



GALA
GLOBAL ADVERTISING LAWYERS ALLIANCE

Advertising Law: A Global Legal Perspective





ABOUT GALA

The Global Advertising Lawyers Alliance (GALA) is the leading network of advertising lawyers in the world. With firms representing more than 90 countries, each member has the local expertise and experience in advertising, marketing and promotion law that will help your campaign achieve its objectives, and navigate the legal minefield successfully. GALA is a uniquely sensitive global resource whose members maintain frequent contact with each other to maximize the effectiveness of their collaborative efforts for their shared clients. GALA provides the premier worldwide resource to advertisers and agencies seeking solutions to problems involving the complex legal issues affecting today's marketplace.

For further information about GALA, please contact the relevant member directly or alternatively GALA's Executive Director, Stacy Bess at:

Global Advertising Lawyers Alliance

488 Madison Avenue, 10th floor, New York, NY 10022

Tel: 212.705.4895 | Fax: 347.438.2185

Email: sbess@galalaw.com

www.galalaw.com

TABLE OF CONTENTS

ARGENTINA	Page 7
AUSTRALIA	Page 23
AUSTRIA	Page 43
BELGIUM	Page 57
BOLIVIA	Page 73
BRAZIL	Page 83
BULGARIA	Page 99
CANADA	Page 117
CHILE	Page 133
CHINA	Page 147
COLOMBIA	Page 167
COSTA RICA	Page 181
CROATIA	Page 193
CYPRUS	Page 207
DENMARK	Page 221
DOMINICAN REPUBLIC	Page 239

DUTCH CARIBBEAN	Page 255
ECUADOR	Page 265
EGYPT	Page 281
FINLAND	Page 291
FRANCE	Page 307
GERMANY	Page 327
GREECE	Page 343
GUATEMALA	Page 361
HOLLAND	Page 375
HONDURAS	Page 391
HONG KONG	Page 399
HUNGARY	Page 417
INDIA	Page 435
IRELAND	Page 455
ISRAEL	Page 471
ITALY	Page 485
JAMAICA	Page 507
JAPAN	Page 525
KENYA	Page 537

LUXEMBOURG	Page 549
MALAYSIA	Page 565
MEXICO	Page 579
NEW ZEALAND	Page 593
NICARAGUA	Page 611
NIGERIA	Page 623
NORWAY	Page 637
PANAMA	Page 653
PARAGUAY	Page 669
PERU	Page 689
POLAND	Page 705
PORTUGAL	Page 723
PUERTO RICO	Page 741
ROMANIA	Page 759
RUSSIA	Page 779
SERBIA	Page 795
SINGAPORE	Page 813
SLOVAKIA	Page 827
SOUTH AFRICA	Page 841

SPAIN	Page 859
SWEDEN	Page 879
SWITZERLAND	Page 893
TURKEY	Page 909
UKRAINE	Page 927
UNITED ARAB EMIRATES	Page 943
UNITED KINGDOM	Page 953
UNITED STATES OF AMERICA	Page 975
URUGUAY	Page 993
VENEZUELA	Page 1007
ZIMBABWE	Page 1021
LIST OF GALA MEMBERS	Page 1033

ARGENTINA

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Argentina?

There are many areas of law and regulation that affect advertising in Argentina.

The most relevant laws applicable to the advertising business are the Fair Trade Act (FTA), the Consumer Protection Act (CPA) and the Trademark Law.

There are also certain provisions applicable to advertising in respect of specific industry sectors, such as the Law Against Alcoholism (Law No 24.788).

Finally, self-regulation has a primary role in our system. The main regulator is the CONARP and its self-regulation code is applicable to all kinds of advertising (see question 2).

1.2 What types of communications are considered to be 'advertising'? How is this determined?

The applicable law and regulation do not give any definition of 'advertising'. Notwithstanding, it is generally understood to be any communication promoting the sale of a product or service.

1.3 What is the basic regulatory framework for advertising regulation?

Argentina does not have any specific law on advertising. However, advertising should comply with the following legal framework: the CPA; the Defense of Competence Act; the FTA; the Trademark Law; the Law against Alcoholism; the Habeas Data Act; the Law in Defense of Women Rights (Law No 26.485); the Broadcasting Law (Law No 22.285); the Media Law and the Argentinean Food Code.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

- (a) **TV and radio:** Advertising through television and radio is specifically regulated by the Broadcasting Law and regulatory decrees.

The AFSCA (Federal Authority of Audiovisual Communication Services) has issued two resolutions which are relevant to the advertising business:

- (i) Resolution No 1328/12 which modifies resolution No 630/12 and provides guidelines for the registration of advertising agencies and producers. It basically places a duty on all advertising agencies and producers to register with the public records of AFSCA; and
- (ii) Resolution No 983/2013 creates a new register for advertisements, the Register of Audiovisual Advertising for TV, and places a duty on agencies as well as on companies and advertising producers to file a form for each new advertisement to be broadcast in open or cable TV. The content and statements included in the form shall be considered a sworn statement.

- (b) **Direct marketing:** There is a recently enacted Act known as the 'Don't Call' Law by which 'any individual or authorized user of a telephone service stating that he or she does not wish to be contacted by whoever advertises, offers, sells or gives away goods and/or services can

register so that he or she does not receive unsolicited direct marketing telephone calls or text messages’.

Other types of advertising practices—such as text messages or social media—are not specifically regulated. Rather, the general law and regulations referred to in question 1.1 and 1.3 apply to all types of advertisements.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There are several industries that are subject to specific laws which govern their advertising, and/or have specific provisions that apply in the Advertising Codes. These are some of the main ones, but the list is not exhaustive:

- (a) **Alcohol** (specifically regulated by the Law against Alcoholism): The Law against Alcoholism prohibits all advertising or incentives to consume alcoholic beverages:
 - (i) aimed at people under the age of 18;
 - (ii) featuring people under the age of 18 who are drinking alcohol;
 - (iii) suggesting that the consumption of alcohol increases physical or intellectual performance; or
 - (iv) using alcohol consumption to stimulate sexuality and/ or violence in any way.

Additionally, alcohol advertisements must include clearly visible health warnings with the words ‘Drink in moderation’ and ‘It is illegal to sell this product to anyone under the age of 18’.

- (b) **Tobacco**: It is prohibited to advertise, promote or sponsor any product manufactured with tobacco. Advertising and marketing of tobacco products is still allowed:
 - (i) at sale points;
 - (ii) in commercial publications addressed to companies involved in manufacturing, distributing, importing, exporting and sale of these products; and
 - (iii) through direct communication to people over 18, though only with their previous consent.

Tobacco packaging must include health warning, such as: ‘smoking causes cancer’ or ‘smoking causes addiction to nicotine’, and others, along with graphic images depicting the effects of smoking cigarettes.

- (c) **Prescription Only Medicines (POM)**: Advertising of prescription-only medications directed to the general public is prohibited by law.
- (d) **Over-The-Counter Medicines (OTC)**: Advertising of over-the counter medicines is subject to a post control by the Food and Drug Administration (ANMAT), after the launching of the advertising campaign, and should comply with the ethical criteria set forth in Disposition No 4980/2005.
- (e) **Medical Devices**: Disposition No 4980/2005 issued by ANMAT governs the advertising of medical devices. Only devices of medical technology or medical products which by their nature and proposed use can be used or are indicated for use directly by the patient and/or non-professional user may be advertised.

- (f) **Food:** All food advertising must fully comply with ANMAT's regulations. Some of these requirements are that advertising must not:
- (i) modify the approved labels according to the legislation currently in force as to uses, intake and specific properties of the product;
 - (ii) measure the degree of risk decrease in catching illnesses due to consuming the product;
 - (iii) mention, either directly or indirectly, a pathological or abnormal condition;
 - (iv) make therapeutic claims for a product, or suggest that the dietary supplement is a medicinal product, or claim that the dietary supplement can diagnose, heal, relieve, mitigate, soothe, prevent or protect against any illness whatsoever. It may include 'helps prevent' or 'helps protect', only if such statements help prevent a typical illness for nutrient deficiency; or
 - (v) claim that a food product can replace a conventional meal or claim that a diet can be based only on a specific food product.
- (g) **Gambling:** Advertising of lawful gambling facilities (eg horse-betting) is permitted. Gambling is strictly controlled. Argentinean provinces regulates gambling at a local level.
- In the city of Buenos Aires, online gambling sites that have not been granted a license in the city are considered to be violating articles 116, 117 and 118 of the Buenos Aires 'Contravention Code'. These articles forbid the local operation and promotion of gambling activities without a local valid license.
- As regards sports betting activities, some provinces have their own regulations in this regard, so their regional governments grant licenses and permissions.
- In 2010 the Argentinean federal government announced plans to create regulations for online gambling activities throughout the country, with no results so far.
- (h) **Financial products and loans:** Under the CPL and other applicable resolutions, advertising of loan products (mortgages and pledges loans) must disclose the following:
- (i) Financial Total Cost (CFT);
 - (ii) applicable annual interest rate;
 - (iii) repayment system (French or German) applicable to cancellation of capital and interests;
 - (iv) number, amount and periods of payment;
 - (v) security deposit, if any;
 - (vi) extra charges and additional insurance, if any; and
 - (vii) company name, address, tax identification number.

Under the Financial and Banking Law (No 21.526) unauthorized entities are not allowed to advertise or promote marketing actions aimed to gain resources from consumers. The Central Bank of the Argentine Republic is entitled to authorize and control the organization and functioning of financial and banking entities

1.6 Are any government pre-approvals required?

Government pre-approval is not required for individual advertisements, but there are requirements that specific types of advertising must contain certain pre-approved warnings or disclaimers in order to be lawful.

Notwithstanding this, Resolution No 983/2013 issued by the Federal Authority of Audiovisual Communication Services (AFSCA) has created a new register of audiovisual advertising for TV, and obliges agencies, companies and advertising producers to file a form for each new advertisement to be broadcast on local TV channels or cable. The content and statements included in the form shall be considered a sworn statement. Hence, it is now mandatory to submit the online form provided by the ENACOM (National Authority of Communications) to ensure compliance with Section 81 of the Broadcasting Law and Resolution No 983/13.

Our recently changed Media Law provides that advertisements that will be broadcast on TV and radio shall be nationally produced. Moreover, Section 4 of the Media Law provides the following definition as to what should be understood by 'nationally produced', namely: 'Programs or advertisements fully produced in the national territory or made under the form of a co-production with foreign investment, with the participation of authors, artists, actors, musicians, directors, journalists, producers, researchers and technicians, who shall be at least 60% Argentine or residing in Argentina from among the total staff involved.'

Broadcasting of advertisements other than those nationally produced shall be subject to the existence of reciprocity conditions with the advertising campaign's country of origin. The agency or advertiser concerned shall invoke and prove such circumstance.

1.7 Does the media pre-clear advertising?

No, as a general principle there is no pre-clearance requirement.

1.8 How does the government enforce advertising laws? What are the potential remedies?

In addition to enforcement in case of a breach of the CONARP's Self-Regulatory Code (see answer to question 2), government agencies are in charge of enforcing the advertising of the product/service they regulate. As an example, the ANMAT is in charge of regulating and enforcing the advertising of POM and OTC medicines.

The most common remedies applied by government agencies are:

- (a) a fine or penalty payments;
- (b) cancellation/suspension of the license or authorization granted.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor has a right of action when there is a breach of the CONARP's Self-Regulatory Code; if the competitor or any of its registered trademarks are named in an advertisement without authorization; or in case of misleading advertising, inter alia.

