss Data Protection Act does provides for criminal sanctions in the case of an intentional infringement of certain provisions (in particular the violation of the duty to inform). In principle, these sanctions are directed against the responsible natural person and not against the company. Furthermore, the Federal Data Protection and Information Commissioner (FDPIC) may investigate data processing activities and impose a temporary or definitive limitation including a ban on processing or a deletion of data. Data subjects may also initiate civil litigation and ask for injunctions (see Article 32 DPA and **1.5 Private Right of Action for Consumers**). As the court fees may be quite substantial, data subjects tend to file complaints to the FDPIC.

In case of an infringement of Article 3 paragraph 1 littera o of the UCA, the affected individual may file a complaint with the civil court and ask for an injunction and for removal of their mail address from the mailing list (Article 9, UCA). Damage claims are rare, as the claimant has to prove effective financial damage. No such civil litigation is on record. There are a few criminal proceedings dealing with infringement of the UCA. Intentional infringement of Article 3 paragraph 1 littera o of the UCA is sanctioned with imprisonment for up to three years or a monetary penalty (Article 23, UCA). Prison is not realistic for such infringements, but penalties might be awarded. However, in the published case law, the criminal authorities have followed a rather liberal approach.

Swiss Fair Competition Commission

Principle C.4 paragraph 2 No 5 and paragraph 3 repeat Article 3 paragraph 1 littera o of the UCA. Consequently, complaints against illicit email marketing can also be filed to the Swiss Fair Competition Commission. The Commission acts upon the request of competitors, recipients of the marketing communication or consumer organisations. It can decide that the marketing is illegal and may publish its decision with full disclosure of the name of the company.

The Swiss Fair Competition Commission decides more cases of alleged illegal email marketing than the civil courts and criminal authorities.

6.2 Telemarketing

In relation to automated telemarketing, the same rules as for email marketing apply (see **6.1 Email Marketing**).

For other types of telemarketing, Article 3 paragraph 1 littera u of the UCA sets out that telemarketing to recipients with a respective opt-out notice in the telephone registry or to recipients that have no entry in the registry is prohibited, unless there is a business relationship with the recipient or there is informed consent of the recipient. It is also prohibited to make advertising calls without displaying a telephone number which is listed in the telephone directory and which is authorised to be used (Article 3 paragraph 1 littera v of the UCA). Not only is it prohibited from making such marketing calls, but it is also explicitly prohibited to relying on information obtained as a result of a breach of these provisions (Article 3 paragraph 1 littera W of the UCA). Sanctions for this infringement are the same as explained in **6.1 Email Marketing**).

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 6 revised DPA as well as the duty to inform (Article 19-21 DPA) apply:

- The data subjects must be informed about the data processing (in particular about the identity and contact details of the Controller, the collected data, the purpose of the processing and the recipients of the data).
- The data processing must be proportionate (ie, only as much data as is necessary for the purpose may be collected and processed).
- Personal data may only be processed for a specified purpose and only in a way that is is compatible with that purpose.

Consent may only be mandatory if the processing violates the general data processing principles or if special categories of data (eg, health data) are disclosed to third parties (Article 30 DPA).

Furthermore, a special provision applies to the use of cookies and similar technologies, according to which information must be provided about the purposes of cookies as well as the possibility of rejecting them (cf. Article 45c of the Telecommunications Act). The interplay of the above rules will in most cases of interest-based advertising lead to the requirement to use a cookie banner that transparently informs about the data processing. It should also be noted that the stricter provisions of EU law with the opt-in principle may also apply to Swiss companies.

6.5 Marketing to Children

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, particularly 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 child needed, but also approval from their parents in the case of minors.

6.6 Other Rules

Apart from the Data Protection Act itself, the most important privacy related provisions for advertising are contained in the UCA and the Telecommunications Act and have already been explained in the previous sections.

7. Sweepstakes and Other Consumer Promotions

7.1 Sweepstakes and Contests

General Requirements

The following requirements must be complied with when conducting sweepstakes and contests.

