Advertising & Marketing

Contributing editor
Rick Kurnit

2017

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Advertising & Marketing 2017

Contributing editor

Rick Kurnit

Frankfurt Kurnit Klein & Selz, PC

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2014
Fourth edition
ISSN 2055-6594

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Advertising & Marketing 2017

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Advertising & Marketing*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 **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 France and Sweden.

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.gettingthedealthrough.com.

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.

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 the contributing editor, Rick Kurnit of Frankfurt Kurnit Klein & Selz, PC, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
May 2017

Introduction

Rick Kurnit
Frankfurt Kurnit Klein & Selz, PC

Advertising may be virtually any communication that impacts on consumers' impressions about a marketer's products or services, or even policies and practices. Traditional media did not have much difficulty distinguishing editorial content from the paid insertions that were authored by an advertiser, but now the integration of brand messages into the content stream is exploding. Today, virtually all content creators, including trusted news sources, are creating content supported in a variety of ways by advertisers. Public relations and corporate communications that were earlier viewed as 'editorial' material, now must be reviewed in terms of the stricter tests imposed on advertising. Press releases, letters to newspapers and content that is placed or even made available in the stream of digital media may be deemed to be advertising. Digital media afford an instant opportunity to move from editorial to purchase, perhaps with a revenue share for the content provider, and this too may cause the content to be viewed as advertising.

Truth in advertising is largely a matter of the techniques that salespeople have always used to overcome consumers' tendency to doubt the seller's claims. Grandiose claims couched in extraordinary superlatives, incapable of any kind of verification and not addressing any specific or absolute characteristic of the product are still mere 'puffery'. They get the consumer's attention, but they are just 'hot air'. They are not likely to convince the consumer to purchase the product on any basis that the consumer cannot evaluate. Truth becomes an issue when apparent, objective or independent evidence that supports the advertiser's claims, particularly those that the consumer cannot independently assess, provides the consumer with a reason to purchase.

However, when a brand makes an actual, objectively provable claim about its product or service, at least where it is likely to influence consumers' purchasing decisions, the brand is likely to be held to a burden of having proof of whatever is communicated, at least to the audience to whom the content is directed. If there is some aspect of the advertising that serves to enhance the credibility of the advertiser or some message that serves to overcome consumers' natural tendency to discount the claims because they are made by the seller of the product, the net communication must be subjected to review. Any factual claim that enhances the credibility of the message or the messenger must be true and be substantiated by appropriate proof.

A product demonstration or test of product performance permits the consumer to rely upon his or her own eyes. A consumer stating his or her own personal experience with the product provides 'independent, unbiased' verification of the seller's claims. Expert testimony and scientific explanations from professors or doctors make extraordinary claims believable. Reliable reports of many satisfied customers similarly provide a substitute for having to take the seller's word for the truth of his or her claims. And finally, a money-back guarantee suggests that performance is measurable and real. In short, facts, demonstrations, tests, endorsements, surveys, guarantees and other means to overcome consumers' natural cynicism about claims made by advertisers and enhance the credibility of the advertiser's message must be supported by hard data and controlled proof.

It is not a question of what was intended. Advertising is judged based on what is communicated and understood by the consumer. Thus we must define the relevant consumers who are likely to be influenced by the advertising in making purchasing decisions. This raises the question of what these consumers understand before seeing the advertising and what they take away from the advertising. Regulators may view the communication from the perspective of the reasonable consumer to whom the advertising is directed acting reasonably in the circumstances. Or they may seek to protect the 'village idiot': 'the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions'. Thus regulators may allow for a portion of the audience being confused, but in most jurisdictions advertising must meet the test with respect to any substantial portion of the audience.

In the digital world in which the current generation has grown up, the consumer is likely to become more sophisticated and experienced in perceiving communications and discerning what is authentic and unbiased. The content that is now being created and displayed on the World Wide Web is sponsored, supported, encouraged and disseminated by advertisers in new ways and with new technologies. Advertisers' greatest asset is the brand equity of a trusted brand. A misstep in communications that tarnishes that brand or damages the brand's relationship with consumers can be catastrophic. In a global ecosystem, a misstep in one part of the world can reverberate worldwide. Attorneys responsible for guiding advertisers on compliance with best practices and avoiding liability face an increasingly difficult task as different jurisdictions must be considered in reviewing global communications and training communications professionals to understand the universal principles that we call 'truth in advertising'.

Australia

Peter Le Guay and Josh Simons
Thomson Geer

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

The principal statute governing advertising in Australia is the Australian Consumer Law (Schedule 2 to the Competition and Consumer Act 2010) (ACL), which prohibits, among other things, misleading or deceptive conduct and the making of false and misleading representations. The ACL is enshrined in each state and territory's fair trading legislation, resulting in the uniform application of the ACL throughout Australia.

Advertising in Australia is also regulated by way of industry codes of practice or conduct that may have the force of law or may be self-regulated by industry groups. Where industry codes of practice are self-regulated by industry groups, those codes are binding only on the industry group's members, as discussed further below.

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?

The Australian Competition and Consumer Commission (ACCC) is the regulator for the ACL and is able to investigate and take enforcement action in respect of contraventions of the ACL. Private persons (including competitors) may also seek to enforce contraventions of the ACL. The Australian Securities and Investment Commission (ASIC) is the regulator in respect of the various legislative provisions relating to misleading or deceptive advertising of credit and financial products contained within the Corporations Act 2001, the ASIC Act 2001 and the National Consumer Credit Protection Act 2009.

As noted above, there are also some industry-specific advertising regulations that have the force of law. For example, the Therapeutic Goods Advertising Code 2007 (TGAC) is administered by the Therapeutic Goods Administration (which is Australia's regulator of therapeutic goods) and the Australia New Zealand Food Standards Code (FSC) is administered by the Australian state and territory government food authorities.

In the self-regulatory space, there is no singular body responsible for 'issuing' advertising rules and industry codes of practice are developed by various industry groups as the need arises. However, the Advertising Standards Bureau (the Bureau) is the peak self-regulatory advertising body that administers a number of industry codes of practice on behalf of the Australian Association of National Advertisers (AANA), the Federal Chamber of Automotive Industries (FCAI) and the Australian Food and Grocery Council (AFGC). The Bureau's Advertising Standards Board (ASB) receives and determines consumer complaints, while the Advertising Claims Board (ACB) receives and determines competitor complaints.

Other industry codes of practice are generally administered and enforced by the industry body concerned. For example, the ABAC Responsible Alcohol Marketing Code is administered by the Alcohol Beverage Advertising Code (ABAC) Scheme Ltd, the Code of Conduct for prescription pharmaceuticals is administered by Medicines Australia and the Weight Management Code of Practice is administered by the Weight Management Council Australia Ltd (WMC).

Generally issues of concurrent jurisdiction do not arise as complaints under self-regulatory codes of practice usually are not permitted to proceed, for example, if court proceedings in relation to the same issue are under way.

3 What powers do the regulators have?

The ACCC has the power to investigate alleged contraventions of the ACL, resolve matters administratively, issue infringement notices, issue substantiation notices, receive court enforceable undertakings (where companies agree to remedy the harm, accept responsibility and improve trade practices compliance), or commence court action (which can result in declarations, injunctions, corrective notices and advertisements, financial consumer redress, pecuniary penalties and criminal convictions).

In general, regulators of the industry codes of practice have little enforcement power and rely on negative publicity in order to ensure compliance. See question 5 for more information regarding the consequences of non-compliance with industry codes of practice.

4 What are the current major concerns of regulators?

The ACCC has indicated that its key areas for concern in 2017 are as follows:

- competition and consumer issues in the agriculture sector;
- competition issues in the commercial construction area;
- consumer issues in private health insurance;
- consumer issues arising in new car retailing, including responses by retailers and manufacturers to consumer guarantee claims;
- issues arising from the ACCC's monitoring of broadband speed and performance claims;
- consumer guarantees, including in relation to services such as those provided by the airline industry;
- providing education to business and consumers in relation to new country of origin labelling laws;
- ensuring compliance by business with new excessive payment surcharge laws;
- consumer issues arising from commission-based sales business models;
- working with internet platform providers to prevent the supply of unsafe products into Australia; and
- ensuring that small businesses receive the protections of:
  - industry codes of conduct, including the Franchising Code of Conduct, the Food and Grocery Code of Conduct and the Horticulture Code of Conduct; and
  - new legislative provisions extending unfair contract term protections to small businesses.

While the ACCC will focus its efforts on the above areas, it will continue to monitor compliance in areas previously identified as priorities.

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

Australia has a strong advertising self-regulatory system. Accordingly, there is a large number of industry codes of practice or conduct that affect both general advertising and advertising for specific products or services, including (but not limited to) the:

- AANA Code of Ethics;
- AANA Food and Beverages Code;
- AANA Code for Advertising and Marketing Communications to Children (AANA Children's Code) (which covers advertising of products with principal appeal to children aged 14 years and younger);
- AANA Environmental Claims in Advertising and Marketing Code (AANA Environmental Claims Code);
- AANA Wagering Advertising and Marketing Communication Code (which covers advertising of wagering products and services by licensed operators);
- FCAI Voluntary Code of Practice for Motor Vehicle Advertising;
- AFGC Responsible Children's Marketing Initiative (which aims to ensure that healthier foods are advertised to children);
- Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children (which relates to advertising by fast food outlets);
- ABAC Responsible Alcohol Marketing Code (which covers both packaging and advertising of alcohol);
- Franchising Code of Conduct;
- Food and Grocery Code of Conduct;
- Horticulture Code of Conduct;
- Australian Self Medication Industry (ASMI) Code of Practice (which applies to the non-prescription sector of the medicines industry);
- Complementary Healthcare Council of Australia (CHC) Marketing Code of Practice: Complementary Medicines and Health Food Products;
- Medical Technology Association of Australia (MTAA) Code of Practice;
- Association for Data-Driven Marketing and Advertising (ADMA) Code of Practice (which applies in relation to direct marketing);
- WMC Weight Management Code of Practice, including the Slimming Advertising Guidelines; and
- Jewellers Association of Australia Code of Conduct.

There are also industry codes of practice that apply in relation to a specific medium of advertising, including the:

- Commercial Television Industry Code of Practice (in respect of free-to-air TV);
- Australian Subscription Television and Radio Association Codes of Practice (in respect of subscription or pay television);
- Commercial Radio Code of Practice (in respect of commercial radio); and
- Outdoor Media Association's Code of Ethics (in respect of outdoor advertising such as billboards).

The codes of practice are generally only binding on the members of the industry group that issue and administer the code. Where an advertisement does not comply with a code of practice, the ASB (or applicable adjudication panel) will request that the advertiser remove or amend the advertisement as soon as possible after making a determination. If the advertiser does not do so, the ASB (or applicable adjudication panel) will report such failure in a public case report, send the report to relevant media proprietors, post the report on its website and, if considered appropriate, refer the report to an appropriate government agency. The ultimate sanction in relation to non-compliance with an industry body code of practice is expulsion by the industry body.

Some codes of practice, such as the TGAC (which applies to therapeutic goods), the Franchising Code of Conduct, the Food and Grocery Code of Conduct (which applies to the grocery supply chain), the Horticulture Code of Conduct and the FSC (which applies to food), have the force of law and are applicable to all advertisers. The Complaints Resolution Panel (CRP) (which adjudicates complaints in relation to the TGAC) can only request that advertisers withdraw the advertisement, publish a retraction, publish a correction or withdraw a particular claim or representation. If an advertiser fails to do so, the CRP may recommend to the Secretary to the Department of Health to take further action. In respect of the FSC, there are monetary penalties that apply to the sale or advertising for the sale of food in contravention of the FSC.

6 Must advertisers register or obtain a licence?

In general, a licence is not required to advertise. However, depending on the good or service concerned, a licence or registration may be required to sell, advertise the sale of, or distribute a particular good or service.

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

The ACCC does not provide advisory opinions as to whether an advertisement complies with the ACL. In respect of industry codes of practice, the ASB does not provide advisory opinions either. However, the ABAC Scheme Ltd provides a pre-vetting service for advertisements and packaging of alcohol beverages in relation to the ABAC. However, approval under the pre-vetting service is no guarantee of compliance if a complaint is made.

Certain advertising needs to receive clearance before publication or broadcasting. In particular, television commercials broadcast on commercial television must be classified and approved by Commercials Advice (CAD). Generally CAD only reviews television commercials for classification purposes, and while in some cases they review substantiation for claims made in television commercials, approval by CAD is no guarantee of compliance with the ACL or any other piece of legislation or code of practice.

In addition, under the TGAC, advertisements for therapeutic goods in specified media (television, radio, print, cinema and outdoor) must be pre-approved before publication. Print and certain broadcast advertisements for complementary medicines and non-prescription (over-the-counter) medicines must obtain prior approval from the CHC and the ASMI respectively. Advertisements are assessed only in relation to compliance with the TGAC and are not assessed in relation to other laws such as the ACL.

Private enforcement (litigation and administrative procedures)

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

Court proceedings can be commenced, for example, in the Federal Court of Australia for misleading or deceptive conduct in contravention of the ACL. A binding decision will be obtained, and although that decision can be obtained quickly if urgent interlocutory injunctive relief is sought, it is a costly process.

Alternatively a complaint can be made to the ACB or relevant industry body if an industry code of practice applies. A complaint to the ACB avoids the substantial costs of litigation and results in a determination of issues quickly (within 15 days of the final submission to the ACB). However, the complainant bears the cost of the proceeding and determinations cannot be enforced, although if the ACB determines that the advertising must be modified or discontinued and the advertiser does not do so, the matter may be referred to the relevant government agency (eg, the ACCC) or to the media. The case report is also published on the Bureau's website.

If the advertising is likely to be detrimental to the public, some advertisers may choose to notify the ACCC of their competitor's advertising. If the ACCC decides to investigate or take action against the competitor, no costs will be incurred by the complainant advertiser. However, the ACCC is under no obligation to investigate or take action and may decline to do so.

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?

A member of the public or a consumer association may bring court proceedings under the ACL or make a complaint to the ASB about taste or decency issues under the AANA Code of Ethics and the other codes the Bureau administers, including the AANA Food and Beverages Code, the AANA Children's Code, the AANA Environmental Claims Code and the AANA Wagering Advertising and Marketing Communication Code.

Any person or association may commence court proceedings under the ACL or make a complaint to the ACCC. Any person can make

a complaint to the ASB if they think the relevant advertising code has been breached.

Court proceedings challenging advertising would most commonly be brought on grounds that the advertising is misleading or deceptive, or is likely to mislead or deceive, in contravention of the ACL. Similarly, a complaint could be made to the ACCC about advertising on the same basis.

10 Which party bears the burden of proof?

In relation to court proceedings, the party bringing the complaint. In relation to complaints to the ASB, once the complaint has been made alleging breach of the relevant code, the onus is on the advertiser to satisfy the ASB that they have not breached the code.

11 What remedies may the courts or other adjudicators grant?

The court may:

- make a declaration that an advertiser has engaged in misleading or deceptive conduct, or conduct that is likely to mislead or deceive;
- grant an injunction restraining an advertiser from making certain advertising claims;
- award damages against the advertiser (or in some cases an account of profits); and
- order legal costs against the advertiser.

The ACCC may also require that an advertiser be ordered to publish a corrective advertisement, provide financial consumer redress, pay a pecuniary penalty and implement a compliance programme.

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

Duration of court proceedings vary. If an urgent interlocutory injunction is sought and obtained, proceedings may take only a few days or weeks and the matter may then settle after the granting of the injunction. Otherwise, taking the proceedings to an early final hearing may take approximately three months or a final hearing in the usual course will generally take between six and 12 months.

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

Costs vary considerably according to factors specific to the individual case, including how vigorously the action is prosecuted and defended, whether discovery of documents is sought, whether expert witnesses are involved, whether senior and junior counsel are briefed to appear for the parties and the length of the hearing.

Costs may start at around A$50,000 for an application for an urgent interlocutory injunction and total between A$250,000 and A$350,000 for a fully contested matter that includes a final hearing over a few days.

Normally, the successful party is awarded costs in their favour. However, unless indemnity costs are ordered (which is unusual), the successful party would normally only recover between about 50 per cent and 70 per cent of their actual costs.

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

A decision of a single judge of the Federal Court (for example, in respect of a claim of misleading or deceptive advertising) may be appealed to the Full Court of the Federal Court (consisting of three judges) and that decision may be appealed on a question of law, with leave, to the High Court of Australia.

No appeal lies from a determination of the ACB. However, a complainant or an advertiser may seek an independent review of an ASB determination if there is new or additional evidence that could have a significant bearing on the determination, or if there is a substantial flaw in the ASB's determination.

Misleading advertising

15 How is editorial content differentiated from advertising?

Information providers (such as media proprietors) are not subject to the ACL in respect of misleading or deceptive conduct (section 18) and false and misleading representations (section 29) in respect of publications made in the course of carrying on the business of providing information. However, the information provider exception does not apply to the publication of advertisements.

In addition, the AANA Children's Code requires that advertising and marketing communications to children aged 14 years and younger (which applies to any medium of advertising) fairly represent, in a manner that is clearly understood by children, that the advertising or marketing communication is in fact a commercial communication rather than programme content, editorial comment or other non-commercial communication.

In some cases, there are requirements to disclose where advertisers have influenced the editorial content (although generally these requirements are imposed on the provider of editorial content). For example, the Media Entertainment and Arts Alliance Journalists' Code of Ethics requires journalists to disclose when any direct or indirect payment has been made for an interview, pictures, information or stories. In addition, under the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2012 broadcast current affairs and talkback programmes must disclose certain commercial agreements and other arrangements that have the potential to affect the content of such programmes. Likewise, under the Commercial Television Industry Code of Practice 2015, where a factual programme (such as a current affairs programme, infotainment programme or documentary) endorses or features a third party's products or services in accordance with a commercial arrangement, the arrangement must be disclosed.

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

It is generally accepted that in the ordinary course of commercial dealings, a certain degree of 'puffing' or exaggeration is expected, and whether such puffery is considered to be a representation requiring substantiation will depend on all of the facts and circumstances of the particular case. For example, claims that are capable of objective assessment or comparative claims are more likely to be regarded as misleading if they are incorrect, as opposed to claims that are clearly fanciful or non-comparative.

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

Under section 18 of the ACL, a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. It is a provision of wide import. Section 29 of the ACL also prohibits the making of false and misleading representations in relation to a range of matters concerning the supply or promotion of goods or services including (but not limited to) quality, standard, sponsorship, approval, performance characteristics, benefits, price and place of origin.

It is the overall impression created by the advertisement, as understood by the reasonable person in the target audience, that is relevant in considering whether an advertisement is misleading or deceptive or likely to mislead or deceive. Material information need only be disclosed if the omission of such information is likely to result in an advertisement being misleading or deceptive. For example, substantiating data for a claim need not be disclosed in an advertisement provided that the advertiser has credible substantiating data in its possession at the time of making the claim. While disclaimers and footnotes are permissible, advertisers should consider whether such disclaimers and footnotes are in fact effective, having regard to all the circumstances, including the prominence and proximity of the disclaimer to the claim and the type of advertising media. Often fine-print disclaimers are held to be ineffective in correcting what is considered to be an initial misleading impression.

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?

Yes, an advertiser must have substantiating evidence on hand before the claim is made. Generally, there are no prescribed standards for the type of proof necessary to substantiate a claim; however, proof should be credible and robust enough to withstand objective scrutiny.

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

There are no specific requirements for advertising claims based on the results of surveys. The usual issues raised about surveys concern the language used, questions asked, methodology and sample size. Survey evidence must be robust in the sense that it is objective, unbiased and based on sound methodology. There is a Federal Court Practice Note (CM 13) that sets out a procedure to be followed in relation to the conduct of surveys, but that practice note only applies when a party seeks to have a survey conducted during the course of court proceedings.

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

There are no special rules in respect of comparative advertising. However, the making of comparative claims in advertising generally requires special care given the greater propensity for misleading or deceptive conduct to occur through inaccurate comparisons.

Comparative advertising does not carry a higher burden on advertisers to substantiate their claims; however, it should be noted that statements made in a comparative context can be more likely to mislead consumers. For example, the same statement made in a non-comparative advertisement may be seen as mere puffery but in a comparative advertisement may constitute a misrepresentation. In addition, care should be taken to make fair and appropriate comparisons between competitors and competing products.

It is permissible to identify a competitor by name, even if the name is a registered trademark. However, some codes of practice may contain a provision that advertisements must not disparage a competitor.

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

No. Provided the tests and studies actually prove the product's superiority, no higher or special degree of proof is required. Whether or not a test or study proves a product's superiority will depend on the construction of the test, its methodology, sample size and so on. Accordingly, the tests and studies relied upon and referred to in the claim must, in addition to proving the product's superiority, prominently disclaim all relevant limitations (if any). Claims purportedly based on tests and studies are more likely to be understood as a representation rather than mere puffery and therefore extra care should be taken to ensure that the tests and studies relied on actually substantiate the claims.

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

There are no special rules for depicting or demonstrating product performance. Providing the depiction or demonstration is not misleading or deceptive or likely to mislead or deceive, there should be no issue.

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

Section 29(1)(e) of the ACL specifically prohibits the making of a 'false or misleading representation that purports to be a testimonial by any person relating to goods or services' and section 29(1)(f) of the ACL prohibits the making of a 'false or misleading representation concerning a testimonial by any person, or a representation that purports to be such a testimonial, in relation to goods or services'.

Generally, a testimonial should be genuine, and reflect typical cases and the actual experience of the person giving the testimonial. Permission to use the testimonial should be obtained and a signed record of the testimonial provided should be retained by the advertiser.

24 Are there special rules for advertising guarantees?

Section 29(1)(m) of the ACL prohibits the making of false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including the non-excludable consumer guarantees set out in the ACL itself). Accordingly, advertisers must be aware of consumer rights and ensure that their advertisements do not claim that those rights have been modified or extinguished.

Statements in advertising such as 'no refunds or exchanges' are generally not permissible, as consumers are entitled to refunds in certain circumstances. Care must also be taken when advertising 'extended warranty' products if claims during the period of the extended warranty will already be protected by the consumer guarantees set out in the ACL.

In addition, if an express warranty against a defect (being a representation made at the time of supply regarding the repair or replacement of goods or provision against or rectification of services or whole or partial recompense on the basis of any defect of the goods or services) is provided by an advertiser, it must comply with the prescribed requirements relating to the form and content of the warranty.

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

There are no special rules for claims about a product's effect on the environment under general law. However, section 29(1)(a) of the ACL prohibits false or misleading representations relating to a particular standard, quality, value, grade, composition of goods (which could include a product's effect on the environment).

The Bureau also administers the AANA Environmental Claims Code that requires, among other things, that advertisements be truthful and factual, that claims must provide a genuine benefit to the environment, and that claims be substantiated.

26 Are there special rules for describing something as free and for pricing or savings claims?

The general prohibition against misleading or deceptive conduct applies equally for claims of 'free' and pricing or savings claims as it does any claim. In addition, section 29(1)(i) of the ACL specifically prohibits false and misleading representations concerning the price of goods and services. It is important to note that the word 'free' has been singled out by the ACCC as a word that should be handled with care and that 'free' from a consumer perspective means absolutely free.

There have also been a number of notable cases in respect of 'was/now' type pricing claims, indicating that goods or services must be offered at the 'was' price for a 'reasonable period' before a retailer advertises the 'was/now' comparison. The 'was' price must be a realistic selling price and businesses that utilise an aggressive discounting policy (for example, whereby goods are rarely actually sold at the ticketed price and are often automatically discounted) should ensure that the 'was' price used in the comparison reflects the actual price at which the goods were sold for a reasonable period immediately prior to sale.

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

There are no special rules for claims about a product's new or improved nature, although section 29(1)(a) of the ACL specifically prohibits the making of false or misleading representations that goods are of a particular style or model and section 29(1)(c) of the ACL specifically prohibits the making of false or misleading representations that goods are new.

Prohibited and controlled advertising

28 What products and services may not be advertised?

Tobacco advertising is banned in Australia. In addition, the labelling and packaging of tobacco products in Australia is highly regulated with plain packaging being prescribed by the Tobacco Plain Packaging Act 2011 and associated regulations.

There are a number of goods and services for which advertising is highly regulated or restricted in terms of the form, content and placement of such advertising, including (but not limited to) alcohol, pharmaceutical products, firearms and financial services.

29 Are certain advertising methods prohibited?

Unsolicited methods of advertising are regulated. In particular, the Spam Act 2003 prohibits the sending of commercial electronic messages (including e-mails and SMS) unless the recipient has provided consent (express or implied) to receiving the messages, and the electronic message contains identifying details of the sender and a functional unsubscribe facility. The Do Not Call Register Act 2006 also

prohibits the making of unsolicited calls by advertisers and marketers to numbers registered on the Do Not Call Register. The Privacy Act 1988 (which applies across all mediums of communication) prohibits the use and disclosure of personal information for the purposes of direct marketing except in specified circumstances. The exceptions are subject to the sender providing a simple means for individuals to opt out and making individuals aware that they can opt out.

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

The normal provisions regarding misleading or deceptive conduct under the ACL apply in respect of advertising directed to minors. When considering whether conduct is misleading or deceptive, all of the circumstances will be taken into account, including the age of the target audience of the advertisement. What may not be misleading or deceptive to an adult audience may be misleading or deceptive in respect of a younger audience.

There are also specific rules in respect of children's advertising within various industry codes and standards. For example, the Children's Television Standards (which apply to commercial television) regulate advertising during C programme classifications (for children aged up to 14 years) and P programme classifications (for preschool children). The Standards address matters such as the following:

- content of advertisements;
- classification;
- maximum advertising time;
- competitions and prizes;
- separation of advertisements and sponsorship announcements;
- repetition;
- undue pressure;
- clarity of presentation; and
- endorsements by programme characters.

There are also specific rules contained in the Commercial Radio Codes of Practice and Guidelines 2011 regarding live-hosted entertainment programmes and treatment of children aged under 16 years in a demeaning or exploitative manner.

The AANA Children's Code, the AANA Food and Beverages Code, the AFGC Responsible Children's Marketing Initiative and Australian Quick Service Restaurant Industry for Responsible Advertising and Marketing to Children also contain specific rules in respect of its members' advertising to children. For example, the AANA Children's Code regulates the advertising of products with principal appeal to children aged 14 years or younger in any medium and deals with matters such as compliance with prevailing community standards, factual presentation of material, placement, use of sexual imagery, safety, social values, undermining parental authority, competitions, use of popular personalities and privacy. The ADMA Code of Practice also regulates its members advertising practices towards minors and the TGAC restricts the types of therapeutics goods that can be advertised to minors (persons under 18).

31 Are there special rules for advertising credit or financial products?

The advertising of credit and financial products is governed by a number of legislative provisions relating to misleading or deceptive advertising practices and are contained within the Corporations Act 2001, the ASIC Act 2001 and the National Consumer Credit Protection Act 2009, which are administered and enforced by ASIC. Promoters who also hold an Australian financial services or credit licence have additional obligations to comply with financial and credit services laws respectively, including in relation to advertising of financial and credit products.

ASIC has issued a number of regulatory guidelines relating to the advertising of financial products and services generally.

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

Advertisement of therapeutic goods directed to consumers is subject to the TGAC, which covers matters such as the content of advertisements, the use of incentives to pharmacy assistants and non-healthcare professional sales persons, use of scientific information, comparative advertising, professional recommendations, testimonials and samples. The TGAC also restricts certain representations, prescribes warning notices for advertisements of certain therapeutic goods and restricts advertising to minors to certain types of therapeutic goods.

Advertisements for therapeutic goods directed exclusively to healthcare professionals are governed by industry codes of practice, such as the Medicines Australia Code of Conduct (in respect of prescription pharmaceutical products), the ASMI Code of Practice (in respect of non-prescription consumer healthcare products) and the MTAA Code of Practice (in respect of medical devices).

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

Standard 1.2.7 of the FSC contains detailed and extensive provisions and rules regarding the making of nutrition and health claims in relation to food. In respect of nutrition content claims, the standard sets out detailed minimum nutrient content requirements that must be met before a nutrition content claim can be made. If the nutrient is not specifically listed in the standard, nutrition content claims are limited to the fact that the food does or does not contain that property of food and the specified amount (if applicable). Nutrition content claims are not permitted to imply slimming effects. Health claims can only be made in relation to the pre-approved food health relationships set out in the standard, although there are some provisions for self-substantiation set out in the standard.

In addition, the WMC's Weight Management Code of Practice (which is binding only on its members) sets out specific rules in respect of advertisements by its members and contains the Slimming Advertising Guidelines, which cover advertisements in which claims are made in respect of weight loss, slimming, weight control, or measurement loss, where weight loss is stated or implied.

34 What are the rules for advertising alcoholic beverages?

The ABAC Responsible Alcohol Marketing Code is a specific alcoholic beverages industry code of practice, which covers the advertising, packaging and labelling of alcohol products. The ABAC requires advertisements for alcoholic beverages not to encourage excess consumption or abuse of alcohol, not to appeal to children or adolescents, not to suggest that alcohol may contribute to a change in mood or environment and not to depict any association between the consumption of alcohol and dangerous activities.

There are also additional rules specific to certain types of advertising mediums, such as free-to-air television, subscription or pay television and outdoor advertising. The advertising restrictions generally relate to the timing, content, location and placement of advertisements. In some states and territories, there are restrictions on trade promotions involving alcohol (whether they are a part of the prize or part of the entry requirements of the promotion).

35 What are the rules for advertising tobacco products?

The advertising of tobacco products is not permitted in Australia. Under the Tobacco Advertising Prohibition Act 1992 it is an offence for a corporation to publish or broadcast a tobacco advertisement except in very limited exceptions, namely for political discourse, in anti-smoking advertisements and in tobacco trade communications.

36 Are there special rules for advertising gambling?

Yes. The Interactive Gambling Act 2001 (Cth) makes it an offence to provide or advertise interactive gambling (including casino-style games and live sports wagering (also known as 'in-play' wagering) made available over the internet) to Australians. This Act is also supported by the Code for Interactive Gambling.

In addition, advertising of gambling is regulated by state and territories legislation and can vary considerably between the states and territories. Depending on the state or territory, legislation may prohibit advertisements that encourage a breach of the law, target people under 18, depict people under the age of 25 gambling, contain false and misleading statements, promote gambling as a form of investment or a skill, or promote the consumption of alcohol while gambling. In some states the advertising of gambling machines is prohibited.

Further, the Australian Communications and Media Authority limits betting odds promotions and gambling advertising during live sports broadcasts on radio, free-to-air commercial television and subscription or pay-television.

The AANA Wagering Advertising and Marketing Communication Code also contains specific rules for advertising by licensed providers of wagering services, which include horse, harness and greyhound races, sporting events and betting on other events.

37 What are the rules for advertising lotteries?

Games of chance (that is, 'sweepstakes' type games) are governed by state and territories lotteries legislation and regulations. In general games of chance are highly regulated and may require permit registration in one or more states or territories (depending on the total prize pool of the promotion and the nature of the promotion). The lotteries regulations and permit conditions prescribe what the terms and conditions of the promotion need to include, provisions for unclaimed prizes, rules for publication of winners' names, scrutineering of draws and approval or assessment of electronic drawing mechanisms.

Advertising of games of chance must also comply with state and territory legislation, which prescribes that certain information must be included in all advertising, including information about where the full terms and conditions can be located, publication of permit numbers, draw times and locations and any unusual or onerous rules that may apply to the promotion.

The AANA Children's Code (which applies to AANA members' advertising of products with principal appeal to children aged 14 or younger) also requires that advertising that includes a competition must contain a summary of the basic rules of the competition, clearly include the closing date for entries and make any statements about the chance of winning clear, fair and accurate.

38 What are the requirements for advertising and offering promotional contests?

Games purely of skill are not subject to state and territory lotteries legislation, which, as described above, applies to games of chance and is highly regulated. Advertising and offering of promotional contests is subject to the usual provisions of the ACL. That is, advertising must not be misleading or deceptive or likely to mislead or deceive.

As with games of chance, the AANA Children's Code applies equally to contests.

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

There are no legal restrictions on indirect marketing, commercial sponsorship of programmes and product placement, where such marketing, sponsorship and product placement is agreed and arranged between the parties. Australia's national broadcaster, the Australian Broadcasting Corporation, does, however, have an editorial policy that prohibits 'product placement or other forms of embedded or surreptitious advertising' other than in 'exceptional cases'.

In respect of 'unofficial' indirect marketing (known as 'ambush marketing'), such conduct may, depending on the circumstances, be considered to be misleading or deceptive or amount to a false or misleading representation that goods or services of the ambush marketer have sponsorship that they do not have or that the ambush marketer has sponsorship, approval or affiliation that it does not have.

Some states and territories also have legislation prohibiting unauthorised advertising within sight of major sports facilities or in certain areas (such as on buildings or aerial advertising) during major events. In addition, for certain events (such as the Olympics and Commonwealth Games) time-limited and specific legislation is enacted that prohibits unauthorised advertising (such as billboards, posters, signs) in and around Olympic and Commonwealth Games venues, in the airspace above such venues (ie, balloon advertising, sky writing and banners) and also in major thoroughfares. One state has also enacted legislation that specifically defines ambush marketing.

40 Briefly give details of any other notable special advertising regimes.

There is a specific advertising regime for political advertising. Commonwealth, state and territory legislation regarding electoral advertising sets out some rules in relation to the content and form of advertising. For example, electoral advertisements must state at the end the name and address of the person who authorised the advertisement and the name and place of business of the printer. The legislation also covers issues such as advertising on how to vote cards, defamation of candidates, as well as an electronic media advertising 'blackout period' from the Wednesday before the polling day until the close of the poll on polling day. The Broadcasting Services Act 1992 contains corresponding restrictions regarding access, timing and identification in relation to the broadcasting of political and election material.

Update and trends

Given the insertion of the new clause 2.7 into the AANA Code of Ethics (effective 1 March 2017): 'Advertising or Marketing Communication must be clearly distinguishable as such to the relevant audience', and the AANA's Best Practice Guideline for Clearly Distinguishable Advertising, advertising practices such as native advertising and the lack of disclosure of commercial arrangements between advertisers and social media influencers are likely to come under greater scrutiny.

Social media

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

The same legal controls that apply to advertising and marketing generally in Australia equally apply to social media. Advertisers should be aware that the ACL and AANA Code of Ethics have been applied in respect of advertising on social media in respect of comments made by third parties on an advertiser's Facebook and Twitter pages. Advertisers are expected to review their social media pages regularly and to remove any content that is likely to breach the ACL or any applicable code. The AANA issued the Best Practice Guideline – Responsible Marketing Communications in the Digital Space in 2013, after a number of strict rulings by the ASB that held that companies were responsible for all content on those companies' social media pages, including user-generated content. The AANA Best Practice Digital Guidelines were updated last year (in September 2015) to bring them in line with recent trends surrounding the application of the ACL to foreign corporations that are 'carrying on business in Australia', so that now the AANA Code of Ethics applies to all advertising or marketing communications where any of the customers of the product or service are physically present in Australia and the advertising or marketing communications are 'directed' at those customers.

The ACCC has also issued guidelines in respect of advertising on social media, which indicate that the amount of time that should be spent monitoring social media pages depends on the size of the company and the number of fans and followers of the page.

In March 2017 the AANA issued the Clearly Distinguishable Advertising – Best Practice Guideline to assist advertisers and agencies in ensuring their advertising and marketing communications are clearly distinguishable as such to the relevant audience. These Guidelines will have direct application to such things as native advertising and the disclosure of commercial arrangements between advertisers and social media influencers.

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

ACCC v Allergy Pathway Pty Ltd (No. 2) [2011] FCA 74 was the first case in Australia in which user-generated content published on an advertiser's Facebook and Twitter pages was held to be a contravention of the ACL by the advertiser. In that case, a number of false or misleading testimonials about the product were written and posted by clients on Allergy Pathway's Facebook 'wall' and on Twitter. While the advertiser was not responsible for its initial publication, it was nevertheless held that once the advertiser became aware (or should have become aware) of the false statements being placed on its Facebook or Twitter pages, and did not remove them, the advertiser then became the publisher of (and responsible for) the testimonials. Allergy Pathway was therefore held responsible for the misleading or deceptive and false representations written and posted by customers on its social media pages. The placement of a disclaimer by the advertiser on its website was not sufficient to overcome this liability.

The finding that advertisers are responsible for the representations made by third parties in user-generated content has been echoed in a number of determinations before the ASB.

In a February 2016 ASB decision, Carlton and United Breweries (the Advertiser) was held to have breached the AANA Code of Ethics as a result of derogatory and offensive material posted by users and not removed or moderated by the Advertiser. An image was posted by a fan on the Advertiser's Facebook page of a person holding out a beer to a kangaroo, while the kangaroo's arms were outstretched, with the caption 'Kangabrew'. The image was subsequently re-posted to the Carlton Dry Instagram page with the hashtag 'SeizeTheDry' and re-posted to Facebook walls. This was seen to be suggesting that giving alcohol to animals, which is a form of animal cruelty, is acceptable, funny and amusing. By failing to remove the user-generated content, the Advertiser was held to be in breach of the AANA Code of Ethics.

The ASB determination in the *Kangabrew* case reflects earlier ASB decisions that have found that social media pages of advertisers, such as Facebook walls, are marketing communication tools over which the advertiser has a reasonable degree of control, and which can be used to draw the attention of a segment of the public to a product in a manner calculated to promote or oppose directly or indirectly that product, or endorse a type of behaviour or cultural trend for business purposes.

It is clear that the ASB's current position is that the AANA Code of Ethics applies to both the content generated by the page creator as well as the material and comments posted by users on the social media page.

43 Are there regulations governing privacy concerns when using social media?

There are no special regulations that apply in terms of privacy on social media. The Privacy Act 1988 (incorporating the Australian Privacy Principles (APPs)) applies to social media as it does to the collection of personal information in any other context. All companies (including overseas entities) with an annual turnover of more than A$3 million are subject to the APPs, which set out rules concerning (among other things) the collection and handling of personal information, prescribed information that must be notified to individuals whose personal information has been collected, including in respect of the privacy policy, and rules in relation to the use and disclosure of personal information for the purposes of direct marketing.

Use and disclosure of personal information for the purpose of direct marketing is now prohibited unless an exception applies. For example, such use or disclosure may be permitted where an organisation has collected personal information directly from the individual and the individual would be reasonably aware that their personal information will be used for that purpose, or where consent has been obtained. However, organisations must provide a simple means for the individual to request not to receive further communications and, in some cases, a prominent statement must be included to make the individual aware of the fact that they may request a direct marketer to no longer send them marketing communications.

THOMSON GEER
LAWYERS

Peter Le Guay **pleguay@tglaw.com.au**
Josh Simons **jsimons@tglaw.com.au**

Level 25, 1 O'Connell Street
Sydney NSW 2000
Australia

Tel: +61 2 8248 5800
Fax: +61 2 8248 5899
www.tglaw.com.au

Austria

Georg Huber, Stefan Kofler and Fabian Bösch

Greiter Pegger Kofler & Partners, Attorneys-at-Law

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

The main source of advertising law in Austria is the Federal Law Against Unfair Competition (UWG). It includes three main types of prohibited advertising practices:

- unfair commercial practices (section 1 UWG);
- aggressive commercial practices (section 1a UWG); and
- misleading commercial practices (section 2 UWG).

Some further, more specific clauses of prohibited practices exist, such as disparagement of an enterprise, misuse of designations of an enterprise, bribing of employees or agents or disclosure of business or trade secrets.

In its annex, the UWG contains a 'blacklist' of concrete commercial practices, which are prohibited in all circumstances.

Several former specialised acts and provisions dealing with, for example, promotional gifts, price discounts or clearance sales were repealed. These areas now fall under the UWG.

Case law also gives consideration to other, more specific laws when interpreting the UWG clauses, such as trade regulations, labelling laws and regional planning laws.

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?

According to the Federal Constitutional Law, for advertising matters, the Federation has powers of legislation and execution. Thus, the Austrian parliament is responsible for issuing advertising laws and the federal government can enact ordinances whenever such ordinances are provided for by law. There is no concurrent jurisdiction in Austria.

Civil claims in advertising law are enforced by the courts; the main competent courts are the Commercial Court in Vienna and the regional courts outside Vienna.

Fines imposed by the district administrative authority shall punish administrative offences set forth in the laws.

3 What powers do the regulators have?

The courts can impose damages and cease-and-desist orders, including a right to elimination of unlawful conditions. In the case of disparagement of an enterprise, there is a right to retraction and publication of the retraction. In some cases, the publication of a sentence or the rendering of accounts to the claimant may also be ordered.

In serious cases, the courts and authorities can impose monetary penalties as well as prison sentences.

4 What are the current major concerns of regulators?

A current issue is advertising on internet platforms that offer illegal services (eg, music downloads that violate copyrights). Advertising on such platforms is not only unethical, but may also constitute a breach of the UWG. In this matter, a process of establishing self-regulation has been launched, and the Advertising Council (see question 5) has already denounced such advertising practices.

At present, Austrian civil procedure law does not provide for a class action like in the US and other countries. This makes it a lot harder and riskier for Austrian consumers to sue big companies. The Austrian Ministry of Justice is preparing a draft legislation to make class actions possible in Austria, too.

The laws to fight online hate speech and incitement have been tightened, and media coverage around this topic has significantly increased in the wake of the recent waves of refugees heading towards Austria.

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

In Austria, self-regulation is only of minor (though growing) importance.

The advertising industry, however, founded the Advertising Council, which established the Advertising Industry Ethics Code, which is available in German and English on the Advertising Council's homepage (www.werberat.at). This Code is to be followed by the advertising industry as an instrument of self-regulation. It guarantees, in particular, that a sense of decency is respected in advertising. The Advertising Council has no power to impose sanctions on advertisers. However, the decisions of the Advertising Council may be published in order to inform the media and the public that a certain practice offends the rules of decency or, in less severe cases, that a certain topic should be handled with greater sensitivity in future advertisements.

Furthermore, advertisers can apply for the ethical seal of the Advertising Council. This seal is granted to advertisers who commit themselves to and comply with the Advertising Industry Ethics Code.

6 Must advertisers register or obtain a licence?

Advertisers (companies who want to advertise their products or services) do not have to register or obtain a licence.

Advertising agencies (companies who provide advertising services for others) are considered 'free trades', which do not fall under the regulated trades according to the Austrian Trade, Commerce and Industry Regulation Act. However, before starting business they have to register with the competent district administration authority.

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

The regulators have not installed an advisory board. There is, however, the possibility of consulting associations or institutions such as the Advertising Council.

Advertisers do not need clearance before publication or broadcasting.

Private enforcement (litigation and administrative procedures)

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

Competitors may bring both principal actions on the merits and an application for preliminary injunctions.

An order to cease and desist is available in both avenues. All other remedies are available only in the principal action on the merits.

On the one hand, preliminary injunctions have the advantage of quick relief through (only) establishing prima facie evidence. On the other hand, if the preliminary injunction is ordered but the court finally dismisses the claim in the principal actions, the defendant can claim damages for not having been allowed to advertise while the preliminary injunction was in place.

In addition, competitors are free to report certain advertising practices to the district administrative authority in the event that such practices are subject to penalties according to the law.

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?

Apart from competitors, a suit for a cease-and-desist order may also be filed by associations, independently of whether the offender is a member of this association, to promote the economic interests of entrepreneurs. Among these are the Federal Chamber of Labour, the Federal Economic Chamber, the Presidential Conference of the Austrian Chambers of Agriculture, the Austrian Trade Union Federation, the Federal Competition Authority and the Association for Consumer Information.

10 Which party bears the burden of proof?

The plaintiff must prove that the defendant undertook the advertising in question. The defendant must prove that its advertising statements are true. As mentioned before, in the proceedings about the preliminary injunction it is sufficient for the plaintiff to substantiate the claim.

11 What remedies may the courts or other adjudicators grant?

Courts mainly impose damage payments and cease-and-desist orders. In the case of disparagement of an enterprise, there is a right to retraction and publication of the retraction. In some cases, the publication of a sentence or the rendering of accounts to the claimant may also be ordered.

In serious cases, courts and authorities can also impose penalties (ie, fees and prison sentences).

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

The duration of a process strongly depends on the complexity of the matter, on the required number of hearings for taking evidence and on whether or not proceedings for preliminary injunctions are necessary (these normally take two or three weeks, when an injunction is not appealed against).

An average cease-and-desist claim takes approximately one to two years from making the claim until judgment by the court of first instance. The decision about an application for a preliminary injunction takes another one to three months.

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

Under Austrian law, the value in dispute is the basis for the calculation of lawyers' fees and court costs. Lawyers' fees are also affected by the number and type of pleadings prepared, the number and duration of hearings and whether there are appeals.

Since claims to cease and desist and for publication do not seek payment of money, they must be valued by plaintiffs. If the valuation is disputed by the defendant, the value in dispute is determined by the court. The valuation must be made in accordance with the interest actually claimed.

For proceedings at first instance, costs are usually between €5,000 and €10,000.

The losing party must reimburse the prevailing party for the lawyers' fees and court costs necessary for the pursuit of the prevailing party's rights.

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

Judgments by the court of first instance can be challenged at the competent court of appeal, which is one of the four Higher Regional Courts of Appeal. They are located in Vienna (covering Vienna, Lower Austria and Burgenland), Graz (covering Styria and Carinthia), Linz (covering Upper Austria and Salzburg) and Innsbruck (covering Tyrol and Vorarlberg).

Judgments of an arbitration tribunal can only be challenged in cases of heavily defective proceedings.

Misleading advertising

15 How is editorial content differentiated from advertising?

According to section 26 of the Media Act, announcements and recommendations as well as other features and reports for whose publication a payment is received must be identified in periodically published media as 'advertisement', 'paid insertion' or 'advertising', unless the design or arrangement excludes any doubts that publication has been made in return for payment.

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

Puffery is exaggerated advertising that cannot be taken seriously or literally by the public. It is therefore not regarded as misleading. Also, purely subjective value judgements such as 'Austria's best coffee' are allowed.

By contrast, the advertising statement that 'probate proceedings without a lawyer is like an appendectomy without a surgeon' implies the verifiable fact that probate proceedings, as a rule, require the assistance of a lawyer. As this is not the case, such advertising is considered misleading.

If doubts remain as to whether a statement is to be taken seriously, it is considered serious.

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

In general, every misleading statement as to the quality and characteristics of goods is prohibited if it causes the customer to buy a product that he or she would not have bought otherwise. Misleading statements, in general, cannot be justified by the rights to freedom of speech and opinion because these rights are only of minor importance in the case of merely commercial interests.

Omissions, incomplete statements, footnotes and disclaimers (eg, which restrict or put into perspective an accentuated advertising claim) are only unlawful if they are likely to mislead the public. It depends on the overall impression of the respective advert.

Footnotes and disclaimers are considered misleading if they cannot easily be seen by the public (eg, if the font size of the footnote or disclaimer is considerably smaller than that of the rest of the advertisement).

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?

Before publishing the advertisement to its target group, an advertiser does not have to prove the statement it makes in its advertisement. Proof has to be provided in court proceedings only.

The necessary standard of proof is high probability based on the principle of free consideration of evidence by court.

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

Advertising claims based on the results of surveys are generally permitted. Survey results must be accurate and not misleading. For example, it would be misleading in a competition among newspapers to compare the number of readers, implying that all newspapers are included in the study, if one significant competitor is not. Further, survey results must be current as of the time of their publication.

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

Comparative advertising in which goods or services of one company are compared with those of a competitor is generally permissible (also identifying the competitor by name). Such comparative advertising, though, must not violate the requirement of objectivity. It must not be misleading, disparaging, aggressive, obscene or against public morality.

Attention must be focused on whether the products compared are actually comparable. It is not sufficient to simply indicate that one's own product or service in general is better than that or those of competitors. All decisive circumstances and reasons must be given, allowing the public to make an objective decision. For example, comparison of one's own price for a certain product with the higher price of a competitor for a higher quality product is not permitted.

Comparisons of different systems, even without identifying a competitor by name, may offend public morals if they denounce a whole group of companies or a whole profession in an unnecessarily disrespectful and aggressive way.

Mere value judgements (eg, one newspaper is 'better' than another) that are unverifiable must not be part of comparative advertising.

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

In general, there is no hierarchy regarding different types of proof. Judges are free in their consideration and evaluation of evidence.

Advertisements describing a product as superior on the basis of tests must take into consideration the usual margin of deviation of such tests. Furthermore, superiority must be continuous (not just statistical outliers) and considerable.

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

There are no special rules for depicting or demonstrating product performance. The general provisions apply (eg, it must not be misleading or aggressive). It must neither discriminate in terms of gender, sexual preference, ethnicity, race or religion nor encourage or trivialise alcohol or violence.

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

To use third-party statements in advertising, permission by the third party is required.

The adherence to a code of practice, if true, may be advertised. The attainment of a quality mark, if validly conceded, may be advertised as well. However, the claim that an enterprise (including its commercial practices) or a product has been approved, endorsed or authorised by a public or private body when it has not, or making such a claim without complying with the terms of the approval, endorsement or authorisation, is prohibited.

24 Are there special rules for advertising guarantees?

There are no special rules for advertising that the seller offers special guarantees for the product.

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

On the one hand, environmental claims are only permitted if such claims can be convincingly proven to be truthful and not misleading. On the other hand, there is no obligation to present data on all possible environmental effects of a certain procedure that has been claimed to be friendly to the environment, as this would make such advertising practically impossible. The expression 'environment-friendly', may, as a rule, be used if the use of the advertised product has a less negative effect on the environment than other comparable products. It is not necessary for the product to have no effect on the environment at all, as consumers do not normally expect this.

26 Are there special rules for describing something as free and for pricing or savings claims?

Pricing claims, above all, must be true and not be misleading. For example, advertising a 'factory price' is misleading if shop overheads form part of the price.

Regarding products that are offered to consumers, according to the Federal Act on Price Marking, prices shall be marked so that any normally attentive observer is able to read and identify them easily. Price lists for services shall be put up at a clearly visible location on the business premises. They may alternatively be laid out on the business premises or made available for inspection by the customer. The prices shall be marked in Austrian currency (euros) and be inclusive of VAT and all other taxes and charges (gross prices).

For special offers, it must be made clear that the special price concerns one single item only. The special offer must be in stock in sufficient quantities to meet normal, anticipated demand in consideration of the given circumstances. The simple addition 'while stocks last' does not release the seller from this obligation.

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

Claiming a product is new or improved must again be true and not misleading. Expressions that indicate a product's newness or up-to-dateness cannot be sustained for too long because otherwise consumers erroneously assume that the innovation is still recent.

For products that are subject to quick technical and fashionable changes, the above-mentioned period is shorter than for other, less 'dynamic' products.

Prohibited and controlled advertising

28 What products and services may not be advertised?

Products whose sale and possession is prohibited under criminal law must not be advertised.

Spirits must not be advertised in radio and TV spots. Furthermore, for alcohol advertising, certain other restrictions apply (see question 34).

For restrictions on advertising pharmaceuticals and medical devices, see question 32.

Tobacco advertising is generally prohibited. An exception is advertising by tobacconists in and around their tobacco shop. This exception is in addition to several restrictions, as discussed in question 35.

29 Are certain advertising methods prohibited?

In general, aggressive advertising is prohibited.

Advertisements may not exert psychological pressure on consumers to buy. Advertisements are prohibited if they place customers under pressure to agree to purchase merely to escape these pressures.

Addressing persons in front of shops, even if not done in a nasty or presumptuous way, is not allowed. The mere distribution of advertising material in public is generally allowed.

Advertising via unsolicited phone calls ('cold calling') to private persons is generally prohibited. Advertising by post is generally allowed unless the addressee declared otherwise.

The use of a snowball sales system is prohibited. A snowball sales system is an arrangement whereby the customer is promised delivery of a good or performance of a service against a remuneration to be performed unconditionally if the customer, by means of the orders or vouchers handed over to him or her, finds for the enterprise of the promising party another purchaser who enters into the same contractual relationship with such enterprise.

Lay advertising, which involves the referral of relatives, friends and acquaintances in order to receive premiums or other benefits, is considered against good morals and therefore prohibited. Moreover, advertisers must not use subliminal messages.

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

The inclusion of a direct exhortation to children in an advertisement to buy advertised products or to persuade their parents or other adults to buy advertised products for them is prohibited. However, an indirect invitation to a purchase by showing the benefits and pleasures connected with a product is allowed, even if aimed at children.

Although not unlawful, the Advertising Council has found it inappropriate to place adverts for brothels and similar establishments near schools, kindergartens or residential areas.

31 Are there special rules for advertising credit or financial products?

For advertising credit or financial products, the general rules apply. In addition, advertisers must provide customers with all relevant and necessary information to enable the customer to make a well-founded decision.

Update and trends

In 2016, the Austrian Advertising Council received a total of 308 complaints about advertising activities. More than half of these (57.5 per cent) reported allegations of gender discrimination. Most decisions on the merits were taken with regard to advertisers of the leisure (10.5 per cent), food and beverage (8.8 per cent) and clothing and textile industries (8.3 per cent). The media involved with these decisions were billboards (26 per cent), adverts in print media (17.7 per cent), TV spots (16.6 per cent) and internet adverts (13.8 per cent).

If advertising for loans contains figures, these have to be clearly, accurately and noticeably illustrated by an example containing all relevant loan information such as the effective interest rate, total loan sum and loan period.

In case of securities and investments, adverts are only permissible after complying with the potential obligation to publish a prospectus. Furthermore, adverts must refer to the existence and accessibility of such prospectus.

Relevant legislation includes the Capital Market Act and the Consumer Credit Act.