There are three courses of action that a competitor is able to take to challenge an advertisement in Argentina, namely:

- (a) **an administrative procedure:** this is a pre-judicial stage known as ‘mediation process’. Within the mediation proceedings, both parties are invited to settle the case to avoid a court action. Note that before filing an ordinary lawsuit, the plaintiff is forced to initiate mediation proceedings;
- (b) **a court action:** injunctions are viewed as the standard remedy in trademark infringement and unfair competition cases; or
- (c) **a self-regulation procedure** managed by the Self-Regulation Commission (SRC) within the CONARP, which deals with claims against advertising made by any of their associates. The 10-member SRC can act ex officio or at the request of any third party who files a complaint in respect of any advert that violates any provision of the Code.

The self-regulation proceeding is very rapid; it takes no more than a month. Administrative proceedings are also quite brief. However, in the case of a judicial proceeding, it can take two to three years to get a final resolution. The potential remedies available are injunctive relief, corrective advertising and damages.

1.10 When do consumers have a right of action? What are the potential remedies?

Generally speaking, any consumer with a legitimate interest can file a complaint or court action. Consumer associations may also file a complaint (even a class action in some cases), representing a certain group of consumers.

Typical grounds for complaint are:

- (a) when consumers are misled by a commercial with regards to the product, its nature or its characteristics;
- (b) breach of articles 4, 7 and 8 of the CPA (which obliges advertisers to provide consumers with clear, accurate and detailed information about the essential characteristics of the goods and services commercialized and the terms and conditions of their commercialization); or
- (c) breach of article 8 of the CPA (which provides that information and announcements made in advertisements, leaflets or any other means of communication oblige the supplier to comply with the offer, and are considered part of the contract with the consumers).

Most cases are settled by signing a private agreement with the claimant at the administrative proceeding. The potential remedies available are injunctive relief, corrective advertising and damages.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Argentina have a primary advertising self-regulation system?

As mentioned above, self-regulation has a primary role in our system. The main regulator is the CONARP and its Self-Regulation Code is applicable to all kinds of advertising.

CONARP is non-profit organization that promotes the use and practice of advertising self-regulation by companies and agencies. CONARP defends the ethics and the responsible exercise of commercial freedom of expression. It was founded in 2001 by the Argentine Association of Advertising (AAP) and the Argentine Chamber of Advertisers (CAA), still its active members. It is composed by a committee of 20 members; 10 representatives from the AAP and 10 from the CAA.

CONARP, a member of CONARED (Latin American Network of Advertising Self-regulatory boards), works as an autonomous entity, and does not serve sectorial interests. It deals with each particular case in compliance with the letter and spirit of the principles, values and rules written in CONARP's Self-Regulatory Code.

Regarding the applicable principles, the CONARP requires advertising to respect:

- (a) the legal rules in force;
- (b) the principles and norms established in the Code of Advertising Ethics and Self-regulation;
- (c) the sectorial chamber codes; and
- (d) the norms and principles of the companies themselves.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The CONARP has issued a mandatory code for advertisers and advertising agencies, titled CONARP's Self-Regulatory Code. CONARP's Self-Regulatory Code incorporates as Annexes the advertising self-regulation codes of the Chamber of Over-the-Counter Drugs, the Chamber of Alcohol Distillers; the Chamber of the Tobacco Industry and the Co-ordinator of the Food Products Industry.

As stated by CONARP's Self-Regulatory Code, adverts must respect the principles of:

- (a) **Legality** (advertising must respect the legal rules in force);
- (b) **Decency** (advertising must respect moral principles and good customs and respect commercial loyalty; shun the unethical, truculent and grotesque; and steer clear of using foul language);
- (c) **Honesty** (advertising must be honest, trustworthy and avoid giving false testimony);
- (d) **Truthfulness** (advertising must avoid misleading consumers, and any exaggeration contrary to good faith); and
- (e) **Social responsibility** (advertising must avoid anything that upsets the concepts and essential values of society; or any expression, attitude or hint that affects people's privacy or causes moral suffering to their family; it must take care of the environment; and must take special care of children's gullibility, and young people's lack of experience).

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The self-regulation commission (SRC) within CONARP deals with claims against advertising made by any of their associates. The 10-member SRC can act ex officio or at the request of any person who files a complaint in respect of any advertisement that violates any provision of the Code. Within two days from the date of receipt of the complaint, the SRC shall meet and deliberate. If after the deliberation the SRC decides that no provision of the Code is violated by the advertisement, it shall inform the complainant of its decision.

If, on the contrary, the SRC concludes that there may be a violation of the Code, it shall inform the interested parties in writing of the infringing company or agency, detailing the provisions that it considers infringed. The SRC shall also invite the interested parties to a hearing to present their views and arguments. If the SRC then decides that the advertisement is contrary to the principles of the Code, it will ask the company and agency to withdraw (cease broadcasting) the advertisement within 24 hours. If the company and agency agree to this, the SRC shall inform the complainant and close the file.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self-regulatory system has proved to be very effective, swift and low cost (compared to judicial proceedings). It is commonly used and the decisions taken by CONARP, although not mandatory, are usually followed by the parties involved, because the most important advertising agencies and companies are part of the CONARP.

2.5 Are the self-regulatory system's decisions reported?

The statements and decisions of CONARP are public and published on CONARP's website: <http://www.conarp.org.ar/casos.htm>

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Beyond the general principles described in question 2.2, advertisers must be very careful when advertising specific categories of products such as tobacco, alcohol, financial and banking services, loan products, gambling, food, and medicines, inter alia. Companies must always check to see if there is any specific regulation applying to the type of product/service they intend to advertise.

2.7 Are there any other self-regulatory systems that govern advertising practices in Argentina?

No

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Argentina (eg, consumer protection laws; IP laws; unfair competition laws)?

Generally speaking, advertising claims are governed by the FTA, which provides for a general prohibition of inaccurate, deceitful or misleading advertising of any kind. Any advertising campaign that may lead consumers to mistakes, or confuses or deceives them about the nature, properties, quality, quantity, use, price, conditions of commercialization or any other characteristic of the product or service offered or promoted will be considered an unfair trade practice.

In addition, article 4 of the CPA provides that the supplier is required by law to grant consumers exact, clear and detailed information about the essential characteristics of the goods and services provided, and the conditions of their commercialization. Moreover, article 8 provides that the statements mentioned in advertisements, leaflets or any other media bind the offeror to the terms of the offer and are considered to be terms included in the agreement with the consumer.

3.2 Is substantiation required for advertising claims?

According to CONARP's Self-Regulatory Code, advertising messages and marketing communications should not include any statement, written claim or image that, directly or indirectly, is likely to mislead the consumer or lead them to believe that the product will falsely perform in a specific manner, except when exaggeration is used to amuse or catch consumers' attention. Besides, as explained in the answer to question 3.1, provisions arising from the CPA also apply (information provided to consumers must be exact, clear and detailed).

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Yes, the CONARP's Self-Regulatory Code states that advertising messages and marketing communications should not include any statement, written claim or images that, directly or indirectly, are likely to mislead the consumer or lead them to believe that the product will falsely perform in a specific manner, except when exaggeration is used to amuse or catch consumers' attention.

Thus, puffery claims do not require substantiation. However, there is a thin line separating puffery and a claim that requires substantiation. As a general rule, the more obvious the exaggeration, the safer the claim.

3.4 What are the rules governing the use of disclosures in advertising?

There are no specific regulations on this regard. The use of disclosures is admissible if it helps to avoid any inaccurate, deceitful or misleading message in advertisements.

Disclosures that are shown as advertisements' footnotes that include relevant information shall meet the following requirements (Resolution 789/1998 of the former Secretariat of Interior Trade):

- (a) the font size must be equal or greater than 2 mm;
- (b) it must be clearly legible; and
- (c) the typeface shall maintain a contrast of colors equivalent to products mentioned in the catalog.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

CONARP's Self-Regulatory Code provides that statements can only include testimonials or authentic recommendations related to the real experiences of the people giving their testimony, or of those who represent them, which in turn must be able to be verified.

Advertising must avoid false testimonials. The representation of real people or dubbing must be expressly authorized by the persons represented or dubbed. The use of models, uniforms or clothing that characterize a profession or occupation must not mislead consumers, and must be validated by someone who belongs to that profession, according to the ethical rules of the latter.

The testimonials and opinions included in the advert must be sincere and verifiable. The statement in such cases must not contain references to any person, trademark, firm or institution without their permission.

3.6 What are the rules governing the use of product demonstrations in advertising?

Regarding product demonstrations, the CONARP's Self-Regulatory Code states 'Any advertising featuring a product's practical use should be truthful and verifiable under equal conditions to the ones shown in the ad, refraining from showing traits that the product does not include and avoiding creating false expectations the product cannot meet'.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Argentina still lacks a statute that specifically regulates comparative advertising. Therefore, courts are forced to apply norms about trademark law, fair trade rules, self-regulatory advertising rules, unfair competition rules and general rules such as the Civil and Commercial Code, in order to establish the legal boundaries for comparisons of products or services provided by a competitor. In addition, Argentina follows the requirements of the EU Directive on comparative advertising—among other international precedents—which indicates as an accepted principle that comparing products in commercial advertisements is lawful.

In this regard, CONARP in 2015 issued a paper on Comparative Advertising by which advertisers are urged to exercise their right of speech responsibly, given that comparative advertising should not mislead, should be honest and truthful, should conform to the rules of fair competition, avoiding denigration of the competition, its brands or products. A copy of the Paper is available at CONARP's website.

There are also several judicial decisions that allow comparative advertising, provided that it is not defamatory and does not lead to confusion, and that it truthfully compares what is likely to be compared in the different products and services.

CONARP's Self-Regulatory Code regulates comparative advertising, stipulating that it should:

- (a) respect third parties' intellectual property rights;
- (b) inform consumers about the verifiable advantages of the advertised product;
- (c) use uniform products and characteristics, while also being truthful and fair;
- (d) be accurate and test products under the same conditions; and
- (e) be shown in an objective manner.

3.8 Are there any special copyright or trademark rules that may impact comparative advertising (eg, whether the use of a competitor's trademark or products may be used)?

Section 4 of the Trademark Law establishes that 'the ownership of a trademark and its exclusive use are obtained by means of its registration'. The law reserves the exclusive use of a trademark to its owner. However, comparative advertising usually involves the use of a third party's trademark.

The law forbids the adoption of a third party's trademark or trade name, but it does not prohibit their use in order to compare products. When products are compared, an advertisement must not try to disparage or discredit the trademark of a competitor, be deceitful, or spread or allow any suggestion of falsehoods. However, because Argentina lacks specific regulation on the subject, the use of third party trademarks in advertising is still uncommon because of the inherent uncertainty and risks involved.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

It should be noted that many geographical indications (GIs) have been recognized for agricultural and food products since the protection of Geographical Indications and Appellations of Origin was

established under Law No 25,380 (2001), as modified by Law No 25,966 (2004), such as: 'CORDERO PATAGONICO', 'YERBA MATE ARGENTINA', among others.

Law No 26,967 created the seal 'ALIMENTOS ARGENTINOS UNA ELECCION NATURAL' and its English version 'ARGENTINE FOOD A NATURAL CHOICE'. The main aim of the law is to promote the distinction of food products of those manufacturers who voluntarily apply for their use, by certifying their quality, authenticity and originality. The 'seal' ensures that the products identified with 'ALIMENTOS ARGENTINOS UNA ELECCION NATURAL' (and/or its English version) are produced and have complied with certain conditions stated by the Secretary of Agriculture, Livestock and Fishing. Furthermore, the use of the GI's approved distinctive sign is mandatory.

It should be also noted, that GIs and appellations of origin covering wines and some spirits are specifically regulated by Law No 25,163 on Wines and Spirits of Wine Origin and its regulatory Decree No 57/2004.

3.10 Are there any special rules governing product packaging?

Yes. Different categories of products are subject to specific regulations. For example, prior approval of labels for food, beverages, cosmetic and personal care products, and household cleaning products is required by ANMAT.