Data privacy laws

The processing of personal data in connection with sweepstakes or contests must comply with the data privacy laws. If personal data submitted by participants shall also be used for purposes other than the conduct of the sweepstake/contest, the participants must be informed about this other purpose and consent might be necessary – in particular for email marketing.

Unfair competition laws

Unfair competition laws require transparent information about the sweepstakes/contest, in particular about eligibility for participation, the participation period, how to participate, the prize, etc.

Trade mark and copyright laws

Trade mark and copyright laws must be considered if third-party trade marks and pictures are used, for example, for the description of the prize if it is a third-party branded product.

Swiss Gambling Act (Geldspielgesetz)

Sweepstakes and contests are most likely to be qualified as money games. The statute generally requires money games to have an approval/licence. However, certain sweepstakes and contests are excluded from the Gambling Act.

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 requirement. Short-term promotional lotteries and games of skill that do not involve the risk of excessive gambling, and where participation is exclusively through the purchase of goods or services offered at no more than market price, are exempted from the Swiss Gambling Act (Article 1 paragraph 2 littera d, Swiss Gambling Act).

7.2 Contests of Skill and Games of Chance

The Swiss Gambling Act distinguishes between contests of skill and games of chance (lotteries).

Contests of skill are defined as money games in which the winning chance depends entirely or mainly on the skill of the player (Article 3 littera d Swiss Gambling Act). Money games are defined as games in which there is the prospect of a monetary gain or other monetary advantage in return for a monetary stake or the conclusion of a legal transaction (Article 3 littera a, Swiss Gambling Act).

Games of chance or lotteries are defined as money games which are open to an unlimited or at least a high number of people and where the result is determined by one and the same random draw or by a similar procedure (Article 3 littera b, Swiss Gambling Act).

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

However, and as mentioned in **7.1 Sweepstakes and Contests**, money games with free participation and certain sweepstakes and contests are exempted from these obligations. It is advisable and common practice to design promotional

sweepstakes and contests in a manner that exempts them from the approval requirement.

7.3 Registration and Approval Requirements

Games of chance and contests of skill for promotional purposes must generally not be registered or approved if designed in a proper manner (see **7.1 Sweepstakes and Contents** and **7.2 Contests of Skill and Games of Chance**).

If such games or contests are not exempted from the Swiss Gambling Act, an approval or licence is needed.

With respect to the approval process, the statute distinguishes between large money games and small money games. Large money games are games of chances or contests of skill, which are executed either in an automated manner, in more than 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 (GESPA; Article 21, Swiss Gambling Act). Approval is subject to certain requirements, such as a registered seat in Switzerland, good reputation, financial stability, etc (Articles 22 and 24 et seq, Swiss Gambling Act). The main issue is that the cantons may determine the maximum numbers of organisers for money games. This means that an organiser might not receive an approval even if it complies with all requirements.

Small Money Games

Approval for small money games is granted by the cantonal authority in the canton in which the money game is executed (see Articles 32 et seq, Swiss Gambling Act).

Sanctions

The execution of money games without the necessary approval is subject to criminal sanctions. Articles 130 et seq of the Swiss Gambling Act distinguishes between large and small money games.

- The intentional illegal execution of large money games is sanctioned with imprisonment for up to three years or a monetary penalty.
- The intentional execution of small money games without approval is sanctioned with a monetary penalty of up to CHF500,000.

7.4 Free and Reduced-Price Offers

Prohibition against Deceptive or Misleading Price Declarations

Article 3 paragraph 1 littera b of the UCA requires that information about prices must not be inaccurate, deceptive or misleading. Furthermore, Article 18 of the UCA sets forth that the declaration of price reductions in a misleading manner is unfair.

Ordinance on Price Declaration

Article 18 of the UCA is concretised by the Ordinance on Price Declaration (PBV). Reduced-price offers are subject to several requirements as set out in Articles 16 et seq of the PBV.

