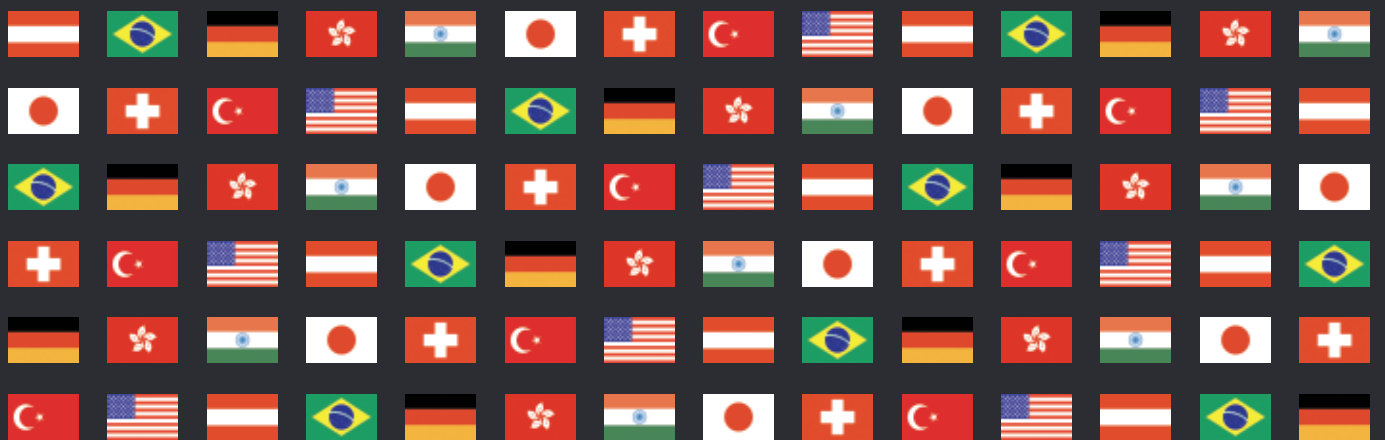


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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Advertising & Marketing*, which is available in print and online at www.lexology.com/gtdt.

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

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

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

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

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



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Switzerland

Sylvia Anthamatten

Walder Wyss

LEGISLATION AND REGULATION

Legal framework

1 | What are the principal statutes regulating advertising generally?

The legal framework regulating advertising in Switzerland is rather complex. The right to advertise is guaranteed on a constitutional level. Basic principles applicable to advertisement can be found in the Federal Act against Unfair Competition (UCA). The UCA prohibits unfair business, including advertising practices, and protects the good faith in business. In addition, various sector-specific regulations exist that regulate advertising in relation to specific products and services (eg, tobacco, alcohol, gaming and pharmaceuticals). Furthermore, different regulations apply to specific advertising media. Regarding broadcast advertising, the Federal Radio and Television Act (RTA) sets up various restrictions.

The applicable rules vary in their legal nature and may constitute civil, public or penal law, either on a federal, cantonal or communal level. Additionally, the self-regulatory regime of the Swiss Commission for Fairness is particularly relevant to advertising in Switzerland.

Regulators

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

Since there is no comprehensive law governing advertising, which parliament of the federal system has legislative power to regulate advertising depends on the matter concerned. In the case of concurrent jurisdiction among regulators, regulations of a lower body remain in force as long as, and to the extent that, the higher body has not made (full) use of its competence. If the federal parliament is competent, as it is in regard to broadcasting, the federal government may issue additional ordinances.

In general, claims are to be enforced by the courts. In addition, the Swiss Commission for Fairness issues decisions on the fairness of advertising upon complaint. Although its decisions are not binding, the respective proceeding is popular and has become a useful tool to enforce rules on advertising.

Regulators' powers

3 | What powers do the regulators have?

The applicable laws foresee a wide range of remedies and penalties. From a civil law perspective, the prohibition of an impending infringement and the elimination of an existing infringement are paramount. Competitors may also claim damages, satisfaction or the handing over

of profits or demand that a rectification or judgment be published. Criminal penalties include monetary sanctions or custodial sentences. Further, according to a new criminal provision added to the UCA as of 1 January 2021, domain names and phone numbers used for certain unlawful marketing practices may be blocked. Under administrative law, authorisations can be revoked, or regulatory fines can be imposed. In contrast, the Swiss Commission on Fairness may not impose any sanctions. Its decisions are rather considered recommendations or requests.