4 PRICE ADVERTISING

4.1 What are Argentina's rules regarding price advertising?

All prices displayed or advertised must be the final prices (unless the advertiser clearly specifies otherwise).

Resolution No 7/2002 of the Secretariat of Interior Trade provides that:

- (a) all products that are being sold directly to consumers must indicate their prices;
- (b) prices must be exhibited in local currency (although, with regard to services to be performed outside the country or being offered from outside the country, prices can be exhibited in American dollars); and
- (c) for products or services whose price has been reduced:
 - (i) suppliers must clearly show the original price of the product or service along with the discounted price,
 - (ii) the original price must be displayed using relevant characters, good contrast and visibility, and
 - (iii) in the case of a percentage reduction in the price of a set of goods or services, suppliers can simply display the generic discount percentage without stating individual rebates for each item or service.

4.2 What are Argentina's rules regarding advertising 'free' products?

Argentina does not have specific regulations regarding the use of the word 'free' in marketing materials. Free offers must comply with the CPA, the FTA and the CONARP's Self-Regulatory Code. The CPA regulates the relationships between producers, importers, distributors and sellers of the products and customers who acquire goods or services for their final use and do not resell them. It

protects not only contracts with consumers for pecuniary interest, but contracts of services or products that are free of charge.

An offer may not use language that suggests that an item is 'free' if it is not, nor contain price indications that could mislead consumers. When 'free' products involve costs such as shipping or taxes, they must be clearly stated.

4.3 What are Argentina's rules regarding sales and special offers?

There are no special rules regarding sales and special offers. Provisions arising from the CPA, FTA and CONARP's Self-Regulatory Code apply to them.

4.4 What are Argentina's rules regarding rebates?

Rebates are not specifically regulated by law. General rules may apply.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

No

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

There are several categories of products or services that are strictly regulated by law, such as alcohol, food and drugs. Some may not be advertised, for example:

- (a) products or services that advocate, promote or glorify violence, crime, obscenity or other unlawful activity;
- (b) products or services that discriminate against, stereotype, inaccurately portray or attack an individual or group on the basis of age, color, nationality, race, religion, sex, sexual orientation or disability;
- (c) products or services that portray minors in a manner that is dangerous, sexually suggestive or otherwise age-inappropriate;
- (d) firearms and related products; and
- (e) escort services (this prohibition was established to control and prevent prostitution and sex-trafficking).

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Spam is specifically prohibited by the Data Protection Act (DPA). The DPA grants Argentine citizens the right to request that a sender of unsolicited emails—known as spam—cease its transmission. It has also created the National Directorate for Personal Data Protection that operates a registry of personal data holders, investigates spam incidents, and is empowered to impose sanctions on spammers.

There is also a public registry for consumers who do not want to receive offers by phone. The registered telephone numbers must be deleted from company's marketing databases.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The CONARP's Self-Regulatory Code states that 'advertising has to respect moral principles and moral customs' (art. 1). It also states that: '...advertising must not contain expressions or audio or visual representations, nor inappropriate references that:

- (a) offend society or the community's moral customs;
- (b) offend the native country, nation, or its symbols, national heroes or authorities;
- (c) offend in any way institutions, whatever their kind or makeup;
- (d) offend religious feelings;
- (e) encourage illicit activities and lack of respect to law and authorities; or
- (f) encourage discrimination of any kind.'

Moreover, the National Constitution (articles 14, 16, 41 and 42), our Civil Code (articles 953 and 1071) and the principle 'alterum non laedere' of our penal law also seek to protect these interests.

Accordingly, without having specific legislative regulation on decency in advertising, national doctrine and jurisprudence have understood as illicit advertising those ads containing obscene messages that show lack of decency or harm moral customs.

Finally, the Broadcasting Law states that 'advertising must keep to the terms of this law and its regulation, mainly with regard to family and moral customs'.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

There are no special rules in such regard.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

In Argentina, there is no specific statute dealing with requirements to disclose where advertisers have influenced the editorial content. Creating advertising content that looks like traditional editorial content has become increasingly common as publishers try to create more sources of revenue. In practice it is becoming increasingly difficult for readers to distinguish between editorial content and advertising, due to this fact.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

As a general principle, advertisers should make clear to the audience when editorial or entertainment content constitutes a marketing action to promote a product or service.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Argentina currently does not have any statutory provisions intended to specifically govern social networks. As a result, the same legal controls should apply to advertising and marketing published through social media and through traditional media (television, radio, print).

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

Regarding User Generated Content (UGC), there is potential liability for copyright, trademark, defamation, privacy, publicity and false product claims. It is always advisable to have a social media policy in place and monitor the activities of authorized social media agencies engaged on behalf of the advertiser and the contributors of UGC.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

No, so far there are no cases worth mentioning in this regard.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

The exclusive rights to exploit the different aspects of a person's identity are generally considered to be part of the 'highly personal rights' (ie inalienable).

In 1994, the Federal Constitution was amended to strengthen the protection of highly personal rights, both directly, by means of the habeas data, and indirectly, by giving constitutional status to international treaties, creating minimum standards of highly personal rights protection.

Besides, Argentine copyright law includes express provisions protecting a person against the unauthorized use of one's photograph. These provisions apply to the use of a person's image or voice in drawings, caricatures, paintings, dolls, sculptures, films, television, theatrical exhibitions, etc.

A violation against a person's right to one's image arises even if no negative message or circumstance are associated with such image within its context and use. Moreover, if authorization is given for a specific use, it may not be extended to any other use.

Additionally, Section 21 of the Law of Names prohibits the use of a person's name without the person's consent, including the malicious use of a name for designating a fictitious character or thing, and Section 23 of the Law of Names provides similar protection for pseudonyms.

9.2 Are there situations when permission is not required?

Section 31 of the IP Law (Law No 11723) provides that publication without permission is allowed if it relates to scientific, teaching, or cultural purposes or to public interest events or to events that have

taken place in public. However, the right to publication of aspects of a public event is limited to the conveyance of information about that event and does not extend to commercial or other purposes.

The constitutional right of 'freedom of speech' may also be invoked if an action is based on the violation of the rules of privacy or intimacy. The courts balance free speech with privacy rights.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

No, there are no specific rules in this regard. Notwithstanding, there are some restrictions with the use of military buildings. Additionally, in some provinces specific regulations may apply. Consequently, it is always advisable to clear every element of an advertisement before its launch.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

The use of other companies' products is not regulated in Argentina. It is generally allowed only for non-commercial use of a third party trademark or when it does not constitute a misleading association with the other company.

In some cases the use of a recognizable product—eg in a TV show—could be considered Non-Traditional Advertising.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Argentina which affect advertising (eg Swedish gender equality law)?

It is important to mention that the Broadcasting Federal Committee (COMFER), together with the National Institution Against Discrimination (INADI), have created the 'Observatory of Discrimination in Radio and Television', with the purpose of examining the content of advertising and sending 'warnings' to the CONARP SRC. INADI has shown particular interest with regard to advertising messages based on gender, mainly after the Law in defense of women's rights was enacted in 2009.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Religion is considered a core value of society. In this sense, article 4 of the CONARP's Self-Regulatory Code states that: 'advertising must avoid everything that may injure the essential concepts and values of society, such as: ... religions...'

Moreover, article 1 of Law No 23.592 provides sanctions and damages regarding any act of discrimination against race, religion, nationality, ideology or sex.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Argentina?

It should be noted that highly regulated industries are constantly faced with changing compliance regulations. Always seek for local advice from a local law firm before starting to operate in Argentina.

AUSTRALIA

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Australia?

Advertising is regulated in Australia through both legislative and self-regulatory systems.

The primary piece of legislation is the Australian Consumer Law (ACL) (Schedule 2 to the Competition and Consumer Act 2010 (CCA)), which prohibits among other things, misleading or deceptive conduct (including conduct that is likely to mislead or deceive) and the making of false or misleading representations.

There is also industry and product specific legislation. For example, there are State and Territory Food Acts which prohibit misleading or deceptive conduct in relation to food advertising, packaging and labelling and which also requires compliance with the Australia and New Zealand Food Standards Code (FSC). Similarly, the advertising of therapeutic goods must comply with the Therapeutic Goods Advertising Code (TGAC) 2015, which has the force of law. A new TGAC 2018 will come in force on 1 January 2019. In addition, the Corporations Act 2001, the ASIC Act 2001 and the National Consumer Credit Protection Act 2009 all have provisions dealing with misleading or deceptive conduct in relation to advertising of credit and financial products.

Australia's advertising industry self-regulatory system administered by Ad Standards is discussed in Chapter 2.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

Legislation prohibiting misleading or deceptive conduct applies broadly to all conduct, rather than being limited by a definition of advertising and covers both the doing of, and the omission to do, any act.

In the TGAC, 'advertisement' or 'advertise' is defined as 'any statement, pictorial representation or design that is intended, whether directly or indirectly, to promote the use or supply of the goods', whilst the Australian Association of National Advertisers (AANA) Code of Ethics defines 'Advertising or Marketing Communications' to include any material that is published or broadcast in any medium and any activity undertaken by, or on behalf of, an advertiser or marketer which is calculated to 'promote or oppose directly or indirectly a product, service, person, organisation or line of conduct'.

1.3 What is the basic regulatory framework for advertising regulation?

The Australian Competition and Consumer Commission (ACCC) is the Federal government regulator for the ACL and it both investigates and enforces contraventions of the ACL (although an individual (corporate or otherwise) may also take, and do take, private actions under the ACL). Fair Trading Offices also investigate and enforce the ACL at the State and Territory level.

There are also industry specific government departments, such as the State and Territory Food Authorities which administer the FSC, the Therapeutic Goods Administration (TGA) which administers the TGAC, and the Australian Securities and Investment Commission (ASIC) which regulates legislation applying to advertising of financial and credit products.

Chapter 2 sets out the framework for Australia's advertising industry self-regulatory system.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The sending of electronic commercial communications (including email and SMS) is regulated by the Spam Act 2003. The Spam Act 2003 generally requires such communications to identify the sender, to only be sent with consent of the recipient, and to include a functional unsubscribe facility. In addition, the Do Not Call Register Act 2006 generally prohibits unsolicited telemarketing calls made to a telephone number registered on the Do Not Call Register, unless the account holder of the telephone number has consented to receiving the call.

Trade promotions involving a game of chance are highly regulated through State and Territory lotteries legislation. Depending on the nature of the promotion and total prize pool value, permits may need to be obtained in one or more States and Territories before the promotion can be advertised or conducted.

In addition, advertising in certain mediums (for example, commercial television and radio) is regulated under legislative codes of practice. Other mediums (including subscription television and outdoor marketing) are regulated by self-regulatory industry codes, which are discussed in Chapter 2.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Food advertising must comply with the FSC, which regulates issues in respect of the use of health, nutritional and advertising claims in advertisements and on packaging/labelling. There are also various self-regulatory industry codes that deal with food and beverage advertising to children and fast food advertising directed at children, which are discussed in Chapter 2.

Therapeutic goods advertising is subject to the TGAC, which prohibits (amongst other things) misleading advertising, advertising which arouses unwarranted expectations or causes consumers to self-diagnose, the offering of incentives to sales staff and the offering of samples. The TGAC also deals with the use of testimonials, professional recommendations, scientific information and comparative advertisements. The TGAC also prescribes wording which must be used in advertisements.

Advertising of financial and credit products are subject to the Corporations Act 2001, ASIC Act and the National Consumer Credit Protection Act 2009. The legislation generally prohibits misleading or deceptive conduct and is supported by ASIC’s regulatory compliance guide (RG 234), which details what is expected in relation to disclaimers, advertising of returns, benefits and risks, comparisons, use of forecasts and information about fees, and media-specific related matters.

Tobacco advertising is banned in Australia and labelling and packaging is also highly regulated under the Tobacco Plain Packaging Act 2011.