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

Pharmaceuticals and medical devices advertising must:

- not be directed at minors;
- not include prescription medicine (except when directed at professionals);
- not include other (non-prescription) medicine that is not clearly identifiable as such;
- not include homeopathic medicine (except when directed at professionals);
- not make an untrue claim that something is a medical (healing) product;
- not claim superiority or comparability with other medical products;
- not claim that a doctor's medical treatment is redundant;
- not hide potential side effects; and
- not feature on teleshopping.

Although not unlawful, the Advertising Council found it inappropriate to promote a pharmaceutical for dyspepsia by showing a woman who secretly adds such pharmaceutical to her husband's and daughter's drinks. The Advertising Council considered it against good morals and social responsibility to promote administering medicine to others without them knowing.

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

In Austria, Regulation No. 1924/2006 on nutrition and health claims made on foods is applicable. Health claims must be approved by the European Commission, which set up a list of already approved claims in Regulation No. 432/2012. Applications for approval of a claim can be sent to the Federal Ministry of Health.

In general, 'well-being' claims are only allowed when supported by an approved statement.

Advertisements must not state or imply that a balanced or varied diet cannot provide appropriate quantities of nutrients in general. Individuals should not be encouraged to swap a healthy diet for supplementation, and without well-established proof, no marketing communication may suggest that a widespread vitamin or mineral deficiency exists.

Advertisements for foods must not claim to treat clinical vitamin or mineral deficiency. Advertisements must not promote excessive consumption of a product. The advertised product must contain a significant quantity of the 'healthy' substance that will produce the claimed nutritional or physiological effect.

For baby food, the strict limitations of the Regulation on Infant and Follow-On Formula by the Austrian Ministry of Health must be obeyed.

34 What are the rules for advertising alcoholic beverages?

Spirits must not be advertised in radio and TV spots.

Furthermore, for alcohol advertising, the following restrictions apply. Adverts must not:

- be directed at minors;
- depict minors consuming alcohol;
- claim therapeutic, tranquilising or conflict-resolution effects;
- promote excessive consumption of alcohol;
- make a connection between alcohol and improved physical or mental performance, or more social and sexual success; or
- display a high alcohol level as something positive.

Further to this, the Austrian Brewers Association as well as the Austrian Spirits Industry have established self-regulatory codes for their advertising practices (see question 5).

For instance, the Advertising Council publicly denounced a party flyer saying that they had 'alcohol police' testing their party guests and that 'whoever is sober, must drink'. The Advertising Council found this advert to violate the principles of not encouraging excessive consumption of alcohol and of socially responsible advertising towards minors.

35 What are the rules for advertising tobacco products?

Tobacco advertising is generally prohibited. An exception is advertising by tobacconists in and around their tobacco shop. This exception is limited by the following restrictions:

- at least 10 per cent of advertising space must be reserved for health warnings;
- there must be no advertising of cigarettes without a filter;
- there must be no belittlement of the negative effects of smoking;
- it must not be directed at those under 30 years of age;
- cartoons must not be used; and
- there must be no discount sales or distribution of free packages.

36 Are there special rules for advertising gambling?

In Austria, there is a governmental gambling monopoly, and the number of gambling licences, exclusively issued by the Austrian Ministry of Finance, is very limited.

According to the Gambling Act, advertisers for gambling must adhere to a certain level of responsibility. This adherence, however, is not subject to claims by competitors under the UWG but only to public supervision.

Foreign casinos in the European Economic Area may only advertise their casinos upon prior permission by the Austrian Ministry of Finance.

37 What are the rules for advertising lotteries?

Lotteries also fall under the Gambling Act (see question 36).

38 What are the requirements for advertising and offering promotional contests?

Promotional contests, which consumers can participate in without additional (hidden) costs, are generally allowed, even if participation requires the purchase of a product. However, as soon as additional costs occur (exceeding the usual price of the product), the contest is considered a 'promotional game', which may fall under the Gambling Act and therefore be subject to restrictions.

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

Sponsorship of programmes must not interfere with the editorial content or directly call for the purchase of a service or product of the sponsoring party. Sponsored programmes have to be made recognisable as such. News and other programmes with political content may not be sponsored.

In general, product placement in broadcast media is prohibited. However, there are numerous exceptions to that prohibition. It is allowed if the provided products are free of charge, and it is generally allowed in films, TV series, sport programmes and in 'lightweight entertainment' programmes.

Where product placement is allowed, it must indicate the product placement before and after the programme and must not:

- interfere with the editorial content;
- directly call for the purchase of a service or product; or
- display the placed product too dominantly.

40 Briefly give details of any other notable special advertising regimes.

Special provisions apply to certain freelance professions such as lawyers, doctors, veterinarians, midwives and morticians. In general, these professions are limited to reserved forms of advertising (eg, no puffery).

Advertisements of the services of plastic and cosmetic surgeons are permitted, but they are subject to the strict limitations of the Doctors Act, the Act on the Performance of Cosmetic Treatment and Surgery and the articles of association of the Austrian Medical Chamber.

According to the Coat of Arms Act, the use of the Federal Coat of Arms and the Flag of the Republic of Austria is permissible, unless such use could harm the reputation of the Republic of Austria or cause the misleading impression of public authority of the user.

Similar provisions apply to the coats of arms of the nine Austrian federal states and the Austrian municipalities. Sometimes, the use of such coats of arms is even subject to notifications or permissions by the concerned federal state or the concerned municipality.

Social media

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

According to the E-Commerce Act, an internet advertiser must ensure that the advertisement is identifiable as such and that the enterprise 'behind' the advertised product or service is also identifiable.

According to the Telecommunications Act, the sending of emails or text messages for the purpose of direct advertising is prohibited without the recipient's explicit consent. This prohibition also applies to social media users as recipients of advertising messages.

In the event that the operator of a social media page on which statements by third parties are published becomes aware that such statements are illegal or contain illegal (advertising) content, the operator has the obligation to immediately (without undue delay) remove these statements. If the operator is negligent in complying with this duty, the operator may be held responsible for such statements. According to present case law, a delay of one week in reacting in relation to an entry in an online guestbook as well as a delay of three days for an entry in an online forum are considered as undue delays. However, a delay of one or two days regarding a Facebook post is considered 'just in time'.

A disclosure saying that the operator does not assume responsibility for third-party statements is not sufficient.

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

Facebook in particular has been heavily criticised for its terms of use, which are often accepted by the users without reading them and which grant Facebook the right to 'use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. [...] You understand that we may not always identify paid services and communications as such.'

This does not comply with Austrian advertising (eg, adverts have to be marked as such) and data protection regulations (eg, no valid consent by customer for data use).

43 Are there regulations governing privacy concerns when using social media?

The use of a social media user's personal data must comply with the provisions of the Data Protection Act. Any use of data for advertising or marketing purposes requires the data subject's explicit consent. The principle of informational self-determination determines that the data subject has to be aware of the exact facts that he or she is giving consent to. Furthermore, the data subject's consent shall be given freely without any form of constraint. A valid consent requires the data subject's exact knowledge in advance about what data is collected for what purpose if the processing of data is not an absolute necessity for the fulfilment of the contract. A generic description of the recipients of the data is not sufficient.

On 25 May 2018, the new EU General Data Protection Regulation (Regulation (EU) 2016/679) enters into application. Generally speaking, it will strengthen the individual data subject's (defensive and information) rights and provide for stricter penalties for the data processing companies ('controllers').

Greiter Pegger Kofler Rechtsanwälte

Georg Huber
Stefan Kofler
Fabian Bösch

Maria-Theresien-Strasse 24
6020 Innsbruck
Austria

Tel: +43 512 57 18 11
Fax: +43 512 58 49 25
office@lawfirm.at
www.lawfirm.at

Brazil

Rafael Salomão Aguillar and Gabriel Francisco Leonardos

Kasznar Leonardos Intellectual Property

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

The legal basis for the provision of advertisement regulation is set forth by the 1988 Brazilian Constitution, which determines that the law will provide for special rules on the advertising of products and services that may offer health and environmental risks, such as tobacco, alcohol and medicines (section 220, paragraph 3, II and paragraph 4).

The general rule of the 1988 Constitution, which came as a result of the re-democratisation process after the military regime, is freedom of speech, so any regulations or restrictions to the contrary are of exceptional character and must be interpreted accordingly.

Only the Federal Union can legislate on advertising in abstract (section 22, XXIX of the Constitution), thus any state law to the contrary is unconstitutional and void. Recently, a municipal act of a city in the state of Goias was declared unconstitutional by the Goias State Court of Appeals on this ground. The said statute intended to compel breweries to insert images of car accidents on beer labels. Nevertheless, state and municipal authorities can enforce the federal legislation (Consumer Protection Code, section 55, paragraph 1).

Major statutes regarding the regulation of advertising are the Consumer Protection Code (Law No. 8,078/90), the Civil Code (Law No. 10,406/02), the Promotional Contests Act (Law No. 5,768/71), the Advertiser Profession Act (Law No. 4,680/65) and the Intellectual Property Acts (Laws Nos. 9,279/96 and 9,610/98).

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?

Advertising regulation is carried out, above all, by the National Council of Advertisement Self Regulation (CONAR), a non-governmental entity to which nearly all the market players have subscribed and whose rules they follow.

Also, on behalf of consumer protection, each Brazilian state may establish its own consumer defence authority, which will be entitled to watch for deceptive or abusive advertising.

Federal government secretaries and ministries may also issue resolutions on advertisement, as done in 2014 by the National Council on Children and Teenagers' Rights (CONANDA), which provoked an enduring debate on advertising to children (see question 30).

Finally, some sectors of the economy have their own specific regulatory agencies, which may dispose advertising rules. In the case of the tobacco and the pharmaceutical industries, for instance, it is the National Agency of Sanitary Vigilance that enforces the law, and it may issue complementary rules and understandings of the law. Frequently, the tobacco industry defies these regulations in courts.

3 What powers do the regulators have?

There is no control prior to publication or divulgation; there is no censorship in Brazil. Regulators can suspend a commercial and order the infringer to publish a new one, with the scope of clarifying to consumers any misleading information from the previous one (Consumer Code, section 60). They may also fine the infringer, but such fines may always be subject to judicial review before the courts of law.

4 What are the current major concerns of regulators?

There are frequent and long-lasting debates on themes such as advertising targeted at children and limitations on the tobacco industry.

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

The Advertiser Profession Act expressly commands the application of the Advertisement Professionals Ethic Code (section 17), which was compiled in 1957 during the first Brazilian Advertisement Congress.

In addition, CONAR has a traditional self-regulation code, first issued in 1978, which is widely applied by the industry.

Non-compliance may subject the infringers to administrative procedures, both by CONAR or by consumer authorities, which will set a penalty as to the extension of any direct or implied damages and the violation background. Judicial remedies may also be sought, either directly or to challenge an administrative decision.

6 Must advertisers register or obtain a licence?

Yes, in order to work, advertisers must register as such with the Ministry of Labour, by providing civil identification documents and a publicity diploma from an officially recognised school. Nevertheless, implementing provisions for this requirement were never enacted and a specific organ responsible for registration and supervision (like those that exist for attorneys and physicians) was not created, meaning it is not uncommon to find non-registered advertisers.

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

There is no prior control, even for advisory opinions.

Private enforcement (litigation and administrative procedures)

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

The most secure and traditional avenue for challenging competitors' advertising is filing a judicial complaint on the grounds of unfair competition, also requiring loss and damages in addition to the suspension of the advertisement.

Filing a complaint to CONAR, which may be broader and admit ethics-related claims, is also effective and may result in the body's recommendation that the media companies suspend the challenged advertisement, which is commonly accepted. Damages, however, cannot be sought from CONAR.

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?

Whenever damages are caused to consumers as a whole, to the environment or to the economic order, a civil class action may be filed by the public prosecutors or by any public association whose statutory proposals regard the defence of any of those matters (Law No. 7,347/85). The decision of this civil action will bind everyone, unless the

decision is to dismiss the action on the grounds of lack of proof, in which case anyone can file another individual complaint. Regardless of the civil action, individual consumers or a group of them are entitled to file their own lawsuits, but the favourable decision of the civil action will not benefit them unless they adhere to it in a timely way (Consumer Code, section 104; consumers have a 30-day term to require the suspension of their individual complaints after becoming aware of the existence of a civil class action, in order to benefit from its result).

Filing complaints to CONAR, on the other hand, is open to any individual, as well as to authorities, associations and advertisers.

10 Which party bears the burden of proof?

In consumer actions on the grounds of misleading or abusive advertising, the advertiser bears the burden of proof (Consumer Code, section 38).

In indemnification actions arising out of unfair competition claims, the general rule through which each party ought to prove its own allegations applies (2015 Civil Procedure Code, section 373). Notwithstanding the foregoing, the new Brazilian Civil Procedure Code, which came into force in March 2016, allows the judge to shift the burden of proof to the party most capable of providing a certain piece of evidence. The parties are also now allowed to execute an agreement on the distribution of the burden of proof according to their will.

11 What remedies may the courts or other adjudicators grant?

As the result of a judgment, CONAR may:

- reprimand the infringer;
- recommend that media outlets suspend the advertisement;
- recommend the modification of publicity materials to fit ethical standards; and
- publicise its decision to the general public in cases of non-compliance with the decision.

Courts of justice, on the other hand, may enforce the law by ordering the suspension of the advertisement, including as part of an interim injunction relief, and establish an indemnification for the calculated damages.

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

CONAR judgments take from two to six months on average. In the ordinary courts, depending on the state, proceedings last approximately five years.

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

Complaints to CONAR are free of charge for consumers. Advertisers must be members of CONAR in order to file a complaint, which involves making contributions to it. Attorneys' fees are usually in the range of 12,000 reais.

In judicial actions, court costs vary depending on the amount claimed as indemnification and the state where the case is brought. Normally it is fixed at a 2 per cent rate on the value of the action. Costs and legal fees can be partially recovered from the defeated party, depending on the judge's decision on this. Attorneys' fees are not paid by the defeated party and they may vary greatly: a typical amount would be in the range of 60,000 reais.

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

One can appeal CONAR decisions to CONAR's review instances. None of these decisions are, however, legally enforceable, hence parties must comply voluntarily. Moreover, a CONAR decision may be challenged by the defeated party before courts, though this is not common.

Lawsuits before the courts allow the ordinary appeals from the Civil Procedure Code, such as regular appeals (for review of both factual and legal issues), interlocutory appeals (for non-final provisory decisions, such as preliminary injunctions) and special appeals to superior courts (to discuss matters of law only).

Misleading advertising

15 How is editorial content differentiated from advertising?

Section 36 of the Consumer Code stipulates that all advertising must be clear enough as to allow the consumer to easily and quickly recognise it as publicity. Therefore, media vehicles must identify and distinguish content from advertisement. Nevertheless, despite this general principle, practices such as product placement in TV soap operas are common and only acknowledged in a very discreet manner.

Section 30 of the CONAR Code indicates that paid reports or articles must be identified as such.

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

Traditional civil law doctrine distinguishes between dolus bonus and dolus malus. In general terms, according to this doctrine, a deal can only be null and void on grounds of dolus if the information provided is plausible and likely to deceive and mislead the average person. This would be a case of dolus malus, in which the average person cannot perceive the deception of the other party that is in bad faith.

The practice of puffery, on the other hand, corresponds to the dolus bonus concept, in which a seller, for instance, only exaggerates the quality and the characteristics of the product in order to convince the customer to buy it. No ordinary consumer is expected to believe these exaggerations, which are purely a marketing strategy.

Whereas the traditional civil law authors still acknowledge and accept the dolus bonus doctrine, most of the modern consumer rights authors deny its application as regards mass consumption relations in light of the stricter Consumer Code rules.

Depending on the concrete case, decisions may vary on whether they recognise dolus bonus or not. CONAR usually upholds puffery ads, while courts may disapprove of them depending on their consequences in the case under analysis.

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

Misleading advertising, understood as any kind of advertisement that contains false information about the product or service – either entirely or partially, or omitting relevant information – and that is able to deceive the consumer, is forbidden and constitutes a crime (section 67 of the Consumer Code). Section 36 of the Consumer Code establishes that the producer of the advertised goods shall make all factual and technical information used to create the advertisement available to the public.

Disclaimers are mandatory to clarify any restrictions on the offer. Footnotes are commonly used by the industry, but courts usually disregard them in order to protect the consumer when they are virtually impossible to read, such as text that is too small on a flyer or that moves too fast on the television to be read.

Recently, the Superior Court of Justice ruled on behalf of applicants against a university for advertising a course that did not actually exist at the time of the advertisement. Also, in a recent case, the Court of Appeals of the Federal District ruled against a mobile telecommunications company for advertising an allegedly unlimited broadband plan that was not actually unlimited.

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?

According to the CONAR Code, section 27, paragraph 1, advertisers and publicity agencies must always be capable of proving claims when requested to. Hence, no unfounded claims should be advertised. However, there are no predefined standards of proof.

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

According to the CONAR Code, section 27, paragraph 7, the advertisement must clearly display the source of the survey, which shall be reliable. No partial, unclear or misleading use of the results of a survey or of scientific data is allowed.

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

Section 32 of the CONAR Code establishes the principles with which comparative advertisement must comply. Firstly, the comparison must always aim at providing clarifications for the benefit of the consumer, and not just with the intention of vilifying the competitor's trademark or reputation. The comparison itself must always be of objective criteria and never of subjective, psychological or emotional criteria. The advertiser must be capable of proving the truthfulness of the comparison. The comparison must not cause confusion between the compared products and must not imply unfair competition, as regulated by the Industrial Property Act.

In addition to these general principles, other specific rules are that the comparison must be made between products manufactured in the same year, except if used to demonstrate the evolution of a product, which shall be made clear; and if the comparison is made between products of different price ratings, this should be clear in the advertisement.

Competitors can be named in a comparison, though this is not a common practice in Brazilian advertising.

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

No specific types or degrees of proof are required, but the advertisers and publicity agencies must always be capable of proving their claims when requested (see question 18).

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

No, but the general principle of not encouraging the dangerous use of the advertised product must be adhered to.

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

Section 27, paragraph 9 of the CONAR Code establishes that testimonials must be personal and always true. Advertisers must also be capable of proving the accuracy and truthfulness of the testimonial employed on request. Civil law obliges the prior authorisation of the endorser.

24 Are there special rules for advertising guarantees?

No, as long as they correspond to the truth. Otherwise, it may be interpreted as misleading advertisement. Moreover, the courts will consider any promises made in advertising as binding, despite what the actual sales contract says.

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

No, but advertisers must always inform consumers about the possible danger and the negative impact their products may cause to the environment, in addition to the fact that positive claims about benefits to the environment must always be truthful (CONAR Code, section 36).

26 Are there special rules for describing something as free and for pricing or savings claims?

No, as long as they correspond to true gifts, savings and discounts. Otherwise, it may be interpreted as misleading advertising. If payment in instalments is advertised, the total amount of the purchase, as well as the number of instalments and the interest to be charged, must be clearly disclosed (Law No. 6,463/77).

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

No, as long as such claims are truthful. Otherwise, they may be interpreted as misleading advertisements.

Prohibited and controlled advertising

28 What products and services may not be advertised?

Firearms, munitions and explosives cannot be advertised, except within specialised magazines (section 33, II of Law No. 10,826/03 (the Disarming Statute)). Non-compliance carries a fine of between 100,000 and 300,000 reais. Advertisements must clarify the necessity of previous registration and authorisation to purchase the products (section 268 of Decree No. 3,665/00).

Medicines and methods to induce abortion are also forbidden (section 20 of Decree-Law No. 3,688/41).

Medicines that cannot be bought without medical prescription cannot be advertised, except within specialised magazines targeted at physicians, chemists and pharmaceutical companies (section 58, paragraph 1 of Law No. 6,360/76). Other medicines must be previously authorised by the Ministry of Health. In any case, medicine advertisements must always be followed by a Ministry of Health statement advising consumers to seek medical assistance (Decree No. 2,018/96, section 15). Medicine advertisements may not show people using medicines nor stimulate the excessive use of them.

Nursing bottles, pacifiers, artificial nipples and nutritional formulas for newborns cannot be advertised either (Law No. 11,265/06). The act on maternal feeding also sets forth some rules on other baby nourishing products, such as the insertion of mandatory advice from the Ministry of Health on breastfeeding at the end of the advertisement.

29 Are certain advertising methods prohibited?

Some proposals have been introduced in the National Congress to expressly forbid product placement, spam emails, subliminal messages, etc, but none of them has yet become law.

Product placement of medicines is prohibited by the Brazilian sanitary authority, ANVISA (RDC No. 96/08, section 4).

On the other hand, advertisements that explore superstitions and fears are expressly prohibited (Consumer Code, section 37, paragraph 2).

These methods can also be interpreted in a concrete case to violate the general principles of the Consumer Code.

Paper advertisements cannot look like money (section 44 of Decree-Law No. 3,688/41).

It is prohibited to offer, stimulate or advertise the possibility of paying for products and services with foreign currencies (section 22, XVIII of Decree No. 2,181/97).

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

Advertising and announcing any film, theatre play or show without establishing its age rating is prohibited (section 253 of Law No. 8,069/90 (the Child and Teenager Statute)). Products forbidden to those under 18, such as alcohol, pornography and tobacco, cannot be advertised to the public, nor include children or teenagers (sections 78 to 79 of Law No. 8,069/90). Tobacco-shaped products or packages, such as a 'chocolate cigar' for instance, are also prohibited (Law No. 12,921/13). Medicines cannot be advertised during the commercial breaks of child-targeted TV shows.

In 2014, CONANDA issued a new resolution on advertising to children (Resolution No. 163/2014). This new resolution put severe restrictions on the industry, making it virtually impossible to advertise anything to children. Since it is not a law, only a resolution, it will probably be challenged in courts if CONANDA tries to enforce it on the industry. The resolution forbids, for instance, the use of cartoons, action figures, dolls, childish language, childish songs and collectable prizes in advertisements. Media and advertisers' class associations have issued a joint statement, through which they have not recognised the legitimacy and the legal validity of the resolution, viewing it as unconstitutional. Therefore, in spite of the new rules, advertising to children is still common. In the National Congress there is a struggle between projects of law supporting the resolution and those wanting to abolish it.

The CONAR Code also provides some important guidelines for advertising to children (section 37). These include that advertising:

- must preserve social values such as honesty, justice, friendship and generosity;
- shall not encourage discrimination against those who cannot afford the advertised goods or associate ownership of the goods with any notion of superiority in relation to children deprived of it;
- shall respect children's inexperience and ingenuousness and must not cause fear or provoke psychological distortions;
- shall not encourage violent behaviour or show children in dangerous situations; and

- must not suggest misbehaviour as a technique to force parents to purchase the advertised goods.

The CONAR Code also forbids product placement or any other form of indirect advertisement targeted at children.

Recently, after being extrajudicially served with an official warning letter by the public prosecutors, a famous board game manufacturer accepted to cease the production and sales of a specific version of a widely known board game that featured dozens of actual third parties' trademarks as market references for the game.

In another recent and interesting case, a famous worldwide fast food chain succeeded in nullifying a multi-million reais fine before the São Paulo State Court of Appeals. The fine was enacted by a state consumer authority on grounds of illegal advertisement targeted at children.

31 Are there special rules for advertising credit or financial products?

Exhibit E of the CONAR Code provides some special rules for financial products, such as respect for the confidentiality of investors and the supply of clear information, including how projections and estimates were made, in order to ensure a conscious decision by the client.

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

As observed in question 28, medicines that cannot be bought without medical prescription cannot be advertised, except within specialised magazines. Other medicines must comply with the terms of the authorisation issued by the Ministry of Health.

Exhibit G of the CONAR Code governs advertisements by physicians, dentists, veterinarians, masseuses, hospitals, etc. Among the guidelines, these professionals and entities cannot suggest the ability to cure diseases for which there is no appropriate treatment yet, such as AIDS; they cannot publicise the use of unconventional methods of treatment or diagnosis or claim to be specialised in non-recognised areas; and they cannot offer long-distance diagnosis.

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

Exhibit H of the CONAR Code provides some guidelines for the advertisement of food and beverages. Among these, we highlight the following.

Advertisements must always seek to encourage the practice of physical exercise and present the announced product data accurately. They shall avoid encouraging excessive consumption and presenting a product as a replacement for ordinary meals, such as breakfast and lunch. They must avoid associating the product with popularity, good sexual or sporting performance, or pharmaceutical or medical benefits.

Decree No. 2,018/96, section 16, forbids all kinds of allusion to metabolic or therapeutic effects in the advertising of diet products.

Those products must also comply with the sanitary regulations, as regards their formula, packaging and presentation, which will naturally affect the advertising.

34 What are the rules for advertising alcoholic beverages?

In radio and broadcast television, alcoholic beverages can only be advertised between 9pm and 6am (section 4 of Law No. 9,294/96). Simple announcements of sponsorship of programmes during daytime broadcasting are, however, allowed. It is important to stress that the Brazilian law does not consider beer as an alcoholic beverage for the purpose of this advertisement limitation. The rules herein only apply to beverages with more than 13 Gay-Lussac degrees.

In all media, advertisements must always warn consumers not to overconsume alcohol as well as not to drink alcohol and drive. Bars and other selling points must also bear signs indicating that the sale of alcoholic beverages is interdicted to minors under 18.

As regards the content of alcohol advertising, they cannot associate drinking with good sexual performance, with the practice of sports or other healthy activities, or with driving. In addition, the commercials must not show people drinking alcoholic beverages, and sexuality cannot be their main message.

Update and trends

In 2016, a very controversial decision from the Superior Court of Justice (a high court that is placed below the Supreme Court) reheated the debate on advertising to children. A food manufacturer was selling themed watches of a famous cartoon character conditioned to the previous purchase of at least five cookies or cakes. The Justices concluded that the case comprised abusive advertising targeted at children and ruled against the manufacturer, which has appealed to the Supreme Court, with no decision rendered so far. After the decision of the Superior Court, many claimed that children's advertising had been judicially prohibited in Brazil, while the industry held the opposite view. While the Supreme Court did not rule on the case, the industry, though continuing to advertise to children, avoids employing the said practice to promote sales.

Recently, the Federal Court of Appeals for the Third Circuit ruled in favour of a brewery that was sued by the public prosecutors on grounds of associating sports performance and health recovery with beer consumption. The advertisement featured famous footballer Ronaldo showing how he overcame his knee surgeries. The court considered that the advertisement was not abusive, nor misleading, since the public it targeted is, in general, aware of the risks associated with excessive alcohol consumption.

35 What are the rules for advertising tobacco products?

Tobacco product advertising is currently limited to the exposure of the products, merchandise displays included, in their sale points, such as in cigar shops or any other store that sells them (section 3 of Law No. 9,294/96). Therefore, absolutely no advertisements outside tobacco shops are permitted. Display stands must also feature the official price chart (section 7, IV of Decree No. 2,018/96).

As a consequence of this general limitation, the law clarifies that tobacco companies cannot:

- sponsor any cultural or sporting activity;
- make use of publicity, such as product placement;
- advertise on the internet;
- sell their products by mail; and
- distribute prizes or samples.

Moreover, as well as the product packaging, tobacco advertisements must include the Ministry of Health warning disclaimers, both in photos and in writing, which covers a large area of the packaging and posters. The disclaimers' lines are a short description of the risks involved in smoking, such as developing lung cancer. Since 1 January 2016, the total surface of the warning disclaimers has increased to more than half of the packaging.

As regards the content of the adverts, the law establishes some directive guidelines, such as that the advertisement shall not associate smoking with good sexual performance, cultural or religious celebrations, children or teenagers, the practice of sports or relaxation.

36 Are there special rules for advertising gambling?

Professional gambling activity, such as owning a casino, is prohibited in Brazil; therefore, no such advertisements are allowed (section 50 of Decree-Law No. 3,688/41). Private gambling is legal, but its debts cannot be enforced before the courts (Civil Code, section 814).

37 What are the rules for advertising lotteries?

Since the lotteries in Brazil are a state monopoly (section 51 of Decree-Law No. 3,688/41), only the state can advertise them. There are no specific rules aimed at them.

38 What are the requirements for advertising and offering promotional contests?

Promotional contests cannot be held without an existing licence, issued by the competent authority before the contest begins (section 1 of Law No. 5,768/71). The competent authority is either the Economic Monitoring Secretary of the Ministry of Treasury (SEAE) if the contest promoter is a financial entity or the CAIXA (a federally owned state bank) for all the other promoting companies.

In order to receive the licence, the promoter must first submit the contest plan (a short summary of the promoter's intentions, featuring the intended rules of the contest, the intended prizes, duration, etc), the terms of participation, the advertisements' intended designs and artwork, a receipt for the purchase of the prize and other bureaucratic documents for the evaluation of the SEAE or the CAIXA. The proceeding takes between one and two months to complete. After the end of the contest, the promoter must provide its accounting numbers and pay income taxes for the prizes.

Prior to this authorisation, therefore, no advertisement or promotional contest can be carried out.

Notwithstanding the foregoing, the Law also comprises the existence of a special category known as 'cultural contests' (section 3, II of Law No. 5,768/71). According to the Law, such 'cultural contests' do not require pre-authorisation, since they are mostly aimed at recreational purposes. Hence, their main goal is not to promote a brand or sell anything; rather, they are intended only to offer some kind of amusement to the participants, who can win a prize (normally not of significant value).

From the viewpoint of time and costs, thus, promoting cultural contests is faster and cheaper, in addition to the fact that they are also preferable when the prizes are not substantial ones (a book rather than a trip, for instance). Unlike pre-authorised promotional contests, however, cultural contests are very limited with respect to publicity. As a result, trademarks cannot be widely exposed and participants cannot be obliged to buy anything in order to participate (see question 41).

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

Apart from the general principle that the consumer must always be able to easily and quickly recognise the publicity as such (see question 15), there are no restrictions as regards those matters.

40 Briefly give details of any other notable special advertising regimes.

Political advertising is regulated by the Electoral Code (Law No. 4,737/65) and other special laws. As a general rule, political advertising must be supported by the politicians and parties themselves, being permitted to acquire the resources through donations and the use of the governmental parties' funds.

In relation to candidates in election years, as elections are held in October, campaigns are only allowed to begin after 15 August (section 36 of Law No. 9,504/97). Parties may, however, advertise their programmes at any time.

Broadcasting and radio have a proper regime. Advertising on these is free to the parties and candidates, each of them having an amount of time proportional to their representation in the National Congress (sections 45 to 49 of Law No. 9,096/95). In ordinary years and during electoral campaigns the parties have a special and compulsory schedule on national TV and radio stations. Pay-TV is not included in this order. In all these advertisements, parties and candidates are entitled to seek the right of reply before the electoral courts if they consider themselves offended by another candidate or if they wish to clarify a misleading statement of the other party.

Publicity of legal services is regulated by the Brazilian BAR association (OAB) on a very restrictive fashion. Lawyers cannot advertise on television, radio or in general press media (except specialised publications). Recently, the Sao Paulo OAB ruled that attorneys cannot advertise pro bono services.

Social media

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

The Ministry of the Treasury has issued an ordinance (Portaria MF No. 422/2013) to restrict the use of social media for cultural promotional contests. These contests may only be publicised on social networks, meaning that participation itself in the contest cannot imply the use of a social network. In other words, contests requiring, for instance, the posting of pictures or sentences by participants on Facebook or Twitter is not allowed. Non-cultural contests (thus subject to pre-authorisation, as explained in question 38) are not included in this restriction.

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

Recently, several fashion blogs have been criticised for not being clear enough about sponsored posts that recommend merchandise. Such blogs became famous for providing fashion tips and recommending products based on the bloggers' personal experiences. As some of them have begun to advertise goods and receive sponsorship from well-known trademarks, their followers started to question whether the recommendations are genuine or paid for by the sponsors. CONAR ruled that the authors must be clear about the nature of sponsored posts on their blogs.

In response to an episode of racism against a Brazilian football player during a match in Europe, social media users and other famous football players started a campaign that became known for using the hashtag 'we are all apes'. A well-known trademark was severely criticised for trying to take advantage of the moment by launching a new line of clothes inspired by the campaign and hashtag.

A mobile phone manufacturer launched videos on social media featuring a young boy claiming that he met a girl the previous night and fell in love with her, but eventually lost her number. The video appeared to be amateur, with the boy asking viewers to help him find the girl. Subsequently it was revealed that the video was an advertisement for a new mobile phone. Dozens of consumers complained to CONAR, claiming that they were deceived by the apparently amateur video. The complaints were rejected by CONAR.

A contraceptives brand released an advertisement on Facebook that, according to some users, encouraged sexual violence against women. After online protests, the advertisement was withdrawn and the company issued an official apology for the campaign.

Kasznar Leonardos 1919
INTELLECTUAL PROPERTY BRAZIL

Rafael Salomão Aguillar **rafael.aguillar@kasznarleonardos.com**
Gabriel Francisco Leonardos **gabriel.leonardos@kasznarleonardos.com**

Rua Teófilo Otoni, No. 63, 6th floor
Rio de Janeiro 20090-080
Brazil

Tel: +55 21 2113 1919
Fax: +55 21 2113 1920
www.kasznarleonardos.com

43 Are there regulations governing privacy concerns when using social media?

On 23 April 2014 President Dilma Rousseff signed into law the Brazilian Internet Statute, the text of which had been in discussion in the National Congress since 2012. The newly approved statute provides the basic rules for using the internet in Brazil, which include setting forth a number of privacy guarantees that were before only implied in general civil law. Although not targeted directly at social media, these guarantees will strengthen the privacy of users, ensuring the confidentiality of data traffic and limiting the commercial use of their personal data. Another bill concerning data privacy in general is currently being discussed by the National Congress, as Brazil does not yet have any statute in this regard, aside from the Internet Statute.

Canada

Bill Hearn
Fogler, Rubinoff LLP

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

The principal federal statute regulating advertising in Canada is the Competition Act, which is a law of general application and applies to both business and consumer advertising. It includes both civil and criminal provisions prohibiting representations to the public promoting the supply or use of a good or service or any business interest that are false or misleading in a material respect.

Generally speaking, the 10 Canadian provinces and three Canadian territories regulate advertising to consumers (but not to businesses) through their respective consumer protection statutes that include provisions relating to unfair practices (ie, deceptive or unconscionable representations that include false advertising). While there are many similarities between these statutes, there are important differences (especially, although not exclusively, respecting the laws of Quebec).

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?

There are federal and provincial or territorial governmental bodies with primary responsibility for regulating advertising as well as self-regulatory bodies.

The Commissioner of Competition (the Commissioner) is vested with primary authority for enforcing the Competition Act and heads the Competition Bureau (the Bureau), an independent law enforcement agency. The Commissioner, supported by the Bureau, investigates both criminal and civilly reviewable matters under the Competition Act. In terms of enforcing the civil provisions, the Commissioner has the power to refer matters either to the Competition Tribunal (the Tribunal) or to the Federal Court or superior courts of the provinces (collectively, the Courts, each a Court). The Tribunal and the Courts have concurrent jurisdiction in respect of 'deceptive marketing practices'. Criminal matters under the Competition Act are prosecuted in the courts of criminal jurisdiction (as defined in the Criminal Code of Canada) by the Director of Public Prosecutions (DPP). The initiation and conduct of all criminal prosecutions are the responsibility of the DPP, which has decision-making power independent of the Commissioner.

The administration and enforcement of provincial or territorial consumer protection laws is the primary responsibility of the applicable provincial or territorial ministry.

Advertising Standards Canada (ASC), the advertising industry's self-regulatory body, maintains the Canadian Code of Advertising Standards (the ASC Code), by which advertisers must abide. The ASC Code is the advertising industry's principal instrument of advertising self-regulation. Advertisers' violations of the ASC Code may be reported by consumers or advertisers by filing a complaint with ASC, each with its own distinct complaint resolution process. ASC will not accept a complaint (whether from a consumer or an advertiser) if it is already before the Commissioner, the Tribunal or the Courts.

The Canadian Marketing Association (CMA) is a national non-profit corporation that embraces Canada's major business sectors and all marketing disciplines, channels and technologies. Compliance with the CMA's Code of Ethics and Standards of Practice (the CMA Code) is compulsory for its members. The CMA Code is enforced through the process described in question 3.

With respect to the handling of concurrent jurisdiction, there are a couple of general rules. First, as in the case of ASC, a self-regulatory body will generally not get involved in a complaint when the complaint is already before the Commissioner, the Tribunal or the Courts. And second, as between government regulatory bodies, in the case of a complaint where both a federal body and a provincial or territorial body have appropriate constitutional and jurisdictional authority, there is no impediment to both dealing with it (although in practice this is rare); and in the case of two bodies within one level of government, there is often a memorandum of understanding (MOU) that helps determine which body will take charge. In March 2015, the Bureau announced an MOU with Ontario's Ministry of Government and Consumer Service to notify each other about enforcement activities, advise on strategic priorities, trends and policies, and coordinate communications to the public on consumer protection and competition matters.

3 What powers do the regulators have?

The powers (including the remedies and penalties that may be imposed) vary by regulator.

The investigative process open to the Commissioner is broad and need not involve the exercise of formal powers. However, the Commissioner has significant formal powers of investigation including statutory mechanisms to gather evidence, compel testimony and execute formal search and seizure actions. The exercise of formal powers of investigation under the Competition Act must be commenced by initiating an inquiry.

If, in the course of an inquiry, the Commissioner proceeds by way of the civil track, and if, in turn, the Tribunal or Court determines that a person has engaged in conduct contrary to any of the civil deceptive marketing practices provisions of the Competition Act, the Tribunal or Court may order the person not to engage in such conduct, to publish a corrective notice, to pay an administrative monetary penalty (AMP), or to pay restitution to purchasers, or any combination of these remedies. When the Tribunal or Court orders the payment of an AMP, on first occurrence, individuals are subject to penalties of up to C$750,000 and corporations, to penalties of up to C$10 million. For subsequent orders, the penalties increase to a maximum of C$1 million in the case of an individual and C$15 million in the case of a corporation. The Tribunal or Court also has the power to order interim injunctions to freeze assets in certain cases.

In practice, the majority of civil track matters are resolved before they ever reach the stage of a Tribunal or Court hearing. The Competition Act provides for consent agreements between the Commissioner and the party alleged to have violated the civil misleading advertising provisions.

With respect to the criminal track, any person who contravenes the criminal false or misleading advertising provision of the Competition Act is guilty of an offence and liable to a fine of up to C$200,000 or imprisonment for up to one year or both, on summary conviction, or to fines without upper limits at the discretion of the criminal court or imprisonment for up to 14 years or both, upon indictment.

In Ontario, as in some other provinces, the Director under the Consumer Protection Act has the power to order a person engaging in misleading advertising to cease and to retract the advertisement or publish a correction. In addition, an individual who is convicted of an offence under the Consumer Protection Act is liable to a fine of not more than C$50,000 or to imprisonment for a term of not more than two years less a day or both, and a corporation that is convicted of an offence is liable to a fine of not more than C$250,000.

With respect to the ASC Code, in the case of the consumer complaints procedure, if an advertiser fails to voluntarily comply with a Standards Council decision, ASC has the power to advise exhibiting media of the advertiser's failure to cooperate and request the media's support in no longer exhibiting the advertising in question. ASC also has the discretion to publicly declare that the advertising and the advertiser in question have been found to have violated the ASC Code.

If a consumer makes a complaint to the CMA that a member has violated the CMA Code, the CMA has internal mediation procedures that involve working with the member to resolve the complaint in a manner consistent with the CMA Code.

4 What are the current major concerns of regulators?

The current major concerns of regulators vary by level of government and whether the body is self-regulatory.

From recent public announcements and enforcement actions, the Bureau is chiefly concerned with deceptive pricing (such as deceptive ordinary selling price claims, all-in pricing and drip pricing), deceptive billing practices (like 'mobile cramming'), deceptive online endorsements, influencers and reviews (commonly called 'astroturfing'), deceptive native advertising, unsubstantiated product performance claims and deceptive electronic messages. For instance, in May 2016, the Bureau announced that Bell Mobility had agreed to pay C$11.82 million in refunds to consumers and to donate C$800,000 to consumer advocacy and research groups in connection with charges for premium text messages and rich content services that were allegedly 'unauthorised' and 'crammed' onto their customers' wireless phone bills. Under the settlement, the Commissioner agreed to discontinue the legal proceedings against Bell in a lawsuit the Commissioner started in September 2012 against Rogers Communications, Bell Canada, Telus Corporation and the Canadian Wireless Telecommunications Association in which the Commissioner was seeking administrative monetary penalties (AMPs) against all defendants totalling C$31 million. Similarly, in March 2015, the Bureau announced that Rogers had agreed to pay C$5.42 million in consumer refunds and in December 2015, the Bureau announced that Telus had agreed to pay C$7.34 million in refunds to consumers and to donate C$250,000 for research on consumer issues. In the end, while no AMPs were paid by the defendants, the Commissioner exacted consumer refunds totalling over C$24 million and donations totalling over C$1 million. Also, in March 2015, the Commissioner commenced an application with the Tribunal against two car rental companies, Budget and Avis, under the deceptive electronic messages provisions of the Competition Act that came into force as part of Canada's Anti-Spam Legislation (CASL) in July 2014, as well as under the deceptive pricing provisions of the Competition Act. In this application, the Commissioner sought a total of C$30 million in AMPs and more than C$35 million in refunds for consumers. In June 2016, under a consent agreement with the Commissioner, Budget and Avis paid a C$3 million AMP and C$250,000 towards the Bureau's investigative costs. In April 2017, also under a consent agreement with the Commissioner, two other car rental companies, Hertz and Dollar Thrifty, paid a total AMP of C$1.25 million to resolve similar deceptive advertising concerns over unattainable prices owing to additional mandatory fees.

With the coming into force of the anti-spam rules relating to commercial electronic messages (CEMs) under CASL on 1 July 2014, and of the software installation rules on 15 January 2015, Innovation, Science and Economic Development Canada (formerly Industry Canada) and the three regulators responsible for enforcing CASL (namely, the Canadian Radio-television and Telecommunications Commission (CRTC), the Office of the Privacy Commissioner of Canada (OPC) and the Commissioner) have given priority to rolling out guidance documents and presentations to help CEM senders, advertisers and software installers get ready for, and comply with, CASL. They have also been actively enforcing CASL. In March 2015, the CRTC issued a C$1.1 million AMP notice against a Quebec-based company for alleged violations of CASL's anti-spam rules regarding valid consents and functional unsubscribe mechanisms. Shortly thereafter, the operator of an online dating site agreed to pay C$48,000 as part of an undertaking to resolve the CRTC's concerns regarding CEMs that were allegedly not compliant with CASL in that the unsubscribe mechanism was not clearly and prominently set out and could not be readily performed. In June 2015, an airline paid C$150,000 as part of an undertaking with the CRTC to resolve various alleged CASL violations, including those relating to unsubscribe mechanisms, the provision of contact information and proof of consent. In November 2015, Rogers paid C$200,000 as part of an undertaking with the CRTC to resolve alleged violations of CASL relating to unsubscribe mechanisms. The CRTC also issued enforcement decisions against CASL violators in October 2016 (imposing a C$50,000 AMP on a small company) and in March 2017 (imposing a C$15,000 AMP on an individual). On the fight against malware, in December 2015, the CRTC served a warrant under CASL against an unnamed organisation suspected of involvement in the distribution of the notorious Win32/Dorkbot malware. In January 2016, the CRTC executed a warrant, for a second time, in a different malware investigation.

One of the OPC's main enduring concerns over the past few years is that online behavioural advertising (OBA), which involves tracking consumers' online activities across sites and over time in order to deliver advertisements targeted to their inferred interests, comply with Canadian privacy law. The persistence of this concern is evidenced by the OPC's issuance in 2012 of specific guidelines on OBA, its investigation of Google in 2013 and subsequent findings and settlement to address personal information protection concerns regarding Google's use of sensitive health information for targeting of Google ads, and by the OPC's 7 April 2015 finding in its investigation into Bell's relevant ads programme (RAP). In its RAP finding, the OPC found that Bell was not, via its opt-out model, obtaining adequate consent for the RAP given the sensitivity of the information Bell used and the reasonable expectations of Bell customers. Furthermore, the OPC's concern with OBA was the impetus for the OPC's research in late 2014 and early 2015 into how businesses are complying with the 2012 OBA guidelines. The OPC issued its report on the findings of this research in June 2015 that concluded, among other things, that OBA is widely used on websites, the AdChoices icon (see question 43) is only sometimes used to provide notice of OBA and an ability for consumers to opt-out, some targeted adverts appeared without any knowledge or consent, and adverts were targeting based on prior online activities that related to sensitive topics without opt-in consent. The OPC recommended that industry bring its OBA practices into line with Canadian privacy law.

In Ontario, regulations under the Consumer Protection Act came into force on 1 January 2017 that strengthen consumer protection for drivers using towing and vehicle storage services. These regulations include specific obligations on the providers of such services to publicly disclose rates and other information.

From recent ASC reports, ASC's main concerns in advertising are with accuracy and clarity, omission of important terms of an offer (ie, fees or conditions), substantiation of advert claims, price claims, exaggerated health claims, illegibility of disclaimers, disguised advertising techniques, influencers who fail to disclose material connections with advertisers, safety, and unacceptable depictions and portrayals.

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

There are two principal industry codes of practice of general application in Canada: the ASC Code and the CMA Code. Each code has different consequences for non-compliance (see question 3). The ASC Code is designed to ensure that advertisements in Canada maintain standards of honesty, truth, accuracy, fairness and propriety. The CMA Code provides helpful guidance to Canadian advertisers regarding the law, ethics and best practices of advertising.

There are also many sector-specific industry codes of practice; for example, in the pharmaceutical sector there is the Pharmaceutical Advertising Advisory Board (PAAB) Code of Advertising Acceptance, the Innovative Medicines Canada Code of Ethical Practices and the Canadian Generic Pharmaceutical Association Code of Marketing Conduct for the Sale of Generic Pharmaceutical Products in Canada.

6 Must advertisers register or obtain a licence?

No, as a general rule, for most goods and services, anyone can advertise. That said, if the advertisement is for a good or service that requires a special registration or licence to offer for sale, the advertiser must be so registered or licensed. For instance, under the Ontario Private Career Colleges Act, only a registered private career college may advertise vocational programmes to prospective students.

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

Yes, the Commissioner has the discretion, on request, to provide a written opinion on the applicability of the Competition Act to a proposed practice or conduct. These written opinions are binding on the Commissioner if all the material facts that have been submitted are accurate and remain substantially unchanged.

Broadcast advertisements directed at children must be reviewed and approved by ASC's Children's Clearance Committee to ensure compliance with the provisions of the Broadcast Code for Advertising to Children (the Broadcast Code).

Private enforcement (litigation and administrative procedures)

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

Competitors may file complaints to the Commissioner, ASC, or the Tribunal or Courts to challenge advertising.

A complaint to the Commissioner may be advantageous because the process is inexpensive for the complainant. Further, the financial consequences for an advertiser found to be in violation of the Competition Act may be significant, with potential AMPs in the millions of dollars. However, on the downside, the process can be slow and the complainant cannot significantly influence the timing of the process.

The advantages of filing a complaint with ASC are that the initial process is confidential and the ultimate result may be the public shaming of the advertiser (if the defendant advertiser is intransigent and does not comply with ASC's determination). ASC's process is also quick as a typical procedure would last only eight to 10 weeks. The disadvantages are that there are substantial ASC filing fees involved and there may be no public relations victory for the complainant if the advertiser simply complies with ASC's determination.

The Competition Act grants a private right of action allowing private parties (both businesses and consumers) to sue in court for recovery of damages for violation of the criminal sections of the Competition Act, including the criminal misleading advertising provisions.

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?

Consumers may file complaints to the Commissioner, ASC, or the Tribunal or Courts to challenge advertising.

A consumer can make a complaint about advertising to the Commissioner with little preparation or expense. However, the consumer has no control over whether and how that complaint will be pursued. ASC has a well-established mechanism for consumers to submit written concerns about advertisements currently running in Canadian media. In 2013, ASC introduced a streamlined process to address the increasing number of complaints related to the accuracy and clarity of, and price claims in, advertisements. Under this process, ASC staff have the discretion to resolve complaints administratively in such cases where the advertiser has taken prompt steps to fix the advertising that gave rise to the complaint. Those complaints that are not administratively resolved, and that raise a potential issue under the ASC Code are reviewed by a Standards Council.

With respect to complaints to the Court, as with complaints by competitors, consumers (which may include a class of consumers under applicable class proceedings laws) have a private right of action under the Competition Act allowing them to sue in court for damages.

10 Which party bears the burden of proof?

With respect to Tribunal or Court proceedings, the burden of proof lies generally with the plaintiff to prove that the defendant advertiser engaged in conduct contrary to the Competition Act or failed to comply with an order of the Tribunal or Court. There are, however, some exceptions. For example, the burden of proof shifts to the defendant when it comes to proving adequate and proper testing for a claim requiring substantiation prior to the claim being made in an advertisement.

Under CASL, the sender of a CEM has the burden of proof that it has the recipient's consent to send the recipient the CEM.

11 What remedies may the courts or other adjudicators grant?

See question 3.

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

The normal length of proceedings depends on the forum and may vary widely depending on the complexity of the complaint. Generally speaking, however, from start to finish (excluding appeals), the proceedings normally take: for ASC, eight to 10 weeks; for the Commissioner, four to six months; and for the Tribunal or court, 24 to 48 months.

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

The costs of proceedings vary by form and may vary widely depending on the complexity of the complaint.

There is no filing fee for a member of the public to submit a complaint to ASC under the consumer complaints procedure. For disputes between competitors and other businesses under ASC's advertising dispute procedure, the filing fees are substantial. To file the complaint, ASC's fee is C$8,000 for members or C$12,000 for non-members. For the hearing, ASC's fee is C$10,500 for members or C$15,750 for non-members.

There is no filing fee for either a consumer or a competitor to make a complaint to the Commissioner.

In the case of complaints to ASC and the Commissioner, the amount of the legal fees and other costs of external counsel and experts depends on the complexity of the complaint and the effort the consumer or competitor makes in preparing and pursuing the complaint. In both cases, legal fees and other costs are not recoverable.

The cost of civil proceedings before the Tribunal or Court is difficult to estimate and depends on many factors. That said, the legal fees for civil misleading advertising proceedings for even a garden variety three-day trial, with some pretrial skirmishes regarding pleadings and productions, may easily exceed C$250,000 over a typical three-year period. Generally speaking, costs for litigation are awarded on a partial indemnity, 'loser pays' basis, which results in the winner recouping approximately one-quarter to one-third of its actual lawyers' fees from the loser.

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

The appeal that is available from a particular decision varies depending on whether the decision is one made by a court or a self-regulatory body.

A decision, order or refusal to make an order under the Competition Act by the Federal Court or the Tribunal may be appealed to the Federal Court of Appeal. A decision, order and refusal to make an order by the Superior Court of a province may be brought before the Court of Appeal of that province.

A decision from one of ASC's Standards Councils may be appealed either by the complainant or the advertiser. Appeals are heard by a five-person appeal panel. A decision from one of ASC's advertising dispute panels may also be appealed by either the complainant or the advertiser. The request for appeal must be accompanied by the applicable request for appeal fee (ie, C$3,800 for members or C$5,700 for non-members). Requests for leave to appeal are heard by a three-member review panel. Upon recommendation of the review panel, and after receiving the applicable appeal hearing fee (ie, C$10,500 for members or C$15,750 for non-members), ASC will draw a five-member appeal panel.

Misleading advertising

15 How is editorial content differentiated from advertising?

The main concern with advertising through editorial content (often called 'native advertising') is that consumers may be misled and influenced to purchase a product as a result of reading a supposedly unbiased review. While there are no laws in Canada that specifically address this type of advertising, the general rules under the Competition Act relating to 'testimonials' apply (see question 23). Furthermore, the ASC Code provides that 'No advertisement shall be presented in a format or style that conceals its commercial intent'. In a recent ASC Code amendment, 'its commercial intent' has been replaced with 'the fact that it is an advertisement'. Unfortunately, given the limited number of complaints that have been publicly dealt with by ASC with respect to this prohibition, there is little self-regulatory guidance with respect to how an advertiser should avoid 'concealing its commercial intent'.

Industry guidance, however, suggests that best practice is to separate editorial content and advertising messages in a manner transparent to the reader. For example, Magazines Canada's Code of Reader and Advertiser Engagement provides that, not only must native advertising be labelled as an advertisement, such advertisements should have a different design from the publication's usual design. Furthermore, the Word of Mouth Marketing Association has published a white paper entitled 'Don't be Naïve about Native' that provides guidance, in terms of best practice, on how marketers should approach disclosure in native advertising.

In an article entitled 'Online Advertising in Canada' in its *Deceptive Marketing Practices Digest*, June 2015, the Competition Bureau expresses its concerns about online information that is actually advertising (ie, deceptive digital native advertising) and provides some guidance.

Likewise, in the United States, the Federal Trade Commission (FTC) has been pushing the industry to adopt practices to make sure that consumers do not mistake editorial content for advertising. In response, advertisers and publishers are increasingly writing their own internal policies. For example, the Interactive Advertising Bureau has released a report on editorial content. In addition, the American Society of Magazine Editors has released editorial guidelines that discuss the relationship between editorial content and advertising content. Furthermore, in December 2015, the FTC published its Enforcement Policy Statement on Deceptively Formatted Advertisements, which has been followed by several high-profile enforcement actions.

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

It is well established at common law in Canada that puffery (which does not require support) is only permissible where the statement (or 'puff') is so boastful an opinion, so vague a statement, or so hyperbolic or outrageous that no reasonable consumer would rely on it. Under the Competition Act, however, where the claim relates to the performance, efficacy, or length of life of a good or service, it must be substantiated by an 'adequate and proper test' conducted before the claim is made. The case law demonstrates that, in practice, the line between a mere puff and a claim requiring substantiation is often difficult to draw.