Regulators' priorities

4 | What are the current major concerns of regulators?

Personalised advertising is currently a widespread topic in regulation and legal discourse. Several areas of law are affected, in particular, the laws on data protection and e-privacy. Discussions held on an EU level have raised controversy about the admissibility of profiling, also affecting the current revision of the Federal Data Protection Act.

Another issue that has been identified as not sufficiently addressed yet by (enforceable) Swiss law is the requirement for separating advertising content from editorial content in connection with the activities of influencers on social media. However, in 2019, the Swiss Commission on Fairness issued its first decisions in this respect. Out of five complaints about posts on a social media platform (Instagram) by famous Swiss people, one complaint has been successful. A Swiss athlete was held to have violated the guidance that advertising content shall be identifiable as such and separated from other content. In 2020, the Swiss Commission on Fairness confirmed such principle and held that it applies to any form of communication, including private communication.

In addition, a new media law is currently going through the legislative process, which is intended to replace the existing RTA. The estimated date of entry into force is early 2022. The new law shall open up the possibility that, in addition to radio and television, online media can contribute to and be promoted as a public media service. The advertising restrictions in the current RTA are intended to remain in place. Already revised and in force since 1 January 2021 is a new regulation on time-shift television stating that the regulation on advertising and sponsorship equally applies to time-shift television.

Industry codes

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

In the advertising sector, the fair commercial communication guidelines of the self-regulatory body Swiss Commission for Fairness are of major importance. They are based on the International Chamber of Commerce Advertising and Marketing Communication Code and promote a rather high ethical standard. Although they have no legal status beyond proceedings before the Swiss Commission for Fairness, they are often invoked in judicial proceedings when arguing that an act of competition

is unfair in terms of the UCA. Based on the guidelines, the Commission may not prohibit unfair advertising; however, it may demand that advertisers refrain from further publishing an advertisement.

Additional industry self-regulations are the guidelines on the marketing of cigarettes and e-cigarettes and the code of conduct for the alcohol industry. Further, it can be referred to the Pharma Code (the code of conduct of the pharmaceutical industry in Switzerland), the Pharma Cooperation Code (the code of conduct of the pharmaceutical industry in Switzerland on cooperation with healthcare professional circles and patient organisations), the guidelines on native advertising of the Interactive Advertising Bureau Switzerland Association and the declaration of the duties and rights of journalists of the Swiss Press Council. Consequences for non-compliance depend on the specific codices in question.

Authorisation

6 | Must advertisers register or obtain a licence?

There is no general obligation for advertisers to register or obtain a licence. However, in some sectors, for example lotteries, advertising may occur only through licensed entities.

Clearance

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

In general, the regulator does not give any advisory opinions on the legality of advertising. However, depending on the advertised product, there may be a specific point of contact to receive an advisory opinion on advertising drafts. For example, the Swiss Alcohol Board examines advertising of alcoholic beverages upon request. As regards radio and television broadcast, the Federal Office of Communications has issued guidelines interpreting the advertising and sponsorship regulations.

Depending on the advertised goods or services, the place of advertising or the content of advertising, specific advertising may be subject to prior approval. For example, this may apply to advertising for medicinal products, advertising on public ground or outdoor promotion elements and advertising with animals.

PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)

Challenging competitors advertising

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

As regards unfair advertising, competitors are entitled to file a claim before the Swiss Commission for Fairness. The respective decisions are issued rather rapidly (within approximately four months) and the proceedings are free of charge. However, the remedies available are limited and the decisions are not binding. Nevertheless, as practice shows, such avenue is an effective way to challenge unfair advertising and the issued recommendations are usually observed.

A competitor may also bring a lawsuit before the competent courts to claim a violation of the Federal Act against Unfair Competition (UCA). Under certain conditions, preliminary injunctions are available or, in cases of special urgency, the court may order interim measures immediately and without hearing the opposing party (ex parte preliminary measures). Preliminary measures may consist of every measure suitable for preventing the threatened harm, which includes injunctions and

orders to eliminate the unlawful situation. An injunction on a permanent basis (ie, in an action on the merits) requires full proof and not only prima facie evidence for an infringement. A permanent injunction does not require that the infringement, were it to continue, would cause irreparable harm. In Switzerland, competitors are also entitled to compensation of damages or an account of profits.