The advertising of firearms and alcohol are also highly regulated. The advertising of alcohol is also subject to a self-regulatory code of conduct, discussed in Chapter 2.

The advertising of gambling is highly regulated. Recent amendments to the Broadcasting Services Act 1992 (effective 30 March 2018) means that certain gambling advertisements can no longer be broadcast during live sports events on commercial free-to-air television, radio and pay TV services (with some limited exceptions). This may soon be extended to online advertising as well.

1.6 Are any government pre-approvals required?

Generally, no.

However, certain types of advertisements for therapeutic goods, namely advertising in specified media (being television, radio, print, cinema and outdoor), are required to be pre-approved by the Secretary of the Department of Health. These approval functions have been delegated to certain industry bodies, namely, Australian Self Medication Industry (ASMI) of over-the-counter (OTC) medicines and the Complementary Healthcare Council (CHC) in respect of complementary medicines.

As a result of recent changes to the Therapeutic Goods Act 1989, pre-approval of advertisements for therapeutic goods will no longer be required after 30 June 2020.

1.7 Does the media pre-clear advertising?

Generally, no.

However, advertising on commercial television is required to be classified by Commercials Advice (CAD). CAD's primary role is the classification of advertisements for the purpose of timing placement. Whilst CAD does on occasion request substantiation of claims in advertising, this is of a preliminary nature only. Any approval of advertising or otherwise by CAD does not guarantee compliance with advertising laws.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The ACCC is the government body which investigates alleged contraventions of, and enforces, the ACL.

The ACCC may in some cases resolve matters administratively, for example, by accepting a signed commitment by a trader which can include terms and conditions relating to the trader agreeing to stop the contravening conduct and compensate those who have suffered damage due to a breach. The ACCC can also resolve matters through infringement notices, which generally involves the issuing of smaller financial penalties in relation to minor contraventions. The ACCC also has the power to accept court enforceable undertakings whereby traders agree to remedy the harm, accept responsibility and improve trade practices compliance.

Finally, the ACCC can commence court action to obtain remedies such as declarations that an advertiser has engaged in misleading or deceptive conduct or conduct that is likely to mislead or deceive, injunctions (including interlocutory injunctions) restraining an advertiser from making certain advertising claims, an order for damages and/or costs, an order for the publication of corrective notices and advertisements, an order for the provision of financial consumer redress (refunds), an order for the payment of pecuniary penalties, and criminal convictions.

1.9 When does a competitor have a right of action? What are the potential remedies?

Competitors can commence court action against another competitor in respect of alleged contraventions of the ACL, for example in relation to misleading or deceptive conduct and the making of false representations. The remedies available for actions commenced by competitors include declarations, injunctions (including interlocutory injunctions), orders for refunds, damages, and costs.

Competitors may also consider using self-regulatory dispute resolution measures, including via complaints through the Ad Standards Industry Jury (a competitive complaint resolution service provided by Ad Standards). Complaints via the Ad Standards Industry Jury are generally much faster and cheaper to obtain; however, decisions of the Ad Standards Industry Jury are not enforceable by a court.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers also have a right of action in respect of alleged contraventions of the ACL. Remedies available for actions commenced by a consumer are the same as those available to competitors.

Consumers can also make complaints to the government regulator (eg the ACCC). If sufficient complaints are received or if the conduct complained of is likely to result in significant public detriment, the ACCC may decide to investigate the complaint and/or take action against the advertiser. However, the ACCC is under no obligation to investigate a complaint or take action against an advertiser and may decline to do so.

A consumer may also lodge a complaint with the Ad Standards Community Panel about an advertisement which they consider to be offensive, violent or sexist.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Australia have a primary advertising self-regulation system?

Australia has a strong self-regulatory framework for advertising regulation. There are a large number of industry advertising codes which cover in their scope general advertising, advertising through certain media, or advertising of specific products and services. These include, but are not limited to:

- (a) AANA Code of Ethics (general advertising code which addresses matters of taste and decency);
- (b) AANA Food & Beverages Code;
- (c) AANA Code for Advertising and Marketing Communications to Children (AANA Children's Code) (general advertising code which addresses products with principal appeal to children aged 14 years and younger);
- (d) AANA Environmental Claims in Advertising and Marketing Code (AANA Environmental Claims Code);
- (e) FCAI Voluntary Code of Practice for Motor Vehicle Advertising;
- (f) AFGC Responsible Children's Marketing Initiative (an initiative aimed to ensure that healthier foods are advertised to children);
- (g) Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children (which addresses advertising by fast food outlets);
- (h) ABAC Responsible Alcohol Marketing Code (addresses packaging and advertising of alcohol);
- (i) Australian Self Medication Industry (ASMI) Code of Practice (which applies to the non-prescription sector of the medicines industry);

- (j) Complementary Medicines Australia (CMA) Marketing & Supply Code of Practice: Complementary Medicines;
- (k) Medical Technology Association of Australia (MTAA) Code of Practice (which applies to medical devices);
- (l) Association for Data-Driven Marketing and Advertising (ADMA) Code of Practice (which applies in relation to direct marketing);
- (m) Jewellers Association of Australia Code of Conduct;
- (n) ASTRA Codes of Practice (in respect of subscription or pay television);
- (o) Outdoor Media Association's Code of Ethics (in respect of outdoor advertising such as billboards);
- (p) Medicines Australia Code of Conduct (which sets out standards for the marketing and promotion of prescription pharmaceutical products);
- (q) Franchising Code of Conduct;
- (r) Commercial Television Industry Code of Practice (which regulates commercial free-to-air television content).

Ad Standards is the peak national self-regulatory advertising body which administers a number of industry codes of practice on behalf of industry bodies, including on behalf of the AANA, the Federal Chamber of Automotive Industries (FCAI) and Australian Food and Grocery Council (AFGC). It receives and determines consumer complaints for these industry groups. Other industry bodies administer their own industry codes.

Ad Standards administers the various industry codes of practice through the Ad Standards Community Panel (Community Panel) and the Ad Standards Industry Jury (Industry Jury). The former responds to consumer complaints about advertisements alleged to be offensive, violent or sexist, whereas the latter is a form of alternative dispute resolution for competitors where allegations of misleading or deceptive conduct are made.

Whilst self-regulatory codes are only binding on the respective industry group members, advertisers should note that broadcast licensees and operators of certain advertising mediums (including commercial television and radio) may only broadcast content which complies with certain self-regulatory codes, including in particular the AANA Code of Ethics.

2.2 Is there a self-regulatory advertising code? What are the key principles?

There are many industry specific self-regulatory advertising codes.

The primary self-regulatory code is the AANA Code of Ethics, which deals with both consumer and competitor complaints.

In respect of consumer complaints, the AANA Code of Ethics:

- (a) prohibits the portrayal of people or depiction of material in such a way that discriminates against or vilifies a person or section of the community;
- (b) prohibits the employment of sexual appeal in a manner which is exploitative or degrading;
- (c) prohibits the presentation or portrayal of violence unless it is justifiable;

- (d) requires advertisers to treat sex, sexuality and nudity with sensitivity;
- (e) requires advertised only to use language which is appropriate in the circumstances; and
- (f) prohibits the depiction of material contrary to prevailing community standards on health and safety.

In respect of competitor complaints, the AANA Code of Ethics:

- (g) requires advertisers to comply with relevant legislation;
- (h) prohibits advertisements from being misleading or deceptive, or being likely to mislead or deceive;
- (i) prohibits advertisements containing a misrepresentation, which is likely to cause damage to the business or goodwill of a competitor;
- (j) prohibits exploitation of community concerns in relation to protecting the environment; and
- (k) prohibits the making of claims in relation to origin or content in a manner which is misleading.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Yes. Generally, each industry code of practice is administered either by Ad Standards or the industry body itself. The codes of practice generally have mechanisms for Ad Standards or the respective industry body receiving and determining complaints. Self-regulatory industry codes of practice are binding only on the members of the specific industry group. Generally, compliance with applicable industry codes is incentivised by the potential for adverse publicity if an advertiser does not comply with the determination of a complaint. The ultimate sanction in relation to non-compliance with an industry body code of practice is expulsion as a member by the industry body.

In respect of industry codes of practice administered by Ad Standards, if the Community Panel or Industry Jury (as the case may be) determines that an advertisement does not comply with an industry code, the Community Panel or Industry Jury will request the advertiser to modify or withdraw the advertisement as soon as possible after making a determination. If the advertiser does not do so, Ad Standards may report such failure in a public case report, send the report to relevant media proprietors, publish the report on its website and if considered appropriate, refer the report to an appropriate government agency.

2.4 Is the self-regulation system effective? Is it widely used and followed?

In general, the self-regulatory system is effective and widely used and followed in the respective industries. Administrators of industry codes often make use of media outlets to advertise non-compliance, which in general encourages compliance by advertisers of the industry codes.

2.5 Are the self-regulatory system's decisions reported?

Usually determinations under an industry code of practice are published on the respective administrator of the code's website. For example, the Community Panel and Industry Jury's decisions are published at www.adstandards.com.au/casereports/determinations. Media proprietors also access these publicly available determinations and report them on through their respective channels.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Generally, the self-regulatory codes of practice deal with matters of taste and decency, truthfulness in advertising and prevailing community standards on health and safety. Many of the industry codes also deal with advertising to children. More recently, given the rise of advertising through social media, there has been a regulatory focus on ensuring that paid advertising is clearly distinguishable from editorial content.

2.7 Are there any other self-regulatory systems that govern advertising practices in Australia?

There are a plethora of industry issued and administered codes of practice. See paragraph 2.1 above.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Australia (eg, consumer protection laws; IP laws; unfair competition laws)?

The ACL is the main piece of legislation which governs advertising claims. Its provisions have wide scope and prohibit misleading or deceptive conduct in trade or commerce, as well as the making of false or misleading representations, including but not limited to, in relation to:

- (a) the standard, quality, value or grade of goods or services;
- (b) sponsorship, approval or affiliation;
- (c) testimonials; and
- (d) the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy, including in relation to non-excludable guarantees under the ACL.

In addition to the ACL, advertisers should consider whether any product specific legislation applies which may prescribe conditions under which claims can be made. For example, Standard 1.2.7 of the FSC contains extensive regulation in respect of the making of nutritional, health, and related claims for foods.

The ACL also contains other consumer protection provisions, including:

- (e) non-excludable consumer guarantees, including but not limited to
 - (i) guarantees as to the acceptable quality of goods; and
 - (ii) services being conducted with due care and skill;
- (f) voiding of unfair contract terms in consumer contracts; and
- (g) prohibition of bait advertising.

Advertisers should also be aware of the laws in Australia which protect both registered and unregistered intellectual property of Australia, including the Trade Marks Act 1995 and Copyright Act 1968 and the common law tort of passing off.

3.2 Is substantiation required for advertising claims?

Yes, advertisers are required to have to hand substantiating evidence in support of advertising claims, prior to the making of the claim.

In respect of statements regarding future matters, statements which do not ultimately turn out to be true are not necessarily misleading or deceptive, as long as the person making the representation had reasonable grounds for making it, or did not know it was untrue or incorrect (and was not reckless as to the truth or correctness of the statement).

There are no specified standards as to the type of proof necessary to substantiate a claim; however, evidence should be robust, credible and able to resist objective scrutiny.

If advertising claims are based on the results of surveys, particular care should be taken to ensure that the survey has been properly conducted (for example, but not limited to language used, questions asked, methodology employed and sample size). Survey evidence should be objective, unbiased and employ sound methodology. The Federal Court Survey Evidence Practice Note (GPN-SURV) governs surveys conducted in the course of court proceedings by setting out the relevant procedures to be followed in order to conduct a survey compliant with court rules.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Some types of advertising messages do not require substantiation, for example, puffery. Whether or not the advertising messages require substantiation will depend on all of the facts and circumstances of the particular case, and a certain degree of 'puffing' or exaggeration is generally accepted in the ordinary course of commercial dealings.