The ordinary price, as well as the reduced one, must be indicated. It must be specified for which products the reduced price is applicable. However, specification is not needed if the reduced price applies to several products, product groups, or entire assortments. In that case, it must solely be specified for which categories of groups the reduced price applies (eg, “50% off on all coffee capsule products”).

The duration of the reduced-price campaign is limited. A reduced-price campaign may only last

for a maximum of two months. The campaign period is calculated in the following way: in the case that the ordinary price prior to the reduced price was charged for two months, the reduced price may last for one month (50% of the period for which the ordinary price was charged prior to the campaign). This also means that a new reduced-price campaign for the same product cannot immediately follow another one.

Additional Requirements

Reduced-price campaigns must also comply with Article 3 paragraph 1 littera f of the UCA. Products and services must not be offered under the cost price repeatedly and in a manner that deceives the consumer about the performance of the advertising company or competitors.

Finally, free offers must comply with Article 3 paragraph 1 littera g of the UCA if it is a premium offer – purchase one product X and receive another product for free (ie, as premium). The premium must not deceive the consumer about the effective value of the offer. There is no deception if the value of the main product and the premium are known or declared.

7.5 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 and the case law of the Federal Supreme Court, general terms and conditions can be subject to ex post judicial control. This control applies in particular the so-called "rule of unusualness": a clause, the content of which the approving party did not expect and could not reasonably have expected under the circumstances, shall not be valid. This can be the case if a clause is unusual and unrelated to the business. According to the Federal Court, automatic contract renewals are not unusual per se. However, whether a provision is unusual is determined from the point of view of the approving party at the time of the contract conclusion.

Furthermore, Article 27 of the Swiss Civil Code and Articles 19 and 20 of the Code of Obligations must be taken into account for both general terms and conditions and individual agreements. These provisions prevent an excessive contractual binding of a contractual party. This could become relevant in the event of continued renewal of a contract and the associated obligation that a consumer enters into.

A parliamentary initiative to restrict automatic renewal of service contracts has been debated in the parliament. However, the Council of State rejected an amendment of the Swiss Civil Code.

8. Artificial Intelligence

8.1 AI & Advertising Content

There are no specific rules or guidance regarding the use of artificial intelligence in the development of advertising content. The general rules apply, in particular that the content must not be false or misleading (see **2.1 Deceptive or Misleading Claims**).

8.2 AI-Related Claims

There are no specific rules or guidance related to making such claims. The general rules apply, in particular that the claim must not be false or misleading (see **2.1 Deceptive or Misleading Claims**).

8.3 Chatbots

There are no specific rules or guidance regarding the use of chatbots. The general rules apply, in particular the provisions of the of the Data Protection Act. It is worth highlighting that there is a specific duty to inform about automated individual decisions which produce legal effects or similarly significantly effects (Article 21 paragraph 1 DPA). In such cases the data subject shall also have the opportunity to state his or her position upon request and may request that the automated individual decision be reviewed by a natural person (Article 21 paragraph 2 DPA).

If a chatbot is used, it should therefore be assessed whether automated decisions with legal or other significant implications are involved and, if so, whether the requirements can be met or an exception applies, such as informed consent of the data subject.

It should also be noted in this context that consent, if required, must be explicit if the data processing by a chatbot involves "high risk profiling". Profiling is defined as any automated processing of personal data consisting in using such data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects relating to that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or change of location (Article 5 littera f DPA). High risk profiling is defined as profiling that entails a high risk for the personality or fundamental rights of the data subject by leading to a combination of data that allows an assessment of essential aspects of the personality of a natural person (Article 5 littera g DPA).

9. Web 3.0

9.1 Cryptocurrency and Non-fungible Tokens (NFTs)

There are no specific rules or regulations regarding the advertising, marketing or sale of cryptocurrency and/or NFTs, but rather the application of rules and regulations depends on the legal qualification of the crypto-asset in question. In particular, if a crypto-asset qualifies as a security, the rules regarding offering and advertising of the Financial Services Act (FinSA) and the Financial Service Ordinance (FinSO) have to be observed, specifically Articles 35 et seq and Article 68 of the FinSA. In certain special cases, if a crypto-asset would qualify as a unit of a collective investment scheme, then the specific rules of the Collective Investment Scheme Act (CISA) apply.