Public challenges

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

Actions under the UCA may also be brought by customers whose economic interests are threatened or infringed by an act of unfair competition, such as unfair advertising. Further, professional and trade associations whose articles of association authorise them to defend the economic interests of their members and organisations devoted to consumer protection based on their articles of association may challenge advertising under the UCA. In addition, anyone, including consumers and consumer associations, may address the Swiss Commission for Fairness to challenge advertising.

Burden of proof

10 | Which party bears the burden of proof?

In court proceedings, the party claiming an infringement must prove the facts complained about. However, the law provides for the possibility of a reversal of the burden of proof to the detriment of the advertiser. The judge can thus require the advertiser to prove the correctness of the factual claims contained in the advertisement.

In proceedings before the Swiss Commission for Fairness, the advertiser bears the full burden of proof for the correctness of its advertising statement.

Remedies

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

The applicable laws foresee a wide range of remedies. This may reach from the prohibition of an impending infringement or the elimination of an existing infringement to the award of damages, satisfaction or the handing over of profits. Furthermore, a rectification of the unlawful advertising claim or the judgment may be published. Additionally, monetary sanctions or custodial sentences may be imposed and official authorisations can be revoked.

In contrast, the Swiss Commission on Fairness may not impose any sanctions. Its decisions are rather considered as recommendations or requests. Nevertheless, the regular publication of the Commission's decisions intensifies the impact.

Length of proceedings

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

As regards proceedings before the Swiss Commission for Fairness, the decisions are issued within approximately four months. If they are appealed to the plenary assembly, the length of the proceedings depends on the biannual meeting of such assembly.

The duration of court proceedings depends on various factors such as the complexity of the matter, the court in charge, the number of hearings, etc. For court proceedings on preliminary injunctions, a timeline of approximately two to four months seems realistic. However, ex parte injunctions may be granted within a few days only. Proceedings on the merits take up to two to three years.

Cost of proceedings

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

The procedural costs (court and legal fees) largely depend on the amount in dispute, the complexity of the case and the time requirement of the court and lawyers. Different cantons have their own schedules of fees. The court may demand an advance payment up to the amount of the expected court fees. Procedures before the Swiss Commission for Fairness are free of charge.

As a general rule, the costs, if any, are charged to the unsuccessful party. Court fees are fully recoverable and legal fees are recoverable up to a certain amount as decided by the court.

Appeals

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

The competent courts for UCA claims for an amount in dispute with a value higher than 30,000 Swiss francs are the upper cantonal courts (in some cantons, commercial courts). Decisions of such instances may be appealed to the Swiss Federal Supreme Court.

Decisions of the Swiss Commission for Fairness may be appealed to the plenary assembly of the Commission.

MISLEADING ADVERTISING

Editorial and advertising

15 | How is editorial content differentiated from advertising?

The guidelines of the Swiss Commission for Fairness stipulate, in implementing the Federal Act against Unfair Competition's (UCA) general prohibition of unfair advertisement, that commercial communications, regardless of the form or media, must be identified as such and separated from other content such as editorial content. It is unfair, for the purpose of the acquisition of commercial mandates, to promise editorial content or to make commercial mandates dependent on concessions in editorial content. Further, product placement in editorial communication against payment is not allowed if it remains non-transparent to the consumer. In addition, surreptitious advertising is not allowed.

Advertising that requires substantiation

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

The UCA prohibits the making of incorrect or misleading statements in commercial communication. Thus, factual statements in advertising must be true. However, puffery statements are allowed in so far as value judgments or subjective statements of opinion are concerned that are readily recognisable as such by the addressees of the advertisement and are therefore not taken seriously by the public.

Rules on misleading advertising

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

Misleading advertising is unfair and prohibited by law. As such, advertising must not only be true but also clear. The consumer should receive the goods and services that he or she imagines and may reasonably imagine on the basis of a relatively fleeting overall view of an advertisement. As such, all material information must be disclosed in a clearly recognisable manner. Disclaimers and footnotes are often used;

however, the respective information must correspond to the aforementioned preconditions. Sector-specific rules may require specific information to be provided in advertisements.

Substantiating advertising claims

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

Generally speaking, advertisers are not required to provide proof of their advertising claims before publishing. However, the UCA requires that the information provided in advertising, for example, information on the company, goods or services, prices, quantities in stock, sales events or business relationships, must be true.

As regards the standard of proof, the general procedural rules apply. The court must be convinced in such a way that any doubts appear to be irrelevant. Although generally the party claiming an infringement must prove the facts complained about, the law provides for the possibility of a reversal of the burden of proof to the detriment of the advertiser. The judge can thus require the advertiser to prove the correctness of the factual claims contained in the advertisement.