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

General rules

The general rules regarding misleading advertising under the Competition Act are as follows:

- it is prohibited to make a representation to the public that is deceptive in a material respect for the purpose of promoting a good or service or a business interest;
- all representations, in any form whatsoever, are subject to the prohibition;
- if a representation could influence a person to buy or use the good or service advertised, it is material;
- the representation need not be material if it is made in certain areas of an electronic message. In particular, with the coming into force in July 2014 of CASL's anti-spam provisions, the Competition Act has been amended to create, without a materiality requirement, new criminal offences and new civil reviewable practices where there is a deceptive representation in an electronic message's locator (ie, the name or other information used to identify the source of data in a computer system such as a URL), sender information or subject matter line;
- the criminal provision requires 'intent' (ie, that the advertiser knowingly or recklessly engaged in deceptive advertising). The civil provision does not;
- it is not necessary to demonstrate that any person was actually deceived or misled, that any member of the public to whom the representation was made was within Canada, or that the representation was made in a place to which the public had access; and
- the general impression conveyed by a representation, as well as its literal meaning, will be taken into account when determining whether the representation is false or misleading in a material respect.

Sophistication of average consumer when interpreting advertisements for deception

The appropriate level of sophistication to be attributed to the average consumer when interpreting the general impression of an advertisement for deception has been in flux over the past couple of years and may continue to be a source of uncertainty for some time yet, namely whether the average consumer, for advertising interpretation purposes, can be taken to be a 'reasonable' person or merely a 'credulous' one.

Inclusion of material information

There is no general rule under the Competition Act requiring that all material information be included in an advertisement. Rather, as upheld by the Ontario Court of Appeal in the 2013 case of *Arora v Whirlpool Canada LP*, an alleged 'misrepresentation by omission', where there is no positive misrepresentation, is not a violation of the misleading advertising provisions of the Competition Act.

Disclaimers

Disclaimers and footnotes are permissible in advertising but must be used with caution. Reflecting common law and best practices, the Commissioner has issued guidelines over the years to assist advertisers, which include the following:

- a disclaimer may properly clarify ambiguity or provide qualification. A disclaimer cannot, however, contradict the main claim in the body of the advertisement;
- if you must use a disclaimer, it should be prominent, clear and close to the main claim being clarified;
- the main claim in the advertisement, apart from the disclaimer, should be capable of standing alone;
- it is not sufficient for the disclaimer to be present. The disclaimer must be likely to be read and likely to alter the general impression of the advertisement;
- when determining the appropriate size of text for a disclaimer, the advertiser should take the context of the advertisement and nature of its target audience into account. The print must be large enough to be clearly visible and readable without resort to unusual means;
- greater leeway may be allowed in cases where it is reasonable to assume that consumers will carefully consider all available information – namely, where the class of persons likely to be reached by the representation is a more sophisticated target audience: for example, purchasers of homes, international vacations and luxury automobiles;
- likewise, where a 'specific target audience' may be expected to have difficulty reading small print, this should be taken into account in the size of the disclaimer; and
- attention-grabbing tools should not distract a consumer's attention away from the disclaimer.

In an article entitled 'Disclaimers Demystified', published in the June 2015 volume of the *Deceptive Marketing Practices Digest*, the Bureau boils down these guidelines into two fundamental principles. First, a disclaimer that expands on, or clarifies possible ambiguities in, the main body of an advert is unlikely to mislead consumers. And second, the potential to mislead consumers increases significantly when a disclaimer is used to restrict, contradict or somehow negate the message to which it relates.

Lastly, digital advertising presents unique challenges for advertisers to make their disclaimers fair and not deceptive (and thus effective and enforceable). These challenges are especially acute in digital advertising on mobile platforms (such as smart phones and tablets with space-constrained screens) and in social media (such as tweets and other space-constrained digital adverts).

In addition to the Commissioner's general (albeit dated) guidance in the Application of the Competition Act to Representations on the Internet, Enforcement Guidelines 2009, the Bureau has recently addressed the 'digital dilemma' with disclaimers. With a digital disclaimer (for an advert that may appear across interconnected platforms or that may be shared by consumers), great care must to taken to ensure that the disclaimer is disclosed and apparent to the consumer before the consumer has committed to the advert. Also, with respect to digital advertising generally, the Bureau published an article entitled 'Online Advertising in Canada' in the June 2015 edition of the *Deceptive Marketing Practices Digest*.

Lastly, Canadian advertisers concerned with making their disclaimers in digital advertising effective should also consult the US FTC's '.com Disclosures – How to Make Effective Disclosures in Digital Advertising', published in March 2013. These FTC guidelines contain practical guidance illustrated by examples of digital advertising in the marketplace.

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?

Whether an advertiser must have proof of the claims it makes in advertising before publishing depends on the claims or statements in the advertising. As discussed in question 16, substantiation is not required for statements that constitute mere puffery. Generally speaking, the substantiation requirement applies to provable advertising claims that might reasonably be taken as true. Such claims usually fall into three categories: performance claims, comparative claims, and preference or perception claims.

Under the Competition Act an advertiser must have proof (in the form of 'adequate and proper' testing) of the claims it makes in advertising before publishing the advertisement, if those claims relate to the performance, efficacy or length of life of a good or service. 'Adequate and proper test' is not defined in the Competition Act in order to preserve flexibility in an increasingly complex and technical field of expertise. Commissioner guidelines over the years have stated that the test results must be significant and reproducible, and samples and comparisons must be representative. In practice, the two problems that most often arise with claim substantiation are that the test results do not actually support the specific claims, and the claims are based on poorly designed test methodologies. While there is no requirement for scientific certainty, testing must be appropriate in the circumstances and the claims must actually flow from the test results without leaving a gap in logic.

In the 2013 decision in the *Chatr* case, the court held that, with respect to tests being 'adequate and proper', industry-standard testing is a good basis on which to conduct tests, and while the Competition Act permits a flexible and contextual analysis when assessing whether a claim has been properly tested, there must still be a test – that is to say the advertiser must have actually conducted some sort of test (and not just reached a logical conclusion or inference based on certain technological facts).

In the 2014 decision in the *Chatr* case regarding the appropriate penalty, the court ordered the advertiser to pay an AMP of C$500,000 for not having conducted adequate and proper tests to support its performance claims prior to making them.

In December 2015, following the Bureau's investigation into allegedly unsupported performance claims related to a hockey helmet (ie, that the helmet would protect players from concussions), Reebok-CCM agreed to discontinue making the claim, donate C$475,000 worth of sports equipment to an underprivileged youth sport charity and pay C$30,000 towards the costs of the Bureau's investigation.

Recently, the Bureau summarised these claim substantiation requirements in an article entitled 'Substantiating Performance Claims – Standing the Test of Time for Over 75 Years', published in the March 2016 volume of the *Deceptive Marketing Practices Digest*.

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

Yes, the specific requirements are set forth in ASC's Guidelines for Use of Research and Survey Data to Support Comparative Advertising Claims (ASC Survey Guidelines). They are, however, only self-regulatory guidelines for interpreting the ASC Code, not laws or regulations binding on the Commissioner, the Tribunal or the Courts. That said, the ASC Survey Guidelines (first published in 1982, last updated in 2012) provide a plain language, pertinent and persuasive summary of current industry best practices and applicable law that advertisers would be wise to follow. The specific requirements include that survey research must be valid, reliable and relevant.

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

The rules for comparisons with competitors are derived from statutes, common law and industry codes. Yes, it is permissible to identify a competitor by name, but care must be taken to mitigate the main legal risks described below.

In Canada, the use of a competitor's name, product, slogan or other intellectual property in advertising, even in a fair and accurate comparative advertisement, may raise legal risks for the advertiser under the Copyright Act, the Trade-marks Act or at common law under the tort of passing off, either separately or in combination.

No deceptive advertising

The main requirements under the Competition Act for comparative advertising are that the claims must not be deceptive and must be substantiated (see questions 17 and 18). But the statutory rules by no means stop there.

No copyright infringement

The federal Copyright Act prohibits advertisers from using a copyrighted work (such as the slogan, jingle or product packaging of a competitor) without authorisation. Unauthorised use puts the advertiser at risk of liability for an injunction or damages for copyright infringement, or both. There is a defence of fair dealing for the purpose of parody or satire. However, it is unclear to what extent this defence applies in a comparative advertising context.

No trademark infringement or depreciation of goodwill

Likewise, the federal Trade-marks Act prohibits advertisers from using a registered trademark (which may include the company and product names and logos of a competitor) without permission or licence. Unauthorised use puts the advertiser at risk of legal proceedings and possible liability for trademark infringement or depreciation of goodwill, or both. That said, the relevant statutory provisions and case law interpreting them are complex and nuanced, with the result that the guidance for advertisers is not intuitive. For instance, the risks of unauthorised use of a competitor's trademark in advertising are:

- increased when the competitor's trademark is registered for services as opposed to only wares or the advertisement is on the product packaging or at a point of sale; and
- decreased when the advertisement focuses on the differences between the two products as opposed to their similarities.

No passing off

Owners of unregistered trademarks must rely on the common law or the Trade-marks Act's unfair competition provisions to prevent competitors from using the trademark in advertising. One avenue is a passing-off action that requires the owner to show the existence of goodwill, the deception of the public owing to the advertiser's misrepresentation and damages.

ASC Guidelines

With respect to self-regulatory regimes, the ASC Code provides that advertisements must not unfairly discredit, disparage or attack other products, services, advertisements or companies, or exaggerate the nature and importance of competitive differences. The use of the word 'unfairly' means that some form of comparison is acceptable. ASC's Guidelines for the Use of Comparative Advertising provide rules that blend the legal requirements under the statutory regime and common

law discussed above with current best practices of advertisers under the ASC Code.

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

No, there are no higher or special degrees or types of proof required other than those mandated by the Competition Act. For details, see questions 16, 18, 19 and 20.

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

No, there are no special rules for advertising depicting or demonstrating product performance other than those under the Competition Act already discussed in question 21.

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

Yes, there are many special rules for endorsements and testimonials, some of which are discussed below. Before using an endorsement or testimonial in advertising, the advertiser should acquire the necessary permissions from the endorser. These include permissions regarding use of the endorser's personality rights and any of the endorser's copyrighted material. The advertiser should also get the endorser to waive his or her moral rights.

The Competition Act prohibits the unauthorised use of tests and testimonials, or the distortion of authorised tests and testimonials. The provision also prohibits a person from allowing such representations to be made to the public. To document compliance with the Competition Act, advertisers should ask endorsers to swear an affidavit or provide some other confirmation in writing that the endorser has in fact used the product and that he or she has provided the opinion set out in the advertisement.

Through recent investigations and announcements, the Bureau has taken action to respond to consumer complaints regarding the deception inherent in 'astroturfing' – that is, fake online reviews written to look like they are from regular consumers, but that are actually written by someone affiliated with the product or service being reviewed. The Bureau published guidance on what it considers to be astroturfing in an article entitled 'Online Reviews' in the June 2015 volume of the *Deceptive Marketing Practices Digest*. At a minimum, if there is a 'material connection' between the reviewer and the company whose product or service is being reviewed (such as employment or paid sponsor), this must be disclosed.

In October 2015, following a Bureau investigation into allegations that certain Bell employees were encouraged to post positive online reviews of certain Bell apps, without disclosing that they were Bell employees, Bell entered into a consent agreement with the Competition Bureau where Bell agreed to pay an AMP of C$1.25 million and to enhance its corporate compliance programme with a specific focus on preventing astroturfing. Bell also agreed to sponsor and host a workshop to promote Canadians' trust in the digital economy, including the integrity of online reviews.

The general rule in Canada, as summarised in the ASC Code, is that testimonials or endorsements by third parties must reflect the genuine, current opinions of the organisation or individuals giving them. They must be based on adequate information or experience and must not be deceptive. Recent amendments to the ASC Code (including a new interpretation guideline for testimonials) make it clear that any testimonial, endorsement or review must disclose any 'material connection' except when the material connection is one that consumers would reasonably expect to exist (eg, when a celebrity publicly endorses a product in a television advert). If such a material connection exists, that fact and the nature of the material connection must be clearly and prominently disclosed in close proximity to the claim.

24 Are there special rules for advertising guarantees?

Yes, there are special rules with respect to advertising guarantees and warranties under the Competition Act and provincial or territorial consumer protection legislation. The Competition Act prohibits advertisers from making materially misleading product warranties or guarantees, or misleading promises to replace, maintain or repair an article. This prohibition also applies to circumstances where there is no reasonable prospect that the warranty, guarantee or promise will be carried out.

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

Yes, there are special rules for claims about a product's impact on the environment. Environmental claims in advertising are regulated under the general deceptive advertising provisions of the Competition Act. To assist industry and advertisers in making environmental claims that are not deceptive under the Competition Act (and other statutes that the Commissioner administers), the Commissioner and the Canadian Standards Association published a guidance document in 2008 (updating an earlier document published in 2000) entitled Environmental Claims: A Guide for Industry and Advertisers (the Environmental Claims Guide).

The Environmental Claims Guide is not a regulation and does not have the force of law. That said, it contains practical guidance on many areas, including that:

- an environmental claim that is vague or non-specific or that broadly implies that a product is environmentally beneficial or environmentally benign shall not be used; and
- self-declared environmental claims must meet 18 specific requirements including that they shall be accurate and not misleading, substantiated and verified, relevant, specific and accompanied by an explanatory statement if the claim alone is likely to result in misunderstanding.

The Environmental Claims Guide is based primarily on ISO 14021 Environmental labels and declarations – Self-declared environmental claims (Type II environmental labelling) (ISO 14021), and replaced the Principles and Guidelines for Environmental Labelling and Advertising published by Industry and Science Canada in 1993. ISO 14021 was first published in 1999, and was amended in 2011 to address new and emerging issues in environmental claims such as those relating to 'carbon neutral/offset' claims and 'qualified sustainability' claims.

In December 2016, the Competition Bureau announced that it had reached a consent agreement with Volkswagen Canada and Audi Canada in respect of allegedly deceptive environmental marketing claims used to promote certain vehicles with 2.0 litre diesel engines. The consent agreement required the advertisers to pay an AMP of C$15 million. At the same time, the advertisers agreed to settle a class action lawsuit by offering to provide buyback and restitution payments to consumers totalling up to C$2.1 billion.

26 Are there special rules for describing something as free and for pricing or savings claims?

Yes, there are special rules set out in the Competition Act and in Commissioner guidance for describing items as free and for pricing or savings claims.

'Free' claims

The Commissioner guidance includes:

- if a 'free' offer is made, the item must in fact be free and available to the consumer at no cost; and
- if a second item is bundled with the first item at no extra cost to the consumer, it is permissible for the advertiser to claim the second item is 'free with purchase' of the first item provided there is no attempt to recover the cost of the free item.

Also regarding 'free' claims advertised in Quebec, advertisers must take care to comply with a unique requirement under Quebec's Consumer Protection Act that prohibits placing more emphasis in an advertisement on a premium than on the good or service associated with the premium.

'Up to' claims

In Canada, 'up to' claims are not addressed specifically in any advertising statute or regulation.

That said, at least in respect of price advertising, the CMA Code provides general guidance for advertisers, which includes:

- where price discounts are offered, a qualifier such as 'up to' must be presented in easily readable form and in proximity to the prices quoted; and
- reasonable quantities of items or services on promotion should be available at discount levels across and up to the range quoted.

Ordinary selling price claims

The deceptive ordinary selling price (OSP) provisions of the Competition Act are designed to ensure that when products are promoted at sale prices, consumers are not misled by reference to inflated regular prices. In other words, when an OSP is advertised in relation to a savings claim, there must really be a bargain.

The Competition Act prohibits false or misleading representations to the public as to the OSP of a product, in any form whatsoever. The OSP is validated in one of two ways: either a substantial volume of the product was sold at that price or higher, within a reasonable period of time (the 'volume test'); or the product was offered for sale, in good faith, for a substantial period of time at that price or a higher price (the 'time test'). In the Ordinary Price Enforcement Guidelines 2009, the Commissioner clarifies the approach taken in enforcing the OSP provisions of the Competition Act as follows:

- with respect to the volume test, 'substantial volume' means more than 50 per cent of sales at (or above) the reference price and 'reasonable period of time' means 12 months before (or after) the claim;
- with respect to the time test, 'substantial period of time' means more than 50 per cent of the six months before (or after) the claim is made, and 'in good faith' depends on a number of factors including that the product was openly available in appropriate volumes and the price was based on sound pricing principles, a price the advertiser fully expected the market to validate (whether or not this happened) and a price at which genuine sales had occurred; and
- with respect to both the 12-month period for the volume test and the six-month period for the time test, these periods may be shortened depending on the nature of the product – namely, a shorter period if the product is seasonal, novel, new or frequently purchased.

In May 2015, following a Competition Bureau investigation into allegedly deceptive OSP claims for custom framing services and certain ready-made frames, Michaels of Canada ULC agreed to pay a C$3.5 million AMP, establish a corporate compliance programme and pay C$165,000 in Bureau investigation costs. In January 2017, Amazon.com.ca Inc agreed to pay a C$1 million AMP and C$100,000 towards the Bureau's costs as part of a consent agreement to resolve the Bureau's concerns with pricing practices on Amazon's Canadian website. Specifically, the Bureau alleged that Amazon's advertising created the deceptive impression that prices offered for sale on amazon.ca were lower than prevailing market prices. Lastly, in February 2017 and following a lengthy investigation, the Bureau announced that it had filed an application with the Competition Bureau, seeking unspecified AMPs, alleging that the Hudson's Bay Company (HBC) had engaged in deceptive ordinary price claims in clearance promotions for mattresses and foundations. In particular, the Bureau alleges that HBC grossly inflated its regular prices and then advertised deep discounts on those prices implying big savings to consumers.

Sale above advertised price

The Competition Act prohibits the sale of a product at a price higher than its advertised price. The provision does not apply if the advertised price was a mistake and the error was corrected immediately upon the advertiser being made aware of the mistake.

Double ticketing

The Competition Act prohibits, as a criminal offence, the practice of 'double ticketing', in which two prices are affixed to an item and the higher of the two prices is charged to the purchaser. The prohibition also applies to the display of multiple prices at point of purchase displays or other in-store advertising.

Bait-and-switch

The Competition Act prohibits advertising a product at a bargain price when it is not available for sale in reasonable quantities – 'bait-and-switch selling'. The provision does not apply if the advertiser can establish that the non-availability of the product was owing to circumstances beyond the advertiser's control, the quantity of the product obtained was reasonable, or the customer was offered a rain cheque when supplies were exhausted.

All-in pricing

Recently, in certain sectors prone to consumer confusion and frustration as to the total price of a product (eg, where the constituent elements of the total price of a good or service may be varied and complex), and to allow consumers to more easily compare prices and make informed choices, sector-specific all-in, transparent pricing laws have been enacted both federally and provincially. This includes advertising the sale of automobiles, wireless services in Ontario, all consumer goods and services in Quebec, and air travel federally.

In March 2015, following the Bureau's investigation of price advertising in Canada by car rental companies Avis and Budget, the Commissioner commenced an application with the Tribunal alleging deceptive advertising. As noted in question 4, this proceeding was settled in June 2016 with the defendants paying a total of C$3.25 million. In the application, the Commissioner alleged that each company advertised prices for vehicle rentals that were not attainable because of additional charges imposed during the rental process. In addition, the Commissioner alleged that these fees were mischaracterised in each company's advertisements as 'government' taxes, surcharges and fees when, in fact, the companies imposed these charges to recoup part of their cost of doing business. The application is an example of yet another action by the Commissioner for 'all-in' pricing and against the practice of drip pricing (ie, where a consumer is presented with a price in the advert but not the full price until later; this is discussed in more detail, below).

Drip pricing

In July 2013, the Commissioner commenced proceedings in the Ontario Superior Court of Justice against two national furniture retailers (Leon's and The Brick) alleging, among other things, deceptive 'drip pricing' – that is, a pricing technique in which firms advertise only a portion of a price and reveal other charges to the customer as they go through the purchasing process. In the Statement of Claim, the Commissioner alleges that:

> *Drip pricing triggers a number of common behavioural biases, including:*
> *(a) price anchoring – consumers "anchor" to the piece of information they think is most important (i.e., the advertised price). They then fail to adjust their perception of the value of the offer sufficiently as more costs are revealed;*
> *(b) loss aversion – consumers see a low price and make the decision to buy the good, which shifts their reference point because they imagine already possessing the good. Later, when they realize that there are additional costs and charges, it is more difficult for them to give up the good that they already view as theirs; and*
> *(c) commitment and consistency – consumers have a desire to be consistent with their previous actions so once they've started the purchasing process they are less likely to walk away.*

The Commissioner then pleads that the advertisers exploited these consumer behaviours and asks the court to order the advertisers, for their alleged reviewable conduct, to pay full restitution to customers.

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

Yes, there are special rules for claiming a product is new or improved. In Canada, the general rule, as expressed in various guidelines and codes (such as in the Broadcast Code – see question 30), is that an advertiser may claim a product is new or improved for up to one year.

Prohibited and controlled advertising

28 What products and services may not be advertised?

Gambling without government sanction is illegal in Canada, and those who advertise gambling activities may be committing a criminal offence or violating a provincial consumer protection statute, or both

(see question 36). While not prohibited, advertising tobacco products or prescription drugs is highly restricted (see questions 32 and 35).

29 Are certain advertising methods prohibited?

The ASC Code prohibits advertising in a format that conceals its commercial intent. Consumers must understand that someone is trying to sell them something. For example, dressing up a commercial as a documentary without indicating its true nature would not be allowed under the ASC Code.

The ASC Code prohibits advertisements that, without justifiable educational or social grounds, encourage unsafe or dangerous behaviour. A dangerous promotional stunt would likely be outside this requirement.

Advertising that shocks and offends public decency is not permitted by the ASC Code.

CASL prohibits the sending of CEMs (which are not limited to emails and may include text messages, instant messaging and some social media messages) without the recipient's prior express opt-in consent, although there are exemptions for certain types of messages and scenarios, and consent may be implied in defined circumstances.

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

The rules for advertising to minors are detailed and complex and vary by province, regulator and media. Minors generally include children under 12 years of age (13 in Quebec) and teenagers under the age of majority (which varies between 18 and 19 depending on the province or territory). Generally speaking, these rules recognise that minors are a vulnerable segment of society that require considerable protection from high-pressure advertising techniques.

There are no federal statutes or regulations that specifically regulate advertising to minors. Rather, the laws of general application, such as the Competition Act, apply. However, there are several self-regulatory industry codes and there are specific laws in Quebec.

The ASC Code addresses advertising to both children and teenagers who are still minors. Advertising directed at children must not exploit their credulity, lack of experience or their sense of loyalty, and must not present information that might result in their physical, emotional or moral harm.

Broadcast advertisements directed at children must be reviewed and approved by ASC's Children's Clearance Committee to ensure compliance with the provisions of the Broadcast Code.

The CMA Code recognises that marketers have a special responsibility to be sensitive to the different issues surrounding marketing to children and teenagers (especially those relating to protecting their privacy) and thus provides many rules and guidelines.

With only limited exceptions, Quebec's Consumer Protection Act bans commercial advertising directed at children under the age of 13. The Quebec ban is complex and nuanced. For instance, excepted from the ban are advertisements constituted by a store window, display, container, wrapping or label, provided the advertisements meet certain prescribed requirements, which include not directly inciting the child to buy or to urge another person to buy the advertised goods or services or even to seek information about them.

Lastly, in response to increasing public pressure to promote healthy dietary choices and lifestyles to children and to combat childhood obesity, many of Canada's leading food and beverage companies have established the Children's Advertising Initiative, administered by ASC.

31 Are there special rules for advertising credit or financial products?

Yes, there are special rules that vary depending on whether the advertiser is, in terms of cost of credit and other disclosures, regulated federally, provincially or territorially.

The special rules for advertising credit or financial products (such as credit cards, lines of credit and mortgages) supplied by federally regulated financial entities (such as banks) stem from federal statutes and regulations (such as the Bank Act, the Cost of Borrowing and the Credit Business Practices Regulations under the Bank Act). Such rules are also derived from certain voluntary codes of conduct including the Canadian Code of Practice for Consumer Debit Card Services 2004 and the Code of Conduct for the Debit and Credit Card Industry in Canada 2010.

The special rules for advertising credit or lease products (such as in the automotive sector) stem mainly from provincial or territorial consumer protection laws. Despite efforts at harmonisation, there are still variations of these rules across Canada. The rules in Ontario, however, are essentially the same as those in the majority of Canadian provinces and include, with respect to both credit agreements and lease agreements, that the advertisements must prominently include the annual percentage rate (APR), a prescribed 'effective' interest rate that takes into account the consumer's foregone cash-purchase-only incentives (and when taken into account is higher than the 'nominal' interest rate).

Federally regulated banks also need to pay attention to provincial and territorial consumer protection legislation. In the recent *Marcotte* decision, the Supreme Court of Canada made it clear that there is no sweeping immunity for banks from provincial laws of general application. In this case, the Court found that the disclosure of credit charges and net capital amounts must comply with both federal and Quebec law requirements.

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

Yes, the special rules for claims made about therapeutic goods (such as prescription drugs, non-prescription drugs, natural health products and medical devices) arise from the federal Food and Drugs Act and the following regulations made under it: the Food and Drugs Regulations, the Natural Health Products Regulations and the Medical Devices Regulations.

Health Canada is responsible for enforcing the Food and Drugs Act and its associated Regulations, and retains ultimate regulatory authority with respect to compliance with federal rules governing the advertising of therapeutic products. To assist advertisers, Health Canada has published several policies and directives, including the Distinction between Advertising and Other Activities 2005 and the Consumer Advertising Guidelines for Marketed Health Products (for Non-prescription Drugs including Natural Health Products) 2006.

The Food and Drugs Act prohibits advertising any drug or medical device in a false, misleading or deceptive manner, or in a manner that is likely to give consumers a false impression regarding the character, value, quantity, composition, merit or safety of the device or drug and, in the case of a device, also its design, construction, performance and intended use. The Food and Drug Regulations also provide that prescription drug advertising to the general public must not exceed mention of the name, price and quantity of the drug.

ASC provides advertisers with preclearance services for consumer advertising relating to non-prescription drugs and natural health products. ASC also provides 'advisory opinions' on consumer-directed messages for prescription drugs (DTCA) and consumer-directed messages or materials discussing a medical condition or disease (DTCI).

The PAAB maintains the Code of Advertising Acceptance, last revised in 2013 (the PAAB Code), which sets out detailed rules that advertisers in this sector must follow to mitigate the risks of not complying with the strict and specialised requirements under the Food and Drugs Act for prescription drug advertising. The PAAB also provides voluntary preclearance reviews for compliance with the PAAB Code and an advisory opinion service on DTCA and on DTCI.

The Food and Drugs Act and its associated Regulations do not apply to advertising of services. The special rules relating to advertising therapeutic services (such as those provided by physicians) arise from provincial or territorial statutes and regulations, and guidelines and codes of conduct published by self-regulating colleges relating to the specific health-care profession in question. In Ontario, for instance, the Regulations under the Medicine Act include specific requirements for the advertising of a physician's services.

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

Yes, the special rules for advertising claims about food arise mainly from the federal Food and Drugs Act and its associated Regulations. Generally speaking, the Food and Drugs Act:

- prohibits advertising food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding the food's character, value, quantity, composition, merit or safety; and

- permits only certain limited 'disease risk reduction' claims (ie, a statement that links a food or a constituent of a food to reducing the risk of developing a diet-related disease or condition), the precise wording of which is mandated by Health Canada.

The Canadian Food Inspection Agency (CFIA), a federal agency, shares responsibility with Health Canada for monitoring and enforcing the food-related provisions of the Food and Drugs Act and its associated Regulations. The CFIA has published the Guide to Food Labelling and Advertising, a lengthy and detailed document that includes provisions establishing guidelines for the use of certain common descriptive terms (such as 'fresh', 'natural' and 'new') and nutrient content claims, including those relating to vitamins and minerals, fat, energy and carbohydrates (such as 'low/high in', 'light' and 'a source of').

The CFIA has also issued guidelines on 'product of Canada' and 'made in Canada' claims. The advertising of 'organic' claims is governed by the Organic Products Regulations made under the Canada Agricultural Products Act. Lastly, ASC provides advertisers with preclearance services for food and non-alcoholic beverage broadcast advertising consistent with the above-noted rules.

34 What are the rules for advertising alcoholic beverages?

The advertising of alcoholic beverages is strictly and extensively regulated in Canada by many provincial or territorial and federal rules that include:

- each province or territory's regulations and guidelines regarding advertising content (for example, in Ontario, these include the Alcohol and Gaming Commission of Ontario (AGCO) Liquor Advertising Guidelines: Liquor Sales Licensees and Manufacturers 2011); and
- the federal CRTC Code for Broadcast Advertising of Alcoholic Beverages 1996.

While there are differences in the details of the various provincial or territorial rules, generally speaking, alcoholic beverage advertising across Canada:

- must be targeted at persons who have reached the legal drinking age;
- must promote safe and responsible consumption, and not depict excessive or prolonged drinking; and
- must not depict a person with alcohol while engaged in an activity that involves care, skill or danger.

Also, if a contest is used as a promotional device in alcohol advertising, the contest must: not require purchase or consumption of alcohol to enter; limit entrants to those who have reached the legal drinking age in their province or territory of residence; and not award alcohol as the contest prize. That said, there are also many variations in specific requirements and rules across jurisdictions.

35 What are the rules for advertising tobacco products?

Tobacco advertising is highly restricted in several respects. First, the Tobacco Act imposes a general prohibition on the promotion of tobacco products and tobacco product-related brand elements. Second, the Tobacco Act imposes specific prohibitions including that there may be no:

- false, deceptive or misleading tobacco advertising, which includes advertising that is likely to create an erroneous impression about the health effects of using tobacco;
- testimonials or endorsements by a person, character or animal, even if only fictional, with some limited exceptions relating to older tobacco company or product trademarks; and
- sponsorships of any kind (be it of persons, entities, events, activities or permanent facilities).

In a narrow exception, the Tobacco Act allows informational and brand preference tobacco advertisements (but not 'lifestyle advertising') in publications sent by mail to an adult identified by name or as signs in places where young persons are not legally permitted.

36 Are there special rules for advertising gambling?

Yes, there are special rules for advertising gambling. The Criminal Code prohibits a broad range of gaming and betting schemes, including lotteries. Advertising a scheme for disposing of property by 'lots, cards, tickets or any mode of chance whatsoever' is an indictable offence punishable by up to two years in prison. Furthermore, under Ontario's Consumer Protection Act, no person shall advertise an internet gaming site that is operated contrary to the Criminal Code.

The Criminal Code provides for several exemptions to this general prohibition and allows provincial governments to establish provincial lottery corporations. Provincial lottery corporations must advertise their lottery schemes under special rules whose overarching goal is 'to promote responsible gaming'.

Second, the Criminal Code also allows provinces to license and regulate gaming (such as bingos, raffles and the sale of break-open tickets) conducted by charitable organisations to raise funds to support charitable purposes. In Ontario, such licences are granted by the AGCO. Charitable gaming operators are also subject to advertising rules designed to promote responsible gaming.

37 What are the rules for advertising lotteries?

See question 36.

38 What are the requirements for advertising and offering promotional contests?

The Competition Act prohibits any promotional contest that does not adequately and fairly disclose the number and approximate value of prizes, the area or areas to which they relate and any important information relating to the chances of winning, such as the odds of winning. As to adequate and fair disclosure in contest advertising, the Commissioner in the Promotional Contests, Enforcement Guidelines 2009 states that all contest advertisements in every media should disclose the following information (this disclosure is commonly called the 'mini-rules', as distinct from the contest's 'full rules'):

- the number and approximate retail value of prizes;
- any regional or other allocation of prizes;
- the chances of winning;
- the fact that no purchase is necessary;
- the skill-testing question requirement;
- any other fact known to the advertiser that materially affects the entrant's chances of winning;
- the contest's closing date; and
- where and how the full rules may be obtained.

In addition to the requirements set out in the Competition Act, the federal Criminal Code prohibits the offering of a promotional contest that forces the entrant to purchase a product or give other valuable consideration. Using a free alternative mode of entry, such as a postal entry, is one way to ensure compliance with the Criminal Code. The Criminal Code also requires that selected entrants in a contest draw correctly answer a skill-testing question to qualify as winners. A simple four-function mathematical question is usually sufficient to meet this requirement.

Quebec is the only province in Canada with its own special contest laws (including provisions relating to contest advertising) supplementing those in the federal Criminal Code and Competition Act.

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

There are currently no restrictions on product placement in Canada. The CMA Code states that product placement within entertainment programming is acceptable.

40 Briefly give details of any other notable special advertising regimes.

Other notable special advertising regimes not already discussed in this chapter include those relating to election advertising, federal government advertising, protecting the French language in Quebec, offence to public morals, cosmetics and telemarketing.

Election advertising

The ASC Code expressly does not apply to political or election advertising. This is governed by federal and provincial legislation – for instance, with respect to federal election advertising, the Canada Elections Act.

Update and trends

There is a persistent trend towards more regular, formal efforts of international cooperation between Canadian government regulators and their counterparts in other countries. This trend reflects the inherently global monitoring and enforcement challenges that online and mobile advertising pose for consumer protection and privacy regulators around the world.

With data more deeply woven into business strategies than ever before, the main vulnerabilities and best practices in data protection, privacy and security (especially in a world of Big Data and the Internet of Things (IoT)) has emerged as a hot topic, particularly with the OPC, which released a research paper in February 2016 on the IoT with a focus on the privacy challenges it raises in the retail and home environments.

In April 2016, the OPC announced that it was joining the fourth Global Privacy Enforcement Network's privacy sweep focused on the IoT and how companies communicate their personal information handling practices to consumers (with Canada's contribution being to look at health devices such as sleep monitors and fitness trackers). In September 2016, the OPC reported on this initiative which involved 25 data protection authorities around the globe, sweeping 314 devices.

'Programmatic advertising' has emerged as both an opportunity and challenge. It involves a system, akin to a stock exchange, of buying and selling online advertising through automated billing on virtual trading desks. This system allows for real-time monitoring of consumers' movements on the internet, allowing advertisers to target consumers with specific target characteristics in real time. With more intermediaries handling advertising buys, the main legal concerns from the advertiser's standpoint relate to privacy protection, transparency and fraud prevention.

Lastly, by July 2017, the OPC will be publishing its 'formal policy position' on the future of the consent model under Canadian privacy law. This paper will be a must-read for organisations that collect, use and disclose Canadian personal information in the course of their business activities (including advertising and marketing). It follows the discussion paper the OPC published in 2016 on the problems with, and possible solutions to, the concept of consent in today's digital economy and the OPC's consultation, which led to over 50 formal representations by businesses, industry associations and consumers' groups. It is expected that the OPC's paper will recognise that there are many ways to enhance the current consent model and that there is no single technological solution to the consent conundrum.

Federal government advertising

In May 2016, ASC announced that, at the request of the government of Canada, it had launched a new advertising review service to help ensure that the government of Canada's advertising met the requirements of being 'non-partisan', as defined in the government of Canada's Policy on Communications and Federal Identity. These requirements include that the advertising is objective, factual, explanatory and free from political party slogans, images, identifiers, bias, designation or affiliation. Also, the primary colour associated with the governing party must not be used in a dominant way, unless an item is commonly depicted in that colour. As well, the advertising must not contain the name, voice or image of a minister, member of parliament or senator.

Protecting French in Quebec

The Charter of the French Language seeks to protect the French language in Quebec with special rules including that:

- outdoor signs (such as billboards and bus shelter adverts) must be exclusively in French, or in French and another language, provided that the French is 'markedly predominant', which requires that the French text has a much greater visual impact than the text in the other language; and
- websites for companies that operate in Quebec or that sell in Quebec must be in French, or in French and another language, provided that the French website is given 'equal prominence'.

Offence to public morals

Publishing obscenities is a crime in Canada. Obscene material is defined as 'any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence'.

Cosmetics

There are special rules for advertising cosmetics that also stem mainly from the federal Food and Drugs Act, the Cosmetic Regulations, and the Guidelines for Cosmetic Advertising and Labelling Claims 2006, as amended in 2010 via an ASC interim summary document. Broadcast advertising copy for cosmetics may be pre-cleared by ASC. Following a process that started in 2014, in October 2016, Health Canada issued a consultation document respecting a proposed new approach to the regulation of self-care products, defined to include cosmetics, over-the-counter drugs and natural health products. According to Health Canada, a key aim of the changes is to help consumers better discern whether the self-care products they are purchasing have been proven to work.

Telemarketing

Since 2007, the CRTC has been responsible for maintaining and enforcing the Unsolicited Telecommunications Rules (UTRs), which, following a comprehensive review, have recently been amended, effective 30 June 2014. The UTRs include the National Do Not Call List Rules, the Telemarketing Rules and the Automatic Dialing-Announcing Device Rules, with which all telemarketers must comply. In a precedent-setting ruling in March 2015, the CRTC issued, as part of a settlement, its first penalty (C$200,000) to a foreign-based telemarketer for violating the UTRs.

In February 2017, a Quebec-based company, Mega Byte Information, pleaded guilty before the Superior Court of Quebec to operating a deceptive telemarketing scheme under the Competition Act and, as part of the plea, paid a fine of C$450,000.

Social media

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

Advertising on social media is generally subject to the same Canadian laws, regulations, guidelines and codes of practice that apply to more traditional forms of media, albeit with a heightened sensitivity to, and increased focus on, the protection of personal information.

A challenge for advertisers on social media sites (even established ones such as Facebook, Twitter and Pinterest) is that these sites have detailed and frequently revised terms of use, guidelines for advertising, contests and other promotions, and developer and platform policies with which advertisers must comply.

The Word of Mouth Marketing Association Guide to Best Practices for Transparency and Disclosure in Digital, Social and Mobile Marketing 2013 sets out certain 'fundamental principles' to help advertisers communicate with audiences ethically and responsibly and to mitigate potential legal and other risks.

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

Advertising on social media, even if well planned, managed and moderated, is inherently riskier than advertising in traditional media (such as print, outdoor and broadcast), given the significant platform and power social media gives the advertiser's target market of consumers, as well as its competitors and critics.

In August 2015, a pregnant Kim Kardashian endorsed on Instagram a Canadian-made prescription morning sickness pill by its name. In her post, Kardashian said that she was so happy with the drug that she was partnering with its Quebec-based manufacturer, Duchesnay, to raise awareness about the treatment of morning sickness. Apart from the concerns raised by the US Food and Drug Administration that the endorsement, deceptively, did not provide a fair balance of the risks and benefits of the drug, it raised serious concerns in Canada because under Canadian pharmaceutical advertising law (see question 32), no one may advertise a prescription drug to the general public by naming the drug and saying what it treats.

There are also notable instances of social media advertising involving iconic Canadian companies going 'not entirely as planned' or leading to 'unexpected' results and thus criticism. Even running a charitable initiative can be subjected to harsh public criticism. For example, in 2014, Bell Canada, a telecommunications company, continued its annual campaign where Bell donates five cents to mental health causes for every tweet containing the hashtag #BellLetsTalk. While many have lauded the campaign's goal of diminishing the stigma associated with mental health issues, others have criticised it as a marketing ploy masquerading as social responsibility.

43 Are there regulations governing privacy concerns when using social media?

While not specific to social media, the federal Personal Information Protection and Electronic Documents Act and substantially similar provincial privacy legislation regulate how social media platforms collect, use and disclose users' personal information. As noted in question 4, in response to privacy concerns about OBA, the OPC has published guidelines on privacy and online behavioural advertising and released a report in 2015 on its research critical of many advertisers' non-compliance with these guidelines.

On the self-regulatory front, in 2013, the Digital Advertising Alliance of Canada (DAAC), a consortium of eight leading Canadian advertising and marketing associations, launched the AdChoices Icon programme and the Canadian Self-Regulatory Principles for Online Behavioural Advertising, which set out a consumer-friendly framework for the collection and use of online data in order to facilitate the delivery of advertising based on the preferences or interests of web users. The Icon programme allows users to opt out from receiving OBA from participating companies. In 2016, 79 companies directly involved in OBA were registered for the programme. In early 2015, the US Digital Advertising Alliance (DAA) launched two new mobile tools for consumers to supplement the already-existing US AdChoices programme for desktop browsers: 'AppChoices' and the 'DAA Consumer Choice Page for Mobile Web'. In January 2017, the DAAC announced that it had adopted AppChoices and has 35 companies on the tool. At the same time, the DAAC also announced that an AdChoices for Mobile programme would be rolled out in Canada during 2017.

fogler rubinoff

Bill Hearn **bhearn@foglers.com**

77 King Street West
Suite 3000
PO Box 95
TD Centre North Tower
Toronto ON M5K 1G8
Canada

Tel: +1 416 941 8805
Fax: +1 416 941 8852
www.foglers.com

Colombia

Juan Carlos Uribe and Sandra Ávila
Triana, Uribe & Michelsen

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

The main statute governing advertisements is Law 1480 of 2011 (the Consumer Protection Statute), which overruled Decree 3466 of 1982 in most parts; however, Decree 3466 of 1982 still applies for what the Consumer Protection Statute does not cover. The Consumer Protection Statute introduced guidelines regarding accuracy and truthfulness of advertisements, which are mandatory. It expressly forbids misleading advertising, and includes a provision by means of which the media in which the advertisement is published or broadcast may be jointly liable if fraud or gross negligence is proven.

Unique Circular No. 10 of the Superintendence of Industry and Commerce (SIC) regulates all matters pertaining to the Superintendence of Industry and Commerce, including consumer protection.

Certain behaviours involving advertising may be deemed as unfair competition under Law 260 of 1996 (the Unfair Competition Law), for example, misleading comparative advertising.

The Self-Regulatory Code on Advertising, amended on 16 October 2013, regulates advertising from an ethical perspective.

There are other bodies of legislation to regulate specific products or services but only those mentioned above have a general scope.

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?

The bodies primarily responsible for issuing advertising regulations are the Congress of Colombia, the government (the Ministry of Commerce and the Health Ministry) and the SIC. Those primarily responsible for enforcing rules on advertising are the SIC and the Health Authority.

The Self-Regulatory Code on Advertising: Colombian Union of Advertising Companies, issued by a conglomerate of advertising companies, regulates advertising from an ethical perspective.

Currently there are no guidelines or case law providing orientation on how concurrent jurisdiction among regulators with responsibility for advertising shall be managed.

3 What powers do the regulators have?

Following an administrative investigation, the SIC may impose the penalties provided in the Consumer Protection Statute, as discussed in question 11.

4 What are the current major concerns of regulators?

The major concerns of regulators are with regard to the kind of advertisement (such as deceptive advertisements for 'miracle products' and false statements) and the goods to be advertised. The following restrictions apply to the advertising of certain goods:

- pharmaceutical goods – depending on the medication it may require prior authorisation;
- alcoholic beverages are subject to restrictions on advertising hours and types of advertisement, and special conditions to carry out the advertisement, such as the inclusion of mandatory phrases;
- tobacco cannot be advertised (Law 1335 of 2009); and
- infant formula cannot be subject to promotions or rebates.

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

The only industry code of practice is the self-regulation system that comprises different professional associations gathered in a commission called the National Commission for Self-Regulation Advertisement (CONARP). This entity is in charge of developing and issuing the ethics code for advertisement activities. The code is called the Colombian Advertising Code of Ethics and applies to members or subscribers and their employees, contractors or suppliers of advertising services.

The Colombian Advertising Code of Practice entitles CONARP to make judgments against an advertiser based on ethical considerations. Based on the Colombian Advertising Code of Practice, CONARP can admonish privately or publicly those responsible for advertising that violates an ethical standard and inform the competent public authorities when the advertisement under review breaches Colombian law.

6 Must advertisers register or obtain a licence?

No, advertisers are not required to register or obtain a licence.

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

Yes, advertisers may seek advisory opinions from the regulator.

Nonetheless, such opinions are not binding and cannot be applied to general matters.

Certain advertising requires clearance before publication or broadcast, such as energy drinks, over-the-counter drugs, over-the-counter herbal medicines, over-the-counter homeopathic drugs, dietary supplements, medical devices and biomedical equipment, categories IIA, IIB and III.

Private enforcement (litigation and administrative procedures)

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

There are two prejudicial claim options: a cease-and-desist letter and a mediation hearing. The advantage of a cease-and-desist letter is that it is interparty, which means that it is not expensive. The timing is also determined by the parties. A disadvantage, however, is that not all counterparties take cease-and-desist letters seriously.

A mediation hearing is also interparty, but takes place before a mediation institution. Given the institutionalised nature of this proceeding, it has good results. It is not expensive and it is a quick process. It is a requirement for judicial proceedings in which no precautionary measures are requested; hence, even if the disagreement is not solved in the mediation hearing, the steps for initiating a judicial proceeding have already been taken.

Another avenue for challenging advertising is an administrative proceeding before the SIC based upon the Consumer Protection Statute and the Unique Circular No. 10. An advantage of this is that the authority will take all measures in order to secure a proper decision. However, this process usually takes a very long time. The complainant is not part of the proceeding. It might also generate retaliation from the competitor.

There is also the possibility of a judicial proceeding before the SIC based upon the Consumer Protection Statute and the Unique Circular No. 10. Its purpose is to compensate any damage caused by an advertisement infraction; however, to do this, damage has to be proven by an advertisement infraction.

An administrative proceeding before the Health Authority may also be taken. An advantage of this is that it is a highly specialised authority, but this, of course, means that it is limited to addressing health requirements.

Finally, there is a judicial proceeding before a judge (either a civil circuit judge or the SIC as a jurisdictional authority) based upon unfair competition law. This is the only option in which the complainant is part of the proceeding and can claim damages. If the defendant is found guilty, it must proceed with a corrective advertisement. This type of proceeding, however, is expensive.

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?

Nowadays consumers are actively using the Consumer Protection Statute to enforce their rights and may autonomously challenge advertising on the grounds of its infringement of the Statute. Most actions are against commercial offers printed in adverts that consumers consider misleading, with supermarkets bearing the majority of the lawsuits. Consumer associations may also bring actions against market agents. Some example grounds for these actions to be brought are as follows.

An administrative proceeding may be brought before the SIC on the grounds that the advertisement in question does not comply with legal requirements because it is deceiving, incomplete or unclear.

A judicial proceeding may be brought before the SIC on the grounds that a consumer suffers damage from an advertisement that does not comply with legal requirements because it was deceiving, incomplete or unclear.

An administrative proceeding may be brought before the Health Authority on the grounds that the advertisement in question does not fulfil the legal health requirements.

10 Which party bears the burden of proof?

It depends on the proceeding, as follows:

- in a prejudicial claim the burden of proof is on the complainant;
- in an administrative proceeding before the SIC, it is on the respondent;
- in a judicial proceeding before the SIC (based upon Consumer Protection Statute), it is on the complainant regarding damages, and on the respondent regarding the fulfilment of the legal requirements;
- in an administrative proceeding before the Health Authority, it is on the respondent; and
- in a judicial proceeding before a judge (either a civil circuit judge or the SIC as a jurisdictional authority) (based upon unfair competition law) the burden of proof is on the complainant regarding damages, and the respondent regarding the fulfilment of the legal requirements.

11 What remedies may the courts or other adjudicators grant?

In an administrative proceeding before the SIC, the penalties provided in the Consumer Protection Statute are as follows:

- fines of up to 2,000 minimum legal monthly wages in force at the time of the imposition of the sanction;
- temporary closure of the party's business establishment for up to 180 days;
- in cases of recidivism and depending on the wrongdoing, closure of the establishment or final order of removal of a website portal on the internet or media used in electronic commerce;
- temporary or permanent prohibition on producing, distributing or offering certain products to the public;
- the destruction of a particular product that is detrimental to the health and safety of consumers; and
- successive fines of up to 1,000 minimum legal monthly wages, for failure to comply with the SIC's orders.

A judicial proceeding before the SIC (based upon the Consumer Protection Statute) may result in the charging of compensation for damages that have been proven by the complainant.

An administrative proceeding before the Health Authority may result in the offending party being forbidden to advertise or market an infringing good.

A judicial proceeding before a judge (either a civil circuit judge or the SIC as a jurisdictional authority) (based upon unfair competition law) may result in the offending party having to pay compensation for damages that have been proven by the complainant and proceed with a corrective advertisement.

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

The length of both administrative and judicial proceedings before the SIC (based upon the Consumer Protection Statute) depends exclusively on the SIC; it could be as short as three months or as long as three years.

Administrative proceedings before the Health Authority depend exclusively on the Health Authority; they take approximately three to four years.

Judicial proceedings before a judge (either a civil circuit judge or the SIC as a jurisdictional authority) (based upon unfair competition law) take approximately one to two years.

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

Administrative and judicial proceedings before the SIC (based upon the Consumer Protection Statute) and administrative proceedings before the Health Authority do not involve any official fees, so the cost depends on the attorneys' fees, which are not recoverable.

A judicial proceeding before a judge (based upon unfair competition law) could cost from US$40,000 to US$100,000, including official fees, expenses and attorneys' fees. Not all of the legal fees may be recoverable; this is for the judge to determine.

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

In administrative proceedings before the SIC, there can be two appeals, which have to be filed at the same time before the authority who issues the decision. The first one, which is a reconsideration appeal, would be resolved by the authority who initially issued the decision, and the second appeal would be resolved by the hierarchical and functional superior of the officer who initially issued the decision.

Regarding judicial proceedings before the SIC, the decision can be appealed before the hierarchical and functional superior of the officer who initially issued the decision (in this case, the tribunal of the civil jurisdiction).

Administrative proceedings before the Health Authority involve two appeals that have to be filed at the same time before the authority that issues the decision. The first one, which is a reconsideration appeal, would be resolved by the authority who initially issued the decision, and second appeal would be resolved by the hierarchical and functional superior of the officer who initially issued the decision.

In a judicial proceeding before a judge (either a civil circuit judge or the SIC as a jurisdictional authority) the decision can be appealed before the hierarchical and functional superior of the officer who initially issued the decision.

Misleading advertising

15 How is editorial content differentiated from advertising?

There are no general principals regulating this issue.

Advertising is ruled by the Consumer Protection Statue, while editorial content is ruled by freedom of speech, which has been widely protected by the Constitutional Court. Content is editorial content if it represents an independent opinion without any relationship with a manufacturer.

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

'Puffery' is understood as subjective assertions, or unbelievable statements, that no consumer would take to be true, such as the claim that a product contains 'the spark of life' (Coca-Cola).

Any claim that refers to an actual characteristic of the good or service would be an objective assertion and would therefore require substantiation.

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

Misleading advertising is forbidden. The advertiser will be responsible for any damages caused by misleading advertising. The media will be jointly liable only if gross negligence is observed. Where the advertised good does not meet the objective conditions claimed in the advertisement, without prejudice to administrative sanctions that may apply, the advertiser must compensate the consumer for damages.

All relevant information must be disclosed and must be clear, truthful, adequate, timely, verifiable, understandable, accurate and suitable for the products that are offered.

Disclaimers and footnotes are permissible.

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?

An advertiser should have proof of the claims it makes in advertising before publishing, as objective assertions require substantiation.

The SIC usually requires third-party scientific studies to substantiate claims.

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

The results cannot be manipulated, the sample has to be representative and the questionnaire should not include leading questions.

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

Comparison should be upon objective facts and upon goods or services of the same nature and category. No incorrect or false statements should be asserted, neither should true statements be omitted.

The technical and legal criteria for comparative commercial advertising include the following: the comparison should be between goods, services or establishments meeting the same needs or intended for the same purpose; and the comparison must relate to objective or verifiable characteristics.

It is permissible to identify a competitor by name.

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

If a manufacturer claims the existence of a test or study, the claim should be substantiated. The manufacturer must have said test or study in its archives and it can be required by the competent authority to provide it.

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

The depiction or demonstration must be clear. The consumer must be informed of the conditions in which the demonstration has been carried out with regard to time, quantity and use, among other things.

If part of the demonstration requires a comparison or is made by means of a comparison, the kind of product it has been compared to must be duly established.

If the comparison is against a competitor, the goods have to belong to the same category, which means that the goods or services must satisfy the same necessities; the comparison must refer to objective or verifiable characteristics; the comparison must therefore be made between one or more relevant, verifiable and representative features thereof; and the advertising shall indicate the characteristics of the compared products and services, without being misleading.

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

The advertiser must have each testifier's release and authorisation to use its name in association with the brand. The testifier's claims or opinions can be jointly and severally liable if advertising rules are breached.

It has to be clear whether the testimony is an endorsement, an independent opinion, a belief or an experience.

Advertisers must keep information and documentation on advertising for at least three years from the date of its latest publication, so that it can be made available to the SIC if required.

24 Are there special rules for advertising guarantees?

There are no special requirements for advertising guarantees, other than being in Spanish, but there are certain products with special rules concerning the information provided regarding the guarantees at the time of purchase, such as used vehicles for private use sold in commercial establishments, batteries, home appliances and tickets (for shows, sports or any other event).

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

There are no special rules for claims about a product's impact on the environment.

26 Are there special rules for describing something as free and for pricing or savings claims?

If the price is advertised, it must be disclosed in Colombian pesos and must include taxes and additional charges. It must also be supported in terms of quantity and validity.

The basic rule for 'free' product advertising is that it has to be true: the goods must be 100 per cent free. In the event of a promotion, in which a free item is attached to the purchased good, the total and usual cost must be exactly the same and should not be increased by any means.