However, in any case, the rules of the UCA have to be adhered to.

9.2 Metaverse

There are no specific rules or regulations regarding advertising within the metaverse. However, the regulations which apply to advertising in general, also apply to advertising activities in the metaverse. In this regard, the UCA and the guidelines on fairness in commercial communication provided by the Swiss Commission for Fairness (SCF) are particularly relevant.

According to the UCA and the above-mentioned guidelines, commercial communication (advertising) shall not:

- disparage or deliberately ridicule other companies, persons, products or commercial activities;
- present a person or organisation as more favourable (than others) by communicating

inaccurate or misleading representations or statements;
- imitate other (pre-existing) products or services in a way that might lead to confusions with said pre-existing products or services;
- use inaccurate or subjective test results in order to promote a product or service;
- use inaccurate or unlawful indications of origin (eg, Swiss cross for products that do not originate from Switzerland); and
- disguise the commercial purpose of advertising (eg, if an influencer receives a remuneration for the promotion of a product, but their followers are led to believe that it is a personal recommendation or an objective product review).

Furthermore, the UCA entails rather strict provisions on promotional raffles/lotteries (eg, Article 3 paragraph 1 littera t, UCA) and aggressive product marketing activities, which also apply to the metaverse.

Even though advertising in the metaverse is widely discussed in legal articles, it has not been discussed by the authorities or the legislature.

10. Product Compliance

10.1 Regulated Products

The Ordinance on Beverages sets forth the criteria to be complied with by specific beverages – ie, it determines when a beverage may be marketed as mineral water, fruit water, alcohol-free beer and so on. It also sets out certain restrictions for the design of the labels, marketing materials and for the use of geographic origins (eg, whiskey).

The Federal Statute on Spirits (Alcohol Act) 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 specific restrictions for advertising, 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 adverts in specific locations, such as on public transport. Another important restriction is the prohibition of providing spirits as prizes in a sweepstake.

Article 1 of the Federal Statute on Banking Institutes sets out that the term "bank" or "banking institute" must only be used in the advertising (and commercial correspondence in general) of institutes, which are subject to the statute and supervised by the Swiss Financial Services Supervisory Authority. Article 4 prohibits misleading or intrusive advertising by the Swiss seat of a banking institute. Article 3 of the Ordinance on Banking Institutes sets out that only institutes with a banking licence are permitted to advertise the acceptance of deposits from the public.

Article 20 of the Federal Statute on Chemical Substances sets out that the advertising for dangerous chemicals or chemical mixtures must not mislead the public about the danger of the products or lead to an improper use. Article 45 of the Ordinance on Chemicals prohibits the use of specific terms, such as "non-toxic", "eco-friendly", in the advertising for such products. Article 75 of the Ordinance contains further advertising restrictions, in particular regarding bio-claims.

Article 31 of the Federal Statute on Medicinal Products and Medical Devices sets out as a principle that it is permitted to advertise all types of medicinal products if the advertising is directed exclusively at persons who prescribe or dispense them. It is also permitted to advertise non-prescription medicinal products to the general public. Article 32 deals with unlawful advertising for medicinal products. Further details on the advertising of medicinal products are included in the Ordinance on Advertising of Medicinal Products. The Ordinance differentiates between advertising to specialists and advertising to the public.

Article 12 of the Ordinance on Foodstuffs stipulates a general prohibition against misleading and deceiving consumers in the advertising of foodstuffs. Article 12 paragraph 3 of the Ordinance prohibits the use of specific claims and information in advertising, such as health-related claims (with certain exceptions), deceptive claims about the origin of a foodstuff, etc.