Survey results

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

Advertising claims based on the results of surveys have to correspond with the general rules applicable to advertising. The fair commercial communication guidelines of the Swiss Commission for Fairness provide some guidance on the conduct of tests and the commercial communication of respective results. However, mere consumer and opinion surveys are not considered as 'tests' and must not be designated as such.

Comparisons with competitors

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

Subject to the provision in article 3(1)(e) of the UCA, and provided the comparison is not likely to create confusion among traders or consumers, it is allowed to make comparisons with competitors and their products – in particular, by using their names. The UCA prohibits comparative advertising only if it compares products or prices by means of incorrect, misleading or unnecessarily offensive statements or in an unnecessarily condescending manner. The guidelines of the Swiss Commission for Fairness state that, among others, the products compared in advertising must allow for a comprehensive and conclusive factual comparison, relevant facts must not be suppressed, no unnecessary intervention with the personality of market participants must occur and the value of the compared product must not be unnecessarily reduced.

Test and study results

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

Producers may advertise their products and services by using expert opinions beneficial to them, if such opinions or tests have been released for advertising purposes. There are no specific rules governing a higher or special degree of proof; the general rules of the UCA apply.

The fair commercial communication guidelines provide some guidance on the conduct of surveys and tests and the commercial

communication of respective results. They must correspond to the principles of neutrality, objectivity, relevance and transparency and, thus, be true, clear, complete and comprehensible. Further details are provided in the guidelines for tests, also issued by the Swiss Commission for Fairness.

Legislation on advertising for medicines strictly prohibits the use of clinical studies, scientific publications or expert opinions in advertising to the public.

Demonstrating performance

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

There are no specific rules governing the depicting or demonstrating of product performance. Advertisers must, however, consider all general rules such as those of the UCA and specific rules concerning, for example, discriminatory content or the use of tobacco products.

Third-party endorsements

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

Advertisers that use testimonials or expert opinions should be able to bring forth the original document or in another way prove its authenticity. This also applies to foreign testimonials and opinions as they must be verifiable in the place they are being used as advertisement. Such third-party opinions and testimonials may be published only with the explicit consent of the author or at least the consent may not have been retracted.

If correct, the adherence to a code of practice may be mentioned in advertising. In addition, the use of certifications and quality marks is generally encouraged. However, the use of untrustworthy or invented labels not only violates the rules on misleading statements of the UCA but may also bear consequences in more specific areas such as laws regulating the advertising of chemicals.

Guarantees

24 | Are there special rules for advertising guarantees?

There are no special rules for advertising guarantees.

Environmental impact

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

Any claims such as 'environmentally friendly' and 'ecological packaging' must be clearly defined and explained. The reasons for such claims may be that the product is refillable or that it can be disposed in an environmentally non-damaging way. Special rules can be found, for example, in the Federal Ordinance on Protection against Dangerous Substances and Preparations.

Free and special price claims

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

As regards pricing claims in general, the Federal Ordinance on the Disclosure of Prices must be observed. Article 18 of the UCA prohibits pointing out price reductions in a misleading way. A price quotation without sufficient informative value, for example, that does not show the value of the discount or the final price or that is based on fictitious comparison prices, is misleading. Moreover, the customer must not be

misled into believing that a particular product can be obtained only at a special price for a short period of time, although the promotion is not limited in time or the product is no longer available at all after the promotion. Further, it is considered unfair if goods are repeatedly offered below cost price and if such offers are particularly highlighted and customers are thereby deceived about the vendor's ability to perform (article 3(1)(f) UCA). Customers must also not be deceived about the actual value of an offer by adding free encores (article 3(1)(g) UCA).

New and improved

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

No specific rules apply for claiming the novelty or the improvement of a product. The general rules apply, which is why respective claims must be true and not misleading. The time span during which a product can be fairly qualified as 'new' or the level of improvement that must be reached for it to qualify as 'improved' substantially depends on the particular product and the market concerned.

Claims of origin

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

There is no general obligation in advertising for claiming where a product is made. However, if a respective claim is made, it must correspond to the applicable legislation. The Federal Trade Mark Protection Act (TMA) protects against any kind of unlawful use of geographical indications of source and states that respective indications in advertising are considered to be correct only if the origin of all of the products and services advertised corresponds to the rules in articles 48 and 49 of the TMA. The respective requirements largely depend on the specifics of the advertised product, for example, whether it is a natural product, foodstuff or an industrial product.