The advertising must include the complete requirements that make the offer applicable, including any conditions of time, mode or place. It must make reference to the quantity of the goods subject to the special offer.

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

There are no special rules for claiming a product is new or improved. The claims are allowed as long as all information provided to the consumer follows the general guidelines.

Prohibited and controlled advertising

28 What products and services may not be advertised?

The advertising of tobacco and its derivatives, and of toy guns is prohibited.

29 Are certain advertising methods prohibited?

All advertising is guided by the general rules. Consequently, if not expressly prohibited, advertising methods are permitted as long as they fulfil the minimum requirements of the general rules. Visual outdoor advertising, however, is subject to several rules about size and location in order to avoid visual pollution.

Spam mail is prohibited based on the Personal Data Protection Statue.

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

The Decree 975 of 2014 regulates the way advertisements must be presented to minors. All information and advertising aimed at children and adolescents should be respectful of their levels of mental development, intellectual maturity and understanding. Consequently, advertisements directed at minors must avoid using images, text, visual or auditory expressions or representations that do not correspond to the reality of the product in relation to its performance or features.

Any information or advertising in which the operation or use of a product is featured, is forbidden from:

- representing children or adolescents of a different age to that required to assemble parts or operate the product;
- exaggerating the true size, nature, durability or uses of a product;
- failing to disclose that batteries or accessories shown in the advert are not included in the product package but sold separately;
- failing to disclose that the functioning of a product requires batteries or a complementary element;
- failing to inform the child or adolescent of the price of the service and that parental permission is required before calling or sending a message in cases where the consumer must make calls or send text messages or multimedia that come at a cost to the consumer to acquire a product;
- containing images or information of a sexual, violent or discriminatory nature, or encouraging conduct contrary to good morals and good commercial practices;
- containing images of or related to the use of drugs or alcoholic beverages, unless it is a prevention campaign;
- using images, text, visual or auditory expressions or representations suggesting to the child or adolescent that he or she will be socially rejected or be less accepted by a group if he or she does not purchase the product;
- asserting or implying that consumption of a food or drink replaces one of the three main meals (breakfast, lunch or dinner); and
- using qualitative expressions, diminutives or adjectives regarding the price of the product.

There is currently a draft bill in place, according to which there has to be a special warning on the labelling of carbonated and sweetened drinks concerning the consequences of their consumption.

31 Are there special rules for advertising credit or financial products?

Chapter I, title III, part I of the Basic Legal Circular of the Financial Superintendence regulates the advertisement of credit or financial products.

The text and images used in advertising campaigns of credit or financial products must observe the following conditions:

- when advertising includes financial, accounting or statistical information, advertisers should only use historical figures, except those which by their nature are variable;
- advertising messages cannot be contrary to commercial good faith;
- advertisements should always state that the entity is supervised by the Financial Superintendence; and
- the corporate name of the entity or its acronym should be used in the advertising as it appears in its by-laws, always accompanied by the generic name of the entity (bank, financial corporation, financing, stock brokerage, securities firm, insurance company, etc).

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

Advertising of medicines and phytotherapeutic products sold without a prescription must:

- provide guidance concerning the proper use of the medicine or phytotherapy product;
- be objective and true regarding the product's properties;
- use Spanish to indicate the uses of the product, in clear language that does not create confusion for consumers;
- avoid technical terms, unless they have become common expressions;
- ensure that advertising the benefits of the drug or phytotherapy product is not contrary to the promotion of healthy habits;
- use visible, legible and high-contrast letters (eg, bold font that is larger than the rest of the words in the legend) in audiovisual and print media;
- use clear and unhurried messages in radio advertisements; and
- not use mechanisms to attract the attention of children or encourage underage consumption.

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

Food advertising must meet the following requirements:

- it must comply with sanitary standards;
- it must fulfil the conditions in which the sanitary registration was granted;
- it must ensure that information does not mislead consumers by statements or omissions;
- the information contained in the advertising should not be contrary to the promotion of healthy habits;
- there should not be claims regarding medicinal, preventive, curative, nutritional or special properties that could lead to misperceptions about its true nature, origin, composition or quality;
- it must clearly indicate the natural or synthetic origin of the basic raw materials used in food processing; and
- the advertisement cannot suggest that the food alone fills the nutritional requirements of the individual or imply that the product has properties that replace a balanced diet or provide all nutrients.

34 What are the rules for advertising alcoholic beverages?

The advertising and marketing of alcohol has been regulated in Colombia for the past 30 years, aiming to protect minors and prevent the consumption of alcoholic beverages by means of warnings and restrictions within the advertisements and limitations of how and when to advertise said goods.

To that end, all advertising and marketing of alcohol has to include the following mandatory phrases:

- 'the sale of alcoholic beverages to minors is forbidden' (Law 124 of 1994); and
- 'excessive consumption of alcoholic beverages is harmful to health' (Law 30 of 1986).

Furthermore, all commercial establishments selling alcoholic beverages must display these mandatory phrases in a visible place.

Since 2012, advertising of alcoholic beverages no longer requires prior authorisation by the Health Authority. Nonetheless, the Health Authority is still in charge of controlling the advertising of alcoholic beverages. The following rules must be implemented:

- the label must include the alcohol content of the beverage and shall not include expressions, phrases or images suggesting medicinal or nutritional properties;
- the phrase 'the sale of alcoholic beverages to minors is forbidden' must occupy at least 10 per cent of the area of the label, located on the front face, with easily readable size and typeface, contrasting with the background on which it is printed; and
- the location of the mandatory phrases must be horizontal and be read in the same way.

Moreover, the mandatory phrases must be part of every advertisement. Indeed, the statement of the mandatory phrases should be clear, understandable, visible and legible. In audio broadcast, they should be delivered at the same speed as the rest of the advertising piece.

Additionally, all advertising and marketing of alcohol must comply with the following rules (Decree 1686 of 2012):

- the use of phrases, words, signs or emblems as any graphical representation that can cause confusion, deception or doubt to the consumer about the true nature, origin, composition or quality of the goods, is forbidden;
- it is forbidden to use qualifying terms suggesting qualities or properties that alcoholic beverages do not possess;
- it is forbidden to refer to alcoholic beverages as having medicinal, preventive, curative, nutritive, therapeutic or wellness and health-producing properties;
- the advertising should respect cultural values and differences of race, sex and religion. It should not violate the principles of ethics or use themes, images, symbols or figures deemed offensive, harmful or humiliating;
- the advertising should not include images of people who are or appear to be underage (under 18);
- the advertising should not include pregnant women; and
- the advertising should not suggest that the consumption of alcoholic beverages is essential for business, academic, sporting or social success.

The media, in the exercise of autonomy and other rights, must refrain from broadcasting alcohol advertising on television between 7am and 9.30pm. The advertising of alcoholic beverages on television can only be transmitted at the times and with the intensity established below.

In promotional advertising, that uses graphic designs or audible or visual characterisation of a company, brand, product or service, without mentioning the attributes of its nature and that is directed exclusively to promote or sponsor a sporting or cultural event, advertising is permitted within a month before the cultural or sporting event between 9.30pm and 5am the following day, and during the transmission of the sporting or cultural event that it promotes or sponsors.

For an implied or indirect advertisement, which uses the product, brand or graphics and audio or visual characterisation of a company or product to promote the use or consumption of goods or services without mentioning their attributes, advertising is permitted between 10pm and 5am the next day.

Direct advertising (in which the product, company, brand or service is identified by a graphic design or audible or visual characterisation, with the express purpose of encouraging or inducing consumption or maintaining their presence) that involves the action of ingesting the drink, is forbidden from being broadcast at any time by television services.

Promotional and implied advertising shall not exceed 60 seconds for every 30 minutes of programming.

Each operator that broadcasts advertisements of alcoholic beverages shall transmit, without cost, an explicit prevention campaign on the risks and effects of its consumption, for half the time spent weekly on advertising alcoholic products.

Programmes whose content is aimed specifically at minors shall not include any advertising regarding alcoholic beverages.

During the broadcast of advertising and marketing of alcohol, the following rules shall apply:

- the advertising may not contain scenes or parts in which the action of ingesting alcoholic beverages is expressed visually or vocally;
- the advertising may not feature models that are, or appear to be, minors or pregnant women;
- the mandatory phrases must be included;
- the advertising of these products shall not associate consumption with success and achievement of personal, sexual, professional, economic or social goals;
- it shall not state or imply that consumption of alcohol is a desirable or valid option to solve problems, or show a negative image of abstinence or moderation;
- the advertising must be truthful and objective;
- the advertising cannot threaten the honour, reputation, privacy of individuals and rights, freedoms and principles that are recognised by the Constitution;
- the advertising may not contain images that by their nature attract the attention of children;
- the advertising cannot claim or imply that alcohol has curative or therapeutic qualities; and
- the advertising may not contain images or messages that relate consumption of alcoholic beverages with driving.

35 What are the rules for advertising tobacco products?

The advertising of tobacco is forbidden.

Furthermore, there is a draft bill in place that has modified the labelling requirements of tobacco products. According to the draft bill, the warning phrases and graphics will change from covering 30 per cent of the package to covering 80 per cent of the package.

The draft bill also states that exhibition of tobacco products in establishments is advertising and this is expressly forbidden.

36 Are there special rules for advertising gambling?

All gambling activities must be previously approved by the competent authority, which depends on the scope of the gambling activity – either national or regional. Once authorised, the gambling activity has to state such authorisation on each of its tickets and adverts have to be approved by the same entity in charge of authorising the gambling activity.

37 What are the rules for advertising lotteries?

All lotteries must be previously approved by the competent authority, which depends on the scope of the lottery – either national or regional. Once authorised, the lottery has to state on each of its tickets such authorisation and the adverts have to be approved by the same entity in charge of authorising the gambling activity. At the national level, approvals are granted by Coljuegos.

38 What are the requirements for advertising and offering promotional contests?

There must be clarity in terms of the mode, time and place of the promotion. The terms and conditions of the promotions should be easily accessible to consumers.

If the promotion does not involve chance, no authorisation from any regulatory entity is needed; nonetheless, the promotion and terms and conditions must comply with all the requirements of the Consumer Protection Statute, which is the governing law of the promotion. If it is a chance-based promotion, authorisation is needed.

It is important that all advertisement pieces include all the conditions of the promotion (ie, they must include all of the conditions of time, mode and place of the promotion), as the information provided to the consumer should be complete and clear.

The terms and conditions must be legible (ie, the font size must be large enough to allow the average consumer to read them without having to make an effort). The SIC has emphasised in relation to the 'fine print' that, while there is no requirement for it to be a certain size, the terms and conditions should be a normal and readable size.

The terms and conditions and all of the advertisement must be in Spanish.

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

As a mandatory rule for all advertisements, the person, company or entity that is offering the goods or services must be clearly indicated for

TRIANA, URIBE & MICHELSEN

Juan Carlos Uribe
Sandra Ávila

Calle 93B
No. 12-48, 4th Floor
Bogotá DC 110221
Colombia

Tel: +57 1 601 96 60
Fax: +57 1 611 42 09
tum@tumnet.com
www.tumnet.com

consumer information. All the general rules apply. Product placement by itself does not have any specific regulations.

40 Briefly give details of any other notable special advertising regimes.

All advertisements must be in Spanish and comply with the principles of good faith and public order.

Social media

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

There are no special rules pertaining to the use of social media for advertising. The general rules of advertising apply to social media as well.

Notwithstanding this, the Self-Regulatory Code on Advertising contains a chapter on social media advertising, which indicates that such advertising must respect individuals, groups and associations and should have acceptable standards of commercial behaviour.

In addition, said advertisements should comply with the provisions relating to the Personal Data Protection Statute.

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

Not within the context of a judicial proceeding publicly discussed in the press.

43 Are there regulations governing privacy concerns when using social media?

Such regulations are mostly within the scope of the Personal Data Protection Statute in force since July 2013, which introduced a protection system in which personal data holders must be informed of the following:

- who the person or entity responsible for the collection and use of their personal data is;
- what their personal data is going to be used for;
- what they can do if they need to update, correct or remove their personal information from the person or entity's database;
- what they can do if they need to complain about the way in which their personal data has been used or if the person or entity in charge of collecting or using their personal data has not abided by the terms of the Personal Data Protection Statute;
- their rights as personal data holders; and
- whether they must authorise the use of their personal data in writing or any other way in which there could be evidence of such authorisation.

France

Marie-Emmanuelle Haas
ME Haas

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

The advertising sector does not have one specific code, but rules are covered in several codes (ie, the Consumer Code, Commerce Code, Environmental Code, Public Health Code, Penal Code). Some other rules are not codified, and are written by decree or ministerial rule.

Regarding EU law, France has the duty to transpose directives (ie, in advertisement law, Directive 2005/29/EC on unfair business practices, dated 11 May 2005 and Directive 2006/114/EC on misleading advertising, dated 12 December 2006 apply). Some rules on advertising and promotional practices are regulated by Directive 2010/13/EU, dated 10 March 2010 (the Audiovisual Media Services Directive).

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?

Advertising is a self-regulatory sector. The Professional Regulation Advertising Authority (ARPP) is the advertising industry's self-regulatory organisation in France. It has three associated bodies: the Jury of Advertising Ethics (JDP), the Council of Advertising Ethics (CEP) and the Joint Advertising Council (CPP).

The ARPP makes recommendations with targeted organisations (eg, consumer associations and environmental associations) and issues advisory opinions, awareness campaigns and advice for consumers. The ARPP also provides decisions relating to complaints against advertising communications (commercials or otherwise). These decisions are taken through the JDP, which receives complaints from the ARPP or natural or legal persons. If the jury, which is the sanctioning body of the ARPP, rejects the complaint or considers that the ethical rules are violated, it asks the ARPP to stop the campaign and to publish the decision online.

The CPP (the concerting body) consists of advertising professionals and targeted organisations. Its tasks are to alert the executive board of the ARPP about relevant questions in debate or useful propositions, provide public opinion on the evolution or modification of professional rules and participate in the annual evaluation of the professional rules. The CEP has the function of providing opinions to enlighten the ARPP about the evolution of advertising. It is the anticipatory body of the ARPP.

Moreover, with advertising on the internet, there is also a problem with personal data. The National Commission on Informatics and Civil Liberties (CNIL) regulates and punishes violations of data protection.

3 What powers do the regulators have?

When consulted, if not compulsory, the ARPP can express a negative opinion about an advertisement and, generally, the advertiser then tries to modify it. The advertising networks have the choice of whether or not to use the advertisement. But if the advertising network takes this risk, a complaint before the JDP can be sued. After a decision of the JDP, the ARPP can stop a campaign or force the advertiser to modify the advertisement and will publish its decision online or in a press release.

For data protection, the CNIL has more power and can punish advertisers with penalties when they practice prohibited methods, for example spamming, or if they fail to respect the rules on online targeted advertising (see question 29).

4 What are the current major concerns of regulators?

The three major concerns of the ARPP are in ensuring sincerity in advertising, keeping media and advertisers (eg, agencies) informed of developments and providing notices regarding visual advertisements complying with ethical rules in this sector.

Regarding personal data, the CNIL regulates targeted advertising campaigns and ensures data protection (eg, on social media).

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

The ARPP's recommendations constitute the frame of ethical rules in this sector. These rules are based on the International Chamber of Commerce (ICC) Code consolidating advertising practices by engagement charters signed by professional representatives and ARPP and public authority representatives.

In the case of violation of these rules, the JDP can accept a complaint and ask the ARPP to stop the campaign.

6 Must advertisers register or obtain a licence?

Advertising is not a regulated profession. However, advertisers have to respect the rules on free competition.

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

ARPP members can ask for legal advice regarding their advertising. Non-members must pay for this service.

The ARPP provides an opinion on TV advertising and on on-demand audiovisual media services advertising before refusing such advertising. The possible verdicts are: 'positive', 'to modify' or 'not to publish'.

Clearance before publication is also required in specific situations (eg, advertising medicines to the public needs an 'advertising visa' granted by the National Agency for Medicines (article L5122-9 of the Public Health Code)).

Private enforcement (litigation and administrative procedures)

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

Competitors' advertising is principally challenged by filing a complaint before the JDP. This procedure offers the possibility to obtain a decision within two or three months, which may result in stopping the advertising, at no cost. The complaint cannot be anonymous. The principle disadvantage is that the ARPP is not allowed to pronounce penalties or to grant damages.

Competitors' advertising can also be sued in court. Advertising professionals are civilly liable in cases where they produced bashing advertisements or advertisements that constitute unfair competition. This court procedure offers the possibility to claim compensation of the

suffered damages. The duration of civil court proceedings in the first instance is around one year. It implies costs for the hiring of a lawyer.

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?

Any legal or natural person may challenge advertising by filing a complaint before the JDP, if an advertisement seems to be inappropriate.

Also, in advertising law, advertisers, agencies, media companies and written press are criminally responsible. They can be sued if they commit misdemeanours (eg, misleading or prohibited advertising). Any person or association (eg, the Union of Outdoor Advertising, which enforces the rules for advertising in outdoor areas) can file a suit.

Advertising professionals also assume civil liability. A member of the public can take an action against an advertiser or media company if the publication of the advertising causes them damage.

10 Which party bears the burden of proof?

Under French procedural rules, the claimant bears the burden of proof. In consequence, it should be proven that the advertising is misleading. Nevertheless, the definition of misleading advertising is large. For example, it includes omissions, which are defined in articles L121-2 and L121-3 of the Consumer Code, the content of which implemented Directive 2005/29/EC (see question 1).

Moreover, French law provides a list of acts, which are considered as misleading (article L121-4 of the Consumer Code): for instance, when the seller falsely indicates that he or she is bound by a code of conduct.

It must also be noted that there are specific provisions concerning comparative advertising, which must not be misleading, as for all advertising. Such provisions require the advertiser to provide evidence as to the accuracy of factual claims in advertising, within a specified time after the request thereof (see question 18).

In case of summary proceedings, it must be proven that the advertising is obviously misleading.

11 What remedies may the courts or other adjudicators grant?

The successful party in court can obtain the following:

- the ceasing of the advertising; or
- civil remedies with the payment of damages, including the following:
  - the publication of the decision in reviews or on a website, or both, within a certain period of time;
  - the involved costs being borne by the losing party; or
  - compensation for the incurred fees, with the payment of a lump sum of €1,000 to €5,000.

If the action is brought before a criminal court, the judge can pronounce penalties or a term of imprisonment, or both (eg, for misleading information in pharmaceuticals advertising, the sanction can be two years of imprisonment and a penalty of €30,000).

The ARPP can stop or modify an advertisement, and would then publish its decision online.

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

The typical time frame for a civil action at first instance is one year and at second instance (appeal), a further year. In the ARPP procedure, the JDP generally takes two or three months to publish a decision.

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

In a court procedure, the fees depend on the difficulty of the case and on the duration of the procedure. There is no official mandatory fee schedule. The official fees are paid by the losing party, unless the judge decides that they should be paid totally or partially by another party (article 696 of the Civil Procedure Code). Official fees are very low in France.

The attorneys' fees supported by each party are only partially reimbursed by the losing party. Each party requests to be reimbursed of its attorneys' fees and the judge decides what amount should be reimbursed, pursuant to article 700 of the Civil Procedure Code. The ARPP procedure is a free service for everyone.

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

Parties can file an appeal against a judgment within one month of it being notified, unless they are domiciled in a foreign country. In this case, this deadline is extended by two months.

For ARPP procedures, parties can request a review application within 15 days of the notice being received.

Misleading advertising

15 How is editorial content differentiated from advertising?

According to article 19 of Decree No. 92-280, dated 27 March 1992:

> *Advertising messages or sequences of advertising messages must be easily identifiable as such and clearly separated from the rest of the program, before and after their broadcast, by screens recognisable by their optical and acoustic characteristics.*

Online advertising can finance editorial content in various forms (eg, pop-up, hypertext link, etc). To avoid misleading the web user, hidden advertising is forbidden (ie, to promote a product by writing fake notices on forums (article L121-15-1 of the Consumer Code)). In the fight against consumer notices that constitute hidden advertising, a regulation was introduced in 2016, in order to ensure that the presentation of content posted by web users is fair, clear and transparent (article L111-7-2 of the Consumer Code).

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

Directive 2005/29/EC constitutes 'puffery' as being without prejudice to 'the common and legitimate advertising practice of making exaggerated statements or statements which are meant to be taken literally'. Even prior to the implementation of this Directive, French case law admitted hyperbolic advertising, which is characterised by parody or emphasis. The courts must check that the average consumer cannot be misled by the exaggeration of the advertising. In this case, no support must be filed. On the contrary, advertising claiming a more serious objective quality that the average consumer would consider as real requires support. If no support can be filed, it is misleading. Advertising claims that appear too general may also be sanctioned under certain circumstances. The assessment is, of course, made on a case-by-case basis.

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

Advertising must not:

- create confusion with any products, trademarks, trade names or other distinguishing marks of a competitor;
- include false information in relation to one or more of the following elements:
  - the existence or nature of the product; or
  - the main characteristics of the product, such as its availability, the extent of the trader's commitments or the price; or
- unclearly identify the advertiser.

Advertising will be considered as misleading if it is likely to cause the average consumer to take a transactional decision that he or she would not have taken otherwise.

Moreover, advertising must not omit material information that the average consumer needs to take an informed transactional decision. In case of an invitation to purchase, the following are considered as material information:

- the main characteristics of the product;
- the address and identity of the trader;
- the price;
- the arrangements for payment and delivery when they are different from the common requirements; and
- the right of withdrawal or cancellation (if any).

Such information must be clearly mentioned on the medium used to communicate. Nevertheless, where the medium imposes limitations of space and time, these limitations and any measures taken by the trader

to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.

In application of these provisions, footnotes (as well as scrolling text in TV spots) are permissible, provided that they respect the conditions of readability.

With regard to misleading advertising, the ARPP has issued codes, in particular concerning notes and overlays. The ARPP also assesses all TV spots and on-demand audiovisual media advertising before their broadcast, in order to ensure their compliance.

Disclaimers are also permissible to a certain extent, provided that they comply with legal rules and that the consumer is clearly informed.

There are also specific rules for digital advertising in the Consumer Code as well as in ARPP codes in order to ensure that the consumer is clearly informed of the advertising nature of the electronic communication.

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?

The general rules applying to advertising do not expressly require the advertiser to have proof of his or her claims before publishing. The provisions concerning comparative advertising require the advertiser to furnish evidence as to the accuracy of factual claims in advertising, within a short period of time after the request of such (article L122-5 of the Consumer Code), which means that the advertiser in that case must have proof of his or her claims before publishing.

There are no recognised standards for the type of proof necessary to substantiate claims, which will depend on the nature of the claims. Such evidence can be freely brought, by any means.

In practice, it appears necessary to have proof of the claims before publishing in order to be able to defend the validity of the advertising in case of a legal action grounded on misleading advertising.

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

There is no specific provision concerning advertising claims based on the results of surveys. Such claims must comply with the general rules of the Consumer Code.

It arises from case law that advertising claims based on the results of surveys may be considered as misleading if those results do not correspond to the advertising claims, totally or partially. Moreover, the results of the surveys must not be too old. The advertising must also clearly mention the author and the date of the surveys, so that the consumer can know if it is an independent study from the advertiser or not.

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

Comparative advertising is defined as any advertising that explicitly or implicitly identifies a competitor of goods or services offered by a competitor. It is regulated by articles L122-1 to L122-4 of the Consumer Code.

Such advertising is permitted, provided that the following requirements are fulfilled:

- it is not misleading;
- it compares goods or services meeting the same needs or intended for the same purpose; and
- it objectively compares one or more material, relevant, verifiable and representative feature of such goods and services, which may include price.

It is thus possible to identify a competitor by name, and even to mention in the comparative advertising the competitor's trademark, provided that:

- it does not take unfair advantage of the reputation of the competitor's trademark, trade name, other distinguishing mark or designation of origin of competing products;
- it does not discredit or denigrate the competitor's trademark, trade name, other distinguishing marks, goods, services, activities or circumstances;
- it does not create confusion between the advertiser and a competitor or between the advertiser's trademarks, trade names, other distinguishing marks, goods or services and those of a competitor; and
- it does not present goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name.

Moreover, for products with a designation of origin, comparative advertising must relate to products with the same designation.

Furthermore, under French law, comparative advertising cannot be included on packaging, invoices, travel tickets, means of payment or tickets for shows.

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

According to the general rules applying to advertising, claims suggesting tests and studies prove a product's superiority are of course considered as misleading if no test or study has been made. Where tests and studies are actually made, they must be correctly used in the advertising. For instance, the actual advertised product (rather than a different one) must have been tested.

Moreover, the consumer must be informed in the advertising if the tests and studies have been made by the advertiser or by an independent body. The advertising will of course be considered as misleading if it mentions that the tests and studies have been made by an independent body, where this is untrue.

It has also been ruled by the French Supreme Court that an advertisement grounded on a study that is the subject of scientific controversy, is misleading.

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

Like any advertising, advertising depicting or demonstrating product performance must not be misleading for consumers (in text as well as in pictures).

Moreover, the protection of the dignity of the person is very important. Such advertising must not show humans, especially women and children, in bad conditions. Animals are also protected against images showing bad treatment.

In addition to the French legal provisions, the ARPP has issued several recommendations – 'Image and Respect of Human Beings Code', 'Safety Code: dangerous behaviours and situations' and 'Children's Code' – notably in order to protect children. For instance, even to demonstrate product performance, advertising must not show dangerous situations, except for the promotion of health or security. In any case, children should not be encouraged to participate in dangerous or violent situations.

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

There is no specific rule. Any information communicated to the public has to be fair and true and shall not be misleading.

In article 13 of the ICC Code, the ARPP published a recommendation that provides that:

> *the communication for business purposes shall not reproduce or refer to any certificate, endorsement or support documentation that is not true, verifiable and relevant. Using certificates and endorsements that have become obsolete or misleading with the time is prohibited.*

24 Are there special rules for advertising guarantees?

Under the Consumer Code, advertising must not include false information concerning the extent of the trader's commitments, the need for a service, part, replacement or repair as well as the consumer's rights and the treatment of his or her claims.

Moreover, the following are deemed to be misleading:

- advertising that presents the rights granted by law to consumers as a specific characteristic of the proposal made by the trader; and
- advertising that falsely creates the impression that the after-sale service in relation to the product is available in a member state of the EU other than the one in which the product is sold.

If the advertiser offers more guarantees than stipulated by law, he or she must clearly and completely inform the consumer, and respect his or her commitments.

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

According to the Consumer Code, advertising must not include false information concerning the main characteristics of the product, which means that claims about a product's impact on the environment must not be misleading for the average consumer. For instance, it has been ruled that the term 'biodegradable' was misleading for a product that contained a substance toxic to fish.

Moreover, the mention of a trust mark, a quality mark or equivalent without having obtained the necessary authorisation is deemed to be misleading. Such a provision could apply to environmental labels.

There are also specific provisions in the Environmental Code that prohibit misleading advertising on a product's impact on the environment.

In addition to these legal provisions, the ARPP enacted a Sustainable Development Code, which recalls that the advertiser must be able to prove his or her claims about a product's impact on the environment, and that the message must be clear and proportionate to the characteristics of the product. More generally, advertising must not trivialise or value practices or ideas that are contrary to the purposes of sustainable development.

26 Are there special rules for describing something as free and for pricing or savings claims?

Under French law, advertising must not include false information concerning the price or method of calculation of the price, the promotional character of the price and the conditions of sale, payment and of delivery of the goods or services.

Moreover, the presentation of a product as 'gratis', 'free', 'without charge' or similar is deemed to be misleading if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the product.

There are also specific provisions that apply to savings. In particular, the consumer must be informed of the reference price as well as of the reduced price, except when the savings apply to several products that are clearly identified. In this case, the indication of the reduced price is not necessary.

In addition to these general legal requirements, the ARPP enacted a Price Advertising Code, which stipulates that the information regarding price in advertising must be clear for the average consumer. Specific rules have also been issued for each means of communication (eg, television or cinema, press, poster, digital communication and radio), and for different kinds of price advertising (eg, the presentation of several prices in the same advertising, the price with or without tax, etc).

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

According to the Consumer Code, advertising must not include false information concerning the main characteristics of the product, and notably its essential qualities, its composition, its method and date of manufacture and the results to be expected from its use.

In these conditions, the terms 'new' and 'improved' must be very carefully used in advertising.

Prohibited and controlled advertising

28 What products and services may not be advertised?

There are many products and services that may not be advertised, as follows:

- tobacco products, including electronic cigarettes and accessories;
- medicaments reliant on medical prescription and not refundable by the obligatory health insurance; and
- firearms, except on TV channels dedicated to hunting, fishing and shooting sport.

There are specific rules regarding TV (ie, regulating advertising for alcoholic beverages containing more than 1.2 per cent alcohol by volume (article 8 of Decree No. 92-280, dated 27 March 1992, as modified)).

29 Are certain advertising methods prohibited?

France prohibits subliminal and surreptitious advertising (articles 9 and 10 of Decree No. 2003-960). Hidden advertising is prohibited (see question 15).

Targeted advertising is regulated. One type of targeted advertising is the spamming method: it is forbidden to send emails with advertising and commercial purposes without the consent of the mail recipient (article L34-5 of the Postal and Electronic Communications Code and EU Directive 2009/136/EC of 25 November 2009). If the recipient expressively gives its consent, the spamming technique is allowed. In case of any violation, the CNIL can, for example, pronounce penalties. The government created Signal Spam, an association that delivers a platform for the online notification of illicit behaviours and practices, which can be used to notify email addresses used for spamming. For any other targeted advertising, rules on personal data apply.

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

Advertising in schools is forbidden. On TV, advertising must respect children and not harm them by moral or physical damage.

Advertising cannot incite children to buy a product or a service by exploiting their inexperience and credulity, cannot incite children to persuade their parents or third parties to buy these products or services and cannot exploit the particular trust of children on their parents or teachers, or show minors in danger without any reason (article 7 of Decree No. 92-280). There are also specific rules about minors with regard to gambling advertising (see question 36).

31 Are there special rules for advertising credit or financial products?

The advertising of credit products is strictly regulated in France. Each type of credit-related product or service has its own rules.

Law No. 2010-737 of 1 July 2010 provides a framework for advertising regarding consumer credit to avoid aggressive commercial practice and enhance better information for the client. Advertising of financial products must be clear and not misleading (article L533-12 of the Monetary and Financial Code).

Directive 2008/48/EC lists the compulsory specific information to be included in the advertising of credit-related products (a risk statement, interest rate, total amount of the credit (article 311-4 of the Consumer Code)).

For mortgage loans, there are also restrictive rules with regard to the right to time for reflection (article L312-4 to L312-6 of the Consumer Code).

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

Misleading advertising for therapeutic goods and services is prohibited (article L5122-2 of the Public Health Code). The presentation of the product has to be objective and must encourage its appropriate use. The National Security Agency for Medicines and Health Products can prohibit advertisements if the arguments about the effects of the medicine used for the promotion are not proven. For misleading information, the penalty can be two years of imprisonment and a fine of €30,000.

Moreover, advertising is authorised only if the medicines are not reliant on medical prescription and are not refundable by the obligatory health insurance. If the advertising is authorised, it must be obvious that it is an advertisement and some mentions of this are necessary (article R5122-3 of the Public Health Code).

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

EU Regulation (EC) No. 1924/2006 regulates nutrition and health claims. The nutritional claims cannot be false, ambiguous or misleading.

In French law, there are specific rules for the advertising of certain types of foodstuffs (ie, artificial sweeteners, powdered infant milk and food supplements).

France also regulates advertising in the fight against dangerous eating-related behaviours, notably childhood obesity. Companies selling beverages with sugar, sweeteners or salt have to advertise with a health message. If companies do not insert this message, they have to pay a retribution amount of 5 per cent of the sum of the advertising (article

L2133-1 of the Public Health Code). There is a list of health messages (ie, 'for your health, eat at least five pieces of fruit and vegetables per day' and 'for your health, do not eat products that are high in fat, sugar or salt') in a ministerial ruling of 27 February 2007. To fight against anorexia, there is a transparency obligation with regard to 'modified photography' in advertising in which models have been modified by software (article L2133-2 of the Public Health Code), with a penalty of €37,500 for violation.

34 What are the rules for advertising alcoholic beverages?

The EVIN Law (Law No. 91-32, dated 10 January 1991) provided the first framework for advertising alcoholic beverages and a new law, dated 26 January 2016, completes it.

Advertising of alcoholic beverages is strictly limited, and any violation is penalised. There has been a restrictive list of the media in which the advertising of alcohol is permitted (ie, written press, radio, delivery vehicles and internet), since 2016 (L3323-2 of the Public Health Code).

All advertising must contain specific text and a health message. The purpose of the advertising is to show the product and not to valorise alcohol.

To promote French terroir, the new legislation does not consider some content, images, geographical indication or terroir information linked to some alcoholic beverages as advertising or propaganda (article L3323-3-1 of the Public Health Code).

35 What are the rules for advertising tobacco products?

All direct or indirect advertising or propaganda of tobacco products (including electronic cigarettes and accessories) is forbidden. In case of any violation, there is a penalty of €100,000 (article L3511-3 of the Public Health Code).

Since January 2016, all cigarette packets must be neutral and must not contain the supplier's logo or trademark. The packets still contain a health message (Directive 2014/40/EU).

36 Are there special rules for advertising gambling?

All commercial communication made by an operator of gambling and games of chance is authorised if the advertising is accompanied by a message cautioning against excessive games, addictive games, the debt risk and gambling addiction as well as a message informing that a help service is available.

The advertising shall not be addressed to minors and is forbidden on any audiovisual media aimed minors, online communication accessible by minors and at the cinema during films accessible to minors (article 7 of Law No. 2010-476, dated 12 May 2010 on the regulation of the sector of gambling and games of chance online). The penalty is a fine of €100,000.

The Regulation of Online Games Authority can be consulted for questions about this type of advertising and has the power to bring cases before the JDP.

37 What are the rules for advertising lotteries?

Advertising lotteries is forbidden (article L322-1 of the Internal Security Code) except for lotteries for charities, arts support or the finance of non-profit sports activities (article L322-3).

The qualification of the lottery is essential in establishing whether the advertising is allowed.

38 What are the requirements for advertising and offering promotional contests?

If the results of the contest depend on chance (even partially), it is not a contest but a lottery and the above rules apply. For real contests, the rules regulating advertising have to be respected (eg, a contest to promote tobacco is forbidden).

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

TV news and political TV programmes cannot be sponsored. Other TV shows must respect the following conditions:

- the content cannot be influenced by the sponsor;
- the content cannot directly incite viewers to buy sponsors' products; and
- the sponsor has to be identified (discretely and in a one-off mention) (article 18 of Decree No. 92-280, dated 27 March 1992 and modified in 2017).

The Higher Audiovisual Council (CSA) had the power to set the rules on product placement; however, in Deliberation No. 2010-4, dated 16 February 2010, France prohibited product placement for goods for which the advertising is forbidden or regulated (ie, alcoholic beverages containing more than 1.2 per cent alcohol by volume, tobacco and tobacco products, medicines, firearms and powdered infant milk). However, product placement is allowed in films and fictional TV. For all other products, product placement must abide by the same rules as for sponsorship. Viewers have to be informed that it is product placement, with the use of a banner or a pictogram 'P', according to the CSA Deliberation No. 2012/35 and the CSA Plenary Assembly, dated 23 October 2012.

40 Briefly give details of any other notable special advertising regimes.

France allows advertising in other languages but imposes a visible translation of the foreign terms in the advertising (the Toubon Law (Law No. 94-665 of 4 August 1994)).

Advertising cannot be contrary to morality according to the Penal Code and ethical rules (ie, any violent or pornographic message constitutes a misdemeanour (article 227-24 of the Penal Code)). The ARPP ensures that violence is not present in advertising.

Political advertising and propaganda is prohibited by the Electoral Code during the six months preceding an election (article L52-1).

me haas

Marie-Emmanuelle Haas **meh@me-haas.eu**

8 rue de Saintonge
75003 Paris
France

Tel: +33 1 85 08 06 60
Fax: +33 1 85 08 06 61
www.me-haas.eu

Selling advertisements for jobs is prohibited. It is, however, permitted to pay for an advert to be published in a publication or in any other paid means of communication (article L5331-1 of the Labour Code).

Lawyers can advertise for legal assistance (since 2014) under three conditions:

- the advert must contain true information about the offered services;
- the advert must respect the essential principles of the profession; and
- the advert must not compare or denigrate (article 10 of the French National Lawyer Rule).

Social media

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

Rules were recently introduced for reporting on online advertising (Decree No. 2017-159 of 9 February 2017 on digital advertisement services). The goal is to enhance transparency.

The Digital Republic Bill (Bill No. 2016-1321 of 7 October 2016) introduced a regulation that applies to online platforms (article L111-7 and 111-7-I of the Consumer Code) and it provides a definition of 'online platform operators'. These operators shall provide fair and clear information on their ranking and deranking rules in terms of how they list and rank the content and services that they host.

Any violation of article L111-7 of the Consumer Code is punished by an administrative fine of up to €75,000 for an individual and up to €375,000 for a legal entity (article L131-4 of the Consumer Code).

Online platforms offering comparisons of prices and characteristics of goods or services offered by professionals to consumers shall explain the comparison process and identify what is to be considered an advertisement, in the meaning of the 2004 law on confidence in the digital economy (article 20 of Law No. 2004-575 of 21 June 2004), which says that any online advertisement has to be clearly identified as such and must clearly provide the identity of the advertiser. The information to be provided for the purposes of comparison platforms shall be defined by decree.

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

It is not the advertisers that have been criticised but the social media directly.

In February 2016, the CNIL gave Facebook a deadline to comply with France's Data Protection Act. If social media platforms do not respect the recommendations of the CNIL and do not change their rules within provided deadlines, the CNIL is allowed to take remedies. Among other requirements, the CNIL requested that Facebook offered a mechanism that allowed users to refuse targeted advertising. Facebook has modified its rules accordingly.

43 Are there regulations governing privacy concerns when using social media?

In 2015, the ARPP published the following recommendation on digital advertising: www.arpp.org/nous-consulter/regles/regles-de-deontologie/communication-publicitaire-digitale/.

Germany

Stefan Engels and Beatrice Brunn
DLA Piper UK LLP

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

In Germany, advertising is not governed by a comprehensive law. The Unfair Competition Act (UWG) constitutes the central framework of rules governing market behaviour and refers in particular to advertising. The UWG seeks to protect consumers, competitors and other market participants against unfair commercial practices. Also, a variety of sector-specific regulations apply to advertising and marketing for specific products and services, and within different communication channels. In addition, specific professional guilds have published codes of conduct to maintain the guilds' integrity. The codes are only obligatory for the members of those guilds.

Broadcasting is in particular subject to advertising limitation rules. Restrictions can be found in the State Broadcasting Treaty (RStV), the state media laws and the Interstate Treaty on the Protection of Minors (JMStV). In addition, the state media authorities have published a number of guidelines for advertising activities, product placement and sponsorship, particularly on television. However, these provisions only take effect in their administration and are not binding on the courts.

Advertising in the press is governed by the special provisions of the State Press Acts.

Moreover, additions or restrictions may depend on the communication channel used. For instance, specific regulations apply to commercial communication via internet or e-mail.

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 commercial practices, the regulation and enforcement of rules on advertising lie with the respective supervising authorities or, when it falls within the scope of application of the UWG, with the competitors or qualified entities for the protection of consumer interests (see question 9). Different supervising authorities may exercise their powers independently.

3 What powers do the regulators have?

Enforcement of the provisions of the UWG is carried out mainly by the affected competitors as well as associations and qualified entities for the protection of consumer interests. The primary focus is on the removal of the adverse effect and preventing future infringements. Competitors may also claim damages (see question 8 for the full range of remedies).

In their field of competence, the respective authorities may issue administration orders and prohibitions or impose fines up to €500,000 according to section 49, paragraph 2 of the 18th RStV, and up to €300,000 according to section 20, paragraph 2 of the UWG.

4 What are the current major concerns of regulators?

One major concern of the state data protection authorities is the use of personal data for customised advertising campaigns, especially in the area of online marketing. Surreptitious advertising remains a central task for state media authorities, as well as for the UWG.

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

The legal provisions are flanked by various industry codes of practice. As one of the most important bodies in the area of advertising regulation, the German advertising council develops guidelines and codes of conduct for specific advertising activities and specific products and services (eg, covering alcoholic beverages or gambling). Such codes of conduct are based on the principle of self-regulation and therefore are on the whole not binding. Nonetheless, in the case of non-compliance, complaints may be issued. If the conduct objected to is not changed or removed, the advertising council may also issue a public reprimand. However, non-compliance can be seen as an indication of unfair competition.

This basically also applies to the various sector-specific guidelines, such as the code of conduct for the insurance industry.

6 Must advertisers register or obtain a licence?

German law does not provide a general obligation for registering or licensing advertising activities. However, this might be different for certain business operations (eg, broadcasters and gambling providers require the permission of the competent authority). In cases such as these, advertising is only permissible if the operation itself is authorised.

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

There is no general clearance procedure for advertising. In a few areas, the use of specific claims may be regulated by sector-specific laws. This applies, for example, to the advertising of food products. When claiming that certain food products have health benefits, the respective claim must be approved by the European Commission.

In the event of the use of personal data, it may be advisable to seek prior consultation with the competent data protection authority.

Private enforcement (litigation and administrative procedures)

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

When advertising activity is considered to be unfair within the terms of the UWG, the law provides for several remedies for the competitors concerned. The focus is on removal and to cease-and-desist from further infringements. The injured party may also demand information about the extent of the infringement and damages. Current practice is to issue a warning, together with the request to sign a declaration to cease and desist, within a short period of time (containing a penalty clause). A particular advantage of this approach is that an out-of-court settlement may be achieved within a few days.

Contractual penalties are also an effective means to prevent further violations. If the requested declaration is not given or is not given in due time, the claimant may file for an interlocutory injunction or bring an action before the competent court. The former allows the enforcement of an injunctive relief within a few days or weeks, while court proceedings in the main may take several months or several years

(see question 12). Since the request for interim measures requires some urgency, the claims must generally be asserted within a short period of time following the violation. It must be noted that those procedures only provide for an interim measure. A final decision about whether the contested advertisement is lawful can only be achieved in the main proceedings. Furthermore, if a preliminary injunction has been revoked, the defendant may demand compensation for any injury caused by the measure.

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?

Under the UWG, only competitors or qualified entities for the protection of consumer interests are entitled to challenge advertising. Consumers may only report infringements to the latter. If the respective association is a qualified institution pursuant to the German Act on Injunctive Relief, or on the list of the Commission of the European Communities pursuant to Directive 98/27/EC, it may assert its own claims for the removal and cease-and-desist like a competitor (see question 8). However, these entities cannot claim for damages.

Except in the case of unfair competition, consumers may report potential inadmissible advertising to the competent supervising authority or inform the respective commercial association where such a body exists.

Regulatory proceedings can only be initiated by the competent authorities.

10 Which party bears the burden of proof?

According to German procedural law, generally each party has to explain and prove the facts that act in their favour. This means that the claimant bears the burden of proof for the claim's requirements. However, this does not apply if the defendant only has knowledge of a specific fact. In some cases, producing evidence is facilitated by legal presumptions. For instance, pursuant to section 5, paragraph 4 of the UWG, it is presumed to be misleading to advertise with a price reduction in cases where the price concerned has been demanded for only an incommensurably short period of time. In the event of a dispute, the advertiser has to disprove this presumption. In the proceedings for interim relief, the applicant only needs to establish facts from which it may be presumed that the affected advertising is inadmissible.

11 What remedies may the courts or other adjudicators grant?

In the case of claims based on unfair competition, the courts may grant several remedies that are subject to compulsory execution, namely, petitions for injunction, verdicts or court settlements.

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

The length of proceedings is difficult to estimate reliably. Several factors have to be taken into account, such as the complexity of the case or the chosen procedure. A decision in the proceedings for preliminary legal protection may be obtained within days or weeks, while the proceedings in the principal action usually take months or even years. The duration significantly increases if an appeal is filed (see question 14).

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

The costs of the proceedings are proportionate to the value of the claim. In determining the value of a claim, several factors have to be taken into account, such as the extent and seriousness of the infringement. In addition, case law has developed 'flat fees' for typical violations, particularly regarding unfair competition. As an example, based on a value of €50,000, the court fees at first instance amount to €1,638 and attorneys' fees for both parties will be €8,814.20.

In principle, the costs are borne by the unsuccessful party. If both parties partially win, the costs will be shared proportionately.

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

Verdicts in the first instance may be challenged with an appeal. An appeal on points of law may be filed against the final judgments delivered by the appeal instance. In addition, there is the possibility of a 'leapfrog' appeal. Furthermore, interlocutory injunction orders can be challenged with a note of objection. Objections may also be raised to orders of supervising authorities, such as fines.

Misleading advertising

15 How is editorial content differentiated from advertising?

Editorial content is defined by law as content in the media (to which mass communication characteristics are inherent, such as press, broadcasting or internet) representing periodical printed matters in words and pictures. However, such content should be relevant for the formation of public opinion. Advertising is generally understood as the making of representations in any form, especially in connection with a trade, business, craft or profession in order to promote the supply of goods or services. Under German law, the strict separation between advertising and editorial content is essential. To ensure the integrity of editorial content, advertising must be clearly identified. Pursuant to the general rules of the UWG, failing to identify the commercial intent of advertising and all other kinds of commercial practices is deemed to be a misleading omission and therefore unfair competition.

Additionally, the separation requirement is specifically regulated in section 7 of the RStV and the State Press Acts ('obligation to identify paid publications', mainly section 10). Within the scope of these provisions, advertising must be explicitly labelled as such and clearly separated from other content.

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

It is important to distinguish between factual claims (claims that can be proved) and mere value judgements. The latter are not covered by the regulations of the UWG. The decisive factor when distinguishing between the two is the target public's viewpoint. If the respective statement is understood as a factual claim rather than mere puffery, it must be correct. This applies in particular to advertising using exaggerations, superlatives or unique selling propositions (like 'the best' or 'the greatest'). Where such claims are taken seriously by the relevant consumers, the advertiser must be able to prove his or her alleged exceptional position. This may, however, only be reviewed on a case-by-case basis.

Eye-catching advertising is understood as advertising using specially highlighted claims (by specific graphic representation) to attract consumers' attention. Case law has developed specific criteria for the admissibility of such advertisements: objectively incorrect claims are prohibited. Claims that are not objectively incorrect, but may lead to misconceptions, shall be accompanied by further information, usually presented in a footnote. The requirements regarding the content and format of this supplementary information depend on the respective product or service and the respective communication channel.

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

The main provisions governing misleading advertising can be found in the UWG. Under these regulations, advertising is deemed to be misleading if it contains untruthful information or other information suited to deception regarding specific circumstances like the essential characteristics or risks of the products and services concerned. At the same time, advertising with facts that simply state the obvious is prohibited.

Section 5a of the UWG provides a duty to clearly and in due time disclose all essential information that is likely to affect the consumer's decision. Within the meaning of the law, 'essential information' should include the identity and postal address of the company concerned, service conditions, terms of delivery, final costs and the right of withdrawal and revocation. The scale of information that is to be disclosed mainly depends on two factors: the understanding of the targeted members of the public and the actual technical capabilities of the communication channel used. Regarding the former, the average (reasonably well-informed and reasonably observant and circumspect) customer's understanding is decisive.

In addition, the requirements depend on the respective communication channel. The limitation of information tools may lead to the limitation of information obligations. For instance, the use of clearly noticeable footnotes is permissible for television advertising. Also,

reference to the advertiser's website may be sufficient to meet the obligations. In this context, any other measures taken by the trader to make the information available to consumers shall be taken into account when deciding whether essential information has been omitted (see section 5a, paragraph 5 UWG).

Although the required amount of information can only be assessed on a case-by-case basis, sector-specific rules may provide for mandatory information that must be disclosed (eg, when advertising credit and financial products).

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?

As mentioned in question 17, advertising claims shall not be inaccurate or misleading. This does not always require prior proof. However, in the event of a dispute the advertiser must provide the necessary evidence as to the accuracy of the advertisement being challenged.

Furthermore, sector-specific law may require proof for claims about particular products and services, such as the Advertising of Medicines Act (HWG) regarding medicinal products. According to section 3 No. 1 of the HWG, advertising statements about therapeutic efficacy are only permissible if there is scientific proof to support the claim.

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

Advertising claims based on the results of surveys are subject to the general rules of the UWG. Since such advertising is not explicitly regulated, case law sets out the criteria about whether respective claims are misleading or not. Surveys must be representative and current. The claim must be clear so that it does not refer to the result of an independent study (see question 21). Under these conditions, advertising is even permissible if the survey has been commissioned by the advertiser itself. If the claim is based on comparisons with competing products, the rules on comparative advertising will also apply (see question 20).

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

Comparative advertising is explicitly regulated by section 6 of the UWG. It is legally defined as any advertising that explicitly, or by implication, identifies a competitor, or goods or services offered by a competitor. Such advertising is generally permissible, but may be deemed to be misleading where a comparison is used that does not relate to goods or services that meet the same needs or are intended for the same purpose, and that:

- does not objectively relate to one or more:
  - materials;
  - relevant, verifiable and representative features of the goods concerned; or
  - to the price of those goods and services;
- takes unfair advantage of, or impairs, the reputation of a distinguishing mark used by a competitor;
- discredits or denigrates the goods, services, activities or personal or business circumstances of a competitor; or
- presents goods or services as imitations or replicas of goods or services sold under a protected distinguishing mark.

Provided these conditions are met, the competitor's name may be used. Even the use of third-party trademarks is permissible, provided it does not lead in the course of trade to a risk of confusion between the advertiser and a competitor, or between the products or services offered or the distinguishing marks used by them.

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

The following requirements must be ensured:

- precise reference of the respective study is to be given;
- the result must be summarised correctly;
- the test must refer to the particular product being advertised; and
- the study must be conducted by an independent body.

If a product was rated best, the respective claim is generally permissible. Where a competing product has achieved a higher rating, the rank of the advertised product must be specified.

The popular consumer magazine *Stiftung Warentest* has published recommendations on advertising using test results.

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

For advertisements depicting or demonstrating a product's performance, the general principles for misleading advertising are applicable. Such advertising is therefore subject to the restrictions of the UWG and may be deemed to be unfair competition if the pictures are arranged in such a way to cause the observer to misunderstand.

In addition, advertising depicting product performance is subject to sector-specific regulations. The HWG prohibits the use of improper, repugnant or misleading pictures of the human body. The same applies to plastic surgery advertisements with 'before and after' pictures.

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

Advertising claims based on endorsements or third-party testimonials are subject to the general rules of the UWG, particularly regarding misleading advertising. Such advertising is generally permissible. However, sector-specific regulations may provide for stricter limitations. Broad restrictions for advertising medicinal products using third-party testimonials can be found in the HWG.

The use of testimonials or pictures of third parties must be approved by the persons concerned. The use of celebrities' photographs for advertising purposes without consent may be permissible under specific circumstances.

Adherence to a code of practice may be advertised if the advertiser is actually bound by the respective code and complies with the provisions.

Advertising using an actual existing quality mark is only permissible if the competent body has authorised the use. In all other cases, the use of quality marks for advertising purposes is misleading if the advertiser itself has awarded the mark or no objective verification has taken place.

24 Are there special rules for advertising guarantees?

No special rules apply to advertising guarantees. Pursuant to the general provisions of the UWG, such advertising is permissible if it does not contain false or deceptive information. Furthermore, it must be distinguished between statutory warranties and voluntary guarantees. Since the former are already granted by law, advertising would be deemed to be misleading. If a voluntary guarantee is granted, the advertiser must provide clear and comprehensive information about the guarantee conditions.

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

The admissibility of such claims will be determined in accordance with the provisions of the UWG. Terms such as 'environmentally friendly' are only permissible if the consumer is clearly informed about the advantage of the product or service. According to the rules for the use of quality marks, the use of eco labels must state the exact product or service for which the label has been awarded. Abusive use of a European eco label is a breach of competition law. Regarding other eco labels, advertising is only permissible if the environmental compatibility is clearly proven and the consumers are not misled. In some cases, the use of eco labels is regulated by contractual provisions.

26 Are there special rules for describing something as free and for pricing or savings claims?

Special rules for information on prices can be found in the Ordinance Regulating the Indication of Prices (PAngV). This act requires, inter alia, the disclosure of the final prices including value added tax and other price components in relation to consumers. Violations of these provisions shall be treated as unfair competition.

Moreover, the general rules of the UWG apply. Describing products or services as 'free' is misleading advertising when actual costs

Update and trends

The European Commission proposed an update of EU audio-visual rules as part of its Digital Single Market strategy regarding traditional broadcasting and online platforms. Among other things, the update aims to give more flexibility over advertising to broadcasters.

At a national level, the federal government is attempting to extend the ban on advertising tobacco products to billboard and cinema advertising from 2020.

Furthermore, the federal government agreed to restructure the national data protection law in accordance with European regulations. With these changes the government aims to fulfill the requirements for the use of data regarding national security.

Moreover, in February 2017, the state of Baden-Württemberg proposed a new national regulation on telephone advertising wherein business-to-consumer contracts concluded using an advertising call shall only be valid after they have been confirmed by the company as well as the consumer in text form. Whether or not this draft will actually turn into national law is still subject to political controversies.

In addition to this, one has to bear in mind that federal elections will be held in Germany in the autumn of 2017. In case a left-wing oriented government is elected, it is likely that more advertising restrictions will be adopted (eg, regarding the image of women in advertisements).

are incurred. However, this shall not apply to the unavoidable costs of responding to the offer, or of collecting or paying for delivery, or of using the services.