Generally, claims which are capable of objective assessment or comparative claims will require substantiation, as these types of claims have a greater likelihood of being misleading if incorrect, in comparison to clearly fanciful or non-comparative claims.

3.4 What are the rules governing the use of disclosures in advertising?

Where a claim can be substantiated by evidence, this evidence need not be disclosed in the advertisement unless to omit the information would result in the advertisement being misleading or deceptive. However, advertisers must be careful not to hide advertising material within other content, and, where it is not necessarily clear whether content is sponsored or part of a paid ad campaign, it must be clearly labelled as such. The AANA Clearly Distinguishable Advertising Best Practice Guideline provides further guidance on how to determine whether advertising content is clearly distinguishable from non-advertising content.

Disclosures by way of disclaimers in supers in a television commercial, statements at the end of radio commercials, or footnotes in print advertising may be necessary if, without the disclosure, the overall impression of the advertisement would be regarded as misleading or deceptive. If this is the case, advertisers should also consider whether the placement, size and prominence of the disclaimer is sufficient enough to be effective.

CAD (the entity which classifies television commercials) recommends allowing a minimum of 0.2 seconds per word or 2 seconds minimum duration if less than 10 words), taking into account all text on screen at the same time as any disclaimer. They also recommend that for standard definition images, the minimum text height be at least 15 pixels in a 576 line raster, or for high definition, 28 lines in a 1080 line raster.

These duration and size recommendations are recommendations only. Whether a disclaimer is in fact an effective means of correcting an otherwise misleading impression, or false and misleading representation, will depend on the specific circumstances of the advertisement and the overall impression created by the advertisement which is likely to be understood by a reasonable person of the target audience.

If the initial impression of an advertisement is overwhelmingly misleading, any disclaimer may not be sufficient to overcome that initial misleading impression.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Advertisers should be aware that in addition to section 18 of the ACL, which prohibits misleading or deceptive conduct, section 29(1)(e) of the ACL also 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’.

Advertisers should also note that the evidentiary onus in respect of representations purporting to be testimonials or concerning testimonials is on the advertiser, in the sense that there is a rebuttable presumption that a representation purporting to be, or concerning, a testimonial is misleading.

In light of the above, testimonials should be genuine and legitimate, reflect typical cases and the actual experience of the individual giving the testimonial. In general, it is recommended that the advertiser should obtain permission from the individual to use the testimonial, and a signed record of the testimonial should be retained for substantiation purposes.

Businesses and review platforms that selectively remove or edit online reviews, particularly negative reviews, for commercial or promotional reasons are likely to be regarded as engaging in misleading or deceptive conduct.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific provisions addressing the use of product demonstrations in advertising. However, the general provisions under the ACL apply. That is, the depiction or use of product demonstrations should not be misleading or deceptive or likely to mislead or deceive.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Yes, comparative advertising is permitted.

However special care should be taken when making comparative claims, because it is generally considered that comparative claims are more likely to mislead or deceive if inaccurate as compared with other types of claims, and because the claims are likely to be scrutinised by the compared party. That being said, there are generally no special rules that apply to comparative advertising, and comparative advertising claims do not carry a higher burden for substantiation than any other type of claims.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

Section 122(1)(d) of the Trade Marks Act 1995 provides that a registered trade mark is not infringed if a person uses a trade mark for the purposes of comparative advertising.

The situation in respect of copyright under the Copyright Act 1968 is more complex. Section 67 of the Copyright Act 1968 provides that copyright in an artistic work is not infringed by its incidental inclusion in a film or broadcast. What is meant by 'incidental' is a question of fact, however providing the artistic work in question is not the main or central focus of the film or broadcast, it is more likely to be considered incidental. In addition, the Copyright Act 1968 permits a fair dealing with a copyright work for the purposes of criticism or review and parody or satire.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Claims about where a product's ingredients or components came from or where it was processed are 'country of origin' claims. Country of origin claims include claims that a product was 'made', 'produced' or 'grown' in a certain country.

'Made in' claims refer to the production of the product, that is, the goods must have been substantially transformed in the country of origin being claimed.

'Product of' claims are used to demonstrate that each significant component or ingredient of the goods originated in the country and the production processes took place in the country.

'Grown in' claims are used to demonstrate that each significant ingredient or significant component was grown in the country of the claim and the production or manufacturing processes occurred in that country.

From 1 July 2018, food offered for retail sale in Australia is required to carry country of origin labelling under the Country of Origin Food Labelling Information Standard 2016 (Information Standard), made under the ACL. The Information Standard aims to make it easier for consumers to see where their food originates from.

3.10 Are there any special rules governing product packaging?

Under the FSC, foods suitable for retail sale sold in a package require labelling that bears certain information such as (but not limited to), the name of the food, lot identification, name and address of the supplier, advisory statements, warning statements, a statement of ingredients. There are general prohibitions relating to altering the labels. For example, a person selling the packaged food must not deface the label on the packaging prior to its sale. There are also legibility requirements for warning statements on the packaging.

As previously mentioned in question 1.5, tobacco packaging is highly regulated under the Tobacco Plain Packaging Act 2011. For example, the physical feature, colour, finish of the retail packaging of a cigarette pack or carton and the depiction and use of the tobacco manufacturer's trade marks on the packaging are regulated by the Act.

There are some special rules under the ABAC Responsible Alcohol Marketing Code in respect of the product packaging of alcohol. For example, the product packaging must not show or encourage excessive consumption, irresponsible behaviour in relation to consumption of alcohol, or have a strong appeal to minors.

In addition, the Agricultural and Veterinary Chemicals Code Act 1994 (Agvet Code) prescribes the approval process and labelling criteria, including content requirements for labels for containers for agricultural chemical products. Under the Agvet Code, a label must comply with the requirements of the Labelling Standards or, if there is no Labelling Standard, the Agricultural Labelling Code or the Veterinary Labelling Code.

4 PRICE ADVERTISING

4.1 What are Australia's rules regarding price advertising?

In addition to the general requirement that any price advertising must not be misleading or deceptive or likely to mislead or deceive, sections 47 and 48 of the ACL contain provisions regarding multiple pricing and component pricing. A supplier who displays multiple prices for the same goods must either sell the goods for the lowest displayed price or withdraw the goods from sale until the price is corrected. In addition, a supplier must not promote or state a price that is only part of the cost, unless the total, single price is prominently advertised.

In practice this means that the advertised price must be the total cost, inclusive of any taxes, duties or levies. However, the single price need not include the costs of delivery.

In addition, section 29(i) of the ACL specifically prohibits false and misleading representations concerning the price of goods and services.

In recent times, the ACCC has targeted the use of 'was/now' type of advertising of sales. In respect of 'was/now' claims, goods or services offered must have been offered at the 'was' price for a reasonable period of time before advertising the 'now' price. The 'was' price must also be the realistic former sale price which may not necessarily be the same as the ticketed price. For example, in respect of businesses where goods are rarely sold at the ticketed price and are often the subject of discounts, any 'was' price used in a 'was/now' type advertising campaign will need to reflect the actual price at which goods were sold for a reasonable period immediately prior to sale.

4.2 What are Australia's rules regarding advertising 'free' products?

There are no specific rules in relation to the advertising of 'free' products. However, in accordance with the general rules, advertising claims of 'free' products must not be misleading or deceptive or be likely to mislead or deceive.

It is important to bear in mind that the ACCC has singled out the word 'free' as a word that should be used with great care and from a consumer perspective 'free' means absolutely free.

4.3 What are Australia's rules regarding sales and special offers?

Advertising of sales and special offers must not be misleading or deceptive or be likely to mislead or deceive. As noted above, section 29(i) of the ACL also specifically prohibits false and misleading representations concerning the price of goods and services.

Section 35 of the ACL also prohibits 'bait advertising', which is where a person advertises goods or services for sale at a specified price, although there are reasonable grounds for believing they are not actually able to offer the goods or services at that price. A typical example is the 'bait and switch', where a retailer offers goods for sale at an extremely good price, knowing that it only has a limited number of the good for sale, for the purposes of drawing in customers so that they can be persuaded to purchase alternative goods from the retailer.

Section 49 of the ACL prohibits referral selling schemes, where consumers are persuaded to buy goods or services by promising benefits (including commissions, rebates or other benefits) contingent on subsequent sales or events occurring after the contract is made.

4.4 What are Australia's rules regarding rebates?

There are no prohibitions in respect of offering rebates.

However, section 32 of the ACL specifically prohibits the offering of any rebate, gift, prize or other free item with the intention of not providing it, or of not providing it as offered. The provisions also require any person offering such a rebate, gift, prize or other free item to do so within the time specified in the offer or, if no time is specified, within a reasonable time after making the offer.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

In Australia, there are numerous non-excludable statutory consumer guarantees enshrined in the ACL, including but not limited to goods being of acceptable quality and services being provided with due care and skill. Advertisers should be aware of Australian consumer rights, because section 29(m) of the ACL prohibits the making of false or misleading representations as to the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including the guarantees provided by the ACL). In practice, this means that any express warranties and refund policies must not conflict with a consumer's statutory rights. Retailers should also be aware that there are extensive provisions detailing the form and content of any express warranties against defects which may be provided by a retailer.

Advertisers should also be aware that section 48 of the CCA prohibits resale price maintenance, namely the imposition of minimum resale prices by a manufacturer or distributor to a retailer. Advertisers may recommend an appropriate price for particular goods or services, but must not stop retailers from charging or advertising below that price, including indirect means such as threatening to stop supplying the retailer.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Tobacco products are completely prohibited from being advertised in Australia. In addition, the Tobacco Plain Packaging Act 2011 and associated regulations highly regulate the labelling and packaging of tobacco products with plain packaging prescribed.

The advertising of drugs and medicines are highly regulated by both legislation and self-regulation. Prescription-only and certain pharmacist-only medicines may be advertised to health professionals,

but are prohibited from being advertised to the general public in Australia, unless approved by the Health Minister for a government-controlled health campaign.

The advertising of firearms is permitted however in some States and Territories, although the advertiser must be a licensed firearms dealer or the proposed sale is to be arranged through a licensed firearms dealer. Most State and Territory legislation also requires the specific firearm serial number to be stated in the advertisement.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

The sending of commercial electronic messages (including through SMS and email) to recipients who have not consented to the sending of the messages is prohibited under the Spam Act 2003. The Act also prescribes requirements to identify the sender and include a functional unsubscribe facility in relation to messages (which are sent with consent).

In addition, unsolicited calls by Australian or overseas telemarketers to numbers which are registered on the Do Not Call Register are prohibited under the Do Not Call Register Act 2006. However, there are some exemptions for some public interest organisations, including charities, political parties and educational institutions. The Telecommunications (Telemarketing and Research Calls Standard) 2017 and Fax Marketing Industry Standard 2011 also apply to prescribe the timing and content of telephone and fax marketing communications.

The broadcast of subliminal messages through free to air commercial television stations are prohibited under the Commercial Television Industry Code of Practice 2010, including during programs, program promotions, station identifications and community service announcements.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The AANA Code of Ethics covers issues relating to indecency and obscenity. The AANA Code of Ethics prohibits the portrayal and depiction of people and material in a manner which discriminates against or vilifies sections of the community, prohibits the employment of sexual appeal in an exploitative manner, prohibits the portrayal of violence except in justifiable contexts, requires sex, sexuality and nudity to be treated with sensitivity, requires language to be appropriate for the circumstances and prohibits the depiction of material contrary to prevailing community standards on health and safety.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

On 1 March 2017, a new section was inserted into the AANA Code of Ethics (section 2.7), which provides that advertising or marketing communication must be clearly distinguishable as such to the relevant audience.