PROHIBITED AND CONTROLLED ADVERTISING

Prohibited products and services

29 | What products and services may not be advertised?

Certain products are banned from public advertising altogether such as prescription drugs. Further, there are several restrictions concerning broadcast advertising: in addition to alcohol and tobacco, advertisements for gambling and lotteries without licence, for political parties and political persons either holding or running for office, and for religious beliefs, are prohibited. Topics that are subject to the popular vote and religious denominations as well as the people and institutions representing them may also not be advertised on the radio or television.

Prohibited advertising methods

30 | Are certain advertising methods prohibited?

Any aggressive methods such as exercising physical or psychological pressure, cornering prospective clients or in any other way limiting their free decision-making abilities are prohibited. Spam emails are allowed only if the sender of the advertisement is visibly and correctly recognisable, the message includes a 'remove me' or 'unsubscribe' option that, when clicked, removes the recipient from the mailing list and if the recipient has given either prior consent to their inclusion in the mailing list or has previously purchased something from the sender. Additionally, mass advertising is restricted, and with the newly adopted article 45a of the Telecommunications Act, telecommunications service providers are now obliged to combat unfair mass advertising. Further,

newly adopted provisions of the UCA restrict advertising calls and add a respective opt-in obligation. They also prohibit spoofing in connection with advertising calls. There are a few more specific rules such as, for example, prohibiting the use of loudspeakers on motor vehicles as well as individual cantonal regulations. Furthermore, the guidelines of the Swiss Commission for Fairness ban gender-discriminatory advertising and consider advertising as sexist and, thus, unfair if it lacks a natural link between the person embodying the gender and the advertised product.

Protection of minors

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

There is no special law concerning the protection of minors in Switzerland: thus, such regulation in the area of advertising falls under the provisions of the UCA. Products unsuitable for minors may not be advertised in media aimed at this target group. Material unsuitable for children must be clearly marked as such. Advertising must not exploit the inexperience and credulity of minors and may especially not display the performance and use of the product in an exaggerated or false manner. It is not appropriate to compromise the social values of minors by, for example, undermining the authority of their parents, displaying violent content or linking the product to social standing.

The Federal Radio and Television Act stipulates specific rules on advertising to minors in broadcasting, such as the rule that programmes for children may not be interrupted by advertising at all. The advertisement of tobacco products directed at minors is prohibited. There are industry codices self-restricting the advertisement of further goods to minors, such as e-cigarettes.

Credit and financial products

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

The UCA regulates the advertising of credit or financial products. In public advertising of a consumer credit, the name of the company of the creditor must be easily and clearly recognisable. The law requires clear indications in the advertisement concerning the net amount of the credit, its total costs and the actual annual interest as well as at least one example calculation. The Swiss Banking Association advises its members to refrain from any targeted advertising. It further discourages any sort of misleading statements such as 'savings credit' and any statements that could encourage uneconomical behaviour.

Therapeutic goods and services

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

Specific provisions for the advertising of therapeutic goods and services are included in the Federal Ordinance on the Advertising of Medicinal Products, the Federal Ordinance on Medical Devices and the Federal Act on Medicinal Products and Medical Devices. Furthermore, such advertising also falls under the general legal provisions of the UCA.

The applicable law differentiates clearly between advertising targeted at professionals and advertising targeted at the general public. It contains specific provisions and lists regulating what may or may not be advertised or included in such advertising. Advertising directed at the general public for prescription-only medicinal products is prohibited. Advertising for over-the-counter medicinal products to the general public is, in principle, permitted. However, medicinal products which have not (yet) obtained a marketing authorisation in Switzerland may not be advertised.

Food and health

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

Advertising of foodstuffs is regulated by the Federal Act on Foodstuffs and the Ordinance on Foodstuffs and Commodities. Claims concerning the effects or properties of a food that, according to current scientific knowledge, it does not possess, or that are not sufficiently scientifically substantiated are prohibited. Health claims are explicitly prohibited in the advertising of foodstuffs save for a list of authorised nutrition claims. Advertisers may apply for special approval for claims from the Federal Health Ministry. Any nutrition or health claims must be correct and formulated in a way that they are understandable to consumers. Advertisements may not claim possible health hazards in the case of non-consumption of the product and must always include indications on the importance of a varied and balanced diet and a healthy lifestyle. Any health-related claims may not be associated with claims concerning weight loss or the duration and extent thereof.