Advertising with discounts and price savings is only permissible if clear and comprehensive information about the conditions is provided, such as the duration of the sales period, the exact scope of goods and services covered or potential restrictions.

Furthermore, it is misleading to advertise with a price reduction where the price concerned has only been used for an incommensurably short period of time.

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

Such advertising claims are governed by the general rules of the UWG. It would be misleading advertising to use a term such as 'new' or 'first-time' if the product or service has been introduced in the market some time ago. The same applies to the use of the term 'improved'. The period of time for which such a claim is permissible depends on the particular market and the particular product or service and can only be reviewed on a case-by-case basis.

Prohibited and controlled advertising

28 What products and services may not be advertised?

German law does not provide for absolute limitations for advertising products and services in general if the products and services themselves are permitted. An exception hereto applies to advertising for pornographic material, which is generally prohibited. Moreover, specific restrictions exist for advertising particular products and services, mainly depending on specific communication channels. For example, tobacco advertising is banned on German radio and television.

29 Are certain advertising methods prohibited?

The prohibitions on certain advertising methods mainly result from the general rules arising out of the UWG. Advertising activities are inadmissible whenever the freedom of decision of consumers is impaired, for example, through applying pressure or exploiting a consumer's credulity or fear.

Sending advertising e-mails without the prior consent of the recipient is generally prohibited. The same applies to telephone advertising ('cold calls'). If the commercial nature of these commercial practices is not clear, it is a misleading omission pursuant to section 5a, paragraph 6 of the UWG, and subliminal advertising is generally prohibited.

Regarding broadcasting, particular advertising methods are also subject to the specific rules of the RStV (see question 30).

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

Regarding advertising via broadcasting and tele-media (electronic information or communication services, such as online news portals), advertising shall not directly exhort minors to buy a product or service by exploiting their inexperience or credulity, or directly encourage them to persuade their parents to purchase the goods or services being advertised (section 6, paragraph 2 JMStV). Further restrictions can be found in the German Minors Protection Act (JuSchG). Additionally, the general rules of the UWG are applicable (see also No. 28 Annex of section 3, paragraph 3 UWG).

31 Are there special rules for advertising credit or financial products?

Advertising of credit or financial products must meet the specific requirements for clear and comprehensive information about the product. In this regard, the PAngV contains detailed provisions, particularly on the amount of mandatory information. For example, credit advertising must contain information on the net loan amount, the borrowing rate and the annual percentage rate using an easily understood example. Infringement of these rules is deemed unfair competition.

Furthermore, such advertising is subject to the general rules of the UWG and therefore must not contain any misleading information. This applies in particular to claims about the risks and the earning potential of the investments being advertised.

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

Specific rules for therapeutic claims can be found in the HWG, the Medical Devices Act or the professional requirements for pharmacists at state level. Misleading advertising for therapeutic goods and services is also deemed to be unfair competition pursuant to the rules of the UWG. The HWG provides special rules for advertising outside the medical circle of experts. The act contains a list of broad restrictions for third-party endorsements and testimonials, advertisements using pictures and specific advertising methods. In addition, it is generally prohibited to advertise remote medical treatment. Furthermore, advertising medicines that have not been approved for sale on the German market is forbidden.

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

The use of health and nutrition claims for advertising is only permissible if the respective claim complies with the provisions of Regulation (EC) 1924/2006 on nutrition and health claims made on food. While the latter must be authorised by the competent authority, the Regulation contains a list of approved nutrition claims. Advertisers should review the EU register for permitted nutrition claims, authorised health claims and the respective conditions of use. Violations of this Regulation may be deemed to be unfair competition pursuant to the UWG.

Claims that make reference to weight control are generally permitted if they are scientifically substantiated and not misleading.

Specific advertising activities outside the scope of the Regulation are covered by the national rules of the German Food and Feed Code.

34 What are the rules for advertising alcoholic beverages?

Advertising alcoholic beverages is subject to the general regulations of the JuSchG and the JMStV. Pursuant to section 6, paragraph 5 of the JMStV, advertising of alcoholic beverages shall not be aimed at minors, nor specifically appeal to them through its presentation or show minors consuming alcohol. Furthermore, the German Advertising Council has established a strict code of conduct for advertising alcoholic beverages.

Such advertising is also covered by the general regulations of the UWG.

35 What are the rules for advertising tobacco products?

Advertising tobacco products and electronic cigarettes is strictly regulated in Germany. In May 2016, the Tobacco Products Directive (Directive 2014/40/EU) was transposed into national law. The Tobacco Act provides for restrictions on any communication channel. While tobacco advertising is completely banned on television and radio, advertising in print media is restricted to media that are only

available for tobacco distributors or that mainly contain information about tobacco products. A sole exception is still made for billboard advertising, which is generally permissible.

Similar to the advertising of alcoholic beverages, advertising for tobacco shall not be addressed to minors.

36 Are there special rules for advertising gambling?

In Germany, the operation of gambling is strictly regulated. The same applies to its advertising, which is in particular subject to the regulations of the State Treaty on Gambling (GlüStV). Pursuant to section 5, paragraph 2 of the GlüStV, advertising shall not be aimed at minors or comparably vulnerable target groups. Misleading claims, in particular regarding the chances of winning or the nature or amount of the winnings, are prohibited. Public gambling advertisements on television, the internet or telecommunications systems are forbidden. However, according to section 5, paragraph 3, sentence 2 of the GlüStV, the states may grant exemptions for lotteries, sports and horse-racing gambling. They also adopt joint regulations to define the nature and scope of permissible gambling advertising.

37 What are the rules for advertising lotteries?

As a sub-category of gambling, lotteries are subject to the general provisions of the GlüStV. Besides the above-mentioned restrictions, advertising lotteries may be permissible in accordance with the Joint Advertising Guidelines of the States Regarding Gambling. This applies to lotteries that are organised no more than twice a week and those with a low-risk potential.

38 What are the requirements for advertising and offering promotional contests?

Advertising activities for promotional contests and games are generally permissible if they are transparent and not misleading. They should provide information on the terms and conditions of participation, particularly the costs, and the announcement of the solution. False statements or non-disclosure of mandatory information are prohibited.

Additionally, further restrictions apply to broadcasting of competition programmes and games. Besides the general requirement of transparency and the prohibition of misleading claims, according to the RStV it is necessary to protect the interests of the participants (child protection in particular should be ensured).

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

Indirect marketing is highly restricted in broadcasting and internet media. Section 8 of the RStV contains specific provisions for commercial sponsorship. Sponsored programmes shall be clearly identified as such by the name, logo or any other symbol of the sponsor at the beginning or at the end of the programmes. Sponsors shall not have any influence on the content and scheduling. Product placement is only permissible under stringent conditions: it must be clearly indicated at the beginning and at the end of the programme and it must always be clearly distinguishable from editorial content. Product placement is completely banned on children's programmes.

Furthermore, indirect marketing is subject to the general rules of the UWG. It may be deemed unfair competition if the advertising character is not clearly recognisable.

40 Briefly give details of any other notable special advertising regimes.

Section 7, paragraph 9, sentence 1 of the RStV declares political, religious and ideological advertising inadmissible. However, this does not apply to public service announcements and charity appeals. Furthermore, the law provides for exceptions, including religious programmes in the private media, or political advertising for parties during their participation in parliamentary elections.

Social media

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

The use of social media for advertising purposes is not governed by a comprehensive act. However, specific provisions of the Telemedia Act (TMG) and the Federal Data Protection Act (BDSG) are of particular importance in this regard (see question 43).

In addition, the general rules of the UWG apply to advertising using social media channels.

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

One recent development of particular public interest was the use of personal data for highly targeted advertising on social media platforms (eg, 'custom audiences'). Some propose that such data transfer between advertising companies and platform operators is not permissible without explicit prior consent of the persons concerned. However, there is no clear decision yet.

Some viral marketing campaigns (eg, via YouTube) have been an object of complaint as their advertising nature was not clearly recognisable in all cases.

43 Are there regulations governing privacy concerns when using social media?

Privacy concerns are regulated by the TMG and the BDSG. These provisions are designed in particular to ensure transparency in the use of personal data. As a result, the use of personal data for advertising purposes is often subject to the consent of the persons concerned. This also requires clear and comprehensive information about the scope and purpose of the data acquisition. Furthermore, the user shall be informed about the body responsible for the content of the social media site by stating its full imprint. Under specific circumstances, the advertiser may be obliged to take its full imprint (in general, name, address, legal form, representative and e-mail address. In individual cases, additional disclosures may be required pursuant to section 5 TMG).

Stefan Engels **stefan.engels@dlapiper.com**
Beatrice Brunn **beatrice.brunn@dlapiper.com**

Jungfernstieg 7 Tel: +49 40 1 88 88 0
20354 Hamburg Fax: +49 40 1 88 88 111
Germany www.dlapiper.com

India

Safir Anand and Swati Sharma
Anand and Anand

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

The Advertising Standard Council of India (ASCI) is a voluntary, self-regulatory council established in 1985 to promote responsible advertising and to enhance public confidence in advertisements. Complaints against misleading advertisements can be filed with this body.

Adverts that contravene the provisions of the following acts of the government or various state governments are not acceptable:

- the ASCI's Code for Self-Regulation 1985 (the ASCI Code);
- the Drugs and Magic Remedies Act 1954;
- the Emblems and Names Act 1950;
- the Indecent Representation of Women Act 1986;
- the Trademarks Act 1999;
- the Consumer Protection Act 1986;
- the Cable Television Network Amendment Act 2011;
- the Drugs and Cosmetics Act 1940;
- the Prize Competitions Act 1955;
- the Press Council Act 1978;
- the Cable Television Network Rules 1994;
- the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002;
- the Bar Council of India Rules formulated under the Advocates Act 1961;
- the Cigarettes and other Tobacco Products Act 2003; and
- the Food Safety and Standards Act 2006.

By a similar analogy, any advert that violates any statutory provision of law or is misleading to any interest can be looked into.

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?

The primary regulatory body responsible for issuing advertising regulations and enforcing rules on advertising is the ASCI (www.ascionline.org). In addition to the ASCI, courts can be approached on issues of consumer interest, disparagement, false claims, intellectual property violations or moral grounds. Courts have a judicial role and their orders are binding, while the ASCI is more akin to a regulator that would recommend alterations or amendments to, or the removal of, adverts, but would not, for example, pass any damages or injunction relief or rendition of accounts.

3 What powers do the regulators have?

On receipt of a complaint, the Secretariat of the ASCI acknowledges the complaint and requests the advertiser or agency to provide comments in respect of the complaint. The Consumer Complaints Council (CCC) usually decides upon the complaints within four to six weeks once the party concerned is afforded the opportunity to present its case. If the complaint is upheld, the advertiser and its agency are informed of the CCC's decision within five working days. The advertiser is given two weeks to comply with the CCC's decision. Details of non-compliant advertisements are published in the ASCI's media quarterly release throughout India.

4 What are the current major concerns of regulators?

The ASCI Code contains basic guidelines for all advertisements to ensure the following:

- the truthfulness and honesty of representations and claims made by advertisements to safeguard against misleading advertisements;
- that advertisements are not offensive and do not contain anything indecent, vulgar or repulsive that is likely, in the light of generally prevailing standards of decency and propriety, to cause grave or widespread offence;
- the safeguarding against the promotion of products that are regarded as hazardous or harmful to society or individuals, particularly minors, to a degree or of a type that is unacceptable to society at large; and
- that advertisements observe fairness in competition so that the consumers' need to be informed on choices in the marketplace and the standards of generally accepted competitive behaviour in business are both served.

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

There are different codes for different industries. Some of the key industries are discussed below.

Pharmaceutical industry

The advertising of medicines is controlled by the code of ethics framed by the Indian Board of Alternative Medicines and is as follows.

A practitioner should not attempt to advertise him or herself in any way except by the legitimate means of proficiency in his or her work and by skill and success in his or her practice.

It is unethical for a practitioner to insert any advertisement in the public press or issue any card or circular relating to his or her profession or the clinical practice except for the following:

- on commencing practice;
- on changing his or her address;
- on temporary absence from practice;
- on resumption of practice;
- on disposal of practice;
- on succeeding to another practice;
- on entering or retiring from a partnership; or
- if a colleague leaves the practice.

A medical journal advertisement must be as simple and direct as possible. Every advertisement shall be 'run on', without spacing and without display. The type shall be that ordinarily used for articles.

Letters or abbreviations indicating all other qualifications may be added. A statement of specialism may be included only if that specialism has constituted the practice of the healer for at least five years.

It is unethical for any practitioner to permit his or her name to be used in any material relating to diseases or their treatment that is published in the public press or broadcast on radio or television. Approval may be given by the Indian Board of Alternative Medicines, on application, to waive this rule when departure from anonymity is in the public or professional interest.

No interview with a media reporter on subjects relating to diseases and their treatment should be given by a practitioner, and the following additional rules also apply:

- the name of the practitioner interviewed should not be published, nor should his or her identity be revealed, in any report published of the interview, except with the approval of the Indian Board of Alternative Medicines or an authorised organisation;
- if possible, a copy of the report proposed to be published should be submitted for prior approval; and
- the practitioner interviewed should not imply that he or she has superior ability over other practitioners.

Public lectures or addresses to lay audiences may be given on professional subjects to promote alternative medicines.

No practitioner, except with the approval in writing of the Indian Board of Alternative Medicines, shall have his or her name plate affixed anywhere except at his or her residence and on the premises where he or she treats his or her patients.

Name plates shall be unostentatious in size, lettering and form, and may bear the practitioner's name, qualification and practice hours. A statement of specialty may appear only if that specialty constitutes the sole practice of the practitioner.

Practitioners may display their titles, after confirmation, in addition to their clinical qualifications.

Unless prescribed by a registered medical practitioner, no person or company shall take part in the publication of an advertisement referring to any drug that produces a miscarriage in women or prevents conception, or that maintains or improves capacity for sexual pleasure.

Non-compliance may lead to the following consequences:

- the practitioner's name may be removed from the medical register maintained by the Board by reasons of conviction of an indictable offence or infamous conduct in a professional respect;
- the Indian Board of Alternative Medicines shall have the power to deregister any practitioner for conduct that is likely to bring the profession or the Board into disrepute, or on the grounds that the practitioner has wilfully and persistently refused to comply with the rules, articles or by-laws of the Board;
- an expelled practitioner shall be liable to pay all sums due from him or her to the Board at the time of his or her expulsion; and
- no canvassing for membership of any professional society is allowed. This rule must be strictly followed at congresses and symposia.

Insurance industry

In exercise of the powers conferred by section 26 of the Insurance Regulatory and Development Authority Act 1999, the Insurance Regulatory and Development Authority of India, in consultation with the Insurance Advisory Committee, hereby makes the following regulations:

- every insurance company shall be required to prominently disclose in the advertisement, and that part of the advertisement that is required to be returned to the company or insurance intermediary or insurance agent by a prospective insured or an insured, the full particulars of the insurance company, and not merely a trade name or logo;
- where benefits are more fully described, the form number of the policy and the type of coverage shall be disclosed fully; and
- if an advertisement is not in accordance with these regulations the ASCI may take action in one or more of the following ways:
  - issue a letter to the advertiser seeking information within a specific time, not more than 10 days from the date of issue of the letter;
  - direct the advertiser to correct or modify the advertisement already issued in a manner suggested by the Authority with a stipulation that the corrected or modified advertisement shall receive the same type of publicity as the one sought to be corrected or modified;
  - direct the advertiser to discontinue the advertisement; or
  - any other action considered appropriate by the Authority to ensure that the interests of the public are protected.

The advertiser may seek additional time from the Authority to comply with the directions. The Authority may, however, refuse to grant an extension of time if it feels that the advertiser is seeking only to delay matters.

Any failure on the part of the advertiser to comply with the directions of the Authority may result in the latter taking action as necessary, including levying a penalty.

6 Must advertisers register or obtain a licence?

Most companies have self-regulation guidelines, standards and policies to which their adverts must adhere. Companies also review their adverts to be sure any claims made are reasonable and verified and do not mislead or deceive consumers.

The ASCI is a voluntary self-regulatory council, registered as a not-for-profit company under section 25 of the Companies Act. The members of the ASCI are firms of considerable repute within the advertising industry in India and comprise advertisers, media companies, advertising agencies and other professionals connected with advertising practice. The ASCI Code regulates misleading and false advertisements. See question 4 regarding the particulars of the Code.

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

The ASCI offers pre-production or pre-release advertising advice to its members. A panel has been formed of experienced persons who have close knowledge of the ASCI Code and rules, and experience in the workings of the ASCI Board and its CCC. The form that advertising advice takes may vary, but it has two essential characteristics: it is non-binding and it concerns a specific advertising proposal.

Private enforcement (litigation and administrative procedures)

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

Competitors may challenge advertising through the ASCI for disparagement, unfair claims, dilution, violation of any statutory law or intellectual property law. In cases of defamation, recourse to the court is available. The advantages and disadvantages of different avenues to challenge advertising are that procedures with the ASCI are quicker and less costly, but they are regulatory, whereas procedures in courts have judicial authority, are enforceable with a penalty for violation and also apply to non-members of the ASCI.

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?

As a general rule the ASCI does not disclose the identity of the complainant. Under the ASCI Code, complaints against advertisements can be filed from a cross-section of consumers and the general public, and this covers individuals, advertising practitioners, advertising firms, the media, advertising agencies and ancillary services connected with advertising. There are three types of complaints handled by the ASCI: complaints from the general public, including government officials, consumer groups, etc; suo motu complaints from the members of the ASCI Board, the CCC or the Secretariat; and intra-industry complaints (ie, complaints by one advertiser against another).

10 Which party bears the burden of proof?

The party that filed the action (whether a criminal complaint by the state's attorney, or a civil lawsuit by a private party) bears the burden of proof.

11 What remedies may the courts or other adjudicators grant?

Injunctions or damages are the remedies that courts or other adjudicators can grant. Injunctions may be obtained on the first day.

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

The duration of proceedings depends on the courts, the complexity of the case and the matters involved. Interim relief may be granted on the first day. The parties also have the option of expedited trial.

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

The total cost for filing a lawsuit can range from 200,000 to 120,000 rupees. Legal fees and costs may be recoverable if the courts grant punitive damages to the plaintiff.

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

Appeals available from the decision of a court depend on the hierarchy of the court in which they are filed. The hierarchy is (from lower to higher) district courts, High Courts (some with original jurisdiction) and the Supreme Court.

Misleading advertising

15 How is editorial content differentiated from advertising?

'Editorials' technically refers to opinion articles in newspapers. Since the vast majority of blogging falls into the 'opinion' category, 'editorial blog content' has come to mean posts that the blogger has posted out of genuine interest, in an unpaid capacity. On the other hand, advertising content is content that the author has been paid to produce. This is usually negotiated in advance. The brand will have certain parameters and goals for the post. Advertisers may compromise accuracy or try to manipulate content, but at least there is no ambiguity regarding their motivation: they are driven by profit.

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

False or misleading advertisements, or advertisements that create false associations, are prohibited by law, namely the Trademarks Act, the Consumer Protection Act and the ASCI Code. The advertisers can use superlatives (puffery) to boost the merits of their products, such as 'the best', 'No. 1' or 'the greatest'. However, where advertising claims are expressly stated to be based on or supported by independent research or assessment, the source and date of this should be indicated in the advertisement.

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

Under the ASCI, general rules regarding advertising are to ensure the truthfulness and honesty of representations and claims made by advertisements, and to safeguard against misleading advertisements. In addition, the advertisement must carry a disclaimer stating 'past results are no guarantee of similar future outcomes and results may vary'. The font size of the disclaimer should not be less than the size of the claim being made in the advertisement.

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?

All descriptions, claims and comparisons that relate to matters of objectively ascertainable facts should be capable of substantiation. Advertisers and advertising agencies are required to produce such substantiation as and when called to do so by the ASCI.

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

Where advertising claims are expressly stated to be based on or supported by independent research or assessment, or the results of a survey, the source and date of this should be indicated in the advertisement under the ASCI Code. Surveys should be conducted by a reliable source so as to be credible and should be backed by evidence to prove their authenticity.

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

Comparative advertising is allowed to some extent in India. A trader is entitled to compare his or her goods with the goods of another trader and to establish the superiority of his or her goods over that of others, but while doing so, the courts in India have upheld that the advertiser cannot say that the goods of the competitor are inferior, bad or undesirable. If any such statement is made, it would be an act constituting 'product disparagement', which is not allowed. The ASCI Code also requires that advertisements shall not make unjustifiable use of the name or initials of any other firm, company or institution, or take unfair advantage of the goodwill attached to the trademark or symbol of another firm or its product, or the goodwill acquired by its advertising campaign.

Section 29(8) of the Trademarks Act states that a registered trademark is infringed by any advertising of that trademark if such advertising:

- takes unfair advantage of and is contrary to honest practices in industrial or commercial matters;
- is detrimental to its distinctive character; or
- is against the reputation of the trademark.

However, section 30(1) creates an exception to such infringement, namely that a trademark is not infringed where the use of the mark is in accordance with honest practices in industrial or commercial matters or the use is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trademark.

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

Yes, claims suggesting tests and studies prove a product's superiority require proof. Where advertising claims are expressly stated to be based on or supported by independent research or assessment, the source and date of this should be indicated in the advertisement under the ASCI Code. Surveys should be conducted by a reliable source so as to be credible and authentic.

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

There are no specific rules or provisions that require an advertiser to mandatorily demonstrate product performance. However, in case an advertisement depicts the performance of a product, such a demonstration must be true and factual, otherwise a consumer complaint may arise regarding the difference in the performance of the product as claimed by the owner in an advertisement when compared to the performance of the same product in the hands of a consumer.

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

To ensure the truthfulness and honesty of representations and claims made by the advertisements and to safeguard against misleading advertisements, the ASCI Code requires that the advertisement shall not, without permission from the person, firm or institution referred to, contain any reference to such person, firm or institution that confers an unjustified advantage on the product advertised or tends to bring the person, firm or institution into ridicule or disrepute. If and when required to do so by the ASCI, the advertisers and the advertising agency shall produce explicit permission from the person, firm or institution referred to in the advertisement.

24 Are there special rules for advertising guarantees?

There are no special rules for advertisement guarantees. Under the ASCI, claims such as 'guaranteed for up to five years' are not accepted if there is a likelihood of the consumer being misled, either as to the extent of the product's availability or as to the applicability of the benefits offered.

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

The Air (Prevention and Control of Pollution) Act 1981 and the Environment (Protection) Act 1986 empowered the government to take necessary steps towards the protection of the environment. The Eco-mark scheme was launched in 1991 to encourage consumers to buy products that have a less harmful impact on the environment. The scheme provides accreditation and labelling for household and other consumer products that meet certain environmental criteria along with the quality requirements of Indian standards for the product. The scheme is voluntary and invites participation from citizens and concerned industrial sectors in the wider interests of the environment.

26 Are there special rules for describing something as free and for pricing or savings claims?

Indian law does not prohibit sales promotions by advertisers. However, sales promotions have to meet the requirements of the ASCI Code. No advertisement shall be permitted to contain any claim so exaggerated as to lead to grave or widespread disappointment in the minds of consumers. As per the ASCI Code:

- products shall not be described as 'free' where there is any direct cost to the consumer other than the actual cost of any delivery, freight or postage. Where such costs are payable by the consumer, a clear statement that this is the case shall be made in the advertisement; and
- where a claim is made that if a product is purchased another product will be provided 'free', the advertiser is required to show, as and when called to do so by the ASCI, that the price paid by the consumer for the product offered for purchase with the advertised incentive is no more than the price of the product without the advertised incentive.

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

No. There is no specific level or type of improvement required for a product to be advertised as 'improved'. There are also no restrictions on the amount of time a product may be labelled as 'new'.

Prohibited and controlled advertising

28 What products and services may not be advertised?

Products and Services that may not be advertised are the following:

- tobacco, under the Cigarettes and other Tobacco Products Act;
- alcoholic beverages, under the Cable Television Network (Regulation) Amendment Bill;
- human organs, under the Transplantation of Human Organs Act 1994;
- magical remedies, under the Drugs and Magical Remedies (Objectionable Advertisements) Act 1954;
- services for prenatal determination of sex, under the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994;
- prize chits and money circulation schemes, under the Prize Chits and Money Circulation Schemes (Banning) Act 1978;
- physicians, under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations; and
- legal services, under the Bar Council of India Rules formulated under the Advocates Act.

29 Are certain advertising methods prohibited?

While there are no laws defining subliminal advertising or restricting such practice, misleading advertisements are banned.

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

According to the ASCI Code, advertisements addressed to minors shall not contain anything, whether in illustration or otherwise, that might result in their physical, mental or moral harm, or that exploits their vulnerability. For example, advertisements may not feature minors promoting tobacco or alcohol-based products; show minors using or playing with matches or any inflammable or explosive substances; or playing with or using sharp knives or guns, the careless use of which could lead to cuts, burns, shocks or other injuries.

31 Are there special rules for advertising credit or financial products?

With specific reference to advertisements of financial products and services, the ASCI Code states that:

> *advertisements inviting the public to invest money shall not contain statements which may mislead the consumer in respect of the security offered, rates of return or terms of amortisation; where any of the foregoing elements are contingent upon the continuance of or change in existing conditions, or any other assumption, such conditions or assumptions must be clearly indicated in the advertisement.*

According to the Reserve Bank of India's guidelines, banks should also not promote schemes for zero per cent interest finance schemes by publishing advertisements in different newspapers and media indicating that they are promoting or financing consumers under such schemes. They should also refrain from linking their names in any form or manner with any incentive-based advertisement where clarity regarding interest rates is absent.

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

Under section 3 of the Drugs and Magical Remedies (Objectionable Advertisements) Act, there are specific laws that prohibit the advertising of certain drugs for the treatment of certain diseases and disorders. The Act also prohibits any individual or company from claiming they can cure diseases. The Act states that, unless prescribed by a registered medical practitioner, no person or company shall take part in the publication of an advertisement referring to any drug that claims to:

- produce miscarriages in women or prevent conception;
- maintain or improve capacity for sexual pleasure;
- correct menstrual disorders in women; or
- diagnose, mitigate, cure or prevent any disease specified in the Act.

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

The Food Safety Standard Authority of India also checks many products for misleading adverts. Section 24 of the Foods Safety and Standards Act states that:

- no advertisement shall be made about any food that is misleading or deceptive or that contravenes the provisions of the Act; and
- no person shall engage in any unfair trade practice for the purpose of promoting the sale, supply, use and consumption of articles of food or adopt any unfair or deceptive practice, including the practice of making any statement, whether orally, in writing or by visible representation, that:
  - falsely claims that the foods are of a particular standard, quality, quantity or grade composition;
  - makes a false or misleading representation concerning the need to consume the food; or
  - gives the public any guarantee of the food's efficacy that is not based on adequate or scientific justification.

34 What are the rules for advertising alcoholic beverages?

Advertising alcoholic beverages has been banned in India as per the Cable Television Network (Regulation) Amendment Bill, which came into effect on 8 September 2000. Private channels often permit alcohol companies to advertise using surrogate means, such as selling the brand name for soda or water or music.

35 What are the rules for advertising tobacco products?

According to clause 6 of the ASCI Code, tobacco products, alcohol and gambling are prohibited from being advertised. Advertisements for these products are made indirectly sometimes by purporting to be advertisements for other products. Indirect advertisement for these products and services is prohibited.

36 Are there special rules for advertising gambling?

With specific reference to gambling, advertisements for gambling in India are highly regulated on account of specific laws such as the Indian Contract Act 1872, the Lotteries (Regulation) Act 1998, the Public Gambling Act 1867 and the Indian Penal Code 1860. State governments have the power to promote or prohibit lotteries within their territorial jurisdiction.

Chapter III, Clause 6 of the ASCI states that an indirect advertisement for gambling (gaming) services is prohibited.

In judging whether an advertisement is an indirect advertisement for a product that is prohibited, attention must be paid to the following:

- visual content of the advertisement must depict only the product being advertised and not the prohibited or restricted product in any form or manner;
- the advertisement must not make any direct or indirect reference to the prohibited or restricted products; and

Update and trends

The Ministries of Consumer Affairs and Law in India have approved amendments in the Consumer Protection Act (the Consumer Protection Bill 2015) to incorporate provisions related to accountability and liability of celebrities endorsing brands that make false, misleading and unrealistic claims.

Section 17 of the revised Consumer Protection Bill defines 'endorsement' as any message, verbal statement or any other form of depiction to show a celebrity's 'admiration' for a product, which leads the consumer to believe that it reflects the celebrity's opinion, finding or experience.

Section 75B of the new Bill seeks to make any 'false or misleading' endorsement that is 'prejudicial to the interest of any consumer' a penal offence, punishable with a jail term of up to two years and a fine of 10 lac rupees for the first offence, and imprisonment of five years along with a fine of 50 lac rupees for the second and subsequent offences. However, as a defence to celebrity liability, as per the proviso of section 75 B, 'it is a defence if it is proved that the endorser took all reasonable precautions and exercised all due diligence before endorsing a product or service, but mistaken belief shall not be a defence.'

- the advertisement must not create any nuances or phrases promoting prohibited products.

37 What are the rules for advertising lotteries?

The Lotteries Act provides a framework for organising lotteries in the country. Under this Act, the state governments have been authorised to promote as well as prohibit lotteries within their territorial jurisdiction. This Act also provides for the manner in which the lotteries are to be conducted and prescribes penalties in cases of breach of its provisions. Lotteries not authorised by the state have been made an offence under the Penal Code.

38 What are the requirements for advertising and offering promotional contests?

Indian law does not prohibit sales promotions by advertisers. However, sales promotions must meet the requirements of the ASCI Code. By making no express bar to 'sales promotions', the ASCI advises that advertisements shall not be framed so as to abuse the trust of consumers or exploit their lack of experience or knowledge. No advertisement shall be permitted to contain any claim so exaggerated as to lead to grave or widespread disappointment in the minds of consumers. For example, as per the ASCI Code, advertisements inviting the public to take part in lotteries or prize competitions permitted under law or that hold out the prospect of gifts shall state clearly all material conditions so as to enable consumers to obtain a true and fair view of their prospects in such activities.

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

There is no specific law in India that bars or governs product placement. The ASCI Code is also applicable to product placement. The Cable Television Network Rules, the Advertising Codes of Doordarshan, and the All India Radio and Norms for Journalist Conduct issued by the Press Council of India, prohibit any advertisement directly or indirectly promoting the production, sale or consumption of tobacco products, liquor or other intoxicants. However, some states allow advertising through billboards, signboards, etc, but this is subject to many restrictions. Also, the ASCI Code prohibits the use of minors for advertising alcohol products. Products that are banned from advertising may not be used to provide any kind of sponsorship. Also, misleading representation of sponsorship is an unfair trade practice under the Consumer Protection Act.

40 Briefly give details of any other notable special advertising regimes.

The ASCI does not accept and process complaints against political and non-commercial government advertising.

The ASCI's self-regulation system is established as an industry initiative with the objective of regulating commercial communications (ie, advertising that directly or indirectly solicits exchange of money for goods and services). The ASCI Code specifically states that 'the code for self-regulation has been accepted by individuals, corporate bodies and associations engaged in or otherwise concerned with the practice of advertising in the best interests of the ultimate consumer'. Therefore, political and non-commercial government advertising attempting to influence voters does not come under the ambit of the ASCI.

It is important to the ASCI's integrity that it is seen as an impartial adjudicator free from the perception of political bias. It is not possible to make decisions about whether a political or non-commercial government advertisement breaches the Code without the potential to be seen as taking a political viewpoint.

The ASCI has mandates from industry associations such as the Indian Society of Advertisers, the Advertising Agencies Association India and the Indian Broadcasting Foundation representing India's advertisers, advertising agencies and media to self-regulate advertising content. The ASCI currently has no mandate to regulate government or political advertising. Complainants need to be aware that the ASCI is an industry-funded body. It is inappropriate for the ASCI to assume jurisdiction over the content of political or government advertising in the absence of political parties' or the government's support for such advertising to be regulated by the ASCI.

The ASCI recommends that anyone with a complaint against a political advertisement should write to the Election Commission of India. Complaints against a non-commercial, government-issued TV advertisement should be made to the Ministry of Information and Broadcasting, which is the regulator for TV content and press advertisements, or to the Press Council of India, which is the regulator for print content.

Social media

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

Online advertisements and website content, including social media sites such as Facebook and Twitter, must comply with a range of marketing, consumer, privacy and contract laws. Online advertisers should comply with the ASCI Code, the Indian Penal Code, the Information Technology Act 2000 (the IT Act) and other applicable laws. For this purpose, the Information Technology Act was amended in 2011.

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

There have been no notable instances of advertisers being criticised for their use of social media in India.

43 Are there regulations governing privacy concerns when using social media?

There is no specific law in India that deals with online behavioural advertising. However, online behavioural advertising is regulated by data privacy laws and contract law in India, namely the IT Act and the Indian Contract Act. Under the provision of section 43A of the IT Act, the government has also enacted the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules 2011 (the Rules). The Rules govern the collection, storage and dissemination of personal data.

As per the Rules, any entity collecting personal information online from a customer must:

- provide the customer with a privacy policy for the handling of or dealing in personal information that has been provided by the customer under a lawful contract or consent. The privacy policy must indicate the purpose of collection and usage of such information and reasonable security practices and procedures followed by the entity collecting the information;
- obtain the consent of the customer regarding the purpose of usage before collection of such information;
- inform the customer of the intended recipients of the information;
- inform the customer of the period for which this information will be held;
- only use the information collected for the expressed purpose;
- allow the customer to review the information provided on request and ensure that personal information found to be inaccurate or deficient be corrected or amended if feasible;

- give the customer the option to not provide the data or information sought or to withdraw consent given earlier; and
- have the prior permission of the customer before disclosing personal information unless the disclosure was agreed to at the time of consent.

ANAND & ANAND

Safir Anand **safir@anandandanand.com**
Swati Sharma **swatisharma@anandandanand.com**

First Channel Building
Plot No. 17 A, Sector 16 A
Film City
Noida
Uttar Pradesh 201301

India
Tel: +91 120 4059 300
Fax: +91 120 4243 056 / 058
www.anandandanand.com

Ireland

Conor Griffin, Duncan Grehan and Éadaoin McLoughlin

Duncan Grehan & Partners Solicitors

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

Advertising law in Ireland is regulated by both public and private law. The laws governing advertising and sales promotions are derived from public legislation and judge-made case law. Much of the legislation is influenced by the requirement to implement European Union directives as part of Ireland's membership of the European Union.

Because of the nature of advertising and the various industries involved, there are a large number of statutes that may need to be taken into account depending on the type of advertisement and the product or service being advertised. By way of example, the Advertising Standards Authority of Ireland (ASAI) lists over 60 separate pieces of legislation as having some effect on advertising law. In general, the principal statutes for regulating advertising are as follows:

- the Consumer Protection Act 2007;
- the Broadcasting Act 2009;
- the Gaming and Lotteries Acts 1956–1986;
- the Consumer Credit Act 1995;
- the Copyright and Related Rights Act 2000;
- the Trademarks Act 1996;
- the Patents Act 1992;
- the Data Protection Acts 1988–2003 (the General Data Protection Regulation will come into force in 2018);
- the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007;
- the European Communities (Misleading Advertising) Regulations 1988;
- the Sale of Goods and Supply of Services Act 1980;
- the Medicinal Products (Control of Advertising) Regulations 2007;
- the Competition and Consumer Protection Act 2014; and
- the Consumer Protection Act 2007 (Grocery Goods Undertakings) Regulations 2016 (the Grocery Regulations).

The above list is not exhaustive.

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?

The chief body for the regulation of advertising is the ASAI. It is the advertising industry's self-regulatory body. The ASAI publishes a Code of Standards on Advertising, Promotional and Direct Marketing in Ireland (the Code). The Code is voluntary and has limited statutory basis, but the vast majority of advertisers and media in Ireland are members of the ASAI and are therefore obliged to abide by the Code. A seventh edition of the Code came into force on 1 March 2016. Complaints are directed to the ASAI by members of the public or rival companies, and in the event of an advertisement or promotion being found in breach of the Code, the advertiser or promoter may be asked to withdraw, alter or amend it. The ASAI is a founder member of the European Advertising Standards Alliance, an umbrella group for similar regulatory bodies across the EU that operate a cross-border compliance system.

The Consumer Protection Act 2007 established the National Consumer Agency. The Competition and Consumer Protection Act 2014 established the Competition and Consumer Protection Commission (CCPC) and dissolved the National Consumer Agency and also the Competition Authority. The CCPC now assumes the roles of the two dissolved agencies. It can process complaints under the 2007 and 2014 Acts and also under the Grocery Regulations.

There are also separate regulatory bodies for specific types of advertising. The Broadcasting Authority of Ireland (BAI) publishes its own code of practice on broadcast advertising on Irish terrestrial TV and radio channels. Complaints about broadcast advertising can be addressed to the BAI through their complaints procedure. The Communications Regulator (ComReg) deals with advertising involving premium-rate telephone numbers or SMS short codes.

Generally, the ASAI is seen as the primary advertising regulator and processes most complaints regarding advertisements. However, its Code of Practice does state that it is subordinate to the law and does not prejudice consumers' or advertisers' statutory rights. Therefore, it is possible to bring a complaint to the ASAI without prejudicing any other right one may have to complain by law. The Consumer Protection Act 2007 allows a judge hearing a case brought under the Act to have regard to the self-regulatory codes that are in place. Generally, though, complaints are addressed to the ASAI, given that it offers a cheaper and faster alternative to High Court proceedings to both consumers and rival brand owners, and jurisdictional clashes are uncommon.

3 What powers do the regulators have?

The Consumer Protection Act 2007 provides for a range of penalties for the various offences set out under the Act. The maximum fine for a first offence is €3,000 for summary convictions and €60,000 for convictions on indictment. There are higher fines for repeat offenders. It is also worth noting that any such fine would constitute a criminal conviction that can have far-reaching consequences.

The CCPC can also seek injunctions, serve compliance notices and issue fixed penalties against non-compliant traders or advertisers.

The ASAI Code of Practice allows for orders for withdrawal or amendment of the offending advertisement, orders stipulating that a repeat offender must clear all advertising copy in advance of publication and, in extreme cases, fines for their members.

4 What are the current major concerns of regulators?

The issue of digital and social media advertising has been a primary concern in recent years. In 2013 the ASAI extended its code of practice to specifically include social media and user-generated content. CopyClear, a compulsory clearance body for alcohol advertising (formerly known as Central Copy Clearance Ireland), extended its remit to social media in 2014 and published guidelines on the issue. The advertising and marketing of gambling-related services and e-cigarettes have been brought under the remit of the ASAI Code with the new seventh edition.

The other major concern relates to alcohol advertising, which has been the subject of some debate between the industry, regulators and the government. In December 2015, the government published the Public Health (Alcohol) Bill 2015 (a document in preparation for introducing legislation), which will affect the advertising, marketing and sponsorship of alcohol in Ireland; this is yet to be enacted.

From 1 February 2016, the CCPC was appointed as enforcer of the Grocery Regulations 2016, and with effect from 30 April 2016, all arrangements and contracts, new or under review for renewal, between wholesalers or suppliers and retailers will have to be in writing and signed by all of the parties. The Grocery Regulations also provide terms that are, from 30 April, deemed to be in all such agreements and arrangements, irrespective of whether they are expressly included, and these implied terms require that all such arrangements must be in clear and intelligible language and that the parties to the agreement must be given an opportunity to have them carefully scrutinised. Henceforth, it will be a deemed term that a retailer or wholesaler cannot compel a supplier to obtain goods or services from a third party from whom the retailer or wholesaler receives payment, and the wholesaler or retailer shall provide a supplier on request with a forecast of the goods to be acquired by them from the supplier during the term of the agreement. A retailer or wholesaler is prohibited from seeking any payment from a supplier as a condition to stocking or displaying or listing the supplier's grocery goods; nor can they compel a supplier to make any payment for the advertising or display of such grocery goods. It is to be noted that the term 'grocery goods' includes alcoholic products and intoxicating liquor. The Regulations also impose terms, which may be excluded by agreement, to include the following:

- payment within 30 days of receipt;
- the prohibition of payment in return for promotion of the grocery goods; and
- the prohibition of claims for the following:
  - reimbursement of marketing costs;
  - the allocation of better shelf space positioning;
  - reimbursement for goods that become unfit for sale after delivery; or
  - for 'shrinkage' losses, which occur as a result of theft or accounting errors.

Here, criminal sanctions will apply to offenders. These restrictions are imposed in the interests of avoiding unfair commercial practices because of dominance in the market and so as to restrict market access and position by unfair practices. The Grocery Regulations are reminiscent of similar regulations that have been in operation to steer the market and market practices since the 1950s, when the Restrictive Practices legislation was in place before the free competition laws were introduced after Ireland became an EU member in 1973.

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

Industry codes of practice include the following:

- the ASAI Code of Standards on Advertising, Promotional and Direct Marketing in Ireland;
- the BAI General and Children's Communications Codes;
- the Alcohol, Marketing, Communications and Sponsorship Code of Practice (the alcohol industry's voluntary code);
- the Mature Enjoyment of Alcohol in Society (MEAS) Code of Practice;
- the ComReg Code of Practice on Premium Rate Services;
- the Central Bank of Ireland Consumer Protection Code 2012 (for financial advertising);
- the Irish Direct Marketing Association – Code of Practice on Direct Marketing; and
- the Grocery Regulations 2016.

The above is a non-exhaustive list as there is a wide variety of industries, many of which publish their own guidelines.

Generally, as these are voluntary codes, the consequences for non-compliance tend to be an order to amend or withdraw the advertisement or an order affecting future advertisements.

6 Must advertisers register or obtain a licence?

There is no specific 'licence' required to operate as an advertiser in Ireland; however, as set out above, it is highly recommended that advertisers sign up to the terms of the ASAI Code of Standards. There are very few advertisers who do not do so.

Additional licences may be necessary in specific circumstances. Certain types of sales promotions and associated advertising involving a charity may require a lottery licence under the Gaming and Lotteries Acts 1956–1986. This is obtained by applying to the local district court. ComReg may require advertisers using premium rate numbers (to phone or SMS) to register with it and obtain a licence.

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

Yes, advertisers have an option to seek copy advice from the ASAI in advance of any campaign. It is non-binding and non-definitive advice but is offered to advertisers, agencies, media and promoters. The national broadcaster, RTÉ, also offers an advice service on proposed advertisements on its TV and radio channels. In practice, advertisers and agencies seek legal advice for campaigns of concern to them.

There is an obligation to obtain pre-clearance for alcohol advertisements through CopyClear. CopyClear is an independent body established by the alcoholic drinks industry and the advertisers associations to ensure that the advertising of alcoholic brands complies with the various codes of practice.

Private enforcement (litigation and administrative procedures)

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

Competitors are free to use the Irish courts should they feel their legal rights have been breached by an advertisement. This would most commonly be used in comparative advertising situations or where there are intellectual property issues. The European Communities (Misleading and Comparative Marketing Communications) Regulations 2007 permit a competitor to instigate court proceedings arising out of misleading comparative advertising. Advertisers use intellectual property legislation to take court proceedings for breach of copyright and passing off. On 31 October 2014, the Competition and Consumer Protection Act of 2014 came into force and under it the newly established CCPC was set up as an amalgamation of the functions of the former Competition Authority and of the National Consumer Agency (both now dissolved). From 1 February 2016, the CCPC commenced its role as enforcer of the Grocery Regulations. The 2007 Act implemented into Irish law EU Directive 2005/29/EC on unfair business-to-consumer commercial practices that are now blacklisted and classed as criminal offences. On 7 March 2017, the CCPC published its Consumer Protection List for 2016, which details the 40 enforcement actions taken by it against traders in breach of this consumer protection legislation. These actions include the following:

- convictions under the criminal law for certain misleading commercial practices;
- breaches in relation to the sale of dangerous goods (contrary to the European Communities (General Product Safety) Regulation of 2004);
- convictions leading to compensation payment orders in favour of both the state and of the aggrieved consumers;
- compliance notices for failure to make available to consumers information on the right to cancel distance contracts or for providing misleading information about same;
- compliance notices to traders who failed to make available to consumers information in plain and intelligible language on the obligation to provide goods in conformity with the contract; and
- compliance notices to traders who provided false information or who charged more for goods than the price displayed.

The Consumer Protection Act of 2007 enables anyone to take enforcement proceedings before the courts and this includes competitors as well as aggrieved consumers.

The ASAI Code of Standards also permits competitors to make an intra-industry complaint that will be considered by the ASAI Complaints Committee in the same manner as a consumer complaint, provided the interests of consumers are involved.

The advantage of the ASAI complaints process is that it is a low-cost and low-risk method of objecting to a competitor's advertisement. The disadvantage is that although there is a fast-track procedure, such procedures are only used in extreme circumstances and the general complaints process can take some weeks, by which time the offending competitor's advertisement may well have run consistently.

The advantage of using the courts is that it may be possible to seek immediate injunctive relief to prevent further publication of the offending advertisement. The disadvantage is that the costs for seeking a High Court injunction are high and there is a risk that if the claim is unsuccessful, the challenging business may well be ordered to pay their competitor's legal costs as well as their own.

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?

The Consumer Protection Act 2007 is the chief legislation used to allow consumers (or the CCPC on their behalf) to challenge advertising in the courts. As the courts are open to any member of the public to instigate proceedings it is not necessary to have any specific standing. It would be advisable for anyone commencing court proceedings to be able to identify breaches of specific legislation as grounds for their case; however, it is not a legal requirement.

It is far more common, however, for consumers to address their complaints to the ASAI (again on the basis of it being a free complaints service). Additionally, the BAI offers a complaints service in relation to broadcast advertising. For complaints under any of the Codes, the grounds would generally be breaches of specific sections of the Code.

10 Which party bears the burden of proof?

In legal proceedings taken under the Consumer Protection Act 2007 or the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007, the burden of proof falls on the advertiser to prove that any representations made in their advertisements are true.

In the case of an intra-industry complaint to the ASAI, the complaining competitor may be required to substantiate its complaint (eg, if you complain that the advertisement is providing incorrect information then you need to be able to prove that). There is no 'burden of proof' as such for consumer complaints. Consumers are free to complain and the advertiser will simply be asked to respond. If it is a substantiation issue, then the advertiser may be asked to provide proof.

11 What remedies may the courts or other adjudicators grant?

The courts have a wide range of remedies open to them, depending on the legislation under which the proceedings are brought. Intellectual property proceedings will frequently allow for injunctions, damages, accounts of profits, and orders to inspect and to seize goods. The Consumer Protection Act 2007 allows for prohibition orders against traders or advertisers, damages for consumers who successfully sue under the Act and significantly also allows for criminal proceedings and fines against offending traders or advertisers.

The ASAI Code of Standards allows for publication of its complaints bulletins (effectively 'naming and shaming') and for withdrawal or amendments of advertisements in breach of the Code. The ASAI can also stipulate that future advertisements by that advertiser are to be cleared in advance by them for a fixed period of time. The BAI has similar powers with its Code of Practice.

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

There is no definitive answer to this. A fully disputed High Court case between two competitors arising out of misleading advertising could take two to three years to reach a conclusion from the date of the first letter of complaint. In certain circumstances an injunction might be sought in a very short time frame of a few days; however, that is only a temporary measure until the full trial of the case.

Complaints to the regulatory bodies are generally resolved faster. The ASAI process allows advertisers time to respond to complaints so it can take up to six months from start to finish unless there is sufficient reason to fast-track it.

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

There is no definitive answer for how much court proceedings normally cost. Costs are a matter of contract between client and lawyer. It would depend on the duration, complexity and urgency of the proceedings from the initial claim being raised to the case being fully resolved and how much of the claim is disputed whether a full court hearing was necessary and over how many days the case was heard and whether any discovery of documents was required. The Consumer Protection Act 2007 facilitates the institution of proceedings in the Circuit Court, which is a cheaper alternative to the higher costs and risk of taking proceedings in the High Court.

Orders for costs are at the discretion of the judge or will be dealt with as part of any settlement of the court proceeding. As a general rule, the unsuccessful party will be ordered to pay the costs and legal fees of the successful party. Such orders do not provide a blanket indemnity as typically there are some costs and legal fees incurred that would not be recoverable under such court orders. Orders for security for costs can be made but are relatively infrequent as there is a high proof bar.

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

Decisions of the Circuit Court can be appealed to the High Court. High Court decisions can be appealed in limited circumstances to the Supreme Court. A new Court of Appeal was established in 2014 following a recent referendum and amendment to the Constitution of Ireland (1937).

Regulatory bodies such as the ASAI do not have an appeals process. The ASAI Code does allow for review of the decision by the Complaints Committee in exceptional circumstances.

Misleading advertising

15 How is editorial content differentiated from advertising?

The ASAI Code of Standards specifically states that advertising promotions need to be designed in such a way that they can be clearly differentiated from normal, non-advertising editorial content. Such 'advertorials' must also comply with all of the other provisions in the Code of Standards.

The Consumer Protection Act 2007 can also have an affect on advertising in the form of editorial content. Section 44(1)(b) of the Act states that a marketing communication can be misleading if it could cause the average consumer to 'make a transactional decision that the average consumer would not otherwise make'. An advertisement disguised as editorial content could easily fall within that description if the consumer does not understand that it is 'paid for' content and enters a transaction accordingly. Section 55(q) of the Act prohibits editorial content from being used without disclosing that it is a paid promotion.

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

There is nothing in law specifically distinguishing between 'puffery' and advertising claims that require support. The ASAI Code of Standards states that substantiation should be available for all claims, although it does state that 'obvious untruths or deliberate hyperbole' are permissible provided they do not alter any material facts. There are advertisements run without complaint in Ireland that contain obvious puffery, but, in theory, any claim made in an advertisement should be capable of substantiation.

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

Under section 42 of the Consumer Protection Act 2007 there is a general prohibition on misleading advertising. Sections 43 to 46 of the Act set out in detail the circumstances in which a marketing communication can be construed as misleading. Material information (seen as anything that may influence the decision of the consumer) must be disclosed. Footnotes and disclaimers are permissible provided they are clearly visible. The ASAI and BAI Codes of Practice also contain specific rules on misleading advertising.

Specific industries will also have rules on the type of information that must be disclosed or the detail of any footnotes or disclaimers. For example, the ComReg provides certain guidelines for the size of small print on advertisements using premium rate numbers.

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?

This depends on the nature of the claim. As set out above, any claim made in advertising should in theory be capable of substantiation. The ASAI Code of Standards states that 'advertisers should satisfy themselves that they will be able to provide documentary evidence to substantiate all claims, whether direct or indirect, expressed or implied, that are capable of objective assessment.'

The standard of proof is generally independent, documentary evidence.

Additionally, the Consumer Protection Act 2007 provides a list of some 25 prohibited commercial practices that traders (and by extension advertisers) simply cannot engage in. As above, there is also a general prohibition on misleading advertising. It is likely that a claim made that is not capable of substantiation will breach the provisions in the Act with consequences of possible fines, criminal convictions and, in extreme cases, imprisonment.

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

There are no specific requirements other than general prohibitions (both by law and in the self-regulatory codes) on misleading advertising.

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

Comparative advertising is permissible and is governed by law by the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007. The legislation permits comparative advertising provided it is not misleading or confusing. The advertisement must be fair and compare 'like for like' as regards products and services. It is permissible to identify a competitor by name (or by its trademark) provided the advertisement or marketing communication does not simply take advantage of that trademark or denigrate or discredit the competitor. The Consumer Protection Act 2007 also includes some protection in that it places a prohibition on advertisements that simply seek to cause confusion between the product being advertised and a competitor product.

Comparisons are also permissible under the ASAI Code of Standards subject to compliance with its requirements.

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

Again, this is simply a case of substantiation. There is no specific requirement for a higher degree of proof, but the claim does need to be capable of independent verification.

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

The BAI Commercial Communications Code of Practice does contain specific rules on teleshopping and interactive advertising that could be applied to advertisements demonstrating product performance. Essentially, the Code states that such segments must operate on a policy of separation whereby they are clearly distinguished from programme content.

All of the provisions in the Consumer Protection Act 2007 relating to misleading advertising and prohibited commercial practices can be applied to advertisements demonstrating product performance without the need for any specific reference to such forms of advertising in the Act.

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

The Consumer Protection Act 2007 prohibits claims of endorsements by traders and advertisers in circumstances where they are not accurate. In particular, claims of adherence to certain codes of practice or quality marks can be advertised, but only provided those claims are accurate. The making of such claims in circumstances where they cannot be substantiated would be a prohibited commercial practice and a breach of the legislation, which could lead to criminal prosecution, fines and even imprisonment.

The ASAI Code also has a specific section regulating the use of testimonials and endorsements. Advertisers need to have documentary proof, the said proof has to be signed and dated, and available on request, and advertisers must only use individuals with their express permission. Endorsements must also be current. If the person making the endorsement is being paid for that endorsement, that message should be clear.

24 Are there special rules for advertising guarantees?

Section 43(1)(3) of the Consumer Protection Act 2007 warns that information regarding warranties or aftersales service will be misleading if it is advertised and induces a consumer to make a transactional decision that he or she would not otherwise make.

The ASAI Code states that if an advertisement refers to a guarantee then that guarantee must be available for consumers to inspect before they commit to the purchase and any conditions in the guarantee or warranty (such as time limitations) must be clearly advertised. Additionally, the use of such guarantees cannot be used to limit the statutory rights of the consumer under the Consumer Protection Act 2007 or the Sale of Goods and Supply of Services Act 1980.