Advertisers must be careful not to hide advertising material within other content, and where it is not necessarily clear whether content is sponsored or part of a paid ad campaign, it must be clearly labelled as such. The AANA Clearly Distinguishable Advertising Best Practice Guideline provides further guidance on how to determine whether advertising content is clearly distinguishable from non-advertising content.

Other than the above, there are no special rules requiring advertisers/sponsors to identify themselves.

However, the usual provisions of section 18 of the ACL apply in relation to misleading or deceptive conduct. If failure to identify the advertiser/sponsor is likely to mislead or deceive consumers, the advertiser/sponsor should be identified. Please also see our comments at question 7.1 below regarding disclosures when editorial content which has been influenced by advertisers.

Please note that electronic commercial communications (being SMS and email) are regulated by the Spam Act 2003, which requires (amongst other things) that the sender of the communication be identified.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are also special rules in relation to advertising and marketing communications to children. Specifically, the AANA Children's Code requires that advertising and marketing communications to children (being those aged 14 and below) is in fact a commercial communication rather than program content, editorial comment or other non-commercial communication.

Further, in relation to advertising content being distinguishable from editorial content, the general provisions of the ACL in respect of misleading or deceptive conduct (section 18) and false or misleading representations (section 29) will apply.

In relation to editorial content, there is a provision exempting information providers (including media proprietors) from sections 18 and 29 of the ACL in relation to publications made in the course of carrying on the business of providing information. However, in respect of some editorial content, there may be a requirement to disclose where advertisers have influenced the editorial content. For example, the Media Entertainment & Arts Alliance (MEAA)'s Journalist Code of Ethics requires journalists to disclose when any direct or indirect payment has been made for interview, pictures, information or stories. In another example, under broadcast current affairs and talkback programs are also required under the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2012 to disclose certain commercial agreements and other arrangements that have the potential to affect the content of such programs.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Usually, special disclosure requirements apply to the media proprietor or producer of editorial content, as opposed to the advertiser.

As noted above, journalists may be obligated under the MEAA Journalist Code of Ethics to disclose when any direct or indirect payment has been made for interview, pictures, information or stories.

In addition, broadcast current affairs and talkback programs are also required under the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2012 to disclose certain commercial agreements and other arrangements that have the potential to affect the content of such programs.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There is no legislation which specifically regulates advertising in the social media space. The regulations discussed in this article which apply to advertising and marketing in Australia in general also apply to advertising on social media platforms.

Whilst the rules which apply are the same, various bodies have issued practice notes and guidelines considering how the rules may be applied in the social media space. For example, the ACCC's guidelines detail the amount of time and resources the government regulator expects companies to devote to monitoring of social media pages.

For example, the AANA's best practice guideline, Responsible Marketing Communications in the Digital Space, includes recommendations as how advertisers should manage consumer interactions and moderate user generated content. In particular, the guideline recommends that moderation should include removal or correction of user generated content, the development of house rules to define what is not accepted in terms of user generated content on an advertiser's website, moderating at least once every business day, moderating on non-business days in a manner consistent with the brand's level of activity and consumer engagements, and including mechanisms for reporting unacceptable content.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

Yes, advertisers can be responsible for claims made in user generated content.

In *ACCC v Allergy Pathway Pty Ltd (No 2)* [2011] FCA 74, misleading or deceptive testimonials were posted by clients of Allergy Pathway's Facebook wall. Whilst the advertiser was not responsible for the testimonial's initial publication, failure to remove the comments after the advertiser became aware (or should have become aware) resulted in Allergy Pathway being deemed to be the publisher of the user generated comments and in contravention of the ACL.

The responsibility of advertisers for user generated content has been echoed in a number of subsequent Community Panel determinations under the AANA Code of Ethics (Case Nos 0272/12 and 0271/12). For example, in 0271/12, derogatory and offensive material posted by users on Fosters Australia's Facebook pages, which were not promptly removed constituted a breach of the AANA Code of Ethics by Fosters Australia. In its determinations, the Community Panel noted that the Facebook site of an advertiser is a marketing communication tool which acts to promote or oppose a product or service and is reasonably controlled by the advertiser.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

As noted above, it has been made clear since *ACCC v Allergy Pathway Pty Ltd (No 2)* [2011] FCA 74 that advertisers are responsible for misleading or deceptive user generated content which is published on an advertiser's website, and not removed after an advertiser has become aware of the comments (or ought reasonably to have been aware). This has been echoed in self-regulatory

decisions of the Community Panel under the AANA Code of Practice, in the decisions of Diageo 0272/12 and Fosters Australia 0271/12.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

There is no right of publicity in Australia. However, there are other laws that an individual may rely on to control the use of their name, picture, likeness, voice and identity in advertising. Generally, however, it is normally recommended that an advertiser obtain the consent of any persons referred to or appearing in an advertisement or promotion.

The Privacy Act 1988, which applies only to entities with a turnover of AU\$3 million or more, regulates among other things the use or disclosure of any information from which a person's identity can reasonably be identified (including in combination with other available sources of information). This will certainly include an individual's name, picture and identity, but perhaps not an individual's voice alone. The Privacy Act 1988 prohibits the use and disclosure of personal information (including use/disclosure in advertising) unless the individual has consented, or an exception applies.

In addition to section 18 of the ACL which prohibits misleading or deceptive conduct generally, section 29(g) and (h) of the ACL prohibits the making of false and misleading representations in relation to sponsorship or approval of goods or services, or in relation to sponsorship, approval or affiliation of the person making the representation. These provisions are usually only effective where the unauthorised use of an individual's identity is in respect of an individual who possesses or has developed a significant reputation in Australia.

The common law tort of passing off also protects against unauthorised trading on another's goodwill.

9.2 Are there situations when permission is not required?

Consent is not required if an individual is not likely to be able to rely on any of the actions discussed above at paragraph 9.1 namely:

- (a) if the Privacy Act 1988 applies, an exception applies in relation to the use or disclosure of personal information of the individual. The main exception is if the individual would reasonably expect the advertiser to use or disclose the information and the purposes for which it is used is directly related to the primary purpose of collection of the information; and
- (b) in respect of the other causes of action under the ACL, if the manner in which an individual's name, picture, likeness, voice and identity is used does not, and is unlikely to, mislead or deceive or constitute a false or misleading representation that the advertiser or promoted goods/services has a sponsorship or approval from, or affiliation with the individual referred to in an advertisement; and
- (c) in respect of the common law tort of passing off, if the individual does not have sufficient goodwill or the advertisement does not damage the goodwill.

Given the complexity of actions available to an individual, obtaining consent from the individual is usually recommended.

Of course, if (for example) a photo is taken of a well-known individual in a public place, and there is no privacy, ACL, passing off, confidentiality or contractual restrictions, permission would not be required. See *Tom Cruise and Nicole Kidman v Southdown Press Pty Ltd* (1993) 26 IRP 125.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Under the Environment Protection and Biodiversity Conservation Act 1999, prior approval from the Director of National Parks is required for commercial filming and photography in some of Australia's parks and reserves, for example, the Uluru-Kata Tjuta National Park, which is a World Heritage Area. There may be conditions to the approval, such as that advertising and promotional materials must be submitted to the relevant park's media office for consideration prior to the publication and use of such materials.

All advertising on commercial television must be classified and approved by CAD. However, this approval process is focused on classification issues rather than compliance with other laws, such as the ACL. In some cases, CAD requests substantiation of advertising claims (for example, if the advertisement has a statement that says 'Our restaurant is located in the oldest historic building in Australia', then CAD may request substantiation of that statement), however any approval by CAD is not a guarantee of compliance with the ACL or any other laws or regulation.

In addition, under the TGAC, advertisements for therapeutic goods (including over the counter medicines and complementary medicines) in specified media, including television, radio, print, cinema and outdoor must be pre-approved before publication.

The ABAC Scheme Limited offers an optional, user-pays pre-vetting service for checking compliance with the ABAC in relation to alcohol advertising. However, approval of an advertisement is no guarantee against an adverse finding against the advertisement under the usual ABAC complaint procedures. It is possible for the ABAC Adjudication Panel to upload a complaint against material which has been pre-vetted and approved.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

On the basis that the use is not misleading or deceptive and does not constitute a false or misleading representation that there is a sponsorship or approval by, or affiliation with the company whose products are being depicted, incidental use of other companies' recognizable products in advertising is permitted.

The incidental display of company branding and trade marks is unlikely to constitute trade mark infringement, as an incidental depiction is unlikely to be considered to be a use of a trade mark in the sense of indicating the trade origin of a product. In addition, there is a specific exemption of copyright infringement for artistic works reproduced in a film or television broadcast when the inclusion of the artistic work is only incidental to the principal matters represented in the film or television broadcast.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Australia which affect advertising (eg Swedish gender equality law)?

There are no rules peculiar to Australian culture, although see our comments at question 11.2 below in relation to depictions of indigenous Australians.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Cultural sensitivity and care should be taken by advertisers when seeking to depict indigenous Australians in advertising, so as not to offend their religious and cultural beliefs. Whilst there is no legislation in Australia which specifically regulates depiction of Aboriginal people, such matters should be treated with special care in Australia.

There is, for example, an advisory note published as part of the Commercial Television Industry Code of Practice in Australia which recommends that Aboriginal and Torres Strait Islander paintings and symbols not be used in programs without seeking appropriate advice or permission.

Generally, it is recommended that any depictions of Aboriginal people in advertising (whether wearing ceremonial markings/symbols or not) be reviewed by an appropriate indigenous arts body to confirm that such depictions are culturally sensitive and accords with Aboriginal religious and cultural beliefs and are not offensive to their laws and customs.

In many Aboriginal and Torres Strait Islander communities, the reproduction of a deceased person's name and image is offensive to Indigenous cultural beliefs. Cultural warnings should be used to alert Aboriginal and Torres Strait Islanders viewers and/or listeners if images and/or voices of deceased persons are used.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Australia?

Do not assume an advertisement that has been approved in other countries will be acceptable under Australian law. Get advice. Be aware that Australian regulators such as the ACCC have significant power, are very vigilant and will prosecute advertisers who they perceive are contravening the ACL. The ACCC's priorities change from year to year, but presently one of its enforcement and compliance priorities is digital platforms, and therefore businesses should ensure that advertising content posted on their social media pages is reviewed and cleared just as thoroughly as advertising material published in more traditional channels.

AUSTRIA

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Austria?

In Austria, there is no statute that specifically regulates advertising in a comprehensive way. Instead, there are several federal statutes which contain legal provisions concerning advertising, the main one being the Federal Act Against Unfair Competition (*Bundesgesetz gegen den unlauteren Wettbewerb*).

There are also specific laws that apply to advertising on television, radio and in audiovisual media; and to certain products and services such as alcohol, tobacco, medicines, medical devices and financial services.

The Trademark Act (*Markenschutzgesetz*) and the Copyright Act (*Urheberrechtsgesetz*) are also of importance when using third party trade marks, copyright works and other intellectual property rights in advertising.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

Austrian legislation does not contain a definition of 'advertising', but the Comparative Advertising Directive contains a definition that is used by Austrian courts. Generally, 'advertising' is any form of commercial communication or representation which, directly or indirectly, promotes the sale of goods or services. Commercial promotions, presentations, recommendations, announcements, sponsorship and sweepstakes which directly or indirectly promote the sale of goods or services will constitute 'advertising'. Even reports with editorial content are considered to be advertising if payment is made for their publication.