Alcohol

35 | What are the rules for advertising alcoholic beverages?

Advertisements for alcoholic beverages are, among others, regulated by the Federal Act on Foodstuffs and the Federal Act on Alcohol. As a general rule, advertising for alcoholic beverages must not be directed at children or adolescents and may not include any type of health claims. Additionally, many cantons and municipalities have chosen to issue a general prohibition for public advertising of alcoholic beverages.

The advertising of alcoholic beverages of more than 15 per cent by volume is subject to severe restrictions: for example, advertising is permitted only if its content is directly related to the product; it is prohibited to advertise spirits on the radio or television, on public buildings, on sporting grounds or on public transport.

Tobacco

36 | What are the rules for advertising tobacco products?

Advertising tobacco products is especially regulated in the Federal Ordinance on Tobacco Products and Products Containing Tobacco Substitutes. It is prohibited to advertise tobacco products on the radio or television and to direct such advertisements towards children and adolescents. All advertisements are subject to a declaration requirement as well as an obligation to display warnings.

The organisation 'Swiss Cigarette' has established an agreement with the Swiss Commission for Fairness that further specifies and limits tobacco advertising. It particularly states that a general warning must always be in the three official Swiss languages and take up at least 10 per cent of the advertising surface.

Against the applicable provisions in the Federal Act on Foodstuffs, based on a recent decision of the Federal Supreme Court, e-cigarettes containing nicotine can now be sold and advertised in Switzerland without particular restrictions as regards the protection of minors if they meet the technical requirements of an EU or EEA member state. However, one of the applicable soft law codices prohibiting sales and advertising to minors has recently been extended to 'other nicotine-containing products' such as e-cigarettes. Under the new Tobacco Products Act, which is anticipated to come into force in mid-2023, e-cigarettes are intended to be regulated extensively (including their advertising).

Gambling

37 | Are there special rules for advertising gambling?

The offering and advertising of money games are subject to the strict regulation of the Money Games Act. Advertising is allowed only for licensed money games and if it is not misleading or intrusive. In addition, the advertising must not be directed at minors or persons barred from playing money games. The Act further prohibits advertising that implies that the players' knowledge, skills or other characteristics influence their chances of winning without this actually being the case. There are additional restrictions on the form and time of the advertising. Inadmissible advertising to blocked or underage persons is punishable by a fine of up to 500,000 Swiss francs.

Lotteries

38 | What are the rules for advertising lotteries?

Lotteries are also regulated by the Money Games Act. In general, the running of lotteries must be licensed. As regards the advertising of lotteries, it can be referred to the respective rules applicable to money games. Accordingly, advertising must not be carried out in a misleading or intrusive manner and may not be directed at minors or blocked persons.

Promotional contests

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

The Money Games Act has lifted the previously existing general ban on games of chance for sales promotion. Provided that promotional contests are carried out for a short period only and do not create any danger of excessive gambling, they are exempted from the scope of the Act and the respective rules on licensing and advertising do not apply. The case law will have to show what the terms 'promotional', 'short period' and 'danger of excessive gambling' mean. However, stricter rules apply to media companies: they are required to offer and advertise promotional contest only if the participation is free and unconditional on purchase.

The UCA requires that all participants in a competition be informed in detail about the conditions of participation and winning. Any ambiguities and misleading information are not permitted in the case of games and promotional contests.

Indirect marketing

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

Sponsoring in radio and television broadcasts is permitted; however, it must be clearly distinguishable from advertising and the editorial content. Sponsors must be named at the beginning and the end of the broadcasts and advertising statements may not be included in the broadcasts. Companies whose products fall under an advertisement prohibition may usually not act as sponsors. Product placements constitute sponsoring and may not have any advertising effect for the sponsor and towards third parties. Broadcasts with product placements must indicate this at the beginning thereof. Product placement is prohibited in children's shows.

Other advertising rules

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

Owing to their recognised need to protect their local language, some cantons have special provisions under which advertisements are required to be in a certain language.

Certain professions such as lawyers and doctors are subject to advertising restrictions. In addition, political advertising on the radio and television is banned; however, it is allowed in other media.

According to the Coat of Arms Protection Act, federal, cantonal and communal coats of arms or related symbols and characteristics may not be used in advertising by private persons.