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

The ASAI Code contains a specific 'environmental section' that details the rules for claims concerning a product and the environment. Essentially unqualified claims can only be used if there is a high level of documentary evidence in support of those claims. The basis of any claim must be explained and the claim qualified if necessary. Such claims are frequently contested as intra-industry complaints. In 2009 Bord Gáis (a natural gas company) challenged a rival company, Airtricity, through the ASAI complaints process on the content of its advertising relating to the environment. The complaint was upheld and Airtricity agreed to change its advertising content.

26 Are there special rules for describing something as free and for pricing or savings claims?

Yes, the Consumer Protection Act 2007 again refers to such claims in its list of prohibited commercial practices. Section 43 of the Act states that providing information on previous prices (which may give an impression of higher reductions to the current price) can be misleading and a breach of the Act. The Act further states that any court or body deciding on such price claims can look at whether the product or service was actually offered at that higher price in good faith and for a reasonable period of time. Section 51 of the Act prohibits the use of the word 'free' unless the consumer must only pay the cost of responding to the promotion and reasonable delivery charges.

The ASAI Code also contains similar provisions regulating the use of 'free' claims. ComReg have regulations concerning the use of premium rate numbers in collecting such 'free' gifts.

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

Again, this would be covered under the misleading commercial practices provisions of the Consumer Protection Act 2007. There are no specific provisions regarding such claims.

Similarly, the ASAI Code and BAI Code do not contain specific provisions but such claims are covered under their more general provisions that claims must be legal, honest, decent and truthful.

Prohibited and controlled advertising

28 What products and services may not be advertised?

There is a blanket ban on tobacco advertising in all media, as detailed in question 35. Alcohol may not be advertised unless cleared, as detailed in question 34. There are also prohibitions on the advertising of certain pharmaceutical products, such as prescription medication, under the Medicinal Products (Control of Advertising) Regulations 2007.

There are certain prohibitions placed on the advertisement of 'junk food', as defined in the BAI Communications Code, for broadcast advertising during certain hours of the day (see question 30). There is also a prohibition on the advertisement of infant formula under the European Communities (Infant Formula and Follow-on Formula) Regulations 2007.

Update and trends

The ASAI has recently published guidance on the issue of the recognisability of marketing communications. This is particularly targeted at the increased amount of blogs and social media 'influencers', which may not always be readily apparent as marketing. The ASAI guidance now states that if a celebrity, blogger or influencer is sponsored by a brand or product then it must be clear that social media posts or other statements are marketing communications.

Under the Broadcasting Act 2009, there is a prohibition on broadcast advertisements for political purposes or dealing with industrial relations disputes and the merits of joining certain religious organisations.

The Grocery Regulations 2016 introduce mandatory rules concerning arrangements between wholesalers, retailers and suppliers who seek to curb unfair competition and anticompetitive practices. This includes arrangements concerning payments for prominent shelf positioning in shops and outlets, for advertising and display of the supplier's grocery goods in the retailer's premises and a requirement that from 30 April 2016 all such arrangements are to be in writing and signed by all parties and are to be in clear and intelligible language.

29 Are certain advertising methods prohibited?

As described earlier, section 55 of the Consumer Protection Act 2007 lists a series of prohibited commercial practices, some of which are based on particular methods of advertising. These are derived from the EU Unfair Commercial Practices Directive.

The BAI Communications Code contains specific prohibitions on certain advertising methods in broadcast advertising. This includes prohibitions on product placement, except in limited permissible circumstances as set out in the Code. Surreptitious and subliminal advertising communications are completely prohibited by the Code.

There are also restrictions and prohibitions placed on the use of marketing emails (or other forms of communication) under the e-Privacy Regulations 2011 and the Data Protection Acts 1988–2003.

Finally, the ASAI Code contains a series of general prohibitions that can be applied to advertising material (eg, any advert that condones or encourages dangerous behaviour or unsafe practices is prohibited).

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

Under Irish law, minors are defined as anyone under the age of 18. Both the courts and the regulatory bodies will have special regard to the susceptibility of consumers of a younger age to the suggestions of advertisements. The Consumer Protection Act 2007 specifically prohibits any form of advertisement that exhorts children to purchase a product or encourages their parents to purchase the product for them.

The ASAI Code of Standards contains a specific section on advertising to children. It includes subsections relating to the advertising of food to children and prize promotions for children. In particular, it places restrictions on the use of children in advertising (for example, children cannot be positioned near an open fire without a fireguard in an advertisement). There are further restrictions similar to the Consumer Protection Act 2007 concerning advertisements that might encourage children to plead with a parent to buy a product and advertisements that use words such as 'only' or 'just' in relation to the price.

Finally, the BAI has a specific and quite detailed Communications Code on broadcast advertising to children. It breaks down certain restrictions under the Code into age categories, so it takes into account that a 17-year-old may have a better grasp of advertising than a six-year-old. There are general restrictions regarding misleading advertising and a higher standard will be placed on advertisers where children are involved. There are restrictions on the duration and type of advertising during certain times of the day when minors are likely to watch children's programming. The use of programme characters and celebrities or sports stars in advertising is restricted. In recent years, a focus has been placed on the advertising of 'high in fat, salt and sugar foods' and there are restrictions and requirements in place for the advertising of these.

31 Are there special rules for advertising credit or financial products?

The rules governing the requirements for advertising credit or financial products are contained in the Central Bank of Ireland Consumer Protection Code 2012 and the ASAI Code of Standards. The Central Bank of Ireland is the governing body for financial institutions in Ireland. Regulated entities (as defined in the Consumer Protection Code) must ensure that their advertisements are clear, fair, accurate and not misleading. They must include a regulatory disclosure statement in all advertisements. Key information must be prominent and in the main body of the advertisement and it must not be disguised by the design, content or format of the advertisement. Warning statements (for example, detailing the risks if repayments are not made) must be included with the benefits of the advertised products or services.

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

Most of the rules in place will apply equally to the therapeutic products and the health and nutrition products detailed below.

The Medicinal Products (Control of Advertising) Regulations 2007 contain specific rules on the advertising of certain medications and health products that can fall under the definition of 'therapeutic goods and services'. The Consumer Protection Act 2007 does not specifically make any provision for therapeutic products or services but its general rules can be equally applied.

The Irish Pharmaceutical Healthcare Association also publishes a Code of Marketing Practice for the Pharmaceutical Industry and a separate Code of Standards of Advertising Practice for the Consumer Healthcare Industry. These were most recently revised in January 2015.

Both the ASAI Code of Standards and the BAI Communications Code contain specific rules for the advertisement of health and beauty products. The ASAI provisions break down restrictions between specific types of therapeutic products such as hair loss products, alternative medicines and vitamin replacements.

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

Depending on the product in question (particularly in relation to weight loss) any claims may fall within the Medicinal Products (Control of Advertising) Regulations 2007 and will need to comply with the restrictions as set out in the Regulations.

The ASAI Code of Standards contains specific rules governing advertisements for foodstuffs regarding health, nutrition and weight control. It includes restrictions on advertising for 'crash diets' or the encouragement of consumers to feel that being 'underweight' is in fact normal. Substantiation will be expected for any claims made.

The BAI Communications Code also contains specific rules on both the medicinal side of such foodstuffs and the more general area of food advertising.

34 What are the rules for advertising alcoholic beverages?

There is no specific legislation for the advertisement of alcoholic beverages in Ireland. The Public Health (Alcohol) Bill 2015 was published in December 2015, but is still awaiting enactment. The Bill includes provisions on the advertising and marketing of alcohol, and sponsorship involving alcohol brands. At present, alcohol advertising is covered by codes of practice between the various members of the alcoholic drinks industry and the Irish government and various health bodies – the Alcohol Marketing, Communications and Sponsorship Codes of Practice and the MEAS Code of Practice, which deals with messaging guidelines. For example, all advertising for alcoholic beverages must contain the tagline 'enjoy "brand name" responsibly' and direct consumers to a responsible drinking website.

Additionally, both the BAI Communications Codes and the ASAI Code of Standards have specific sections regarding alcohol advertising.

The content of all of the codes is too detailed to list here but compliance is ensured by CopyClear (see question 4). Essentially, all advertisements for alcoholic drinks (whether broadcast, print, online or other social media) must be pre-vetted and cleared by CopyClear. Once a proposed advertisement has been cleared it will be given a specific code, and media outlets will not run the advertisement unless they are first provided with that code proving the advertisement has been cleared.

The Grocery Regulations 2016 prohibit any premium payment for more prominent shelf positioning in a retailer or wholesaler's premises or for advertising and promotion costs in connection with the marketing, advertising, sale and promotion of alcoholic beverages.

35 What are the rules for advertising tobacco products?

There is a blanket ban on advertising tobacco products in Ireland pursuant to the Public Heath (Tobacco) Act 2002 and the Public Health (Tobacco) (Amendment) Act 2004.

36 Are there special rules for advertising gambling?

There is no specific legislation for advertising gambling, and the various gambling companies that operate here simply fall under the remit of the normal regulators and the general legislation such as the Consumer Protection Act 2007. The various codes of practice permit the advertisement of betting services, although some restrictions are placed on actively encouraging people to gamble. The latest edition of the ASAI Code now contains a specific section on gambling advertising. All such advertisements need to comply with the guidelines as set out in the Code, which include that the advertising should not:

- portray gambling in a manner that is socially irresponsible;
- imply any peer pressure to gamble;
- link gambling to social or sexual success; or
- imply that it is a rite of passage.

37 What are the rules for advertising lotteries?

Lotteries are governed by the Gaming and Lotteries Acts 1956–1986. There are severe restrictions on the circumstances in which a lottery can be legally operated (without even looking at the advertising of the said lottery). Only specific types of lottery as set out by the legislation can be operated. From the point of view of advertising or sales promotions, the type of lottery generally used will require a licence from the local district court issued under section 28 of the Acts. The advertising of a lottery is prohibited unless it is one of the specific types of lottery permitted under the Acts, and holds the appropriate licence or permissions.

38 What are the requirements for advertising and offering promotional contests?

Often one of the difficulties faced by promoters and advertisers is that promotional contests fall within the definition of a lottery contained in section 2 of the Gaming and Lotteries Acts 1956–1986. In such circumstances, a licence as detailed above is normally required. An alternative is to ensure that entry is free for all participants or that the contest involves an element of skill (thereby removing the element of chance involved in a lottery).

Provided the promotional contest does not fall within the definition of a lottery, the requirements for advertising it will fall within all of the legislation and regulations detailed above. It will be required to comply with the codes of practice and legislation.

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

The BAI Communications Code includes restrictions on sponsorship and product placement, except in limited circumstances. Both are permissible provided they comply with the provisions and circumstances set out in the Code. For sponsorship, the sponsor must be clearly identified with its name and logo and it must be a sponsor that would be entitled to advertise anyway (eg, it is not possible to use sponsorship to circumvent advertising restrictions). Certain types of programming may not be sponsored.

Product placement was not permissible until relatively recently. It is now permissible, provided that the placement complies with the restrictions as set out in the Code (eg, the programming cannot be affected by the product placement). Paid product placement is not permitted in children's advertising.

For alcoholic drinks, as detailed above, there are specific rules governing sponsorship. Sponsorship of sports broadcasts is not permitted and there are restrictions on the types of events that can be sponsored. The restrictions on sponsorship will be tightened further when the Public Health (Alcohol) Bill 2015 is enacted.

40 Briefly give details of any other notable special advertising regimes.

Ireland is traditionally seen as a conservative, Catholic country and the regulators generally take that into account. The ASAI, when dealing with complaints generally, considers whether the advertisement is likely to cause offence. One of the issues that arises is whether offence would be caused to the general population because of religious issues. That problem may not often be apparent to an international advertiser seeking to run a campaign in Ireland that has previously run without complaint in other Western countries.

Social media

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

There is no specific legislation in place for social media advertising. However, the ASAI Code of Standards applies equally to social media, so all of the rules detailed above apply equally to social media advertising.

In relation to alcohol advertising, the CopyClear remit extends to social media, so a social media campaign by an alcoholic drinks company would need to be cleared in advance by CopyClear.

The general guideline is that advertisers should treat any advertisement on digital or social media as they would treat an advertisement intended for broadcast on more traditional media.

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

Since extending the remit of its Code to social media, the ASAI has considered complaints specifically relating to advertisements on social media. A recent 2014 decision involved a Facebook page for the

DUNCAN GREHAN
PARTNERS

Conor Griffin **cgriffin@duncangrehan.com**
Duncan Grehan **dgrehan@duncangrehan.com**
Éadaoin McLoughlin **emcloughlin@duncangrehan.com**

24 Suffolk Street
Dublin 2
Ireland

Tel: +353 1 677 9078
Fax: +353 1 677 9076
www.duncangrehan.com

alcoholic drink West Coast Cooler that featured a bottle of West Coast Cooler positioned in sand on a beach with the taglines 'Girls Shine On' and 'Taste of Summer'. A complaint was made that the advertisement of an alcoholic drink at a beach or seaside location was a breach of the ASAI Code. The complaint was upheld, although the ASAI accepted that the advertiser had taken extensive steps to correct the error by admitting a mistake had been made by its third-party agency, removing the post immediately on receipt of the complaint and reviewing procedures and training to ensure compliance with the Code.

43 Are there regulations governing privacy concerns when using social media?

There are no specific regulations; however, the Data Protection Acts 1988–2003 and the Defamation Act 2009 have both been used in the courts for cases involving privacy and social media. The Defamation Act 2009 presents a risk for advertisers on social media who permit user-generated content, as it can leave them open to claims of publishing defamatory content by a third party.

Japan

Chie Kasahara
Atsumi & Sakai

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

Advertising activities are generally regulated in Japan by the following acts:

- the Act against Unjustifiable Premiums and Misleading Representations (AUPMR);
- the Act on Specified Commercial Transactions (ASCT);
- the Medical Care Act;
- the Act on Pharmaceuticals and Medical Devices (formerly the Pharmaceutical Affairs Act);
- the Health Promotion Act; and
- the Outdoor Advertisement Act.

There is also a 'fair commission code' applicable to advertising, and a number of advertising guidelines issued by government bodies responsible for specific industries.

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?

The Secretary General of the Consumer Affairs Agency and prefecture governors are responsible for issuing advertising regulations and enforcing rules on advertising in accordance with the AUPMR. The Minister of the Economy, Trade and Industry (METI) also has responsibility in accordance with the ASCT.

In addition, the Japan Advertising Review Organization (JARO) (www.jaro.or.jp), a self-regulatory body established by the advertising industry, handles complaints and enquiries from consumers, competitors and others, and makes recommendations for the modification or discontinuance of questionable representations.

3 What powers do the regulators have?

If a representation is found to be misleading, the Secretary General of the Consumer Affairs Agency (CAA) may order the advertiser to cease the misleading representation, to take the measures necessary to prevent a reoccurrence or to take any other necessary action, including public notice of the matters relating to the implementation of such measures (collectively, a cease-and-desist order). Such an order may be issued even if the violation has already ceased to exist.

If a prefectural governor recognises that misleading representations have been made in violation of the AUPMR, he or she may issue a cease-and-desist instruction similar to the order described above. If the advertiser does not comply with this instruction, or the prefectural governor finds it necessary to put an end to a violation, or prevent its reoccurrence, he or she may take appropriate measures, including the issuance of a cease-and-desist order. A prefectural governor may ask the advertiser itself, or others who have a business relationship with the advertiser (for example, its advertising agent, media company, etc) to report on the misleading representations, and may also have his or her officials enter the advertiser's offices or other places of business, or those of other persons who have a business relationship with the advertiser, to inspect its books and documents, etc, or to ask questions about the persons concerned. The power of a prefectural governor has been strengthened, allowing him or her to independently take appropriate measures, without going through the CAA.

Where a seller or a service provider designated under the ASCT has violated the obligation to indicate certain information concerning goods, rights or services (for example, price, payment due and method, and cancellation) in an advertisement, the prohibition of misleading advertising, or the prohibition from sending e-mail advertising without consent, and if the METI finds that the conduct is likely to significantly prejudice the fairness of a transaction arising from mail order sales and the interests of the purchaser or the service recipient, or if the seller or the service provider fail to comply with the above obligations and abide by the above prohibitions, the METI may order the seller or the service provider to suspend business activities that are connected with such mail order sales, either partially or completely, for a specified period of no longer than one year.

4 What are the current major concerns of regulators?

The CAA has concerns over compliance with existing laws by new means of advertising through the internet, such as the many 'advertising agents' that offer services related to providing positive feedback and comments on evaluation sites where there is an assumption of voluntary 'word-of-mouth' evaluation. The CAA has announced that such staged word-of-mouth evaluations are deemed to be an unjustifiable representation under the AUPMR.

Misleading representations and supply issues in relation to foodstuffs have been a problem, flaring up again in Japan in 2013, with instances of processed meat represented as high-quality beef and 100 per cent reconstituted juice sold as fresh juice, etc.

There are concerns over labelling that is misleading but not fraudulent. For example, 'salmon' can include rainbow trout and trout salmon, not just red salmon and silver salmon. The CAA considers and advises on how to represent foods collectively.

The CAA also requires advertisers to comply with AUPMR and related laws and regulations by instructing employees and assigning a person in charge of advertising and promotion.

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

Each industry usually has its own code of practice. These are voluntary rules, but members generally follow these rules once formulated. Advertising agencies and media companies are also generally familiar with, and comply with, the rules specific to their clients' industries. Non-compliance is very rare and could directly lead to a cease-and-desist order by the CAA and calls for commercial boycott by consumers.

6 Must advertisers register or obtain a licence?

No.

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

Advice may generally be sought from regulators; however, clearance before publication or broadcasting is not necessarily required. Each prefecture has its own advisory desk (for example, the Bureau of Social Welfare and Public Health in Tokyo), which can provide advice

in relation to the Act on Pharmaceuticals and Medical Devices, the AUPMR and the Health Promotion Act. However, confirmation before publication or broadcast is optional.

In addition, the Advertising Review Counsel, Japan (ARC), a public interest incorporated foundation authorised by the Cabinet Office and originally established by major Japanese newspaper companies, can also research and provide a report on the contents of advertising prior to publication or broadcast, if requested by a member media organisation. Such ARC reports are not legally binding.

Private enforcement (litigation and administrative procedures)

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

If an advertisement infringes the rights of a competitor, the competitor may bring a lawsuit against the advertiser. The competitor may ask the court for an injunction, damages and other remedies. However, litigation is costly and time-consuming, so advertising-related litigation of this kind is rare. A competitor may also complain to the JARO and ask them to recommend that the advertiser modify or discontinue any questionable advertising. This is relatively inexpensive, and generally produces reasonable results.

Notifying a prefectural governor or the CAA, or both, is another option. However, handling of complaints is at the discretion of the governor of the prefecture or the CAA, so notification is not always an effective remedy. In practice, directly contacting and discussing the questionable advertising with the advertiser or the advertising agency that is handling it can be fast and effective. If the assertions of the competitor are reasonable, faster settlement and an effective remedy can be obtained in many cases.

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?

In practice, most advertising is challenged through the CAA or the JARO. Anyone may contact the CAA and the JARO, and no grounds are required to bring a complaint with either of these organisations.

If the CAA receives notice of questionable advertising, it will research the advertising, and, if it agrees that the advertising is misleading, it may issue a cease-and-desist order as described in question 3.

If the JARO receives complaints and enquiries concerning advertising, it examines them and, where necessary, recommends the advertiser to modify or discontinue making any questionable representations. Advice or information is also provided in response to enquiries.

10 Which party bears the burden of proof?

In the court, the party asserting that there has been an infringement of rights bears the burden of proof.

In a procedure before the CAA under the AUPMR, the advertiser bears the burden of proof.

There are no specific rules regarding burden of proof in procedures before the JARO, though, in practice, the advertiser bears the burden of proof.

11 What remedies may the courts or other adjudicators grant?

The courts may grant an injunction, damages and other remedies, such as publishing additional advertisements to correct an original misleading representation, or making a public apology if there is sufficient cause.

The CAA may issue a cease-and-desist order against the advertiser. Such order includes, in practice, an injunction to restrain the advertisement; necessary measures to prevent reoccurrence of the misleading advertising; a public notice of the above measure through newspapers; and requiring that all planned future advertising be submitted for approval.

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

The injunction process usually takes a few months in court (both parties are involved); a court proceeding related to damages and other remedies would generally take one to two years from start to conclusion.

Procedures through the CAA or the JARO would generally take two to six months depending on the case.

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

Judicial proceedings cost about ¥500,000 to ¥1 million (legal fees depending on counsel) plus ¥2,000 (court costs) for an injunction; and approximately ¥1 million to ¥2 million (legal fees) plus ¥10,000 (if the amount claimed is ¥1 million) or more in relation to an action for damages and remedies, depending on the amount of damages claimed. The successful party can recover its court costs, but, in practice legal fees are not fully recoverable. CAA and JARO proceedings entail low costs, but they are not recoverable.

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

Appeal to a higher court is available from the decision of a court. Administrative litigation is available from the decision of the CAA.

Misleading advertising

15 How is editorial content differentiated from advertising?

There are no such requirements to disclose where advertisers have influenced editorial content.

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

Advertising claims generally require support in Japan. If claims cannot be supported, they are generally treated as misleading or untruthful advertising. What might be considered puffery in another jurisdiction can be potentially subject to challenge. See question 17.

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

Misleading advertising is considered to occur in the case of any representation:

- by which the quality, standard or any other matter relating to the substance of goods or services are shown to general consumers to be much better than is actually the case or much better than that of other competitors, contrary to the facts, and which thereby tends to unjustly influence customers and impede fair competition;
- by which price or any other trade terms of goods or services will be misunderstood by general consumers as being much more favourable to them than is actually the case or more favourable than those of competitors, and which thereby tends to unjustly influence and impede fair competition; or
- that is likely to cause any matter relating to transactions for goods or services to be misunderstood by general consumers and that is designated by the CAA as being likely to unjustly influence customers and to impede fair competition.

Misleading advertising is prohibited in Japan.

It is not necessary to disclose all material information, and footnotes are permissible. There are no specific rules on disclaimers, but it is rare to use disclaimers in advertising, with the exception of tobacco advertising. In tobacco advertising, disclaimers such as 'light neither means low tar nor low risk' or 'mild does not mean mild effect' are generally used.

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?

It is not necessary to have proof of the claims before publishing, and there are no recognised standards for the type of proof in Japan, but it is advisable to have proof of any claims before publishing if you are going to make any claims that might appear to be misleading.

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

No.

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

Advertising may use comparisons if the comparison is proven objectively, is supported by evidence and presented correctly and appropriately and is fair in methodology. It is permissible to identify a competitor by name, although it is rare in practice.

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

There are no specific degrees or types of proof. However, tests and studies must be objective, must be supported by results and facts, and must be fair.

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

No.

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

No. Industry codes of practice generally stipulate that a statement of opinions, beliefs and experience must not mislead consumers, and advertisers use notes on statements such as 'this is an individual experience and not for everyone'. Endorsement by third parties may not be used without their prior consent and must not mislead consumers. Professional comments, for example, by a doctor or a specialist, must be general and not for a specific good or service.

24 Are there special rules for advertising guarantees?

No.

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

No.

26 Are there special rules for describing something as free and for pricing or savings claims?

No. However, there is a special guideline on representation of pricing in relation to the AUPMR issued by the Fair Trade Committee (now taken over by the CAA), and, again, any misleading advertising is prohibited.

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

No. However, some industry-based fair commission codes only allow the use of 'new product' or 'newly on sale' for the first six months after a new product is introduced to the market.

Prohibited and controlled advertising

28 What products and services may not be advertised?

Under the Medical Care Act, advertising regarding a medical practice, dental practice, hospital or clinic is strictly limited and comparative advertising; misleading or exaggerated advertising; non-objective advertising (without good evidence); and immoral advertising are prohibited. Advertising of the following details is permitted:

- details on whether medical professionals are physicians or dentists;
- the clinical department name;
- the name, telephone number or any information that indicates the location of the hospital or clinic, and the name of the administrator of the hospital or clinic;
- the days and hours of practice, or whether an appointment can be booked;
- the names, ages, genders, positions and brief personal records of physicians, dentists, pharmacists, nurses and other medical professionals practising at the hospital or clinic; and
- other matters related to these people that are prescribed by the Minister of Health, Labour and Welfare as matters that contribute to recipients of medical care making appropriate choices with regard to their medical care.

Update and trends

We have recently seen many gender-related advertisements being criticised as 'sexual harassment' or 'sexual discrimination'. For example, a company that owns and manages a shopping complex was criticised harshly for a particular advertisement. Such company published online advertising that implied gender discrimination in business. The advertisement showed daily communication between a male superior and two female subordinates. One of the females was described as the 'flower at the office' and the other as effectively just 'one of the lads', with different demands placed on her. This advertisement was heavily criticised as portraying sexual harassment; the company ceased using the advertisement and apologised publicly.

In another case, in a major cosmetic company's online advertisement, young girls discuss that a female who is 25 years or older is no longer a girl (implying that such a woman is no longer attractive). This advertisement was also criticised as sexual discrimination and the company apologised and communicated that their intention to demonstrate that such a woman should be considered independent could not be conveyed as planned.

It must be pointed out that this kind of stimulative message is often used in order to attract the attention of target customers. However, we also note that public criticism of advertising can lead to withdrawal of advertising or damage to a company's reputation in Japan, irrespective of the legal circumstances. Advertisers should be aware of the potential for reputational damage from negative advertising, even if there is no regulation to prohibit the particular expression.

Advertisements by lawyers, law firms and foreign lawyers were prohibited until 2000. They are now permitted, but still strictly limited in Japan. Regulations on Advertising by Lawyers and Foreign Lawyers and related guidelines prohibit advertising that is false, misleading, exaggerated, comparative, illegal or that infringes regulations of the national bar association and local bar association, or damaging or in danger of damaging the dignity of lawyers, etc. There is no prohibition on media types, but the wording, placement and methods are strictly limited. The advertiser must maintain a record of the advertising for three years. Any local bar association may investigate records of questionable advertising, facts relating to the advertising, order an injunction and take other measures.

29 Are certain advertising methods prohibited?

Spam e-mails are prohibited under the ASCT.

There are no legal prohibitions on subliminal messages. However, the Japan Commercial Broadcasters Association prohibits the use of subliminal effects on broadcasting by its regulation for broadcasting, so in practice it is not possible to broadcast advertising with subliminal messages.

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

Some voluntary rules (for example, rules on alcoholic beverages and tobacco) prohibit certain advertising to protect minors. In addition, local ordinances on advertising issued by local governments prohibit certain kinds of advertising (for example, advertising on gambling and any immoral advertising).

31 Are there special rules for advertising credit or financial products?

The Financial Instruments and Exchange Act requires a financial instruments business operator to indicate the following information in such advertising: the name or trade name of the financial instruments business operator; the fact that the financial instruments business operator is authorised as a financial instruments business operator, and its registration number; and the matters concerning the contents of the financial instruments business conducted by the financial instruments business operator. These matters are specified by Cabinet order as important matters that may have an impact on customers' judgement.

There are also rules against making an indication that is significantly contradictory to facts or seriously misleading with regard to the

outlook of profits from conducting financial transactions and other matters specified by Cabinet Office ordinance.

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

The Act on Pharmaceuticals and Medical Devices prohibits the following:

- false or exaggerated advertising in relation to the name, effect or efficiency of medicines, quasi-drugs (whose effect on the human body is milder than drugs), cosmetics, medical equipment and regenerative medical products;
- advertising that misleads consumers into thinking that a doctor guarantees the effect or efficiency of a medicine, quasi-drug, cosmetic or medical equipment; and
- advertising that suggests abortion or uses obscene documents or images in relation to medicines, quasi-drugs, cosmetics or medical equipment.

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

The Health Promotion Act prohibits false or exaggerating advertising of foodstuffs in relation to maintaining or improving health. The Minister of Health, Labour and Welfare or a chief of a local bureau of health, labour and welfare may recommend advertisers to take measures necessary to correct misleading advertising, and order advertisers to take necessary measures if they do not follow the recommendation. Penalties including imprisonment with labour of up to six months or a fine of up to ¥1 million may apply.

A company may make certain health claims if it is approved by the CAA to state that the particular food product in question has certain health effects as a 'food for specified health use' (FOSHU), which refers to foods containing ingredients that are shown to have certain functions for health and are officially approved to claim to have certain physiological effects on the human body. Once approved, this allows the use of a FOSHU seal of approval. The CAA also recommends that FOSHU-approved food advertising include a health advice statement such as: 'Our eating habits should be based on a staple diet, a main dish and side dishes, and balanced eating.' Approval to make the above-mentioned health claims does not, of course, allow the company to make exaggerated or false claims, which can attract punishments including imprisonment with labour of up to six months and fines of up to ¥1 million, although this would most likely come after governmental warnings and orders.

34 What are the rules for advertising alcoholic beverages?

There is no specific legislation on alcohol advertising, and alcohol advertising in Japan is regulated only via voluntary rules adopted by the industry (the Commission on Alcohol Beverages, which consists of nine major beverage groups).

These voluntary rules basically stipulate:

- the prohibition of alcohol-related TV advertisements from 5am to 6pm, with some exemptions such as adverts warning about the effects of drinking, for example for minors or pregnant women, and adverts aiming to improve the company's corporate image through, for example, emphasising its commitment to social responsibility;
- alcohol adverts shall follow only after TV or radio programmes that have been confirmed as having an audience of which 70 per cent or more are of drinking age (20 years or older in Japan);
- characters and celebrities appealing to the younger generation may not be used;
- warnings must be provided for pregnant women and nursing mothers (that alcohol may have a harmful influence on their embryos or babies);
- a warning to minors such as 'you can drink after you are 20 years old' or 'minors' drinking is prohibited by law' must be included; and
- the above warning must be given in a specified manner in terms of, for example, wording, point size of type and timing of the warning.

In addition to the above voluntary rules, pregnant celebrities may not appear in alcohol adverts. There are no substantial sanctions under the voluntary rules, though in practice, negative public relations may arise if there is a failure to respect these.

35 What are the rules for advertising tobacco products?

There are no legal rules on tobacco advertising and packaging. However, the Tobacco Institute of Japan has issued voluntary rules on advertising and the industry obeys these rules. The voluntary rules essentially:

- prohibit TV, radio, cinema and internet advertisements, with some exemptions, such as where it is technically possible to target adults only;
- prohibit the use of signboards in public places, with exemptions around tobacco stores, vending machines and smoking places;
- prohibit the targeting of minors;
- prohibit the use of characters and celebrities appealing to the younger generation;
- require health warnings, including on the quantity of tar and nicotine; and
- provide for the format of the above warning, for example, wording, point size of type and package design.

36 Are there special rules for advertising gambling?

There are no special rules for advertising gambling. Legally, gambling is only permitted if supervised by a national government body, and illegal gambling is of course not advertised. Advertising gambling is under general advertising voluntary regulations.

37 What are the rules for advertising lotteries?

There are no specific rules for advertising lotteries.

Atsumi & Sakai

Chie Kasahara **chie.kasahara@aplaw.jp**

Fukoku Seimei Building (Reception: 12F)
2-2-2 Uchisaiwaicho, Chiyoda-ku
Tokyo 100-0011
Japan

Tel: +81 3 5501 2111
Fax: +81 3 5501 2211
www.aplaw.jp

38 What are the requirements for advertising and offering promotional contests?

There are no specific rules for advertising and offering promotional contests.

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

No.

40 Briefly give details of any other notable special advertising regimes.

Generally, the right to advertise is protected by the Constitution as an example of freedom of speech in Japan. Political advertising is freely done in practice, unless the advertising infringes the rights of others.

Recently, election candidate advertising through social media (which was previously prohibited) was permitted, and some candidates and political parties used social media actively for election campaigns.

Social media

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

No.

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

Advertising agencies that put false 'word of mouth' comments on evaluation websites (for example, restaurant recommendation sites) have come under intense pressure in recent years for the untruthful use of social media, and many such agencies have changed their methods of advertising.

43 Are there regulations governing privacy concerns when using social media?

There are no specific regulations governing privacy concerns. However, the Act on the Protection of Personal Information and the respective guidelines also apply to the use of social media.

South Africa

Kelly Thompson and Nicole Smalberger
Adams & Adams

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

There are numerous pieces of legislation and areas of the common law that regulate and affect advertising in South Africa. The Trade Marks Act of 1993, Copyright Act of 1978 and Consumer Protection Act of 2008, as well as the common law remedies of passing-off and unfair competition, are particularly relevant. There are also numerous laws containing provisions affecting advertising of certain products or categories of products, for example, the Regulations to the Foodstuffs, Cosmetics and Disinfectants Act. The Advertising Standards Authority of South Africa (ASA) is a self-regulatory body. The ASA and its Code of Advertising Practice play a significant role in the regulation of advertising in South Africa.

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?

The ASA is the primary regulator of advertising in South Africa. However, in cases where advertising amounts to, for example, trademark infringement or unlawful competition, a competitor could also approach the High Court for an interdict (injunction) against the advertiser. In terms of concurrent jurisdiction, a complaint may be referred either to the ASA or the High Court, but the ASA will not hear a complaint that is already before the court.

3 What powers do the regulators have?

The following sanctions may be imposed by the ASA Directorate, Advertising Industry Tribunal or Final Appeal Committee should an advertisement be found to be in breach of the ASA Code:

- withdrawal of an advertisement in its current format;
- the advertiser may be directed to submit the proposed amendment, original advertisement and relevant ASA ruling to the Association for Communication and Advertising (ACA) Advisory Service for pre-publication advice;
- the respondent may be directed to submit all future advertising to the ACA Advisory Service, at the cost of the respondent, prior to publication thereof (this sanction is only imposed if more than one adverse ruling against the respondent has been made by the ASA in a period of 12 months and if certain additional aggravating factors are present);
- adverse publicity, including the publication of the names of defaulters;
- the respondent may be ordered to publish a summarised version of the ruling in all or some of the media in which the advertising complained about appeared, or media considered appropriate by the ASA, and the cost of such publication will be borne by the respondent; or
- the matter may be referred to a disciplinary hearing.

It is the complainant's responsibility to check whether or not the respondent has adhered to the ASA ruling. In the event that the respondent simply ignores a ruling, the complainant may lodge a breach complaint with the ASA. Should the respondent still fail to comply, the ASA will issue an 'Ad Alert' to its members (including newspapers, magazines, radio, television and the Printing Industries Federation) warning them to withdraw the advertisement and that future advertising from the advertiser in question should not be accepted. Unfortunately, the ASA is not empowered to enforce its rulings beyond this. However, the ASA Code does not prevent an aggrieved party from approaching the High Court for relief.

4 What are the current major concerns of regulators?

The regulation of advertising of foods and beverages that are not essential to a healthy lifestyle is often at the forefront of the issues being dealt with. This is because of the high rate of obesity in South Africa. The debate as to how far the government can go in regulating how such foods may be marketed to children, in particular, has raged on for many years, with ongoing discussions around the advertising of 'unhealthy' foods and the imposition of taxes, such as the 'sugar tax'. There has also been much debate around the advertising and marketing of alcohol products as the proposed National Liquor Policy, if it comes into force, will empower the Minister of Trade and Industry to impose restrictions on and parameters for the advertisement and marketing of alcohol products. The Control of Marketing of Alcoholic Beverages Bill, which has been approved by cabinet but not published for public comment, is mentioned in the National Liquor Policy as specifically seeking to restrict the advertisement of alcohol and prohibit sponsorships and promotions associated with alcohol products. It is likely that in coming years the ability of advertisers to promote alcohol products freely will be fairly limited, with likely restrictions, for example, on times when such advertisements may be aired and locations where they may be placed (not near schools, for example). Draft Regulations Relating to the Labelling, Advertising and Composition of Cosmetics were also published in August 2016 and are to be enacted in terms of the Foodstuffs, Cosmetics and Disinfectants Act of 1972. There is much industry concern in respect of these draft regulations, which are similar to the EU regulations relating to cosmetics, as they place fairly onerous requirements on the cosmetics industry. For example, if enacted, the regulations will require manufacturers or producers of cosmetics to maintain a 'product information file' in respect of each cosmetic product to be launched in South Africa, setting out a detailed description of the product, its composition and manufacture. The draft regulations also contain provisions regarding information, warnings and the like that ought to appear on product labels.

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

The ASA Code of Advertising Practice is the primary code of practice for the advertising industry. It is available online at www.asasa.org.za. The ASA Code covers virtually all forms of advertising, such as, for example, television, radio and print advertisements, and also 'point-of-sale' materials, such as menus, labels, letterheads, circulars, stickers and product packaging. Particular industries also have self-regulating bodies with codes of conduct that usually include guidelines for advertising.

For consequences of non-compliance, see question 3.

6 Must advertisers register or obtain a licence?

Licences are non-applicable in South Africa.

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

Advertisers cannot approach the ASA for advisory opinions but the ACA provides an advisory service. Most advertisers will rather use advertising law attorneys.

There is no requirement that advertisements be pre-cleared, although the South African Broadcasting Association will not accept an infomercial for broadcast unless it has been pre-cleared.

Certain types of advertisements also require approval from other bodies. For example, if advertising stock remedies, advertisements must comply with the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act of 1947 and must be submitted to the Department of Agriculture for approval.

Private enforcement (litigation and administrative procedures)

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

A competitor may lodge a competitor complaint with the ASA, provided the latter is a member of the ASA or agrees to its jurisdiction by participating in the proceedings. The ASA must inform a non-member respondent that the ASA has no jurisdiction over it and that it is not obliged to participate in the proceedings before the ASA. In terms of a recent court ruling, if a non-member respondent does not participate in the proceedings, the ASA cannot make any rulings against it and any rulings so made will be null and void. The advantages of pursuing a complaint before the ASA are that this is a fairly swift and effective process, but the disadvantages are that complaints to the ASA attract fairly high official fees and the enforcement procedures available are less far-reaching than those of the courts.

A competitor may also approach the High Court for relief and, in light of the recent ruling, will have to do so where the respondent is not a member of the ASA or will not agree to its jurisdiction. The advantage is that a High Court interdict may be enforced by way of contempt of court proceedings (thereby preventing future infringements), and, in addition, the High Court may grant a costs order in favour of a successful litigant. The disadvantage is that this is a lengthier process than that before the ASA. Additionally, High Court judges have a fairly wide discretion in considering the matters before them and applying the law to the facts before them. As a result, in certain instances, the likely outcome of a matter may be less predictable than that before the ASA.

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?

A consumer complaint may be lodged by members of the public or by associations in respect of consumer-related matters on the grounds that the advertising complained about does not comply with the ASA Code. The remedies are as set out in question 3. Consumer complaints are dealt with free of charge.

To bring a civil action, the person wishing to institute proceedings must have a direct interest in the right that forms the subject matter of the litigation. Generally, the litigant would need to prove an interest in a right that has been infringed in some manner, or damage or harm of some sort.

If the advertising falls foul of the provisions of the Consumer Protection Act, a consumer may lodge a complaint with the National Consumer Commission. Similarly, consumers may file complaints with the Broadcasting Complaints Commission of South Africa if the matter concerns content of a television or radio broadcast, or the Independent Communications Authority of South Africa (ICASA) if the complaint is against any person licensed by ICASA to provide communications services such as broadcasting, telecommunications, internet or postal services.

10 Which party bears the burden of proof?

The ASA Code does not specifically set out which party bears the onus of proof, and this proof will depend on the circumstances of each case. For example, if a competitor files a complaint on the basis of an exploitation of its advertising goodwill, it would be required to prove that the alleged goodwill indeed exists and has been exploited. However, if the complaint is based on non-compliance with the Code, for example, that an advertisement is misleading, the advertiser must be able to substantiate its claims and prove that it has indeed complied with the provisions of the Code.

11 What remedies may the courts or other adjudicators grant?

The court may grant an interdict restraining the advertiser from continuing to make use of the advertising complained about; it may also order that, for example, any print advertisements to which a third party's trademarks or copyright works have been applied be delivered to the owner of the intellectual property right to be destroyed. The court is empowered to grant damages (in which case the applicant would have to prove the damage suffered) and may also grant a costs order in favour of the successful litigant. The court has a wide discretion to grant a litigant appropriate relief and the relief sought will differ from case to case. The remedies that the ASA may grant are set out in question 3.

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

High Court proceedings brought by way of action proceedings (ie, a trial) could take up to three years from institution to finalisation. Generally, however, application (ie, motion) proceedings would be instituted in such matters and the time frame would be approximately four to 12 months, depending on whether or not the matter is defended.

A complaint lodged with the ASA is likely to be dealt with within two to three months. If the matter is very urgent and time-sensitive, proceedings can sometimes be fast-tracked.

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

High Court proceedings could cost anywhere between 60,000 and 200,000 rand, and possibly more, depending on the particular facts, evidence, cause of action and course the litigation takes. Legal fees are recoverable, but successful litigants tend only to recover approximately one-third of their legal costs because costs are calculated according to an outdated tariff.

Costs of preparing an ASA complaint depend entirely on the basis for the complaint and whether any evidence is filed. They also depend on whether or not the matter is defended. The non-refundable official charges are, however, quite high (currently 24,396 rand for a competitor complaint).

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

A decision of a High Court judge may be appealed to the Full Bench of the High Court. Subsequent appeals to the Supreme Court of Appeal and, if appropriate, the Constitutional Court, are also possible.

A person aggrieved by the decision of the ASA Directorate may appeal to the Advertising Industry Tribunal, and, if a person is aggrieved by a decision of the Advertising Industry Tribunal, a final appeal is possible to the Final Appeal Committee.

Misleading advertising

15 How is editorial content differentiated from advertising?

In terms of the ASA Code, advertisements must be clearly distinguishable as such and, in respect of print media, wherever there is any possibility of confusion, the material in question should be headed conspicuously with the words 'ADVERTISEMENT' or 'ADVERTISEMENT SUPPLEMENT', and should be boxed in or otherwise distinguished from surrounding or accompanying editorial matter. It is a requirement that the words be conspicuous, and upper case lettering is, therefore, often used. In electronic media, particular care should be taken to distinguish clearly between programme content and advertising. Where there is a possibility of confusion, advertising should be identified in a manner acceptable to the ASA.

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

The ASA Code requires, if called upon, documentary evidence to support all claims that are capable of objective substantiation.

Certain types of claims, such as puffery and hyperbole, are not capable of objective substantiation and are, therefore, not required to comply with the provisions relating to documentary evidence. Puffery, value judgements, matters of opinion or subjective assessments are permitted, provided that it is clear that what is being expressed is an opinion and there is no likelihood of the opinion misleading consumers about any aspect of a product or service that is capable of being objectively assessed in the light of generally accepted standards. Humorous or hyperbolic claims are permissible if it is obvious that they are intended to be humorous or hyperbolic and are not likely to be considered as being literal claims regarding the advertised product.

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

Advertising claims may not, directly or by implication, omission, ambiguity, inaccuracy, exaggeration or otherwise, mislead the consumer. The facts contained in an advertisement must be capable of being proven to be truthful. Conspicuous disclaimers and footnotes are allowed but cannot be used to correct an otherwise misleading claim. They may only clarify a claim.

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?

Advertisers must hold documentary evidence in their possession, prior to advertising, to support all objectively determinable claims. The evidence must be from an independent expert in the relevant field.

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

In terms of the ASA Code, advertisements must not 'misuse' research results.

The ASA Code also provides that documentary evidence, whether in the form of survey data or any other documentation, shall be up to date and current, and shall have market relevance.

The ASA Code requires survey data submitted as documentary evidence to conform to the following:

- the survey must emanate from an entity approved by, or acceptable to, the Southern African Market Research Association;
- the accuracy of the claims based on the survey must be confirmed by an entity approved by, or acceptable to, the Southern African Market Research Association; and
- where the survey does not meet the requirements of the ASA Code, the survey shall be evaluated by the Southern African Marketing Research Association to confirm the accuracy of the claims based on the survey. The advertiser shall bear the costs of such evaluation.

In commissioning survey research, it is strongly recommended that Guideline 6 (one of the guidelines included in the ASA Code) be consulted.

More generally, to have any evidentiary value and be genuinely capable of substantiating claims, surveys must have been conducted in such a manner as not to manipulate the outcome of the survey. For example, the persons conducting the survey should not have put leading questions to persons surveyed, nor should a particular answer have been suggested to them.

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

The ASA Code provides that comparative advertising is permitted provided that:

- all legal requirements are adhered to (specifically, the Trade Marks Act that protects against trademark infringement);
- only facts capable of substantiation are used;
- one or more material, relevant, objectively determinable and verifiable claims must be made;
- the claims are not misleading or confusing;
- it does not infringe the advertising goodwill of another or disparage another;
- the facts or criteria used are fairly chosen;
- products or services compared must have the same or similar characteristics and purposes; and
- the advertiser accepts responsibility for the accuracy of the research and claims.

The guiding principle in all comparisons is that products or services should be promoted on their own merits, and the aim of advertising should not be to disparage competitive products.

Comparative brand advertising has been held to constitute trademark infringement in the past. The current position is less clear since the Supreme Court of Appeal held (in the case of *Verimark v BMW AG*) that, in order to be infringing, the use of the trademark in question must be use 'as a trademark', intended to be used as a badge of origin, and not merely incidental. In circumstances where comparative advertising causes confusion or deception or otherwise jeopardises the essential function of a trademark, it may constitute trademark infringement. Comparative advertising may also constitute other forms of trademark infringement if, for example, the use of the mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trademark. The latter argument may be raised where a competitor is identified by name, and it may, therefore, not be advisable to do so. Currently, advertisers do not engage in comparative brand advertising in South Africa.

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

The tests and studies referenced must have been conducted independently (ie, not by the advertiser) by experts in the relevant field. The claims must be objectively verifiable. There must be a causal connection between the research and the claims made, to the extent that the research body expressly agrees on the accuracy and scope of the claims.

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

No, but insofar as 'live' product demonstrations are concerned, the Code of Ethics and Standards of Practice of the Direct Marketing Association provides that product demonstrations must be carried out safely by trained personnel. The information provided directly to consumers by the demonstrators may not be misleading and the representatives may not employ unreasonably aggressive sales tactics.

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

Testimonials must comply with the terms of the ASA Code. They must be genuine and relate to the personal experience of the person giving it. They should not contain any claims as to efficacy that cannot justifiably be attributed to the use of the product, and any specific or measurable results claimed should be fairly presented.

In terms of permission, a person's right to identity, which falls under the umbrella of personality rights, is infringed if an element of that person's identity is used to create the false impression that he or she supports or endorses the advertised product or service. It is good practice to retain evidence of the endorsement or testimonial, should a future dispute arise.

24 Are there special rules for advertising guarantees?

The advertiser is under an obligation to be as clear as possible as to the sense in which it uses the words 'guarantee' and 'warranty'. Advertisements should not contain any reference to 'guarantee' or 'warranty' that take away or diminish any rights that would otherwise be enjoyed by consumers, purport to do so, or may be understood by the consumer as doing so.

Where an advertisement expressly offers, in whatever form, a guarantee or warranty as to the quality, life, composition, origin, duration, etc, of any product, the full terms of that guarantee should be

available in printed form for the consumer to inspect – and, normally, to retain – before he or she is committed to purchase. Where a phrase such as 'money back guarantee' is used, it will be assumed that a full refund of the purchase price of the product will be given to dissatisfied consumers, either throughout the reasonably anticipated life of the product or within such period as is clearly stated in the advertisement. There is no objection to the use of 'guarantee', etc, in a colloquial sense, provided there is no likelihood of a consumer supposing that the advertiser in using the word to express a willingness to shoulder more than simply its legal obligations.

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

Advertisements must confirm to the ASA Code, which contains an appendix dealing specifically with environmental claims such as 'recyclable', 'ozone-friendly' and 'degradable'. These claims must be accurate and capable of substantiation.

26 Are there special rules for describing something as free and for pricing or savings claims?

'Free' goods must, for example, be clearly advertised as only being received subject to purchase, should that be the case.

If there are any costs to the consumer in addition to, for example, the actual cost of any delivery, freight or postage, products may not be described as 'free'.

Where it is claimed in an advertisement that, if one product is purchased, another product will be provided 'free', the advertiser must be able to show that it will not be able immediately and directly to recover the cost of supplying the 'free' product, wholly or partially. Furthermore, an advertiser may not recover or attempt to recover the cost of the 'free' product by, for example, increasing the usual price of the product with which the 'free' product is offered, imposing packaging and handling charges, or inflating actual delivery costs.

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

The word 'new' or words implying 'new' may be used in all media, packaging, posters, billboards, etc, for any entirely new product or service marketed or sold during a given 12-month period. It may also be used to advertise any change or improvement to a product, service or package, provided that the change or improvement is material and can be substantiated and defined. The maximum use of the word 'new' or words implying 'new' in the above-mentioned context shall be confined to a 12-month period calculated from date of proven first usage in an advertisement. In exceptional circumstances, the ASA may agree to an extension of the 12-month period.

Prohibited and controlled advertising

28 What products and services may not be advertised?

All advertising and promotion of tobacco products, including sponsorship, is banned.

Alcohol advertising may not be directed at persons under the age of 18 years.

The regulations promulgated under the Medicines and Related Substances Act provide that prescription medication may not be advertised to the general public. Prescription medication may be advertised only to medical practitioners, dentists, veterinarians and pharmacists.

29 Are certain advertising methods prohibited?

Although not specifically prohibited, subliminal messaging is unlikely to be found to be in accordance with the ASA Code as advertisements are required to be 'clearly distinguishable as such'. Shock tactics, depending on the content of the advertisement, may similarly not be permissible given the Code's prohibition of, for example, unreasonably playing on fear or causing offence.

There are specific provisions in the ASA Code regulating direct marketing advertising. The Code contains a fairly lengthy appendix that sets out the guidelines and principles governing all forms of direct marketing, including marketing practices such as direct mail or catalogue marketing; direct response broadcasting; telephone marketing; cell phone and text message marketing; and email marketing.

Update and trends

Section 82 of the Consumer Protection Act allows the Minister of Trade and Industry to accredit industry-specific ombudsman schemes and to prescribe accompanying industry codes. The ASA has approached the National Consumer Commission with a proposed industry code in respect of the advertising industry and has also requested accreditation as an ombudsman scheme in terms of the Consumer Protection Act. The aim of the industry code is to protect consumers against improper trade practices, as well as misleading, unfair or fraudulent conduct in the advertising and marketing industry. If the code is accepted, all advertising and marketing 'participants or subscribers' will be required to register with the ASA and contribute to its funding, comply with the code and inform consumers, by way of online notices and signage at their business premises, for example, that they are bound by the industry code. 'Participants and subscribers' is broadly defined and would include advertising agencies, media owners and their agents, media buyers and all other advertisers and marketers of goods and services in South Africa. The proposed industry code overlaps to a great extent with the provisions of the ASA Code, but seems to have a greater emphasis on consumer rights, although it does provide for dispute resolution between industry participants. Interested parties had until 20 October 2016 to submit comments in respect of the industry code. The National Consumer Commission will now consider these comments and consult with relevant industry participants, whereafter it may make amendments to the code before making recommendations to the Minister of Trade and Industry regarding the adoption of the code and accreditation of the ASA as an ombudsman scheme.

The Wireless Application Service Providers' Association (WASPA) has a Code of Conduct that entitles consumers receiving unwanted SMS marketing messages (where they have not directly supplied their numbers to the marketer) to report the spammer to WASPA. This regulation is based on consumer protection principles, particularly the consumer's right to privacy. Consumers must be given the option to 'opt out' of spam messages.

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

The ASA Code contains a number of provisions relating to advertising directed at children. The general principle is that advertisements addressed to, or likely to influence, children should not contain any statement or visual presentation that might result in harming them, mentally, morally, physically or emotionally. Children should not be portrayed in advertisements as being sexually appealing, provocative or in any other manner that involves any form of sexual innuendo. Advertisements should also not take advantage of children's lack of experience. The advertising of certain foodstuffs to children is also specifically regulated.

31 Are there special rules for advertising credit or financial products?

The National Credit Act of 2005 is applicable to a provider of credit, or a seller of any goods or services that are being advertised for purchase on credit, and sets out how such credit may be advertised. Credit may not be advertised in a misleading manner, nor may an unlawful form of credit (as set out in the Act) be advertised.

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

The ASA Code of Practice for the Marketing of Health Products regulates, inter alia, the advertising of prescription medications to the healthcare profession and self-medication to the public.

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

The Foodstuffs, Cosmetics and Disinfectants Act of 1972 prohibits false or misleading advertisements or descriptions of foodstuffs, cosmetics or disinfectants and has detailed regulations governing the labelling of such products. The ASA Code also has an appendix dealing with health, nutrition and weight control-related claims.

34 What are the rules for advertising alcoholic beverages?

The Liquor Act of 2003 restricts false and misleading advertising of alcoholic beverages, as well as advertising that is meant to target minors. The ASA Code also has an appendix dealing with the advertisement of alcoholic products in detail.

35 What are the rules for advertising tobacco products?

The Tobacco Products Control Act 83 of 1993 sets out various control laws in respect of tobacco products. For example, the advertising, promotion and sponsorship of tobacco are banned and warnings must appear on the packaging of tobacco products.

36 Are there special rules for advertising gambling?

In terms of the National Gambling Act of 2004, a person must not advertise or promote:

- any gambling activity:
  - in a false or misleading manner; or
  - that is unlawful in terms of the Act or applicable provincial law; or
- a gambling activity, other than an amusement game, in a manner intended to target or attract minors.

In addition, any advertisement of a gambling machine or device, a gambling activity, or licensed premises at which gambling activities are available must, in terms of the Act, include a statement, in the prescribed manner and form, warning against the dangers of addictive and compulsive gambling.

The ASA Code also regulates advertisements for betting tipsters.