1.3 What is the basic regulatory framework for advertising regulation?

The main advertising law in Austria is the Federal Act Against Unfair Competition, which implemented the Comparative Advertising Directive and the Unfair Commercial Practices Directive. The Act Against Unfair Competition prohibits unfair commercial practices, aggressive commercial practices and misleading commercial practices – and contains provisions regulating, amongst other things, the disparagement of businesses and misuse of brands. The use of promotional gifts, price discounts and clearance sales are also covered by this act.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The E-commerce Act (*E-Commerce-Gesetz*) and the Distance and Away Business Act (*Fern- und Auswärtsgeschäfte-Gesetz*) contains a legal framework for the sale of goods and services over the internet and off premises. In particular, both acts impose certain information requirements on businesses when distributing goods and services ordered via the internet or that are sold outside of business premises. The Telecommunications Act (*Telekommunikationsgesetz*) prohibits telephone calls and fax messages for advertising purposes without the prior consent of the recipient; and it restricts the sending of electronic post, including SMS, for marketing purposes without the prior consent of the recipient.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Advertising drugs is restricted by the Act on Pharmaceuticals (*Arzneimittelgesetz*) and advertising medical products is restricted by the Act on Medical Products (*Medizinproduktegesetz*).

Tobacco advertising and sponsorship are—with few exceptions—prohibited by the Tobacco Act (*Tabakgesetz*).

Specific acts regulating the banking and financial services sectors (*Bankwesengesetz*, *Wertpapieraufsichtsgesetz*), restrict the advertising of certain financial services.

The Gambling Act (*Glückspielgesetz*) contains provisions regulating the advertising of casinos and gambling.

Advertising restrictions also apply to certain professions such as physicians, dentists, public notaries, lawyers, veterinarians and morticians.

1.6 Are any government pre-approvals required?

No. Government pre-approvals are not required for individual advertisements, although advertisers must obviously comply with restrictions imposed by law. According to the Austrian legal system, every competitor may pursue illegal advertising before the ordinary courts. The courts will then decide whether an advertisement is in accordance with the law or not. It would be against this assignment of jurisdictional powers if a governmental authority required the pre-approval of individual advertisements. However, there are some laws which provide for particular information requirements, listed in these laws, when marketing specific products and services (eg, pharmaceuticals and financial services).

1.7 Does the media pre-clear advertising?

There are laws which impose restrictions on certain media operators, such as television, radio, newspaper and audiovisual media operators. Media operators covered by such laws have to ensure that advertisements and sponsorship on their media are identifiable as such, and that no subliminal messages are used for advertising purposes. To protect themselves, media operators that are caught by such laws will examine advertisements to ensure they are in accordance with these restrictions.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Advertising restrictions are enforced in different ways. Where an entity violates advertising laws, this may amount to an act of unfair competition. Certain associations, in particular the Federal Chamber of Commerce, the Chamber of Agriculture, the Chamber of Labor, the Federal Trade Unions Association, the Federal Competition Authority and the Consumer Protection Association, are entitled to sue before the ordinary courts alleging illegal advertising. Furthermore, any other association with the purpose of promoting the economic interests of its members may be entitled to proceed before court. It is then up to the ordinary court to decide on the claims based on illegal advertising, particularly to issue a cease and desist order. Certain violations of advertising restrictions will be enforced by administrative authorities, which may impose fines on those responsible for violating advertising laws.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor is entitled to start civil action before the state courts and has the right to combine a civil action with an application for preliminary injunctions. Every competitor has the right to start court action against a defendant for illegal advertising if a competitive relationship with the defendant exists. It is not necessary for the competitor bringing the claim to provide evidence that the illegal advertising by the defendant caused any damage.

A competitor is entitled to apply for a court order requiring the defendant to cease and desist from illegal advertising. Such a cease and desist order may be granted by the court by way of a preliminary injunction based on prima facie evidence. A competitor may also:

- (a) claim damages if they can prove that they suffered damage as a result of illegal advertising by the defendant and/or
- (b) apply for a court order requiring that the judgment against the defendant advertiser is published in certain media in order to inform the public about the illegal activity.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers only have a right of action against illegal advertising if their personal rights are adversely affected. This will only be assumed in exceptional cases. As an example, the consumer may claim for a cease and desist order in cases of 'cold calls' or if the consumer is harassed with unsolicited fax messages or e-mails. A consumer may also apply for a cease and desist order and/or damages if their likeness or name is used in advertising without their consent. The same applies if intellectual property rights of a consumer (eg, trade marks, patents, works of art, designs) are used in advertising without obtaining the prior consent of the consumer. Apart from this, a consumer is not entitled to start court action against illegal advertising. Every consumer, however, may inform one of the associations of any kind of illegal advertising, so that the association may then decide to proceed against illegal advertising before court.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Austria have a primary advertising self-regulation system?

In Austria self-regulation is of minor importance. The advertising industry founded an Advertising Council, which established guidelines to be followed by the advertising industry as an instrument of self-control. These guidelines require, in particular, that a sense of decency is shown when advertising. Generally, the Advertising Council will not strictly examine whether an advertisement is in accordance with the law or not. The main focus of the Advertising Council will be whether an advertisement complies with public morality and ethical standards. Most of the decisions of the Advertising Council tend to concern sexism or racism in advertising. As the Advertising Council does not primarily judge advertisements on the basis of the law, the Advertising Council may object to advertising practices even though such practices are in accordance with the law.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The Advertising Council has issued an advertising industry ethics code. This ethics code constitutes a core area of the Austrian system for the protection of consumers against the misuse of advertising. The rules of conduct include general principles of advertising relating to ethics and morality, violence, health, safety, environment, gender discrimination, children and young people, elderly people, addictive substances and advertising for automotive vehicles. The guidelines are based on the principles of social responsibility, human dignity and personal integrity. Advertising that directly or indirectly discriminates against individuals or promotes discrimination is prohibited. Suffering, misfortune and death must not be misused for the purpose of advertising. In addition, the Advertising Council has issued codes relating to specific areas of advertising. Such codes include advertising alcoholic beverages, advertising motor vehicles and advertising food by audio-visual commercial communications and commercial communications directed at children. All these codes emphasize the principles of decency, morality and responsibility.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Any person may complain about an advertisement to the Advertising Council. The Advertising Council may also become active 'ex-officio' without having received a complaint. The Advertising Council will only deal with commercial and professional advertising. Political campaigns, advertising in the area of art and culture and for non-profit organizations will not be dealt with by the Advertising Council. The Advertising Council will also not deal with advertising which is illegal under the Act Against Unfair Competition. If the complaint is justified, the Advertising Council may request the advertiser to immediately stop the advertising measure objected to, or to be more sensitive in the future. The decision of the Advertising Council cannot be enforced and does not involve sanctions and therefore only amounts to a recommendation.

The decisions of the Advertising Council have no binding effect on the ordinary courts in the event that a certain advertisement is the subject of court proceedings following a decision of the Advertising Council. The ordinary court, therefore, may decide that advertising practices are lawful, even though the Advertising Council decided that the advertisement offends ethical standards. Even if an entity continues with a campaign which has been objected to by the Advertising Council, this will not lead to any sanctions.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The Advertising Council is of minor importance in Austria. Nonetheless, as the principles of the advertising industry ethics code are in many respects in accordance with the law, these principles are widely respected by the advertising industry. As the statistics published by the Advertising Council show, this can be seen in particular in relation to advertising for alcoholic beverages and advertising aimed at children. In other areas, advertisers base their promotions on the law and not on the ethical standards of the Advertising Council.

2.5 Are the self-regulatory system's decisions reported?

The decisions of the Advertising Council may be published on the Advertising Council's website at www.werberat.at. Furthermore, the Advertising Council may inform the media of its decisions in order to encourage the media to publish such decisions.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Most of the complaints brought before the Advertising Council relate to sex and sexism. The key areas that companies should be aware of are advertisements with sexual images (eg, advertising for a brothel near schools, excessive nudity in advertisements), sexism, advertising generally offending human dignity, gender discrimination, violence, advertising for alcoholic beverages, advertising for motor vehicles and advertising directed at children.

2.7 Are there any other self-regulatory systems that govern advertising practices in Austria?

The Austrian Ethics Council for Public Relations (*Österreichischer PR Ethik Rat*) issues self-regulatory rules that only have recommendatory character. The most notable publication is the Code of Conduct for Ethics in Digital Communication defining (non-binding) rules and principles for communication in online and social media channels.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Austria (eg, consumer protection laws; IP laws; unfair competition laws)?

The main source of advertising law is the Federal Act Against Unfair Competition. This act prohibits unfair commercial practices, aggressive commercial practices and misleading commercial practices. The act also contains regulations concerning the disparagement of a business, the misuse of business designations and brands, bribing employees or agents and the disclosure of business or trade secrets. The use of promotional gifts, price discounts as well as clearance sales are also covered by this act.

The Copyright Act (*Urheberrechtsgesetz*) protects creative works (eg, works of literature, paintings, sculptures, music and databases) against use or exploitation by third parties without the applicable owner's consent.

The Trademark Act (*Markenschutzgesetz*) and the Industrial Designs Act (*Musterschutzgesetz*) prevents trade marks and designs being used or exploited by third parties without the applicable owner's consent.

The owner of the rights may object to the use of their works, trade marks or designs by other persons or businesses in advertisements.

3.2 Is substantiation required for advertising claims?

Generally, no substantiation is required in the advertising claim itself. However, if court action is started it could then turn out to be necessary to have the claim substantiated within a short period of time in order to avoid the court issuing an injunction. The advertiser has to prove that the claims made in the advertisements are true and provide substantiation, if this is appropriate and reasonable under the specific circumstances of the case.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Puffery is exaggerated advertising that cannot be taken seriously or literally by the public. If a claim is clearly identifiable as puffery, it will not be regarded as misleading. Also, purely subjective value judgments such as 'Austria's best coffee' do not require substantiation. Claims in advertising which are clearly identifiable by the consumer to be undoubtedly blatant and which are not objectively verifiable will not require substantiation and generally are not forbidden. If doubts remain as to whether or not a statement is to be taken seriously, it will be considered as being serious.

3.4 What are the rules governing the use of disclosures in advertising?

Disclosures will be necessary if an advertising claim would otherwise be deceptive. It is a general principle that an advertising claim must not be deceptive. Such deceptiveness could also be created by omitting information which is relevant for a consumer - in which case, in order to avoid deceptiveness by omission, disclosures will be necessary. Generally, disclosures must be clear and conspicuous so that they can easily be noted by the consumer.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Endorsements and testimonials must not be used if using them would make an advertising claim deceptive or aggressive. The statement of the third party will be considered as part of the advertising claim.

The claim that a business or a product has been approved, endorsed or received an award from a public or private body when it has not, or making such a claim without complying with the terms of the approval, endorsement or authorization, is prohibited.

3.6 What are the rules governing the use of product demonstrations in advertising?

Product demonstrations may be used in advertisements and will form part of any advertising claim. The rules regulating advertising in general will apply to product demonstrations, which means that product demonstrations are not allowed if they are deceptive or aggressive, or if they disparage a competitor's product or service in a subjective way. Some laws provide for specific rules for product demonstrations (eg, showing doctors or nurses presenting pharmaceuticals is prohibited).

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising, where goods or services from one company are compared with those of a competitor, is permissible, provided it complies with certain conditions. Comparative advertisements must be objective, must not be misleading or aggressive and must not disparage a competitor or a competitor's products or services.

The products or services that are being compared must actually be comparable (ie, they must meet the same needs or be intended for the same purpose). It is not sufficient to simply claim that one's own products or services are better than those of a competitor. All relevant circumstances and reasons for the comparison must be provided in order to allow the public to make an objective decision.

Products with an indication of origin may only be compared with products of the same origin. If the compared products or services are on special offer, the period of the special offer must be clearly and conspicuously notified to the public.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

If an advertising claim complies with the comparative advertising requirements it is permitted to use a competitor's trade mark and show a competitor's products. It is also permitted to compare a no-name product with a branded product. However, the use of a competitor's trade mark may be an illegal sales practice if the reputation of the competitor's trade mark is exploited in an unfair way. This could be, for example, if a competitor's famous trade mark is used in a comparative advertisement where all the necessary information for the comparison could be provided to the public without using the famous trade mark.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

According to the Act Against Unfair Competition it is forbidden to mislead consumers about the origin of a product. Furthermore, based on EU law and on the Trademark Act, various designations of origin and geographical indications relating to food and agricultural products cannot be freely used and are protected against misleading uses (eg 'Tyrolean Bacon' (*Tiroler Speck*)).