SOCIAL MEDIA

Regulation

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

There is no comprehensive legislation on e-commerce in Switzerland that covers advertising on social media. The general provisions of the Federal Act against Unfair Competition (UCA) apply. The principle of good faith, aiming at transparency and the undistorted formation of opinions among recipients (general clause in article 2 UCA), requires advertisements to be recognisable as such. However, as this clause is not subject to penal law, infringements are rarely prosecuted in court.

Nevertheless, the guidelines of the Swiss Commission for Fairness clearly state that commercial communications are unfair if they are not clearly separable from other content. Surreptitious advertising is prohibited while product placement, sponsoring and public relations messages are allowed only if the commercial communication is clearly marked and is visible to the onlooker.

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

General dissatisfaction has arisen among Swiss people as regards the difficulties in identifying advertising on social media and differentiating it from editorial content. In 2019, the Swiss Commission for Fairness decided, for the first time, five complaints about influencer-marketing on a social media platform (Instagram). It held that one athlete did not comply with the Swiss Commission for Fairness' principle that commercial communications have to be clearly identifiable as such. The athlete (Iouri Podladtchikov) should have marked his post, in which he was standing in front of a store of his main sponsor with the caption 'what to wear', as advertisement. On the other hand, in a case regarding another athlete (Roger Federer), it was found that the athlete's Instagram post did not have to be explicitly marked as advertisement, since it was held that it is evident, and the relevant public is well aware of the fact that the depicted brands have commercial relations with the athlete, as sponsoring in sports is common. In May 2020, the plenary assembly of the Swiss Commission for Fairness confirmed such decision upon appeal and held that the obligation to separate advertising from editorial content would cover every form of communication, not only journalistic communication but also private communication. On the merits, the Commission took an influencer-friendly position as it acknowledged that posts clearly identifiable as commercial do not need to be labelled and that even young followers are able to recognise potential commercial intentions underlying a post and that they have a critical attitude towards influencer posts.

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

There are no specific provisions regarding the use of social media. The protection of privacy is essentially regulated by the Federal Data Protection Act (currently under revision), the Telecommunications Act and the UCA. As such, the general rules on the protection of personal data apply. In the context of social media, questions on the admissibility of profiling as the basis of personalised advertising arise. The regulation of profiling is still subject of debate in the context of the revision of the Federal Data Protection Act. Under certain circumstances, the General Data Protection Regulation and, for the future, the e-privacy regulation of the European Union, will also have an impact in Switzerland.

UPDATE AND TRENDS

Recent developments

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

The Federal Data Protection Act is currently under revision. It shall be adapted to the transformed technological and social conditions and particularly improve the transparency of data processing and strengthen the self-determination of data subjects. The revised Act will also have an impact on the advertising sector, in particular with respect to online and personalised advertising. Additional reforms concern possible justification for the processing of personal data, handling of automated decisions and data security. The revision will also bring a closer alignment to the General Data Protection Regulation, inter alia, with respect to accountability requirements, and will provide for a continued adequate legal standard of data protection. The revised Act is expected to come into force in 2022.

A public initiative has been launched calling for the prohibition of any tobacco advertisement that can reach children and adolescents. Coupled with the legislative work on a new Tobacco Products Act, this shows a trend towards ever-stricter regulation of tobacco and e-cigarette advertisement. However, the Federal Council recently advocated against the initiative as it would result in a very far-reaching ban on tobacco advertising. It rather proposed to supplement the draft of the new Tobacco Products Act with additional restrictions on advertising in cinemas and on posters. This would enable Switzerland to meet the minimum requirements of the WHO Framework Convention on Tobacco Control.

Coronavirus

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

A number of regulatory measures have been taken in the course of the covid-19 pandemic. For example, the Swiss Federal Council adopted support measures for all types of media. The measures in favour of print media are being extended until mid-2021, and those in favour of online media until the end of 2021. Additionally, the Swiss Confederation assumes the costs of the news agency Keystone-SDA for the time being.

Furthermore, advertising relating to the pandemic has already been subject to an official procedure in 2020: the Swiss Commission for Fairness dismissed a complaint regarding a private campaign that advertised the slogan 'Staying at home saves lives. Help us!' The complainant considered the campaign to be ethically and morally questionable,

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claiming that such statements were reserved for the authorities. The Commission disagreed, advocating the freedom of expression and the fact that the Swiss Federal Administration has called for private companies to disseminate its messages.

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