Since the individual substances of cannabinoids as well as hemp extracts containing cannabinoids have historically not been consumed to any significant extent in connection with foodstuffs, products constituted in this way are regularly to be qualified as novel food. Advertising for novel food is subject to the same requirements as set out for other foodstuffs above. Please note that certain products containing CBD (only products with less than 1% THC are permitted) can also be qualified as utility articles, such as pouches (snus) with CBD or cosmetic articles. For such utility articles, the advertising must not be deceptive, misleading or inaccurate and the advertising must not contain any health claims (Article 18, Federal Statute on Foodstuff and Utility Articles).

Articles 17 et seq of the Ordinance on Tobacco Products prohibits the use of misleading or deceptive claims in advertising. Furthermore, it prohibits advertising tobacco products to consumers under 18 years old, in specific locations (eg, close to schools) or on specific products (eg, on advertising material which is distributed to minors). In addition, the industry has established its own advertising guidance, which expand on the advertising restrictions set out in the Ordinance. Such advertising self-regulations also exist regarding e-cigarettes as well as oral tobacco or nicotine products. Advertising of tobacco products and e-cigarettes is further restricted by some cantonal laws.

A new Federal Statute on Tobacco Products, which is expected to enter into force in 2024, will cover e-cigarettes, oral products with tobacco or with nicotine only, and "heat not burn" products. The new statute contains advertising restrictions for all of these products, such as no advertising and sale to minors, no deceptive claims, etc. Certain sales activities, such as price-offs and raffles, shall be prohibited. The advertising related provisions are the most contested provisions in this new statute.

10.2 Product Placement

There are special rules for the placement of products in radio and television broadcasts. According to these rules, product placement is in principle permitted and is subject to the rules for sponsorship (see **2.6 Disclosures** and **2.11 Sponsor ID and Branded Content**) with the exception of the following special provisions (cf. Article 21 Radio and Television Ordinance):

Product placements are not permitted in children's programmes, documentaries and religious programmes unless the sponsor merely provides goods or services of subordinate value

free of charge, in particular as production aids or prizes, and makes no additional payment. Product placements must be clearly indicated at the beginning and end of the programme and after each advertising break. For product placements, production aids and prizes of subordinate value up to CHF5,000, a single reference shall suffice. For certain films, there are exceptions to this obligation to indicate the product placement at the beginning and at the end of a programme.

10.3 Other Products

The most relevant specific rules for products have been mentioned. Advertising for other products or services must be assessed on a case-by-case basis.

Trends and Developments

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MLL Legal is one of the most reputable international law firms in Switzerland. The firm's experienced and dynamic lawyers offer innovative and solution-focused services. With offices in Zurich, Geneva, Zug and Lausanne, MLL is present in the key Swiss economic centres. The firm has one of the strongest and largest IP/ICT teams in Switzerland and its team unites some of the most reputed experts in all legal aspects related to online and offline advertising. Its strong practice in data privacy makes it a first stop for issues around digitalisation and advertising in Switzerland. Both Swiss and international clients, from corporations and banks to private families, appreciate the accessibility and involvement of partners at MLL in representing their interests. The firm's experience in serving clients from across a variety of sectors has given its lawyers a practical understanding of business that ensures delivery of legal advice that works in a commercial context.

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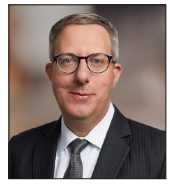

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Overview

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 two important legislative changes: an important motion to revise the Price Indication Ordinance and the reform of the Data Protection Act. Subsequently, a notable new decision is presented, which deals with the topic of misleading advertising claims by FIFA.

Current Legislative Changes

Price Indication Ordinance

Just a year after a revision of the Price Indication Ordinance entered into force, a new Motion to amend the ordinance was adopted by the National Council. The motion demands a simplification of the rules regarding advertising with price reductions (Motion Nr. 21.4161). Specifically, the motion aims to allow companies to compare their own prices, especially for "seasonal goods such as clothing, shoes, sporting goods", etc, without time restrictions, if the goods have actually been offered at the higher price for at least four weeks immediately prior to the advertising containing comparison was launched. It is now up to the Council of States to vote on the motion.