37 What are the rules for advertising lotteries?

The regulations of the National Lotteries Board of South Africa regulate the advertising of lotteries. The National Lottery is governed by its Advertising and Public Relations Code of Practice in terms of which all advertising must be legal, decent, honest and truthful, must not suggest that winning the games in question is anything other than a matter of chance, nor must the odds of winning be misrepresented. Advertising should not be directed at minors, nor should advertisements feature or contain any characters, real or fictitious, cartoon figures, symbols, role models or celebrity or entertainer endorsers, who are likely for any reason to appeal to or influence people under the age of 18 years.

38 What are the requirements for advertising and offering promotional contests?

The ASA Code does regulate the advertisement of competitions. The ASA may, in respect of any advertisement for a competition, require that substantiation, in the form of acceptable legal advice that the competition is legal, be furnished.

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

There is a separate Sponsorship Code that sets out the guidelines for good practice and fairness in sponsorship. Sponsorship and all related communications must be accurate and clear to all persons and organisations involved in a sponsorship covering any rights or privileges granted to a sponsor. However, there is no specific requirement that the advertising in question identify the sponsor, or indeed the advertiser. Generally, a product or logo that is not directly associated with the sponsor of the event, activity, team, individual or organisation may not be visibly used or displayed during the event.

Product placement as a means of advertising is subject to the ASA Code. In terms of the Independent Broadcasting Authority (Advertising, Infomercials and Programme Sponsorship) Regulations under the Independent Broadcasting Authority Act of 1993 (which has since been repealed, although the Regulations remain in force), no broadcaster shall permit any product placement in any news or current affairs programme transmitted by it, and product placement in programming other than news and current affairs shall be subordinate to the content of the programme material. In terms of the ASA Code, advertisements should be clearly distinguishable as such whatever their form and whatever the medium used. Product placement should therefore be so designed, produced and presented that it will be readily recognised as an advertisement.

40 Briefly give details of any other notable special advertising regimes.

South Africa is a constitutional democracy and it is therefore important to note that all legal issues, including those related to advertising, will be viewed through the prism of the Constitution. In terms of advertising, constitutional issues, such as the right to equality (relevant in regard to possibly discriminatory advertising) and freedom of expression, can be relevant. In terms of cultural considerations and public morals, South Africa, being a very diverse country, has widely varying cultural and moral norms, depending on, for example, race, socio-economic factors, language, gender and religion.

Social media

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

Currently, South Africa has no legislation that relates specifically to or regulates social media. Guidelines for advertising and marketing through social media must be drawn from a variety of peripheral sources. The Consumer Protection Act contains a number of provisions relating to marketing, including a number of general standards for marketing of goods or services. The ASA Code and the Code of Ethics and Standards of Practice of the Direct Marketing Association of South Africa serve as self-regulatory mechanisms for advertising and marketing practices. These provisions of these codes would also apply to marketing and advertising on social media platforms.

Kelly Thompson **kelly.thompson@adamsadams.com**
Nicole Smalberger **nicole.smalberger@adamsadams.com**

Lynnwood Bridge
4 Daventry Street
Lynnwood Manor
Pretoria, 0081
South Africa

Tel: +27 12 432 6298
Fax: +27 12 432 6546
www.adamsadams.com

The Electronic Communications and Transactions Act, 2002 (ECTA) applies to all forms of electronic communication. Given that advertising via social media platforms clearly constitutes a form of electronic communication, advertisers must give due consideration to, and comply with, the relevant provisions of the ECTA.

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

Yes, there have been a few instances. For example, to celebrate National Women's Day in August 2015, Bic South Africa posted an advertisement on Facebook inviting consumers to 'Look like a girl, act like a lady, think like a man, work like a boss', which led to widespread criticism from individuals and women's rights organisations both locally and internationally. In general, there has also been a steady rise in the number of defamation (libel) cases emanating from social media platforms, such as the case of *H v W*, which covers a wide range of issues. South Africa's courts have clearly recognised that defamation can take place via social media and have proved willing to grant orders to restrain persons from using social media to defame others. There have also been a number of social media-related cases in an employment context. In most of those instances, employees were dismissed because they wrote defamatory comments about their employers on social media sites. Those dismissals were held to be lawful.

43 Are there regulations governing privacy concerns when using social media?

South Africa recently adopted data protection legislation, although it is not yet in force. The Protection of Personal Information Act is expected to come into force by the end of 2017 or early 2018, and it provides for stricter data-protection regulation in South Africa. The Bill of Rights also protects the individual's right to privacy, and there is no reason why conduct engaged in through social media platforms could not, in theory, infringe that fundamental right and result in litigation on that basis.

Sweden

Katarina Lindgren, Mathilda Nordmark and Nejra Poljo
Advokatfirman Fylgia

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

The principal legislations on advertising are the Marketing Act (2008:486), which is primarily based on the EU Unfair Commercial Practices Directive (2005/29/EC), and the Act on Names and Pictures in Advertising (1978:800). The Marketing Act sets the legal framework for all types of advertising practices and regulates relations between business-to-business and business-to-consumer undertakings.

In addition to the general advertising rules established in the Marketing Act, there are special regulations that apply to the advertising of specific products and services, such as the following:

- the Radio and Television Act (2010:696);
- the Alcohol Act (2010:1622);
- the Tobacco Act (1993:581);
- the Medicinal Products Act (2015:315);
- the Food Act (2006:804);
- the Lotteries Act (1994:1000); and
- the Consumer Credit Act (2010:1846).

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?

The Swedish Consumer Agency is the primary government body responsible for issuing advertising regulations and it is also the central supervising authority in respect of the general marketing rules. Other regulatory agencies, which have the mandate to issue regulations and are responsible for overseeing the advertising of specific products and services, are, for example:

- the Swedish Press and Broadcasting Authority;
- the Medical Products Agency;
- the National Food Agency;
- the Gambling Authority (LI); and
- the Financial Supervisory Authority (FI).

In addition, there are various self-regulatory bodies within the business sector that have the power to enforce the advertising standards and regulations of the industry (see question 5).

Regulators are, furthermore, legally obliged to cooperate with each other in order to resolve any issue of concurrent jurisdiction.

3 What powers do the regulators have?

Regulators have the power to impose informative or prohibitive injunctions under penalty of a fine in order to ensure conformity with applicable laws and regulations. The penalty amount is based on the circumstances of the individual case in which the size of the company and the damage incurred are factors that will be considered. For instance, the Swedish Consumer Ombudsman (KO) imposes penalties from approximately 500,000 Swedish kroner against larger companies. Regulators can furthermore refer a case to the KO who has the right to take legal action in court with the purpose of safeguarding consumer interests against businesses.

Many self-regulatory bodies on the other hand, cannot impose any sanctions, instead they must rely on the publication of their own statements and verdicts that may result in decreased economic benefits for the convicted business or advertiser if other companies are hesitant to use them in the future.

4 What are the current major concerns of regulators?

A major concern that the regulators are faced with in regards to advertising is the lack of transparency; that is, unclear and insufficient advertising information. Subliminal advertising in social media, inadequate pre-sale information in telemarketing and the use of unsubstantiated health-related claims are a few examples of recurring complaints made to the KO.

Moreover, according to the Consumer Agency's reports for 2013–2016, the main products and services that many consumers experience problems with are telecommunications services, insurances, legal services and banking and financial services.

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

The business industry, represented by different trade and consumer associations, develops its own codes of ethics and self-regulations in various areas such as the Ethical Rules for the Pharmaceutical Industry, the Advertising Guidelines from the Ethical Council of the Gaming Industry and the Code of Ethics for Press, Radio and Television. A well known trade association and market player within the advertising industry is Swedish Direct Marketing Association, representative of the direct marketing industry, which works continuously with ethical rules and industrial relations.

Furthermore, around 200 Swedish companies and business organisations are members of the International Chamber of Commerce (ICC) through the Swedish National Committee. The ICC Code of Advertising and Marketing Communication Practice (ICC Code) constitutes a general source of knowledge in the field of ethical marketing and is used in the industry's self-regulations such as those mentioned above.

Compliance with the industry codes of practice is monitored by the self-regulatory bodies instituted by the business sector such as the following:

- the Swedish Advertising Ombudsman (RO) and the RO Jury (RON);
- the Swedish Ethics Committee for Direct Marketing;
- the Swedish Alcohol Suppliers' Scrutineer;
- the Swedish Ethical Committee for Fund Marketing;
- the Pharmaceutical Industry Information Examiner (IGM); and
- the Swedish Information Practices Committee (NBL).

In the absence of formal sanctions, the consequences of non-compliance with the decisions of the self-regulatory bodies consist primarily of negative publicity and public criticism.

6 Must advertisers register or obtain a licence?

Advertisers are generally not required to register or obtain a licence for advertising; however, specific products and services require prior approval from government agencies in order to be used for marketing purposes.

The following are examples of such permissions required:

- advertisers must seek permission from local authorities, such as the Swedish Transport Administration or the County Administrative Board, in order to use a space near a public road;
- advertising of non-prescription medicines is only allowed if the medicine has been approved for sale on the Swedish market; and
- advertisers are not allowed to promote (advertise) participation of lotteries organised without a licence.

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

Regulatory agencies do not provide advertisers with the possibility of receiving individual advisory opinions; they only issue general advice and guidelines. These are recommendations that aim to facilitate the application of laws and regulations to specific areas and ensure uniform practice.

Advertisers are furthermore not required to receive clearance before publication, instead it is the advertiser's own responsibility to ensure that the advertising and the marketing methods used are in accordance with applicable laws and regulations. The responsible media editor of the journal, or radio or television programme may nevertheless reserve the right to examine the advertising content's conformity with advertising rules before allowing it to be broadcast or published.

Private enforcement (litigation and administrative procedures)

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

Competitors can choose to file a complaint against a business or a product that does not meet the requirements of the advertising rules, addressed to the responsible regulatory or self-regulatory agency. It is then up to the regulator to assess and determine whether or not any actions will be taken against the company or product. Provided that the regulator chooses to assist the competitor in its personal claim, the accused company will first be given the opportunity to comply voluntarily under penalty of fine (see question 3). If an amicable solution is not reached, the regulatory agency may request the Patent and Market Court to impose the penalty, or even refer the case to the KO who can take legal action in court against the company. In view of this, the competitor does not have to bear any costs in terms of time or money, but has to leave it up to the regulator to decide whether any actions should be taken against the company.

Competitors may furthermore take legal actions themselves against a company that has advertised in breach of the rules in the Marketing Act. Such claim should be addressed to the Patent and Market Court, which has the power to issue preliminary (and final) injunctions and award damages for improper advertising. The general rule in Swedish court proceedings is that the losing party has to pay for the successful party's legal costs. Thus, provided that the competitor is successful with its claim, it may also be compensated for its legal costs. Advantages of a court proceeding include the possibility of a decision being final as well as the possibility of sanctions being issued against the challenged party. The process can, on the other hand, be quite time-consuming, especially if appealed, and at the risk of being the losing party, one might be obliged to cover both parties' legal costs.

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?

Misleading advertising can be challenged by members of the public through the Swedish Consumers Agency whereas sex and gender discrimination and unethical advertising can be challenged through the RO. Advertising with regards to specific products or services can be reported to other regulatory agencies as set out by law, for example the Medical Products Agency, the FI and the LI. Regulatory proceedings are initiated only after the regulators have reviewed the filed complaint and assessed the need to bring actions against the advertising company.

Additionally, a business entity that is being impacted by certain advertising or an association of consumers, employees or business entities also have standing to bring a court action before the Patent and Market Court. A single or private consumer, on the other hand, does not have standing on its own to bring a civil action but has to go through the KO, who has standing to bring such civil actions.

10 Which party bears the burden of proof?

In a marketing dispute, the legal burden of proof is placed on the respondent, which is also known as the reversal of burden of proof. Hence, it is not the plaintiff but the accused advertiser who is responsible for presenting the necessary evidence that proves that the advertising has been proper. In respect of other legal issues that arise in an injunction claim, traditional burden of proof rules apply.

11 What remedies may the courts or other adjudicators grant?

The courts can grant the following legal remedies for unlawful advertising: interim and permanent injunctions under penalty of a fine, damages and a market disruption fee.

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

The length of time proceedings normally take from start to conclusion differs from case to case depending on several circumstances such as the complexity of the case. As of 1 September 2016, the former Market Court was replaced by two new specialised Patent and Market Courts: the Patent and Market Court and the Patent and Market Court of Appeal. The two courts now handle all cases and matters in the country relating to intellectual property, marketing and competition law. A proceeding in the former Market Court could roughly be estimated to take a year from start to conclusion. The extended chain of court bodies with the new Patent and Market Courts has consequently given rise to some uncertainty regarding the time aspect of court proceedings. The new courts were established with emphasis on shortening the court proceedings but it is too soon to give a rough approximation on how long the process may actually take. A proceeding in the first court instance may be resolved in one year but if the case is subject to appeal, the time until the final decision is reached may take from one-and-a-half to two years.

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

The costs of the proceedings can be divided into three parts: the court fee, the legal fees and the party's own costs for the proceeding. The court fee is normally 2,800 Swedish kroner. The legal fees are dependent on how time-consuming and complex the proceeding is and whether the case is subject to appeal, etc. A rough estimation is that each party's legal costs in one court instance amount to between 200,000 and 1.5 million Swedish kroner.

The main rule is that the losing party should pay the successful party's (reasonable) legal fees. However, in cases where both parties have been successful in some part but lost in another part or issue, the court may decide that each party should bear its own costs or that one party should be compensated in proportion to how successful that party has been in the case. The court may also decide that the party's own costs should be recovered.

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

Decisions of the KO can be appealed to the Patent and Market Court. Decisions or judgments of the Patent and Market Court can be appealed to the Patent and Market Court of Appeal, provided the appellant is granted leave to appeal. Decisions of the Patent and Market Court of Appeal, on the other hand, cannot be appealed. However, if the Patent and Market Court of Appeal finds that the application of the law is unclear and that the Supreme Court could provide guidance, the Patent and Market Court of Appeal may decide that the decision can be appealed to the Supreme Court, provided the appellant is also granted leave to appeal.

Decisions of the RO can be appealed to RON and the decisions of the IGM can be appealed to the NBL.

Misleading advertising

15 How is editorial content differentiated from advertising?

Editorial content is regulated by the principles in the Freedom of the Press Act (1949:105) and not by the general rules in the Marketing Act. Editorial content may, however, be tried as advertising under the marketing rules if the purpose and content is of a commercial nature. It is therefore necessary to make a clear distinction between what constitutes editorial content and what constitutes a paid advertisement. Failing to identify the commercial content of an advertising message is regarded as misleading advertising.

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

The Marketing Act does not explicitly distinguish puffery from claims that require support, which means that the same marketing rules apply. The former Swedish Market Court has, however, in its rulings expressed that puffery is only allowed as long as the average consumer identifies it as a general praise and it is not meant to be taken literally.

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

The general rules regarding misleading advertising are set out in the Marketing Act. According to these rules, advertisers are not allowed to use false claims or other misleading statements in their marketing. Advertising is considered to be misleading and false if it affects the consumer's ability to make an informed transactional decision. Advertisers are furthermore not allowed to leave out any material information that is of importance and that may result in unclear, unintelligible, ambiguous or otherwise inappropriate advertising.

Although not all material information needs to be disclosed, the advertisers are subject to different information requirements depending on the product or service being advertised. Advertisers of therapeutic goods and financial services are, for example, naturally required to provide more detailed information in their marketing compared to advertisers of other products and services.

As for the use of disclaimers and footnotes in advertising, there is no specific stipulation regarding these in the law. However, advertising that contains small print text that has conflicting marketing messages compared to the main text is considered to be in violation of the Marketing Act's requirements on clarity and thus misleading. For instance, the NBL has ruled that certain information regarding medicinal products must be designed and placed so that such information can be noticed even from fairly fast and cursory contact with it.

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?

Advertisers are generally not required to provide proof of their advertising claims before publishing. However, in the event of a court proceeding, it is the advertiser's responsibility to provide the necessary evidence to support the accuracy of the claims made in the advertising. The stringency of the standard of proof applied is dependent on how general or narrow the statement or claim is. For example, claiming a product is the best in the country naturally requires a higher standard of proof compared to claiming a product is the best within a local area.

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

No, such advertising must be compatible with the general marketing rules stated in the Marketing Act (see question 17). Advertisers must keep in mind that the quality of the survey is of great importance so that the conclusions made are well founded.

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

Advertisers are generally allowed to make comparisons to identifiable competitors and products as long as the explicit requirements listed in section 18 of the Marketing Act are observed.

For example, this section explicitly states that comparative advertising must not be misleading and is only allowed if comparisons are made between products meeting the same needs or intended for the same purpose. Further, taking unfair advantage of the reputation of another trader's mark, name or other distinguishing mark is not allowed, nor are comparisons that are discrediting or may create confusion among traders.

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

Advertisers must be able to substantiate superiority claims against other products; that is, not only to prove that the advertiser's product is superior but also that no other product is of the same quality. Advertisers should furthermore be careful not to draw the wrong conclusions based on inadequate studies or tests, otherwise it may be viewed as misleading advertising (see question 20).

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

No. All advertising, including the depiction or demonstration of a product performance, should be in accordance with the general advertising rules in the Marketing Act (see question 17).

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

Advertisers are responsible for all the material used in their advertising, including the use of testimonials and endorsements by third parties, such as customer reviews and evaluations. Such claims can only be used for marketing purposes if they are true, relevant and verifiable. Thus, testimonials and endorsements that are outdated are regarded as misleading and the same applies to claims for which the advertiser lacks proof. Misleading commercial practices also include the use of a trust mark, quality mark or equivalent mark without having obtained the necessary authorisation, as well as claiming that a code of conduct has an endorsement from a public or other body for which it does not have.

Advertisers should additionally be aware that the use of trademarks or copyright-protected material, such as text or images that belong to someone else, requires the authorisation of the holder. The same requirement for consent applies to the use of a name or image of an individual if used for advertising purposes.

24 Are there special rules for advertising guarantees?

Traders, who in their advertising offer warranties or similar undertakings are, according to the Marketing Act, obliged to give the purchasing party clear information regarding the warranty as well as the information necessary for the purchasing party to enforce the warranty. Such advertising may not include a statement or otherwise create a false impression that the consumer will be in a better legal position than they would have otherwise been in. The commitment or information must also be submitted as a document or in another legible and durable form available to the buyer.

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

The Marketing Act makes explicit reference to environmental claims, meaning that such claims require particular honesty and trustworthiness. In this regard, the former Swedish Market Court has, in a number of judgments, emphasised that the term 'environmentally friendly' can only be used for marketing purposes if the product or service either improves or at least does not harm the environment.

26 Are there special rules for describing something as free and for pricing or savings claims?

Advertisers are not allowed to make unfair, false or misleading claims about a product's price, the basis for calculating the price, specific price advantages or the terms of payment. In view of this, words like 'free' or 'free of charge' may not be used for marketing purposes if in fact the consumer has to pay something in return. Phrases such as 'buy one, get one free' are, on the other hand, allowed, provided that the

liability for all costs is made clear, the free product is a complimentary good and that the regular price of the paid goods is neither reduced nor increased.

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

No. The Marketing Act, however, specifically prohibits advertising that includes misleading information about a product's existence, nature, quantity, quality and other distinguishing characteristics. Claiming a product is new or improved is therefore only allowed if is such statement is true.

Prohibited and controlled advertising

28 What products and services may not be advertised?

Advertising that is in breach of other legislation is also per se in violation of good marketing practice as set out in the Marketing Act. The following are examples of products that are subject to the special legislation that includes rules about prohibited or controlled advertising:

- tobacco products (although a few exceptions apply) according to the Tobacco Act;
- prescribed medicines according to the Medicinal Products Act;
- alcoholic beverages on TV and radio according to the Alcohol Act; and
- foreign arranged lotteries according to the Lotteries Act.

The general clauses in the Marketing Act are furthermore supplemented by Annex I to the Unfair Practices Directive, which sets out a 'black list' of prohibited commercial practices. Such prohibited practices include pyramid schemes, illegal products and products that closely resemble others in their product's class that cause or are likely to cause confusion between the products.

29 Are certain advertising methods prohibited?

Any advertising that is considered to be misleading or aggressive according to the general clauses in the Marketing Act or advertising that is listed in the 'black list' (see question 28) is prohibited. Such commercial practices include, for example, subliminal advertising, sending spam e-mails without the prior consent of the recipient and making persistent and unwanted solicitations by telephone, e-mail or other remote media.

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

Advertising directed at children and youths is only allowed under certain limited conditions. The reason is that young people have yet to develop the skills necessary for critical thinking and are therefore more susceptible to advertising messages compared to adults.

Advertising that includes direct exhortation to children, to either purchase or to persuade their parents or other adults to buy an advertised product for them, are prohibited according to the Marketing Act. Sweden also has a total ban on television advertising aimed at children under the age of 12 and addressed direct advertising, such as text messages or e-mails, aimed at children under the age of 16.

31 Are there special rules for advertising credit or financial products?

Yes, the main rule is that companies and intermediaries that provide financial or credit services to the public must obtain permission from the FI to conduct such activities.

In advertising credits or credit services, companies are required to safeguard the consumer's interests with due care along with particular moderation and restraint. Advertisers are furthermore obliged to provide the credit consumer with all the necessary information leading them to making an optimal decision based on their own needs and economic situation. The information provided on the credit should be presented as factual, accurate and in neutral terms, and it must be easy to pay attention to. Thus, it is important not to mislead the consumer in any way regarding the consequences or conditions of the credit arrangement. The Consumer Credit Act additionally stipulates the obligation to provide information relating to the effective interest rate for the credit.

As for the advertising of other financial products such as insurances, loans and investment products, similar rules apply and the intermediary or the company concerned is naturally obliged to provide detailed pre-contractual information. These specific information requirements are listed in different regulations depending on the product or service being advertised. For example, with regards to the advertising of saving and investment products, it is necessary and of great importance to provide the consumer with information about the risks associated with such products.

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

Advertising prescription medicines directed at the general public is not allowed according to the Medicinal Products Act, with the exception of vaccination campaigns against infectious diseases. Advertising non-prescription medicine, on the other hand, is permitted only if the medicine has been approved to be sold on the Swedish market by the Swedish Medical Products Agency and the advertising is not directed at children.

In addition, the advertising should promote the proper use of the medicine and include information that is objective, balanced and up-to-date. The Medicinal Products Act also stipulates certain information and presentation requirements, such as that the content of the advertising must not be designed in a way that may lead individuals away from seeking the appropriate care. As for naturopathic drugs and traditional herbal medicinal products, they can only be advertised as effective against illnesses of a temporary or mild nature and the marketing also needs to be compatible with the above-mentioned requirements.

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

Nutrition and health claims are only allowed if they satisfy the requirements as set out in the Regulation (EC) No. 1924/2006 on nutrition and health claims made on foods. The rules are EU-wide and apply to all types of labelling, presentation and advertising of foods.

Nutrition claims that can be used for marketing purposes are listed in the Annex to the Regulation. Examples of permitted nutrition claims, provided the products in question also meet the requirements set out in the Regulation, are 'low in fat', 'no added sugar' and 'light'. Health claims, on the other hand, need to have been approved by the EU Commission in order to be used for commercial purposes. Health claims that are not allowed include those that make reference to recommendations of individual doctors or individual health professionals and health-related claims that make reference to the rate or amount of weight loss.

34 What are the rules for advertising alcoholic beverages?

In Sweden, there are significant restrictions on advertising alcoholic beverages because of its effects on public health. The principle rule according to the Alcohol Act is that all permitted advertising of alcoholic beverages (greater than 2.25 per cent alcohol by volume) must display the text 'particular moderation'. This means that any variety of advertising of alcohol directed to consumers may not be intrusive, insistent or encourage the use of alcohol, nor be aimed at people under the age of 25. The advertising of alcohol may furthermore only display the product itself and thus not be linked to individuals, attributes or to a certain lifestyle.

There is, moreover, a total ban on advertising alcohol on television and radio, with the exception of advertising that conforms to the 'country of origin' principle. This means that Sweden does not prohibit alcohol advertising on TV transmitted from other countries, if such advertising is allowed in the country of origin. As for other media, there is no explicit prohibition of marketing alcohol other than that the content of such advertising should be promoted in accordance with the requirement for particular moderation. Commercial adverts in periodicals are, for example, only allowed if the alcoholic beverage does not exceed 15 per cent alcohol by volume and 20 per cent of the advertising surface includes warning text about the harmful effects of alcohol. Advertising alcohol on the internet is subject to the same rules only with somewhat less stringent requirements.

Update and trends

In 2016, an official report of the Swedish government regarding the implementation of the new Tobacco Products Directive (2014/40/EU) was published. The Report (SOU 2016:14) presented a number of proposals that aim to reduce the use of tobacco and illicit trade in tobacco. The Report contains proposals that tighten the restrictions on tobacco advertising in Sweden in terms of suggesting a permit requirement for selling tobacco and a prohibition of tobacco display in shops. The Report also examined whether there is reason to impose requirements for neutral tobacco packaging and found that such requirement can only be introduced if the Swedish Constitution is amended.

Adopted in 2016, the new EU General Data Protection Regulation will ensure that personal data can only be gathered under strict conditions and for legitimate purposes, and it is expected to impact advertising practices overall. Furthermore, on 10 January 2017, the European Commission adopted a proposal for a Regulation on Privacy and Electronic Communications to replace the 2009 e-Privacy Directive and align the e-privacy rules with the EU General Data Protection Regulation. The draft e-Privacy Regulation seeks to extend the scope of protection to all electronic communications service providers, including Gmail, Skype, WhatsApp, Facebook and Messenger and to metadata derived from electronic communications such as the time and location of a call. Under the draft e-Privacy Regulation, marketing callers would now also be required to display their phone number or use a prefix indicating a marketing call. The proposed changes are thus very likely to impact advertising on the internet and in social media.

35 What are the rules for advertising tobacco products?

The Tobacco Act bans almost all forms of tobacco advertising in Sweden, including indirect advertising and distribution of free tobacco products. The major exceptions to the prohibition on tobacco advertising, provided that such advertising is not intrusive, insistent or encouraging the use of tobacco, are commercial messages at the point of sale and advertising that only consists of providing tobacco products for sale.

36 Are there special rules for advertising gambling?

The main legislation that regulates gambling in Sweden are the Lotteries Act and the Casinos Act (1999:355). Currently, only licensed gaming operators are allowed to advertise on the Swedish market and such permits are only granted by the Swedish state or the Swedish Gambling Authority.

The following are the requirements for advertising of casino games arranged in premises that are mainly used for this purpose (ie, a casino):

- it should be moderate;
- it may not be intrusive or insistent;
- it may not be directed at children or youths under the age of 25;
- it may only appear in newspapers, on the internet or at the venue; and
- the advertising of individual games and jackpots may only appear at the venue.

With regards to the Lotteries Act, it not only refers to what is familiarly called a lottery but also to various forms of gambling whose outcome is partially or entirely determined by chance (see question 37).

37 What are the rules for advertising lotteries?

The rules that regulate the advertising of lotteries in Sweden are set out in the Lotteries Act. In order to arrange a lottery for the general public, it is a general requirement that a licence be obtained from the Swedish Gambling Authority. Advertising that is prohibited under the Lotteries Act is any advertising that promotes the participation in unlawfully arranged lotteries, and advertising that promotes the participation in lotteries arranged outside of Sweden.

In addition, two new provisions regarding advertising have been introduced under the Lotteries Act as of 1 January 2017: a general provision that states the need to observe 'moderation' and a second provision, which prohibits advertising specifically directed at children and youths under the age of 18.

The requirement of moderation, inter alia, refers to the advertising not being intrusive or socially attractive and that the commercial content is factual and reliable.

38 What are the requirements for advertising and offering promotional contests?

Unlike the arrangement of a lottery, the outcome of a contest is determined by someone's performance and not by chance. This means that the provisions set out in the Marketing Act are applicable to the advertising of promotional contests. However, should a promotional contest also include a random element, then this random element stage needs to occur before the element of skill, otherwise the Lotteries Act becomes applicable.

The advertising of promotional contests needs to include all detailed information regarding the essential conditions for the contest, such as price information, time limitations and other limitations set for the contest. As with other types of marketing, the advertisement of a promotional contest must not be false or misleading.

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

Provisions regarding product placement and sponsoring are set out in the Radio and Television Act. The sponsorship rules state that the sponsor needs to be announced in an appropriate manner at the beginning or end, or both, of the programme. Such sponsorship message should include the sponsor's name, logo or other distinctive mark and may not contain promotional elements.

The following rules apply to programme sponsorship:

- news programmes cannot be sponsored;
- sponsorship by someone whose main activity is the production or sale of alcoholic beverages or tobacco products is prohibited; and
- sponsorship by pharmaceutical companies that promote prescription medicines or medical treatments available on prescription is prohibited.

Similar to the sponsorship rules, product placement is only permitted if information is given about the placement at the beginning and end of the programme as well as following advertisement breaks. The information should contain a neutral announcement about the appearance of the product placement and the product or service that has been placed in the programme.

Product placement is furthermore only allowed in movies, TV shows, sports programmes and light entertainment programmes, based on the following rules:

- the product placement does not unduly benefit commercial interests;
- the product placement of tobacco, alcohol or prescription medicines is prohibited; and
- the programme is not primarily intended for children under 12 years of age.

40 Briefly give details of any other notable special advertising regimes.

Political propaganda, religious teachings and civic information are not subject to the Swedish marketing rules but fall under the Fundamental Law on Freedom of Expression (1991:1469) and the Freedom of the Press Act. Gender discriminating and other offensive advertising that are in breach of the ethical marketing rules also fall outside the Marketing Act. The RO is, however, entitled to handle complaints about gender discrimination and unethical advertising with the guidance of the ICC Code (see question 5).

Social media

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

Advertising through social media must comply with the same advertising rules as any other type of media. A recurring issue, however, is the difficulty in determining whether texts and images conveyed through blogs, Instagram and other social networks are purely informative or advertorial. Since subliminal advertising is prohibited under the Marketing Act, an advertorial post in a blog or Instagram must clearly

indicate its commercial purpose by being labelled as an advertisement. It is furthermore important to have such labelling in the introduction and not at the bottom of the post and that the reader is able to identify the sender of the advertisement.

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

The use of subliminal advertising in social media has been the subject of extensive discussions for the past few years in Sweden, in which bloggers and their advertising posts have drawn the most headlines. The question raised in these cases has been whether the advertisement labelling had been sufficient to meet the requirements as set out in the Marketing Act (see question 41).

In addition, the Nordic Consumer Ombudsmen, a cooperation set-up between the Nordic countries, reached a joint position statement on social media advertising in 2016. The Ombudsmen stated, among other things, that an advertorial post is sufficiently labelled if it is clearly marked with the word 'advertisement' in the introduction, whereas an introduction such as: 'This is in collaboration with...' is not always considered sufficiently clear with regards to commercial messages hidden in editorial text.

43 Are there regulations governing privacy concerns when using social media?

There are several regulations governing the privacy of an individual when using social media. The Act on Names and Pictures in Advertising and the Electronic Communication Act (2003:389) (referring to online behavioural advertising such as cookies) both stipulate the requirement for obtaining approval from the person being exposed.

The provisions set out in the Personal Data Act (1998:204) additionally regulate an individual's right not to have their privacy violated through the incorrect processing of their personal data. Although there are a few exceptions, the principle rule when processing such data is that you need to obtain consent from the person concerned. The consent does not need to be in writing, however, it must be voluntary and give a clear expression of the registered person's will. It can also be withdrawn at any time and can only be processed as long as it is necessary with regards to the purpose of the processing.

As of May 2018, the Personal Data Act will be replaced with the new and adopted EU General Data Protection Regulation (see Update and trends). Similar rules will apply; however, they will be somewhat more stringent with regards to the requirement of consent, privacy and transparency, as well as the sanctions that can follow if the rules are breached.

Katarina Lindgren **katarina.lindgren@fylgia.se**
Mathilda Nordmark **mathilda.nordmark@fylgia.se**
Nejra Poljo **nejra.poljo@fylgia.se**

Nybrogatan 11
PO Box 55555
102 04 Stockholm
Sweden

Tel: +46 8 442 53 00
Fax: +46 8 442 53 15
www.fylgia.se

United Kingdom

Susan Barty and Poonam Majithia

CMS

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

In the UK, the two principal pieces of legislation regulating advertising are the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) (CPUTs) and the Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276) (BPRs). Both pieces of legislation are derived from EU law and much of the CPUTs and BPRs is also covered in the industry codes (see question 5).

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?

The Committee of Advertising Practice (CAP) is a self-regulatory body that is responsible for issuing new advertising rules. These rules are then enforced by the Advertising Standards Authority (ASA), its sister body. If an advertiser repeatedly breaches advertising rules or the breach is particularly serious, the ASA may refer the case on to Trading Standards or the Office of Communications (Ofcom). These bodies act as the ASA's 'legal backstop'.

Trading Standards is primarily responsible for breaches of the CPUTs and BPRs. In addition, Ofcom has a statutory duty to control radio and television advertising. The UK Competition and Markets Authority (CMA) may also play a part in enforcing the CPUTs where there is evidence of market-wide practices.

There are also a number of industry-specific bodies that regulate the advertising of specific products, for example, the Financial Conduct Authority (FCA) (financial services), the Medicines and Healthcare products Regulatory Agency (medicines), the Proprietary Association of Great Britain (over-the-counter medicines) and the Association of British Healthcare Industries (advertising of medical devices). The Information Commissioner's Office is responsible for data protection breaches including in relation to direct marketing.

3 What powers do the regulators have?

The ASA has the power to investigate breaches of the advertising codes but does not have the power to impose financial penalties (see question 5 for further details). In relation to the CPUTs and BPRs, Trading Standards has the power to carry out inspections. They can seek informal assurances from a trader or commence proceedings that can lead to a criminal conviction and unlimited fines. Ofcom has the power to investigate broadcasters and suspend their broadcasting licences.

4 What are the current major concerns of regulators?

A recent concern is advertising to children and the advertising of food and drink products that are high in fat, salt and sugar (HFSS). The increasing use of social influencers and affiliate marketing is also a hot topic, as is the use of consumer reviews and surveys in advertising. Advertisers should be aware that in certain situations such reviews and surveys may be considered to be 'adopted and incorporated' in the advertising. Telecoms advertising remains an ongoing issue (especially broadband speed claims) and the ASA is currently undertaking a review of the advertising of fibre broadband services.

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

The two principal industry codes of practice (issued by CAP) are the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) and the UK Code of Broadcast Advertising (the BCAP Code). All the main trade and professional bodies representing advertisers, agencies, service suppliers and media owners are members of CAP and they agree not to accept any advertising that contravenes the codes.

The CAP Code has a broad remit and applies to print advertising, posters and promotional media in public places, cinema and video commercials and non-broadcast electronic and online media (including social media), sales promotions, advertorials, other promotions (eg, competitions) and a number of other marketing communications. The BCAP Code regulates television (including on-demand television) and radio advertising.

The advertising codes are enforced by the ASA. Anyone may lodge complaints with the ASA, although commercial competitors must first correspond with the advertiser to try to resolve their complaint before approaching the ASA. The ASA can also decide to investigate an advert on its own initiative. If an advertisement is found to breach the advertising codes, the ASA will ask the advertiser to withdraw or change it. A large number of cases are resolved informally but where there is a formal investigation, the ASA's ruling is published online (leading to potential adverse publicity).

The ASA has a number of other sanctions that it can use to ensure compliance. This includes issuing alerts to CAP's members to request that they withdraw an advertiser's access to services such as advertising space, pre-vetting all advertising prior to publication or broadcast and requesting CAP's members to withdraw an advertiser's privileges and online sanctions (eg, asking websites to remove paid-for search advertising).

If an advertiser is repeatedly in breach of the codes or there is a particularly serious breach, the ASA may refer the advertiser to either Trading Standards or Ofcom (one of its legal backstops). These bodies can impose fines or seek an injunction in court. Ofcom can also withdraw a broadcaster's licence to broadcast.

Ofcom has also published a Broadcasting Code that covers some advertising-related issues, such as product placement and sponsorship.

6 Must advertisers register or obtain a licence?

Advertisers do not generally require a licence. However, broadcasters require a licence to broadcast and broadcasters are obliged by a condition of their broadcast licence to enforce ASA rulings. In addition, there are industry-specific licences (eg, for financial promotions or advertising of medicines).

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

CAP does provide a useful copy advice service but the ASA is not bound by the advice that is given by CAP. Generally, there is no requirement for non-broadcast advertising to obtain clearance before publication. All television advertising is pre-vetted by Clearcast and advertising messages on radio networks are pre-vetted by Radiocentre, but again the ASA is not bound by such clearance.

Private enforcement (litigation and administrative procedures)

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

Competitors normally challenge advertising through the ASA rather than by commencing court proceedings. This is faster and more cost-effective and the ASA's sanctions are commercially effective. The disadvantages are that the competitor must first attempt to resolve the issue with the advertiser before they can formally lodge a complaint. Further, the ASA does not have any legal powers, cannot impose financial penalties and no costs can be recovered for lodging a complaint.

Competitors may also be able to challenge advertisers in court on the basis of trademark infringement, passing off (misrepresentation of goodwill), defamation or malicious falsehood but legal proceedings are expensive and slow and courts have expressed reluctance to get involved in regulating advertising.

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?

Members of the public or consumer associations normally challenge advertising by making an ASA complaint for breach of the advertising codes. Members of the public may also bring civil or criminal legal proceedings against an advertiser if they commit an unfair commercial practice in breach of the CPUTs (businesses do not have this same direct right to redress under the BPRs). Although consumer associations cannot initiate legal proceedings, they can complain to the CMA about a particularly widespread market practice.

10 Which party bears the burden of proof?

The complainant needs to demonstrate an apparent breach of the advertising codes in an ASA complaint. The ASA will contact the relevant advertiser who will then be required to submit proof to the contrary. In legal proceedings, the claimant will bear the burden of proof.

11 What remedies may the courts or other adjudicators grant?

For ASA remedies, see question 5. Courts can award injunctions, interim injunctions, damages or an account of profits.

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

The ASA normally takes about two to three months to provide a ruling but difficult cases can take considerably longer. In relation to court proceedings, it may take a few weeks to obtain an interim (temporary) injunction to prevent the dissemination of the advertising. However, full trials can last a number of years.

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

Costs are not recoverable for ASA complaints and the costs of making a complaint will depend on how much external legal input a complainant will want to include. Costs for legal proceedings are substantially higher, normally thousands if not tens of thousands of pounds. The successful party will usually recover some costs but courts will ensure that any cost recovery is proportionate.

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

An ASA ruling can be reviewed by an independent review process if there is evidence to suggest that there has been a substantial flaw in the process or ruling or there is additional evidence. A party has 21 days to request a review following notification of the ASA's decision. If the independent review finds in favour of the appellant, the matter is then referred back to the ASA for reconsideration.

Court cases can be appealed all the way up to the Supreme Court and certain points of law may be referred to the European Court of Justice.

Misleading advertising

15 How is editorial content differentiated from advertising?

Editorial content is outside the ASA's remit and the advertising codes state that any advertising must be identifiable as such. In particular, advertisers should ensure that advertisements are designed and presented in such a way that they can easily be distinguished from editorial content. In particular, advertisers should also make clear that advertorials are advertising content.

The ASA and CAP have been focusing on the increasing use of advertorials and 'native advertising'. There has also been recent CAP and ASA guidance on making advertisements clear in new forms of online media, for example blogs, YouTube videos and other social media. In such circumstances the ASA considers whether the content is controlled by the advertiser (rather than the publisher) and whether it is disseminated in exchange for payment or another reciprocal arrangement.

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

Puffery (defined by the advertising codes as 'obvious exaggerations') and claims that the average consumer is unlikely to take literally are allowed and require no substantiation provided that they are not materially misleading.

The ASA has previously ruled that 'younger looking skin' (to advertise collagen) would not be perceived as puffery as this is an objective statement. However, 'the most comfortable beds in the world' was considered to be puffery because consumers' experiences of comfort of mattress types would vary and be based on their individual needs.

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

The general rules under the advertising codes are that advertising must not:

- materially mislead or be likely to do so;
- mislead by omitting material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner; or
- imply that expressions of opinion are objective claims.

'Material information' is defined as information that the consumer needs to make informed decisions in relation to a product (eg, the main characteristics of the product, the advertiser's identity and address, the product price including all taxes and delivery charges, any unusual payment, delivery or performance arrangements and that consumers have a right to withdraw from or cancel the purchase).

In addition, under the CPUTs, a number of misleading commercial practices are prohibited. It is a criminal offence to make false and misleading statements or omissions including about the existence of a product, the main characteristics of a product and the price. Omissions are considered to be 'misleading' if taking into account the circumstances of the commercial practice and the medium used to communicate it, it omits, hides, disguises or delays material information so as to cause the average consumer to take a transactional decision that they would not otherwise have made.

Disclaimers and footnotes are permitted in order to further explain or qualify any advertising claims. However, advertisers should be careful to ensure that they only clarify and do not contradict those 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?

Advertisers must be able to substantiate any objective claims and hold documentary evidence before publication to prove claims that consumers are likely to regard as objective. Without such evidence, the ASA will consider such advertising to be misleading. Advertisers may provide genuine customer testimonials in their advertising but these alone are unlikely to be considered sufficient to substantiate objective claims.

In relation to medical and scientific claims about health and beauty products (including slimming products, food supplements and cosmetics), evidence used to substantiate should generally consist of trials conducted on human subjects.

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

CAP has provided the following guidance:

- universal claims (ie, people prefer product A) will be difficult to make unless there is robust data heavily in favour of a positive result (the ASA has previously ruled that an 83 per cent positive response was not sufficient to support this type of claim);
- it is not a requirement to state sample sizes in advertising. However, where the sample size is unlikely to be big enough to substantiate a headline claim, then it is advisable to include qualifying text that gives the sample size;
- where consumers are given an incentive to participate in a survey (eg, sample products and a chance to win a large prize), this may undermine the impartiality of the participants; and
- when making claims based on extrapolated conclusions (eg, 80 per cent of British consumers prefer Flora, based on 500 British consumers), the advertising should make it clear that this is the basis of the claim to ensure that the advertising does not mislead by exaggeration.

In addition, the ASA has previously provided some guidance on what survey information should be provided when making a comparative claim. The ASA has advised that advertisers should provide information on the following:

- the methodology of the survey;
- the group of respondents represented in the survey sample;
- which competitors had been included in the comparison; and
- any factors that the respondents were required to consider when answering the question on which the claim was based.

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

Comparative advertising is regulated by the BPRs. Advertisers are permitted to identify a competitor by name, product or a trademark (implicitly or explicitly) provided that the comparative advertising:

- is not misleading;
- compares products meeting the same needs or intended for the same purpose;
- objectively compares one or more material, or relevant, verifiable and representative features of those products (including price);
- does not create confusion between the advertiser and their competitor (or their trademarks or products);
- does not discredit or denigrate the competitor's trademark, name, product or activities;
- does not take unfair advantage of the competitor's trademark, name or product; and
- does not present products as imitations or replicas of products bearing a protected trademark or name.

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

There is no requirement to provide a higher or special degree or type of proof in superiority claims. However, advertisers must follow the general rules to ensure any such claims are objectively accurate and can be substantiated.

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

Advertising must not exaggerate the capability or performance of a product or service, for example in visual representations (eg, depicting a surface cleaner easily removing difficult dirt) or in before and after photos. Advertisers are required to hold signed and dated proof that the photos are genuine and have not been manipulated. The photos should not exaggerate the efficacy of the product and advertisers need to ensure that they have relevant evidence to substantiate the impression created by the images.

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

Under the advertising codes (Rules 3.45 to 3.48), third-party endorsements and testimonials cannot generally be used in advertising unless permission is obtained from the relevant third party. The following additional rules apply:

- advertisers must hold documentary evidence that a testimonial or endorsement used in advertising is genuine;
- advertisers must hold contact details for the person or organisation that gives the endorsement or testimonial;
- testimonials must relate to the advertised product (rather than, for example, the advertiser generally); and
- claims that are likely to be interpreted as factual and appear in a testimonial must not mislead.

Further, advertising must not display a trust mark, quality mark or equivalent without the necessary authorisation, nor claim that the advertiser or the product has been approved, endorsed or authorised by any public or other body if it has not.

24 Are there special rules for advertising guarantees?

The advertising codes set out specific rules on guarantees that are defined to include warranties, after-sales service agreements, care packages and similar products. Advertisers should ensure that the word 'guarantee' is not used to cause confusion about consumer rights and, for example, it should be made clear if a guarantee is in addition to the statutory consumer rights protection. Advertisers should also ensure that full terms of the guarantee are provided to consumers before they are committed to taking it up and clearly state any significant limitations. If the guarantee is a money-back guarantee, advertisers should refund consumers who make a valid claim promptly.

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

The advertising codes do have specific rules relating to environmental claims (section 11 of the CAP Code and section 9 of the BCAP Code).

Environmental claims must be substantiated and based on the full life cycle of the advertised product. 'Greener' or 'friendlier' can be used if the advertised product provides a total environmental benefit over that of the advertiser's previous product or competitor products and the basis of the comparison is clear. Advertisers should also consult the Green Claims Code published by the UK Department for Environment, Food and Rural Affairs.

The advertising of certain electrical appliances must comply with the energy efficiency labelling requirements of EU Directive 2010/30/EU on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products and the Energy Information Regulations 2011 on labelling and standard product information of the consumption of energy.

26 Are there special rules for describing something as free and for pricing or savings claims?

Advertising must not describe something as 'free' if the consumer has to pay anything other than the unavoidable cost of responding and collecting or paying for the delivery of the item. As such, an item cannot be described as free if:

- the consumer has to pay additional fees such as for packing, packaging, handling or administration charges;
- the cost of what the consumer has to pay to take advantage of the offer (eg, if the consumer has to buy product A to get product B for free), has been increased to make up for the cost of the free item. In conditional-purchase offers particularly, the advertiser must ensure that the 'free' item is genuinely separate from and additional to the item being paid for;
- the quality of the product that the consumer must buy to take advantage of the free offer has been reduced; or
- the item constitutes an element of a package unless consumers are likely to regard it as an additional benefit (eg, because it has recently been added to a package without increasing the price).

Advertisers must make clear to consumers the extent of commitment they must make to take advantage of the free offer. Advertisers should also be careful to ensure that there is sufficient availability of the free items. It is advisable to make a reasonable estimate of demand beforehand.

In relation to pricing and savings claims, the advertising codes state that 'up to' and 'from' pricing claims must not exaggerate the availability or amount of benefits likely to be obtained. When using 'up to', at least 10 per cent of the products should be available at the maximum saving. In addition, when making pricing claims based on the recommended retail price (RRP) or a previous 'was' price, the RRP or previous price must represent the genuine normal selling price. Savings claims must be genuine (eg, the product must not have been sold at an artificially higher price beforehand). Advertisers should also consult the Chartered Trading Standards Institute Guidance for Traders on Pricing Practices when making pricing or savings claims.

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

Guidance from CAP indicates that 'new' should only be used where a product is sold for 12 months or less although this will depend on the nature of the product being advertised and the specific market. In a fast-moving market (such as technology), it is advisable to stop the 'new' claim after a shorter time period. Equally, in slow-moving markets, it may be possible to use the 'new' claim for over a year. It is also possible to use a 'new' claim where the product itself is not new but there is a new subset of it (eg, a new flavour). There is no specific guidance on 'improved', although any such claims should not be misleading, should not exaggerate the extent of improvement and should be substantiated.

Prohibited and controlled advertising

28 What products and services may not be advertised?

Advertising the following products or services to the public is prohibited in both broadcast and non-broadcast advertising: prescription medicines or medical treatments, infant formula, tobacco products and e-cigarettes that contain nicotine and are not licensed as medicines. As of 1 July 2017, HFSS food products will be prohibited from children's media.

In relation to broadcasting and radio, the BCAP Code states that the following is also prohibited:

- political broadcasts, except for certain party political or referendum broadcasts;
- breath-testing devices;
- betting systems or products that are intended to facilitate winning games of chance;
- guns, gun clubs and offensive weapons;
- prostitution, sexual massage services and escort agencies (television only);
- obscene material;
- products (though not services) for the treatment of alcohol and illegal-substance dependence;
- pyramid promotional schemes; and
- the acquisition or disposal of units in collective investment schemes not authorised by the FCA.

29 Are certain advertising methods prohibited?

Under the BCAP Code, radio advertising should not include sounds that are likely to be a safety hazard and television advertising should not be excessively noisy. TV advertising should not include visual effects or techniques likely to adversely affect viewers with photosensitive epilepsy. The Ofcom Broadcasting Code also prohibits subliminal messaging and surreptitious advertising. Unsolicited marketing is generally prohibited in the UK.

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

Children are defined as being under 16. The principal rules set out in the advertising codes are as follows:

- advertising must not condone, encourage or unreasonably feature behaviour that could be dangerous for children to emulate. Children should not appear unsupervised or going off with strangers;
- advertising must not condone or encourage practices that are detrimental to children's health;
- advertising must not include a direct exhortation to children to buy or to their parents or guardians; and
- advertising should not present children in a sexual way.

Advertisers should also ensure that they do not take advantage of children's inexperience, credulity or vulnerability (eg, by exaggerating features of a product) nor imply that children are likely to be ridiculed, inferior to others, less popular, etc, if they do not use a product or service.

There are also scheduling restrictions for broadcast advertising and, in addition to the ban on advertising HFSS food in children's media, advertising for alcohol, gambling or medicines should also not be placed in children's media or target children.

Update and trends

A recent hot topic for the advertising regulators has been the advertising of HFSS food products. Following a public consultation, with effect from 1 July 2017, new rules will be introduced to bring the non-broadcast advertising rules in line with the TV rules by the ASA, banning the advertising of HFSS food or drink products in children's media. The new rules also prohibit the use of licensed characters and celebrities popular with children unless they are being used to promote healthier options.

Another hot topic is the use of social media influencers in advertising. In particular CAP has issued new guidance to ensure that content produced by social media influencers for advertising a particular product or service is obviously identifiable as advertising.

31 Are there special rules for advertising credit or financial products?

The advertising of credit and financial products is regulated by the FCA and, under section 21 of the Financial Services and Markets Act, advertisers of such products must be authorised by the FCA. There are also provisions in the CAP Code regarding financial products.

Consumer credit advertising is subject to the FCA's rules in section 3 of the consumer credit sourcebook and the key rule is for such advertising to be, clear, fair and not misleading.

The advertising of high-cost short-term credit (HCSTC) has recently attracted concern, chiefly about targeting vulnerable people who do not always have a full understanding of the terms associated with the loan. Following some high-profile adverse rulings by the ASA, the ASA issued a public consultation in late 2015; but in June 2016 it announced that it had decided not to introduce scheduling restrictions on the advertising of HCSTC.

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

Rule 12 of the CAP Code and Rule 11 of the BCAP Code deal with the advertising of medicines, medical devices and health. This area is also heavily regulated by statute (Human Medicines Regulations 2012) and enforced by various regulatory bodies such as the Medicines and Healthcare Products Regulatory Agency (MHRA), the Proprietary Association of Great Britain (over-the-counter medicines) and the Association of British Healthcare Industries (medical devices) who also have their own advertising codes.

Medicinal or therapeutic claims can only be made on a medicinal product that is authorised by the MHRA. A medicinal claim is defined as a claim that a product can be used to make a medical diagnosis or treat or prevent disease, injury or an illness.

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

Health and nutrition claims are regulated by EU Regulation 1924/2006 on nutrition and health claims. Under the Regulation, nutrition or health claims can only be made if a claim is specifically authorised and listed on the EU Register of Authorised Health Claims. In addition, any general health claims (eg, X gives you energy) must be supported in the advertising by a specific authorised health claim. Further, there are rules on when nutrition claims can be made (eg, reduced or low

claims). For example, reduced sugar claims can only be made if the sugar is reduced by 30 per cent on the previous product.

Regarding weight control products, any claim to the effect that a product is an aid to slimming must be accompanied by a statement making it clear that this will only be the case if it is consumed as part of a proper calorie-controlled diet (Schedule 6 of the Food Labelling Regulations 1996 (SI 1996/1499)). The advertising codes also contain regulations on the advertising of slimming or diet products. Rule 13 of the CAP Code sets out how and to whom weight control products may or may not be marketed.

34 What are the rules for advertising alcoholic beverages?

The advertising codes require that advertising should be socially responsible and should neither encourage excessive drinking or daring behaviour nor suggest that drinking can overcome boredom, loneliness or other problems. Care should be taken not to exploit the young, the immature or those who are mentally or socially vulnerable.

People shown drinking should neither be nor look under 25 years of age and should not be shown behaving in an adolescent or juvenile way, nor should advertising be associated with those under 18 years or reflect their culture. Younger people may be shown in some contexts but should never be shown drinking. Advertising should not suggest that drinking alcohol is a reason for the success of any personal relationship or social event. Links must not be made between alcohol and seduction, sexual activity or success.

The Portman Group Code of Practice (an industry code) also covers the promotion of alcoholic drinks. Although it is a voluntary code, when a complaint is made under the Code to the Portman Group's Independent Complaints Panel, the panel will try to enforce the decision, in particular through retailer alert bulletins asking retailers not to stock products in breach of the Code.

35 What are the rules for advertising tobacco products?

The UK has implemented a ban on almost all forms of advertising and promotion for cigarettes and other tobacco products imposed by the EU Tobacco Directive (Directive 98/43/EC). In May 2016 the Standardised Packaging of Tobacco Products Regulations 2015 came into force, introducing plain packaging for tobacco products, e-cigarettes and herbal cigarettes. The regulations stipulate that only minimal branding and advertising is permitted on tobacco products.