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. On 1 September 2023 the new DPA finally entered into force.

Several new duties and stricter sanctions

The Data Protection Act is significant for all companies in the marketing sector and will continue to have a very wide scope of application. However, one of the most remarkable new features is the introduction of direct criminal sanctions against natural persons responsible for data processing activities up to a maximum amount of CHF250,000. This is provided instead of administrative sanctions against corporations and legal persons, as is the case in EU law. Together with the extension of the powers of the Federal Data Protection Commissioner, this intimidating sanctions regime is intended to improve enforcement. In addition to the expansion of the rights of the data subjects, numerous duties established by the EU GDPR have also been adopted, such as the duties to keep a record of data processing activities, to notify data breaches and to conduct data protection impact assessments. For companies domiciled abroad, it should also be emphasised that, under certain conditions, there is an obligation to appoint a legal representative in Switzerland.

Stricter information requirements

The extension of information duties is certainly of great practical importance for the implementation of advertising campaigns and interaction with data subjects for marketing purposes. In addition to the identity and contact details of the controller, information must, at least, be provided on the purpose of the processing and, in the case of the transfer of data, the categories of recipients and any foreign countries to which the data is transferred. This also applies in the case of obtaining data from the databases of other companies or publicly accessible sources. In the case of such indirect collection of data, informa-

tion 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. The definition of profiling is the same as under the EU GDPR, although there are special requirements for high-risk profiling. Thus, the new Swiss data protection law defines 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. According to the majority in the literature, it can be assumed that Parliament did not want to deviate from the established principles in the case of (high-risk) profiling. For private controllers, consent or other justification will therefore only be required if the data processing violates personality rights or if special categories of personal data is disclosed to third parties. However, depending on the type and scope of (high-risk) profiling, a violation of personality rights may be assumed 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 the profiling is related to email marketing, where, due to the special provision in the law against unfair competition, consent (opt-in) must, in principle, be obtained anyway. In order for consent to serve as a safeguard and justification in the case of high-risk profiling, consent must be explicit under the new DPA. This means that higher standards apply with regard to the validity of consent, although the details are controversial.

Important Decisions

No landmark court rulings related to advertising have been published in recent months. However, the following decision by the Fair Competition Commission is worth highlighting.

FIFA-Decision Nr. 188/22 of the Swiss Fair Competition Commission

In its decision of 10 May 2023, the Swiss Fair Competition Commission upheld the complaints submitted from five European countries (Switzerland, France, Belgium, the United Kingdom and the Netherlands) against FIFA. The Commission found that the statements made by FIFA in its communication on the climate neutrality of the 2022 FIFA World Cup in Qatar were unlawful.

The communication did comply with the criteria set out by the Marketing and Advertising Code of the International Chamber of Commerce,

with specific reference to Chapter D concerning advertising and marketing with environmental relevance.

In some of the communications that were the subject of the complaint, FIFA used absolute statements, giving the false and misleading impression that the 2022 FIFA World Cup was already climate-friendly and CO2-neutral before and during the tournament. On the contrary, the Commission found that the sustainability goals cannot be pretended to have been achieved in the absence of definitive and generally accepted methods for measuring sustainability and ensuring their implementation. The burden of proof lies with the advertising company, in this case, FIFA. FIFA was not able to provide sufficient evidence of offsetting the ex-ante estimated total emissions of 3.63 million tonnes of CO2, nor of a concrete strategy for further offsetting. The Fair Competition Commission concluded by recommending that FIFA refrains from promoting the 2022 FIFA World Cup as being climate-friendly and CO2-neutral unless, at the time of the communication, FIFA can provide full evidence, using generally accepted methods, of both the total number of CO2-emissions actually caused by the tournament and the full offsetting of those emissions.

CHAMBERS GLOBAL PRACTICE GUIDES

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