Regarding e-cigarettes, the advertising of unlicensed, nicotine-containing electronic cigarettes and e-liquids is prohibited in broadcast media and some non-broadcast media.

36 Are there special rules for advertising gambling?

The Gambling Act 2005 permits gambling advertising but this law does not apply to Northern Ireland. Section 16 of the CAP Code and section 17 of the BCAP Code contain rules on gambling advertising and spread betting. They focus on ensuring that advertising is socially responsible and does not appeal to or exploit young people (those under 18 years). In addition, gambling companies are required to obtain a licence from the UK Gambling Commission, which also imposes controls on advertising.

37 What are the rules for advertising lotteries?

Lotteries can only be advertised if they are licensed by the Gambling Commission or a local authority. Section 17 of the CAP Code and section 18 of the BCAP Code contain rules on lotteries, and as with gambling, the rules are designed to prevent socially irresponsible advertising or to ensure such advertising does not appeal to young people. Further, advertising must not suggest that participating in a lottery can be a solution to financial concerns or provide financial security. The UK National Lottery must also comply with the advertising controls stipulated in the National Lottery Advertising and Sales Promotion Code of Practice.

38 What are the requirements for advertising and offering promotional contests?

Promotional contests can be either skills-based competitions or prize draws (games of chance). Advertisers should be careful to ensure that prize draws have a free entry route, otherwise they may be deemed an illegal lottery. The advertising of promotions should communicate all applicable significant conditions or information including how to participate, free entry route information, start and closing dates, prize details, material restrictions (eg, geographical or age) and the promoter's name and address.

Advertisers should not exaggerate consumers' chances of winning a promotional contest or imply that they are lucky or have progressed to a further stage in a promotion if they have not. Contests should also be administered fairly (use of an independent panel in skills-based competitions or supervision in prize draws). Further rules are set out in section 8 of the CAP Code and section 28 of the BCAP Code.

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

Commercial sponsorship is generally permitted in both broadcast and non-broadcast advertising except for on the state broadcaster, the BBC's, television channels. Both commercial sponsorship and product placement is regulated by Ofcom's Broadcasting Code. Programming (including a channel) may not be sponsored by any sponsor that is prohibited from advertising on television and a sponsor must not influence the content or scheduling of programming in such a way as to impair the editorial independence of the broadcaster. Sponsorship must also be clearly identified by sponsorship credits.

Product placement is permitted in films, TV series, sports programmes and light entertainment programmes. It must not:

- affect a broadcaster's editorial independence;
- be surreptitious;
- directly encourage purchase;
- be unduly prominent; or
- advertise any prohibited products.

C/M/S/
Law.Tax

Susan Barty **susan.barty@cms-cmno.com**
Poonam Majithia **poonam.majithia@cms-cmno.com**

Cannon Place
78 Cannon Street
London EC4N 6AF
United Kingdom

Tel: +44 207 367 3000
Fax: +44 207 367 2000
www.cms.law

Further, product placement should clearly be signalled with the PP symbol at the beginning and end of the programme and after any commercial breaks. The Broadcasting Code also regulates virtual advertising and prop placement and prohibits surreptitious advertising.

40 Briefly give details of any other notable special advertising regimes.

The advertising codes have general rules on ensuring advertising does not cause serious or widespread offence. Care must be taken to avoid causing offence on the grounds of race, religion, gender, sexual orientation, disability or age.

It is also worth noting that, although certain political advertising is prohibited in broadcasting, political advertising is generally outside the ASA's remit.

Social media

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

There are no particular rules relating to the use of social media but the advertising codes apply in the same way to social media (including user-generated content that has been adopted and incorporated into advertising) as they do to other marketing communications. Advertisers must also ensure that they comply with the relevant social media platform's advertising terms and conditions.

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

There are a number of examples, including in September 2016, a tweet by a well-known TV presenter advertising a yoghurt was held to breach the advertising codes for not being clearly identifiable as a marketing communication. The ASA considered that the tweet was presented in a similar 'voice' to the presenter's other tweets and did not include any clear identifier, such as '#ad', to distinguish it from her own content.

43 Are there regulations governing privacy concerns when using social media?

Data protection in relation to advertising is generally covered by the Privacy and Electronic Communications Regulations, which regulate direct marketing and the Data Protection Act 1998, which will be replaced by the EU's General Data Protection Regulation in May 2018. In a social media context, care should be taken to ensure that users have consented to the use of their data for online behavioural advertising and to receive marketing messages. Unsolicited marketing messages (including via social media) are prohibited.

United States

Rick Kurnit and Hannah Taylor
Frankfurt Kurnit Klein & Selz, PC

Legislation and regulation

1 What are the principal statutes regulating advertising generally?

Federal law

There are numerous federal laws governing advertising in the United States, many enforced by the Federal Trade Commission (FTC). There are general statutes prohibiting deceptive practices, as well as statutes governing specific marketing practices. Some key examples are:

- the FTC Act: the FTC Act prohibits 'unfair or deceptive acts or practices';
- the Lanham Act: the Lanham Act is the federal false advertising statute; and
- the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The Consumer Financial Protection Bureau (CFPB) has the authority to implement and enforce federal consumer financial law, and their purview is 'non-bank' financial companies that have historically fallen outside the domain of consumer protection agencies.

State and local law

Each state also regulates advertising, both with general consumer protection statutes (many modelled on the FTC Act), as well as with statutes regulating specific practices (such as the administration of sweepstakes and contests). Some counties and municipalities also have consumer protection laws. These laws run the spectrum from general prohibitions on deception to specific requirements related to pricing and other retail practices. Some examples include:

- New York: The General Business Law in New York provides that 'deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful'. New York law also prohibits 'false advertising in the conduct of any business, trade or commerce or in the furnishing of any service'.
- California: The Business and Professions Code in California provides that it is unlawful to make any statement that 'is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading' (see *Williams v Gerber Products Co*, 523 F3d 934 (Ninth Circuit 2008) and *Kwikset Corp v Superior Court*, 51 Cal 4th 310 (2011)).
- New York City: New York City prohibits 'any deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts'. See NYC Administrative Code section 20-700. The New York Court of Appeals has interpreted the statute to give New York City broad authority to go after a wide range of deceptive practices. See, for example, *Polonetsky v Better Homes Depot Inc*, 735 NYS 2d 479 (2001) (real estate sales and repairs); *Karlin v IVF America Inc*, 690 NYS 2d 495 (1999) (medical services).

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?

As noted above, numerous regulatory bodies have authority over advertising and marketing. Among them are the following:

- the FTC is primarily responsible for enforcing the nation's federal consumer protection laws, including the FTC Act, which prohibits 'unfair or deceptive acts or practices' (see 15 USC section 45); and
- state attorneys general and local district attorneys also have jurisdiction to enforce state and local consumer protection laws.

In addition, there are regulatory agencies charged with responsibility over specific industries and their advertising and marketing practices:

- the US Food and Drug Administration (FDA) is charged with regulating prescription drug and biomedical advertising (see, for example, 21 CFR 312.7(a));
- the CFPB has authority to implement and enforce federal consumer financial law for 'non-bank' financial companies (see, for example, 12 USC section 5491);
- the Department of Transportation has jurisdiction to regulate airline advertising (see, for example, 49 USC section 41712);
- the Securities Exchange Commission has control over the false advertising of securities (see, for example, Securities Act of 1933 and Securities Exchange Act of 1934);
- the Financial Industries Regulatory Authority (FINRA) has a variety of rules and guidelines affecting advertising by its members (see, for example, FINRA Rule 2210); and
- the Federal Alcohol Administration regulates unfair competition, including false advertising, in connection with the interstate sale of alcoholic beverages (see, for example, 27 USCA section 205(e), (f)).

3 What powers do the regulators have?

Remedies available for false advertising vary widely, based on the claims that were brought, and range from equitable relief to substantial money damages. Examples of the types of remedies that may be available to the FTC include:

- disgorgement: an order requiring the advertiser to pay the total amount of revenues or profits by refunds to consumers;
- penalties: civil penalties of up to US$16,000 per violation, in certain types of cases;
- injunction: an order prohibiting the marketing method or practice;
- fencing in: a 'fencing in' order prohibits more than the current conduct and prohibits marketing practices or marketing a type of product;
- products: an order prohibiting advertising certain types of products;
- marketing practices: an order prohibiting engaging in certain types of marketing practices;
- trade name: an order barring the use of a deceptive trade name;
- disclosures: an order requiring certain disclosures to be included in future advertising;
- direct notification: an order requiring sending notices to consumers;
- consumer education: requiring the marketer to supply or publish information; and

- corrective advertising: an order requiring the advertiser to engage in corrective advertising:

  If a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.
  (*Novartis Corp v FTC,* 223 F3d 783 (DC Cir 2000).)

4 What are the current major concerns of regulators?

Regulators in the United States have been particularly focused in recent months on 'native advertising' and disclosures by influencers and other endorsers of their connection with an advertiser. The FTC and the states have been actively pursuing measures and cases that require marketers to sufficiently distinguish between editorial content and adverts designed to mimic the look of editorial content. Other areas of concern are claims about 'natural' products, environmental benefits, health and nutrition, the sufficiency of digital disclosures on small screens and mobile devices, and privacy.

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

Self-regulation plays an important role in the advertising industry. Industry groups have promulgated respected and widely followed self-regulatory codes, and many advertising disputes are resolved through self-regulatory dispute mechanisms. Examples of self-regulatory groups, with advertising codes or dispute regulation programmes, include:

- the National Advertising Division (NAD) resolves truth-in-advertising disputes (see www.nadreview.org);
- the Children's Advertising Review Unit (CARU) resolves disputes regarding compliance with the CARU Self-Regulatory Guidelines for Children's Advertising (see www.caru.org);
- the Electronic Retailing Self-Regulation Program (ERSP) resolves disputes regarding truth in advertising, primarily for direct response advertising (see www.narcpartners.org/ersp and www.retailing.org);
- the Better Business Bureau has issued its own Code of Advertising (see www.bbb.org/membership/codeofad.asp);
- the Direct Marketing Association has issued numerous guidelines on marketing practices, such as the Guidelines for Ethical Business Practice (see www.the-dma.org);
- the Mobile Marketing Association has issued various guidelines for the mobile marketing industry (see www.mmaglobal.com);
- the Brand Activation Association has issued industry guidance, including its Best Practices for Rebates (see www.baalink.org); and
- the Word of Mouth Marketing Association, which addresses the issues faced by buzz marketers, has issued its Word of Mouth Marketing Code of Ethics (see www.womma.org).

Participation in cases heard by advertising review programmes administered by the Council of Better Business Bureaus, such as the NAD, the CARU and the ERSP, is voluntary and their recommendations are not binding. However, regulators, particularly the FTC, have given notice that they will investigate cases referred to them by self-regulatory agencies where the marketer has declined to participate. Examples of remedies sought include:

- withdrawal: ceasing use of the advertising (or element of the advertising) that has been determined false or misleading;
- modifications: modifications to the advertising in the future as specified by the regulatory group;
- disclosures: adding specific information to the advertising that is deemed necessary in order to avoid consumer confusion or deception; and
- product name change: for example, removing 'all-day' from the 'one-a-day all-day energy' product name.

6 Must advertisers register or obtain a licence?

No, not in the United States.

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

The FTC's Rules of Practice provide that the FTC or its staff, in appropriate circumstances, may offer industry guidance in the form of an advisory opinion. Advisory opinions serve a public informational and educational function, in addition to their value to the opinion requesters. The basic requirements for obtaining advisory opinions, the limitations on their issuance and application, and the point at which both a request for an advisory opinion and the advisory opinion will be placed on the public record are described in sections 1.1 to 1.4 of the Commission's Rules of Practice, 16 CFR sections 1.1 to 1.4.

The major broadcast networks (such as ABC, CBS, NBC and Fox), as well as some others, require that commercials that air on their networks comply with their guidelines. In order to ensure compliance, the networks pre-clear commercials before they are accepted for broadcast.

Some industry groups provide ratings on entertainment products, to give consumers information about the content of those products. They include the Motion Picture Association of America (www.mpaa.org), the Entertainment Software Rating Board (www.esrb.org) and the Recording Industry Association of America (www.riaa.com).

Many industry groups have also issued self-regulatory guidelines that are applicable to the marketing of specific types of products. Examples include the Distilled Spirits Council of the United States (DISCUS) (www.discus.org) and the American Gaming Association (www.americangaming.org).

Private enforcement (litigation and administrative procedures)

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

The federal Lanham Act provides the main remedy (in addition to state law claims) for competitors to address false advertising claims. Section 43 of the Lanham Act provides, in relevant part:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which ... in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

See 15 USC section 1125(a)(1)(B).

Additionally, as noted above, many advertising disputes are resolved through self-regulatory dispute mechanisms such as the NAD and the CARU.

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?

Private consumer actions for false advertising, including class actions, may be brought under state laws in various state and federal courts, as consumers in most states have standing under state false advertising statutes. See, for example, California Civil Code section 1780(a); NY General Business Law section 350.

10 Which party bears the burden of proof?

Private plaintiffs, as well as administrative authorities, bear the burden of proof in false advertising litigation.

11 What remedies may the courts or other adjudicators grant?

Temporary restraining orders prohibiting publication of advertising pending a preliminary injunction hearing are possible, but they are

rarely granted. First Amendment concerns and the need for evidence of the meaning actually communicated are grounds for waiting for a hearing. However, where advertising makes a claim that is found to be literally false, a court may issue a temporary order prohibiting publication pending a hearing. Within a week to 10 days of a section 43(a) action it should be possible to have a hearing – usually devoted to the interpretation of the advertising and the adequacy of the substantiation. Irreparable injury is presumed if likelihood of success on the merits of a false advertising claim is established by a direct competitor. In most cases the ruling on a preliminary injunction has been dispositive. Frequently, the parties consent to one hearing, combining the preliminary injunction hearing with the trial. Altering the advertising that has been preliminarily enjoined is usually less expensive than continuing the litigation. Permanent injunctions are granted without proof of lost sales.

One tactic that has met with mixed results is to pull the offending advertising and submit revised material to the court. In order to recover damages, a plaintiff must establish actual consumer confusion or deception or establish that the defendant's actions were intentionally deceptive, giving rise to a rebuttable presumption of consumer confusion. The court may treble actual damages and award attorneys' fees under sections 35 and 36 of the Lanham Act. A competitor's damages may include the profits obtained during the time that the false advertising was in use, as well as an amount equal to the cost of the advertising campaign in order to permit advertising to correct the misimpression. Such damages may only be available where the advertising was published wilfully and in bad faith.

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

A Lanham Act case instituted in a federal court may be concluded in a matter of months, if the parties consent to merge the trial with the preliminary hearing. However, the judge may reserve his or her decision and might take several months to decide, even whether to grant a preliminary hearing. Often the losing party will appeal the grant or denial of the preliminary injunction, since this a strong indicator of the way the judge will rule even after hearing additional evidence. The appeal can be expedited and therefore only take a month, or may proceed normally and take three to six months or more. A full trial can take a year or more and be followed by an appeal. Damages are usually left for a later hearing, after the rendering of the decision on liability, and are rarely pursued, as once the only issue is the amount of money, settlement makes more economic sense.

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

A federal false advertising case moves quickly with the attendant costs during the first few weeks culminating in the preliminary injunction hearing mounting rapidly. Depending on the complexity of the claim (and whether scientific evidence and experts will be necessary or whether the claim is implied so that consumer perception studies are necessary), the cost could range from US$100,000 to US$500,000 (if a large US or global firm is retained). The prevailing party may recover reasonable attorney's fees, but only by the discretion of the judge and only on proving that the deception was knowing and wilful.

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

A decision of a trial court is appealable as a right to a higher tribunal to address claimed errors of law, but generally not errors of facts found by a trial court. NAD decisions can be appealed to the National Advertising Review Board, which composes a panel of five advertising experts to review the ruling of the NAD staff attorneys. These panels rarely reverse the NAD determinations about the competence of substantiation, but will frequently reassess the determination of what is communicated by the advertising.

Misleading advertising

15 How is editorial content differentiated from advertising?

Section 5 of the FTC Act prohibits 'unfair or deceptive acts or practices'. The FTC has held that it is potentially deceptive (or a 'misrepresentation or omission likely to mislead the consumer acting reasonably to the consumer's detriment') for an advertiser not to disclose that its content is not pure editorial content but is instead advertising (see, for example, www.ftc.gov/opa/2012/01/fakenews.shtm). In December 2015, following on from its 2013 workshop 'Blurred Lines: Advertising or Content,' the FTC issued enforcement guidance on native advertising in the form of an Enforcement Policy Statement and a Guide for Business. Highlights from the Guidance and Policy Statement include the following:

- although the FTC does not define 'native advertising', the Policy Statement notes that native advertising encompasses a broad range of advertising and promotional messages that match the design, style and behaviour of the digital media in which it is disseminated. The FTC says that native advertising is deceptive when it misleads consumers as to the 'nature or source' of the content. In other words, it is deceptive when consumers do not realise that an advertiser is behind the content they are viewing;
- the more a native advert is similar in format and topic to content on the publisher's site, the more likely that a disclosure will be needed to prevent deception. Disclosures may be necessary on both the publisher's site and on linked pages where the content appears;
- an article which is not itself an advert, when promoted by a company through a recommendation widget, can become an advert by the company. That company is in turn responsible for ensuring that the statements in the article are truthful and substantiated;
- the FTC reiterated that, like other disclosures, whether a disclosure regarding a native advert's commercial nature is clear and conspicuous will be measured by its performance: did consumers actually notice, process and understand the disclosure? In order to be effective, according to the FTC, disclosures should appear near where consumers are likely to look first; and
- common terms like 'promoted' or 'presented' may no longer be adequate to convey that a sponsoring advertiser was involved in the creation of the content. Phrases that include the actual word 'advertisement' are preferable.

The FTC has also promulgated the Guides Concerning Use of Endorsements and Testimonials in Advertising (16 CFR section 255 et seq). Under the Guides, advertisers could ostensibly be subject to liability for failure to adequately communicate any material information that the consumer of the content should have to comprehend any material influence over its content other than the apparent author's unbiased choice (Id section 255.1(a); *RJ Reynolds Tobacco Co v FTC*, 192 F2d 535 (Seventh Circuit 1951); Cliffdale Associates, 103 FTC 110 (1984)). Also, content deemed 'advertising' (as opposed to editorial content) can have implications for clearance issues. Once the content becomes advertising, or 'commercial speech', it is granted less First Amendment protection (eg, for fair use in copyright) and no protection against right of publicity claims.

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

Claims by advertisers must be able to be substantiated, but substantiation is not required for puffery (see *In the matter of Pfizer Inc*, 81 FTC 23 (1972)). The crucial issue is whether the advertising makes an actual, objectively provable claim about the product that is likely to influence consumers' purchasing decisions or whether the claim is an obviously exaggerated representation that 'ordinary consumers do not take seriously' (see the FTC Deception Policy Statement appended to *In the matter of Cliffdale Associates, Inc* 103 FTC 110 (1984)).

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

Section 5 of the FTC Act prohibits 'deceptive' acts or practices. The FTC defines a 'deceptive' act or practice as a misrepresentation or omission that is likely to mislead the consumer acting reasonably under the circumstances to the consumer's detriment (see the FTC Deception Policy Statement appended to *Cliffdale Associates Inc*, 103 FTC 110 (1984); see also *FTC v Telebrands*, 2005 WL 2395791 (2005) (FTC decision)). If a disclosure is required in order to prevent a claim from being misleading, the FTC generally requires the disclosure to be 'clear and conspicuous'. The factors that the FTC considers when determining whether a disclosure is 'clear and conspicuous', include the placement

of the disclosure in the advert, the proximity to the claim being modified, the prominence of the disclosure, and how the disclosure is presented (such as, are there other elements of the advert that distract consumers' attention from the disclosure and is the disclosure in language that is easy to understand?) (see, for example, '. com Disclosures: How to Make Effective Disclosures in Digital Advertising' and FTC Deception Policy Statement 'Qualifying disclosures must be legible and understandable').

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?

The general rule is that all express and implied claims that are made in advertising must be truthful and not deceptive, and there must be proof for claims before they are disseminated. See 15 USC section 45. An advertiser must have a 'reasonable basis' for any claims that it makes in its advertising (see *In the matter of Pfizer Inc*, 81 FTC 23, 87 (1972) and FTC Advertising Substantiation Policy Statement). In order to determine whether an advertiser has a 'reasonable basis' for its claims, the following factors are considered: the type of claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation and the level of substantiation that experts in the field would agree is reasonable.

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

Surveys must conform to the appropriate research techniques. An expert in research methodologies is usually required in order to be sure that the survey is projectable both geographically and demographically over the scope suggested in any advertising. If no limitations are expressed, the survey must be projectable on a national basis. The population surveyed should be unbiased. Any bias or limitation with respect to the population should be disclosed (see *Litton Industries*, 92 FTC 1 (1981), aff'd, 676 F2d 364 (1982) (survey was limited to Litton-authorised dealers)).

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

The FTC specifically encourages comparative advertising, when truthful and non-deceptive, since it is a source of 'important information to consumers and assists them in making rational purchase decisions' and because it 'encourages product improvement and innovation, and can lead to lower prices in the marketplace'. See 16 CFR section 14.15(c). But comparative advertisements must be truthful, not deceptive or misleading, and, if an advertiser chooses to compare unlike products, it has the obligation to clearly delineate the nature and limitations of the comparison and disclose material differences between the products. In a truthful comparative advertisement, an advertiser may use a competitor's name, mark, logo or likeness, but any advertising that contains disparaging, unfair, baseless, incomplete or false comments or comparisons of competitors' products, or any that makes false or misleading claims about a competitor (or its products or services) could put the advertiser at risk of liability under the Lanham Act.

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

If an advertiser claims in its advertising to have specific substantiation for its claims (eg, 'tests prove ...'), then it must, in fact, have that substantiation. See the FTC Advertising Substantiation Policy Statement. When dealing with health and safety claims, the FTC generally requires a higher level of substantiation. The FTC typically requires 'competent and reliable scientific evidence' (see, for example, *FTC v Garvey, et al* (2000) (consent order)). The FTC has defined 'competent and reliable scientific evidence' as: 'tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results'. See, for example, id.

The FTC has indicated that 'competent and reliable scientific evidence' consists of 'at least two adequate and well-controlled human clinical studies of the product, or of an essentially equivalent product, conducted by different researchers, independently of each other'. See *FTC v Iovate Health Sciences USA Inc* (2010) (consent order) (claims by dietary supplement manufacturer that its supplements could help consumers lose weight and treat or prevent colds and other illnesses); *In the matter of Nestlé Healthcare Nutrition Inc* (consent order) (claims by Nestlé that its BOOST Kid Essentials protects against cold, flu and other illnesses by strengthening the immune system); but see *Pom Wonderful LLC v FTC*, No. 13-1060 (DC Circuit 30 January 2015) (holding that the FTC failed to justify its requirement that Pom have at least two randomised and controlled trials as a precondition for making disease claims).

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

If a product's performance is shown in an advertisement, the general rule is that the demonstration must be real, without any special effects whatsoever. In addition, the advertiser must also be able to substantiate that the performance shown reflects the performance that consumers can typically expect. Demonstrations must accurately show a product's performance, characteristics or features. Demonstrations must show the performance that consumers can typically expect to achieve. It is generally deceptive to use an undisclosed mock-up of product performance. Special effects should not generally be used to demonstrate (or misrepresent) product performance. Even if a demonstration is accurate, advertisers are still responsible for implied claims that may be communicated. Not all depictions of product performance are 'demonstrations', however. If the depiction is not understood to communicate product performance or specific product attributes, it may not be necessary for the depiction to be real. A dramatisation may be permissible, when the fact of the dramatisation is disclosed, so long as the dramatisation accurately reflects product performance.

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

The FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising set forth the FTC's views on the use of consumer, celebrity, expert and organisational endorsements in advertising (see 16 CFR section 255.5). Endorsements must be truthful, non-deceptive and be substantiated by the advertiser. Any connection between the endorser and the advertiser that might materially affect the weight or credibility of the endorsement (in other words, a relationship not reasonably expected by the audience) should be disclosed. See 16 CFR section 255.5.

24 Are there special rules for advertising guarantees?

A guarantee serves to reinforce the advertiser's promise of performance and will often be treated as a factual claim that must be substantiated. It is not sufficient that the advertiser will in fact refund the purchase price if the product does not perform as advertised. The advertiser must have a reasonable basis for believing that the product will perform as advertised. In addition, certain products are subject to rules requiring that the terms of their warranty must be available before purchase (see FTC Pre-Sale Availability Rule, 16 CFR section 702). Any advertising of such goods that references their warranty must disclose that the warranty document is available for examination prior to purchase (FTC Guidelines For Advertising Warranties, 16 CFR section 239). A 'money-back guarantee' is deemed to be unconditional unless the terms and conditions are clearly communicated. Thus, if the consumer must return the unused portion, or send in the proof of purchase, this must be disclosed (16 CFR section 239.3). A 'lifetime guarantee' is presumably the life of the original purchaser unless it is clarified in the advertising, for example, 'for as long as you own your car' or 'for as long as your car runs' (16 CFR section 239.4).

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

The FTC Guides for the Use of Environmental Marketing Claims (the Green Guides) set forth general standards for promoting the environmental benefits of products in advertising. See 16 CFR part 260.

26 Are there special rules for describing something as free and for pricing or savings claims?

'Free' suggests a special offer giving the consumer the free item at no cost over the cost previously established or actually planned (in the case of an introductory offer) (see FTC Guidelines on the Use of 'Free', 16 CFR section 251 and *FTC v Mary Carter Paint Co*, 382 US 46 (1965)). Any conditions or limitations on the free offer must be clearly and conspicuously disclosed. Local regulations may specify type size and placement. See, for example, New York City Consumer Protection Regulation 2, requiring a type size at least half the size of the word 'free'.

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

An FTC advisory opinion suggests that 'new', 'introducing' and similar terms should be used only where the product has been generally available in the particular market where the advertising appears for less than six months. See http://rms3647.typepad.com/files/advisory-opinion.pdf. Under the rules governing the identification of textiles, fabric cannot be advertised as 'new' if it has been reclaimed or respun. The rules governing advertising claims for tyres prohibit the use of the word 'new' to describe retreads. However, when no specific regulation applies, each case must be considered within the context of the advert. At least one FTC advisory opinion has suggested a six-month limit on the use of the word when advertising the introduction of a 'new' product not previously on the market.

The old FTC guidance says that a product may be described as 'new' if it 'has been changed in a functionally significant and substantial respect'. A product may not be called 'new' when only the packaging has been altered or some other change is made that is functionally insignificant or insubstantial. In a staff advisory opinion in response to a Sony Electronics Inc proposal, the FTC has also suggested that the term 'new' may be used to describe returned consumer electronics products when it can reasonably be determined that the products were never used.

Prohibited and controlled advertising

28 What products and services may not be advertised?

Any legal product may be advertised. Disclosures, for example, tobacco product warnings, may be required. Restrictions apply to targeting certain product advertising to minors, and advertising directed at children may require special disclosures.

29 Are certain advertising methods prohibited?

In 1974, the Federal Communications Commission (FCC) issued a public notice defining subliminal advertising as: 'any technique whereby an attempt is made to convey information to the viewer by transmitting messages below the threshold level of normal awareness'. See Public Notice Concerning the Broadcast of Information By Means of 'Subliminal Perception' Techniques, 44 FCC 2d 1016, 1017 (1974). The same policy statement provides:

> *We believe that use of subliminal perception [technique] is inconsistent with the obligations of a licensee, and we take this occasion to make clear that broadcasts employing such techniques are contrary to the public interest. Whether effective or not, such broadcasts clearly are intended to be deceptive. (Id.)*

Contemporary thinking is that subliminal advertising is ineffective and, if used, a form of deceptive advertising. In the current version of the FTC's 'Advertising FAQ's: A Guide for Small Business' (http://business.ftc.gov/documents/bus35-advertising-faqs-guide-small-business), the FTC states that 'it would be deceptive for marketers to embed ads with subliminal messages that could affect consumer behaviour. However, most consumer behaviour experts have concluded that such methods aren't effective.'

The Federal CAN-SPAM Act of 2003, 15 SSC section 7701, pre-empts state law and regulates unsolicited commercial email, which refers to any electronic mail message with the principal purpose of promoting the sale of goods or services, that is sent to a consumer with whom the sender does not have an existing business or personal relationship and that is sent without the consumer's consent or prior request. See 15 USC section 7702(2)(a). The Act requires any commercial email to include:

- a working opt-out procedure;
- notice of the recipient's right to opt out;
- the sender's physical address;
- accurate header information and subject lines;
- labelling the message an advertisement (but not necessarily 'ADV' in the subject line); and
- warning labels on sexually explicit material.

In addition, the Act prohibits opening multiple email accounts using false information, using open relays to transmit unsolicited commercial email, falsifying header information, using deceptive subject lines and harvesting email addresses.

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

There have been numerous efforts, led primarily by the CARU, to protect children from inappropriate marketing messages and purchase solicitations. One of the CARU's most significant efforts is its Self-Regulatory Guidelines for Children's Advertising, which, although lacking the direct force of law, are – like the FTC's Fair Information Practice Principles – extremely influential and useful to advertisers, as well as e-commerce companies. Advertising for adult products should not be directed at minors. Advertising directed at minors may require additional disclosures, for example, separation from the content on broadcast advertising, and hosts of children's programmes may not advertise products on the programmes.

31 Are there special rules for advertising credit or financial products?

Federal Reserve Board regulations govern advertising of financing terms. Truth in Lending Act disclosure under Regulation Z requires disclosure of certain terms, including the annual percentage rate of interest when any related representation is made (see 15 USC section 1601 and 12 CFR section 226). Consumer Leasing Act disclosures under Regulation M require disclosure of the following terms whenever any details of the lease terms are included in the advertising:

(i) the lease;
(ii) the total amount to be paid up front, including security deposit;
(iii) the schedule of payments and total;
(iv) whether there is an option to purchase; and
(v) the liability at end.

(See 15 USC section 1667 and 12 CFR section 213.) Regulations permit advertising on radio and television to include (i), (ii) and (iii) with the remaining disclosures on an 800 telephone number or in a print advert. The FTC has aggressively enforced these regulations in leasing advertising (see *Grey Advertising*, CCH Trade Rep paragraph 24, 373).

Further, under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB has the authority to implement and enforce federal consumer financial law, and their purview is 'non-bank' financial companies that have historically fallen outside the domain of consumer protection agencies.

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

The FDA regulates advertising for drugs – essentially any claims that a product affects the body or disease. Such advertising must present a fair balance between claimed benefits and disclosure of risks and side effects. All advertisements must be submitted to the FDA at the time of the initial dissemination (preclearance is the usual practice). Print advertising must include the 'brief summary' describing each specific side effect and contraindication in the FDA-approved labelling. Broadcast advertising must include a thorough description of the major risks in either the audio or in video and provide an effective means for consumers to obtain the approved labelling (see Guidance for Industry: Consumer-Direct Broadcast Advertisements). Off-label use (use of drugs other than as approved by the FDA) may not be advertised. Comparative claims must be supported by two well-controlled clinical studies.

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

Under the Nutrition Labeling and Education Act of 1990, the FDA was required to develop definitions for food labelling of terms such as 'free', 'low', 'light', 'lite', 'reduced', 'less' and 'high'. The regulations for labels became effective in May 1994. The FTC opposed legislation to require food advertising containing nutrient content claims or health claims to conform to the FDA regulations as overly restrictive of advertising. In May 1994, the FTC issued an Enforcement Policy Statement on Food Advertising (59 Fed Reg 28,388). It gives great weight to the FDA definitions. Thus, advertising contrary to the labelling regulations is likely to be investigated by the FTC. The FDA defines a health claim as 'any claim that characterises the relationship of any nutrient to a disease or health-related condition', 21 CFR section 101.14(a)(1). The health claims recognised by the FDA include calcium for osteoporosis, sodium and hypertension, fat and cholesterol in coronary disease, dietary fat and cancer, fibre found in fruits, vegetables and grains for cancer and heart disease, antioxidants found in fruits and vegetables for cancer and soluble fibre for heart disease.

Nutrient content claims characterised as 'absolute' (low, high, lean, etc), must be described in terms of the amount of the nutrient in one serving of a food, and claims characterised as 'relative' (less, reduced, more, etc), must be described in terms of the same nutrient in another product. Some of the most important definitions of 'low' are the following limits in the larger of a serving or 50g: 'low cholesterol' – no more than 20g; 'low sodium' – no more than 140mg; and 'low calorie' – no more than 40 calories. For 'reduced' or 'less', the regulations for 'calories', 'total fat', 'saturated fat', 'cholesterol', 'sodium' and 'sugars' require at least 25 per cent less per serving compared to an appropriate reference food. 'Healthy' cannot be used for any food high in fat or saturated fat. The FDA has also aggressively pursued labelling issues such as the use of 'fresh' as part of the name of orange juice that was processed and made from concentrate.

Under a memorandum of understanding between the FTC and FDA, 36 Fed Reg 18,538 (1971), the FTC has primary responsibility over food advertising. The FTC has been particularly active on health claims – see the following:

- *Tropicana Prods Inc*, File No. 0422-3154 (claiming cholesterol-reduction benefit);
- *Conopco Inc*, (claiming that consumers can get 'Heart Smart' based on low saturated fat in Promise Margarine, but high total fat required – promise to include, in future advertising, total fat information);
- *England's Best Inc*, File No. 9320-3000 (serum cholesterol – corrective advertising ordered);
- *Stouffer Foods*, Dkt No. 9250 (low sodium – but order expanded by the FTC to cover 'any other nutrient or ingredient');
- *Bertolli Olive Oil*, File No. 902-3135 (health benefits of olive oil); and
- *Campbell Soup Co*, Dkt No. 9223 (sodium content).

The FTC's order against Kraft for misrepresenting the amount of calcium in its American cheese slices was based on literally true advertising of the calcium in the milk used in making the product, because some is lost during processing (*Kraft Inc v FTC*, 970 F2d 311 (Seventh Circuit 1992)). The FTC has also been particularly active in policing misleading low-fat claims (see *Haägen-Dazs Co*, File No. 942-3028).

The FTC has also shown great interest in weight-loss products and products touted as dietary supplements. See *FTC v Pacific Herbal Sciences Inc*, (CD Cal 10/18/05). Its consent orders require advertising to disclose:

- average percentage weight loss maintained;
- period of time maintained; and
- that 'for many dieters, weight loss is temporary'.

FTC policies and concerns are summarised in 'A Guide for the Dietary Supplement Industry' – see the following examples:

- *FTC v Enforma Natural Prods Inc*, No. 04376JSL (CD Cal 4/26/00) (US$10 million consumer redress);
- *FTC v Window Rock Enterprises Inc*, (CD Cal 9/21/05) (US$4.5 million);
- *FTC v SlimAmerica Inc*, No. 97-6072 (SD Fla 1999) (US$8.2 million consumer redress); and
- *FTC v Airborne Health Inc* (Central District of California, 13 August 2008) (US$30 million consumer redress in conjunction with private class action lawsuit *Wilson v Airborne Inc* 2008 WL 3854963 (CD Cal 2008)).

34 What are the rules for advertising alcoholic beverages?

Broadcasters have long voluntarily refused to air hard liquor adverts or even props or references in commercials for other products. NBC, in December 2001, proposed accepting them for airing after 9pm in connection with programming with an 85 per cent adult audience. Actors in the commercials would have to be over 30 years of age. Public objections forced NBC to abandon this experiment. Beverages with less than 24 per cent alcohol by volume may be advertised, but are subject to special review in terms of safety, over consumption, mood alteration, maturity or connection to athletic or other prowess. Models should be 25 years old and appear to be at least 21, and advertising should not be targeted at underage drinkers. See *Becks NA*, 127 FTC 379 (1999) (consent order) (young people holding beers on a sailboat at sea); and *Allied Domecq*, 127 FTC 368 (1999) (consent order) (5.9 per cent alcohol by volume misleadingly claimed to be a 'low alcohol' beverage, since the alcohol content is much higher than numerous other alcoholic beverages). In March 2011, the FTC announced that it planned to conduct a new study of the self-regulatory efforts of the alcoholic beverage industry (see www.ftc.gov/opa/2011/03/alcohol.shtm). The study would serve as the foundation for the FTC's fourth major report on the efficacy of voluntary industry guidelines designed to reduce alcoholic beverage advertising and marketing to an underage audience. The FTC plans to explore alcoholic beverage company compliance with the following:

- 'voluntary advertising placement provisions, sales, and marketing expenditures';
- 'the status of third-party review of complaints regarding compliance with voluntary advertising codes'; and
- 'industry data-collection practices'.

Additionally, DISCUS issued new self-regulatory guidelines governing online marketing practices. The guidelines, which became effective on 30 September 2011, apply to marketing on social media sites and other digital communications platforms, including websites, blogs and mobile communications and applications. Key requirements of the new DISCUS guidelines include:

- 'age-gating' on websites before any direct communication between advertisers and consumers;
- regular monitoring and moderating of websites that include user-generated content, and removal of inappropriate content;
- where online content is intended to be forwarded by users, marketers must include instructions that content should only be forwarded to those who are of legal purchase age;
- clear identification of online communications as advertising;
- inclusion of social responsibility statements in all communications, where practicable; and
- standards for privacy policies.

The guidelines are intended to supplement, and be read in conjunction with, the DISCUS Code of Responsible Advertising Practices.

35 What are the rules for advertising tobacco products?

Since 1971, broadcast advertising of cigarettes and little cigars has been banned by federal law. Broadcast advertising of smokeless tobacco was banned in 1986. Surgeon General's warnings are required in all print advertising. Tar and nicotine values measured in accordance with the FTC-approved test methodology are included in advertising based on a voluntary agreement with the FTC. The FDA lacks jurisdiction to regulate tobacco advertising (*FDA v B&W Tobacco Corp*, 529 US 120 (2000)). The multi-state settlement of tobacco litigations includes substantial limitations on permissible advertising (see www.columbia.edu/itc/hs/pubhealth/p9740/readings/master_settlement.pdf), including restrictions on the following:

- cartoon characters;
- outdoor, store window or stadium billboards;
- transit advertising;
- advertising seen by children;
- product placements;
- merchandise and sponsorships; and
- point-of-sale displays.

36 Are there special rules for advertising gambling?

Prohibitions on depicting gambling in broadcast adverts for casinos, at least in states with lotteries, violate First Amendment rights (see *Greater New Orleans Broadcasting Association v US* and *US v Edge Bag Co*). However, national networks do not permit them, except state lotteries. Advertising for online gambling sites is not protected by the First Amendment (see *Casino City Inc v US DoJ*). The DoJ asserts that offshore gambling by customers in the United States violates sections 1084 (the Wire Act), 1952 (the Travel Act) and 12955 (the Illegal Gambling Business Act) of the US Code (Letter from John G Malcolm to National Association of Broadcasters, 11 June 2003). On 7 April 2005, the WTO ruled that the United States may restrict internet gambling (United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS 285/AB/R). A number of states' attorneys general have also taken the position that online gambling from within the state violates state gambling laws. The state of Washington passed its Internet Gambling Act, SB 6613, effective 7 June 2006, making it a Class C felony. Creating or publishing advertising may be viewed as aiding and abetting (see 18 USC section 2).

37 What are the rules for advertising lotteries?

According to the Federal Communications Commission, a lottery is 'any game, contest or promotion that combines the elements of prize, chance and consideration'. Federal law generally prohibits the broadcast of any advertisement or information concerning a lottery. Advertisements or information about the following activities, however, are permitted:

- lotteries conducted by a state acting under the authority of state law, where the advertisement or information is broadcast by a radio or television station licensed to a location in that state or in any other state that conducts such a lottery;
- gambling conducted by an Indian tribe pursuant to the Indian Gaming Regulatory Act; or
- lotteries that are authorised or not otherwise prohibited by the state in which they are conducted, are conducted by a not-for-profit or governmental organisation or are conducted as a promotional activity by a commercial organisation and are clearly occasional and ancillary to the primary business of that organisation.

Casino gambling is a form of lottery because it has the elements of prize, chance and consideration. The FCC has determined that it is permissible to broadcast truthful advertisements for lawful casino gambling, regardless of whether the state in which the broadcaster is licensed permits casino gambling (www.fcc.gov/guides/broadcasting-contests-lotteries-and-solicitation-funds).

38 What are the requirements for advertising and offering promotional contests?

The terms 'contests' and 'sweepstakes' are often used interchangeably, but contests are usually promotions that have some element of skill to them. In skill contests, chance does not play a dominant role in determining the outcome. Examples include essay, cooking, and art and photography contests. Most states permit requiring a fee in a skill contest, although some require certain disclosures if a fee is required. Sponsors of skill contests should make sure skill determines the outcome; a tie-breaker should not be determined by chance. It is very important to set out the criteria for winning the skill contest and judging (by qualified judges) must be based on the criteria. The sponsor does not need to award a prize if no one satisfies the contest requirements (for example, getting a hole-in-one). The sponsor must be careful about what is said in advertising to avoid a deception issue. The following are not skill contests: answering multiple choice questions, guessing the number of beans in a jar and determining winners in upcoming sports events. See Terri J Seligman, 'Marketing Through Online Contests and Promotions', 754 PLI/ Pat 429, 438 (July 2003).

There are numerous state laws governing the administration and advertising of chance sweepstakes and skill contests in the United States. All states permit sweepstakes in connection with promotions of other products or services, provided that no consideration is required. For example, 'no purchase necessary' and an explanation of the 'alternate means of entry' must be prominently disclosed. In order to avoid creating an illegal lottery, one of the following must be eliminated: the award of a prize, determined on the basis of chance, where consideration is paid to participate. 'Prize' includes anything of tangible value. The rules of the sweepstakes are the terms of an offer resulting in a contract and are subject to varying state law requirements.

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

The Lanham Act provides a cause of action where communication 'is likely to cause confusion … as to the affiliation, connection, or association of [the advertiser] with another [person, firm or organisation], or as to the origin, sponsorship, or approval of [the advertiser's] goods, services, or commercial activities by [the other person, firm or organisation]' (15 USCA section 1125(a)(1)(A)). It is not necessary to prove that consumers believe a party has endorsed the advertised product, only that consumers think the party has authorised the advertising or promotion. Disclaimers are a favoured way of alleviating consumer confusion as to source or sponsorship.

The Communications Act of 1934 and FCC Rules require that when consideration has been received or promised to a broadcast licensee or cable operator for the airing of material, including product placements, the licensee or cable operator must inform the audience, at the time the programme material is aired, both that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied.

Further, the FTC has said that disclosures may be needed when objective product claims are being made if consumers will be confused about whether those claims are being made by the advertiser or an independent third party. The reason for this is that consumers may give more weight to claims if they think that the claims are being made by someone other than the advertiser. The FTC said, however, that it does not believe that advertisers are generally using product placements to make objective claims about their products. Therefore, the FTC believes that it is not generally deceptive to fail to disclose when something is a product placement. The FTC has cautioned that it can still take action against an advertiser if a product placement is used to make a false claim (www.ftc.gov/system/files/documents/advisory_opinions/letter-commercial-alert-applying-commission-policy-determine-case-case-basis-whether-particular/050210productplacemen.pdf).

40 Briefly give details of any other notable special advertising regimes.

First Amendment protection for even commercial speech prohibits government regulation of truthful speech. Consequently, unless speech rises to the level of conduct, such as inciting violence or physical action (eg, crying 'fire' in a crowded theatre), there can be no government regulation. Political campaign advertising is not subject to regulation as to truth, and does not have to be substantiated.

Social media

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

Although sites like Facebook, Twitter, Instagram, Pinterest, SnapChat and YouTube have transformed traditional notions of advertising, as the law in this area develops, it is becoming increasingly clear that legal principles governing 'traditional' advertising often apply equally to advertising via social media. Advertising through social media can implicate many areas of law, including copyright, trademark, right of publicity, defamation, unfair competition, union issues, idea misappropriation, obscenity and indecency, hate speech, other tort liability, criminal law and privacy. Advertising involving user-generated content, which has become quite common on social media, can also pose special liability risks for advertisers. Social media advertising is also subject to the terms and conditions of the host platform's own terms of use.

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

The FTC has reviewed numerous social media advertising cases in recent years.

The following are select examples of recent social media advertising cases:

- *Warner Brothers*: in 2016, the FTC settled its lawsuit against Warner Bros Home Entertainment Inc, which included allegations that Warner Bros falsely represented that positive gameplay

videos of its game Shadow of Mordor posted by YouTube influencers reflected the independent opinions of impartial gamers and failed to adequately disclose the influencers' material connection to the company. In exchange for posting pre-approved videos designed to promote Warner Bros' game, the YouTube influencers received free access to the game and up to thousands of dollars in cash. The influencers were instructed to promote the game in a positive way and to place sponsorship information in the description box below the video, where it was not immediately visible. In many cases, the influencers did not disclose that Warner Bros had paid them to promote the game. The videos generated more than 5.5 million views on YouTube. The final order requires Warner Bros to clearly disclose material connections to influencers or endorsers. It also specifies the measures Warner Bros must take to educate and monitor what influencers do on the company's behalf, including, under certain circumstances, withholding payment or terminating influencers or ad agencies that do not comply with requirements (*In the matter of Warner Bros Home Entertainment Inc* (2016) (decision and order));

- *Machinima*: Machinima, the operator of a popular YouTube network, settled FTC allegations that it paid influential gaming bloggers to create videos touting the new Xbox One without requirement for them to disclose that they were paid for their favourable reviews. The FTC also alleged that Machinima later recruited and paid more people to upload positive video reviews without requiring a disclosure (*FTC v Machinima* (2015) (consent order));
- *AmeriFreight*: AmeriFreight, an automobile shipment broker, settled FTC allegations that it promoted customer website reviews without disclosing that the authors of such reviews were paid by the company (*FTC v AmeriFreight* (2015) (consent order));
- Deutsch LA: ad agency Deutsch LA settled FTC allegations that agency employees promoted its client Sony's products on Twitter without disclosing that they were agency employees (*FTC v Sony and Deutsch LA* (2014) (consent order));
- *In the matter of ADT LLC*, File No. 122 3121 (24 June 2014) (consent order): FTC charges alleged violations by ADT of section 5 of the FTC Act in connection with the company paying US$300,000 (giving US$4,000 worth of security products) to spokespeople hired to review, demonstrate and plug ADT's Pulse Home Monitoring System on high-profile TV and radio shows, and across the internet in articles and blog posts, without disclosing that they were paid to do so. The FTC's investigation also extended to Pitch Public Relations, LLC (the public relations firm), Village Green Network (the advertising network that published the blog posts), News Broadcast Network (the booking agency), and even one of the experts herself, Alison Rhodes-Jacobsen, when the FTC had not previously publicly addressed the obligations of an intermediary (ie, a party facilitating payments from a marketer to an endorser) for the failure of endorsers to disclose material connections with marketers;
- *Cole Haan Inc*, FTC Matter No. 142-3041 (20 March 2014) (closing letter): FTC investigation of Cole Haan's alleged violation of the endorsement guides in connection to Cole Haan's 'Wandering Sole Pinterest Contest', which instructed entrants to create Pinterest boards with images of Cole Haan shoes and pictures of their 'favorite places to wander' for a chance to win a US$1,000 shopping spree, but did not instruct contestants to label their pins and Pinterest boards to make clear they were pinning Cole Haan products in exchange for a contest entry;
- *HP Inkology*, FTC File No. 122-3087, (27 September 2012) (closing letter): FTC investigation into HP and its public relations firm for providing gifts to bloggers in exchange for posting content about HP Inkology, without adequately disclosing the material connection;
- *In the matter of Hyundai Motor America*, FTC File No. 112-3110 (16 November 2011) (closing letter): FTC investigation of Hyundai where bloggers were given gift certificates as an incentive to comment on or post links to the advertisements and were explicitly told not to disclose this information; and
- *FTC v Reverb Communications Inc* (August 2010) (proposed consent order): marketing and PR agency Reverb, hired by video game developers, settled charges that its employees posed as consumers and posted game reviews online without disclosing their affiliation with Reverb.

In 2008, the NAD reviewed a video clip disseminated by Cardo Systems, a manufacturer of wireless Bluetooth technology, as part of a viral marketing campaign on YouTube. The video depicted individuals using their mobile phones to pop popcorn kernels in close proximity. The NAD requested that the advertiser address concerns that the video clip communicated that mobile phones emit heat and radiation at a level that allows popcorn kernels to pop. Cardo argued that the video was created to create a 'buzz' and to depict something absurd. Cardo also questioned whether the popcorn video was 'national advertising' as the term is defined and used in the NAD's Policies and Procedures. The NAD found that video clips placed by advertisers on video-sharing websites such as YouTube, when controlled or disseminated by the advertiser, may be considered national advertising, and that the absence of any mention of a company or product name does not remove a marketing or advertising message from the NAD's jurisdiction or absolve an advertiser from the obligation to possess adequate substantiation for any objectively provable claims that are communicated to consumers (*Cardo Systems*, NAD case No. 4934 (14 November 2008)).

The NAD reviewed Nutrisystem Inc's 'Real Consumers. Real Success' Pinterest board, featuring photos of 'real' Nutrisystem customers with weight-loss success stories. The customer's name, weight loss and a link to the Nutrisystem website appeared below each photo. The NAD determined that such 'pins' showcased atypical results and thus required clear and conspicuous disclosures noting typical results consumers could expect to achieve (*Nutrisystem Inc*, NAD case No. 5479 (29 June 2012)).

Department of Transportation advertising rules require air travel price advertising to mention the full price a consumer can expect to pay, including carrier-imposed surcharges. Spirit Airlines settled allegations that it failed to comply with such rules when it tweeted about its fares but did not disclose that taxes and fees applied, or that a round-trip purchase was required. Such information was only disclosed after consumers clicked on a link to a landing page (23 November 2011 consent order (*Spirit Airlines Inc*): violations of 49 USC section 41712 and 14 CFR 399.84).

The NAD reviewed advertising claims made by Coastal Contacts in a Facebook promotion offering 'free' products to consumers who 'liked' its Facebook page. It was the first time the NAD addressed 'like-gating' promotions, which require consumers to 'like' a company's Facebook page in order to gain access to sweepstakes, a coupon code or savings noted in an advertisement. The NAD determined that material terms of an offer should be disclosed before a consumer is required to 'like' a page (*1-800 Contacts*, NAD case No. 5387 (25 October 2011)).

43 Are there regulations governing privacy concerns when using social media?

Use of social media for advertising purposes could implicate numerous privacy laws and regulations. For example, California requires commercial website operators that collect personally identifiable information from consumers residing in California to conspicuously post privacy policies indicating what use, if any, will be made of users' information and how the operators respond to web browser 'do not track' signals (California Business and Professions Code section 22575). The FTC has held in numerous instances that failure to disclose practices or adhere to statements made in a published privacy policy is actionable as false advertising. The FTC has also held that failure to take appropriate security measures to protect customers' personal information, including sensitive financial information, is actionable.

The purpose of the data collection is particularly important in the advertising context. The Digital Advertising Alliance's Self-Regulatory Guidelines, enforced by the Council of the Better Business Bureau (CBBB), require companies that collect information about users for retargeting purposes to provide users with notice of their practices and choice to opt-out. This requirement applies to all companies involved in the advertising ecosystem, including advertisers, publishers, media agencies and technology providers. Similarly, the FTC has emphasised the importance of transparency and choice, specifically in its report on cross-device tracking from January 2017. Both the CBBB and FTC have looked into alleged failures by companies to provide adequate notice and choice. In February 2017, the FTC announced a stipulated order with Vizio, Inc for US$2.2 million based on allegations that Vizio failed to adequately disclose its practice of collecting and sharing user

information for retargeting purposes. This order followed a similar settlement between the FTC and Turn, Inc in December 2016 over claims that Turn misrepresented the scope of its opt-out.

Collection of information from children over social media poses another significant concern. The Children's Online Privacy Protection Act (COPPA) limits the types of information a company can collect from children under the age of 13 and the purposes for which it uses such data. A company must not knowingly collect personal information (which is broadly defined to include IP addresses and other persistent identifiers) from children unless it collects such information to support the internal operations of the website, with parental consent, or under another exception. Regulators in the United States have recently focused on alleged COPPA violations caused by the use of third-party cookies and other tracking technologies. In September 2016, the Attorney General of New York announced consent orders with four publishers to settle allegations that the publishers allowed third parties to collect personal information from children through tracking technologies integrated on their websites. While the consent orders only involved publishers, the companies operating the tracking technologies, as well as the advertisers associated with those technologies, also could have faced enforcement under COPPA.

There are numerous other US federal and state privacy laws that could be implicated through the use of social media, including the Health Insurance Portability and Accountability Act, the Federal Credit Reporting Act, the Gramm-Leach-Bliley Act, the Telephone Consumer Protection Act and state breach notification laws. Some state statutes, most notably Illinois and Texas, restrict the collection of biometric data or geolocation data. Also, to the extent the use of social media involves data from outside the US, international law may apply, which may be far more stringent than law in the US.

Frankfurt Kurnit

Rick Kurnit **rkurnit@fkks.com**
Hannah Taylor **htaylor@fkks.com**

488 Madison Avenue
10th Floor
New York, NY 10022
United States

Tel: +1 212 980 0120
Fax: +1 212 593 9175
www.fkks.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

Law Business Research

Advertising & Marketing
ISSN 2055-6594

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

LACCA
LATIN AMERICAN CORPORATE COUNSEL ASSOCIATION

Official Partner of the Latin American Corporate Counsel Association

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the ABA Section of International Law