With regard to wines and spirits, it is illegal to use a geographical origin for wine and spirits which does not correspond to its actual origin.

3.10 Are there any special rules governing product packaging?

The general provisions set out in the Act Against Unfair Competition also apply to product packaging. Thus, it must not create a likelihood of confusion with a competitor's product or trade mark and must not mislead the consumer about the origin of a product. Furthermore, it can be considered misleading under the Act if the packaging suggests it contains a significantly higher quantity than is actually the case.

An advertising claim as well as the product name must not mislead the consumer. This must be assessed based on the target public. With regard to foodstuffs, the Codex Alimentarius Austriacus documents the public perception of the quality of foodstuffs.

In particular, with regard to foodstuffs and wines, there are specific acts that need to be considered, ie the Food Safety and Consumer Protection Act (*Lebensmittelsicherheits und Verbraucherschutzgesetz*) and the Wine Act (*Weingesetz*).

4 PRICE ADVERTISING

4.1 What are Austria's rules regarding price advertising?

There are a number of rules that apply to price advertising. For example, price advertising must not be deceptive, and if actual prices are compared with former prices for the same product or service, the former prices must have applied for a certain period of time.

Advertising products or services with price discounts or special offers is permitted. Although, when advertising claims like 'special offers', 'best price guarantee' or similar claims are used the courts will examine whether the use of such claims will have a deceptive effect on the consumer.

If a special offer with reduced prices is advertised, there must be sufficient products in stock in order to meet the expected consumer demand. It is also illegal to invite consumers to purchase a product at a specified price and then refuse to show the advertised item to a consumer, refuse to take orders for it and/or refuse to deliver it within a reasonable time.

4.2 What are Austria's rules regarding advertising 'free' products?

If products or services are advertised as 'gratis', 'free of charge' or similar, the consumer will expect the product to actually be delivered without charging any costs. If costs are to be charged for transport or packaging or for similar services in connection with the delivery of the product, a clear and conspicuous disclosure would have to be made in order to avoid the advertising claim being deceptive. Generally, granting free products for advertising purposes is permitted.

4.3 What are Austria's rules regarding sales and special offers?

Special offers and sales are generally permitted. If products are offered for a special price, the trader should have sufficient quantity of such products in stock to satisfy the expected consumer demand.

Seasonal sales are also permitted, provided that the advertising claims made in connection with such sales are not deceptive. For example, it would be deceptive if the special offer prices were compared to own prices which had not actually been seriously applied (ie, the comparison price only applied for a very limited time, or in a very limited geographical location).

Special rules apply to sales or special offers in connection with the closing of a business or the moving of a business to another location and require permission from the authorities. Special rules apply to sales related to incidents, such as fire, flooding etc. For such sales, a notice to the authorities demonstrating the reason for this specific incident must be made.

4.4 What are Austria's rules regarding rebates?

The granting of rebates is a permitted sales practice. However, the granting of rebates must not be deceptive or aggressive. Rebates may be granted in various ways. For example, offering two items for the price of one, or offering a free item or an item at a reduced price if a purchase of a product is made, are permitted. Offering participation in sweepstakes when making a purchase is also permitted. In these cases, it is not necessary to offer a 'no purchase necessary' route.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

The following restrictions may be of importance:

- (a) the distribution of goods or services by way of a pyramid scheme is prohibited;
- (b) products that form part of bankruptcy assets must not be advertised to give the wrong impression that they are cheap;
- (c) products must not be incorrectly advertised as only being available for a limited period of time; and
- (d) direct exhortations aimed at children encouraging them to buy, or persuade their parents or other adults to buy, advertised products are prohibited.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

There are several categories of products and services that are specifically regulated by law and which are subject to prohibited and controlled advertising. The following bans and restrictions are of particular importance:

- (a) spirits must not be advertised on radio, television and in audio-visual media;
- (b) restrictions apply to advertising other alcoholic beverages on the radio, television and audio-visual media;
- (c) advertising tobacco products is – with a few exceptions – prohibited;
- (d) advertising certain financial services is restricted;
- (e) advertising drugs and medical products is restricted; and
- (f) advertising casinos and gambling must meet specific requirements and must be responsible.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Advertising via unsolicited telephone calls (cold calls) or fax messages to private persons is generally prohibited.

Sending electronic mail—including SMS—for marketing purposes without the prior consent of the recipient is prohibited.

Advertising which exerts psychological pressure on consumers to buy is prohibited as an aggressive sales practice.

Subliminal advertising is prohibited.

Special rules apply for lay advertising, which involves the referral of relatives, friends and acquaintances in order to receive premiums or other benefits.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

There are rules with respect to certain freelance professions such as physicians, dentists, public notaries, lawyers, veterinarians and morticians, who have to maintain a certain level of decency in advertising. Puffery is not allowed for these professionals. Television programs, radio programs and audio-visual media are required to maintain a certain level of decency. Commercial communications must not discriminate and must not adversely affect human dignity or jeopardize public health, public safety or environmental protection.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Special sponsorship rules apply to television, radio and audio-visual media. The editorial content on such media must in no way be influenced by the sponsor. Sponsored programs must not contain direct encouragement to buy products or services. The name of the sponsor must be indicated at the beginning and at the end of the program and it must be made clear that the program is sponsored. Indications of sponsorship during the program are not allowed. News programs and programs containing political information must not be sponsored. Furthermore, restrictions apply to sponsorship relating to categories of products and services for which specific advertising bans or restrictions apply. With regard to product placement, similar rules apply.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

It is a general requirement that advertising must be identifiable as such. Surreptitious advertising is forbidden. If television, radio or audio-visual media programs are sponsored, the sponsor is not allowed to influence the editorial content of the program in any way. Sponsorship of news programs and programs with political content is forbidden. Commercial communications in media (including television, radio, print media) for which consideration is paid, must clearly be marked as being advertisements. This also applies in cases in which only a contribution to the costs of printing an article with editorial content is paid. If such articles with editorial content, for which any kind of consideration is paid, are not clearly marked 'advertisement' this will be a misleading sales practice. This principle also applies to commercial communications on the internet; it must always be clearly identifiable in whose interest the commercial communication is published.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Editorial reports, announcements and recommendations for which consideration is paid, must be clearly marked as advertisements. Surreptitious advertising is forbidden. If television, radio or audio-visual media programs are sponsored, the sponsor must be indicated at the beginning and at the end of the program. Similar rules apply for product placement. Commercial communications on the internet must be clearly identifiable as such. The person or business that ordered the commercial communication must be shown.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

The rules for ‘off-line’ advertising apply to advertisements in social media. This means, in particular, that any kind of deceptive or aggressive advertising is forbidden on social media. It is important that the necessary company information is provided in social media so as to clearly identify the advertiser. Companies must provide the company name, address, contact information, registration number of the trade register and the competent authority for the trade register, the supervisory authority (if applicable), the VAT number and the professional association or chamber the company is a member of. A violation of this duty of disclosure may constitute an act of unfair competition and may therefore be pursued in the courts. A violation may also lead to a fine by the administrative authority.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

The operator of a website or a Facebook page on which statements by third parties are published has a responsibility to carefully review and control such statements. In the event that such statements are illegal or contain illegal content the operator has the obligation to immediately remove the statements. If the operator is negligent in complying with this duty the operator may be held responsible for such statements. A disclosure saying that the operator does not assume responsibility for third party statements will not be sufficient.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

Advertisers using Facebook and other social media platforms must be aware that they have to comply with specific information duties. This requires, in particular, providing information about the name and address of the company, the company’s registration number, the competent authority for the trade register, the supervisory authority (if applicable), the VAT number, the professional association or chamber, the contact information and specific information on prices of products and services. Non-compliance with these information requirements may entitle every competitor and certain associations to start court action under the Act Against Unfair Competition, provided that the missing information may influence a consumer’s decision. If contracts are concluded over the internet it must be possible to permanently store the terms and conditions of the contract. A violation of this regulation may also establish an act of unfair competition.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

An individual's personality is protected. The use of an individual's name, picture, likeness, voice and identity generally requires the consent of the person. This principle also applies to any imitation of the individual's voice if used in advertising. It is general court practice that a person's legitimate interests are being violated if their name, picture, likeness, voice and/or identity are used in advertising without the individual's permission. If an individual's name, picture, likeness, voice or identity is used in advertising without his or her consent, the individual may start court action before the ordinary court. Such court action can be combined with an injunction for a cease and desist order. The individual may also claim compensation for damages including moral damage. The individual also has a claim to have the court decision published in the same medium in which his name, picture etc. was used unlawfully in advertising.

9.2 Are there situations when permission is not required?

It is the general principle that any use of an individual's name, picture etc requires the individual's permission. An exception would apply if, for example, a person wasn't identifiable in a picture. Only in very exceptional cases, the use of a picture of an individual in advertising will be allowed without obtaining their permission because it is assumed that such use does not adversely affect the person's legitimate interests. The Supreme Court decided in a case in which pictures of famous football players were used on stickers for collecting albums that this would not violate their legitimate interests.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Specific rules apply to state symbols and state emblems, which may require prior permission or clearance before use for commercial purposes. The use of pictures of public buildings is generally free and does not need clearance.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

The use of recognizable products of other companies will be illegal if it is an infringement of a registered trade mark, which would require that the product is used in advertising for identical or similar products or services. In addition to trade mark infringement, the use of branded products will be an act of unfair competition if an image transfer takes place. This will certainly be the case if products of very well-known brands or products with big reputations are used. This will usually be considered illegal parasitic behavior as a result of taking unfair advantage of the reputation of other companies or brands. Using other companies' branded products will, therefore, usually involve considerable risk. Branded products of a competitor may, however, be used in comparative advertising.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Austria which affect advertising (eg, Swedish gender equality law)?

There are no specific rules that are particular to Austrian culture which affect advertising.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

There are no cultural norms in Austria that should be considered in relation to advertising.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Austria?

The pre-approval of advertisements which would be binding on the courts is not possible in Austria. Self-regulation does not play an important role in Austria. Advertisers, therefore, must strictly observe the law, which to a high degree will be determined by court practice, more than by the general legal provisions. As a number of associations and any competitor may start court action alleging illegal advertising, it is important to have advertising campaigns cleared in advance by obtaining legal advice as to whether they are in compliance with legal provisions and current court practice.

BELGIUM

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Belgium?

The most important source of advertising regulation in Belgium is legislation, the content of which increasingly implements EU Directives. Following various challenges before the European Court of Justice, a comprehensive overhaul of the statutory regulations took place resulting in the enactment of the Belgian Act of 6 April 2010 on Market Practices and the Protection of Consumers (MPA). Since the codification of the Code on Economic Law in 2014, the MPA and other laws on Market Practices and Consumer Protection became Book VI, Code on Economic Law (CEL), as of 2014.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

Any communication which has as its purpose, directly or indirectly, the promotion of the sale of products, regardless of the place or means of communication used is considered advertising. This very broad definition is also construed broadly, determined on a case-by-case basis. There is no general definition of online/digital marketing communications. Essentially, that means that online advertising in paid-for space such as banners or pop-ups, online videos, paid-for searches, virals, in-game promotions, and online sales promotions and prize promotions are considered advertising. Non-paid-for channels in Belgium, such as marketers' own websites, are also covered.

1.3 What is the basic regulatory framework for advertising regulation?

The main source of regulation of advertising is Book VI of the CEL. In addition, many sector and media specific laws regulate advertising nationally or on a language community level (for audiovisual media advertising). A third important source of regulation is self-regulation, with the Jury for Ethics in Publicity (JEP) being the main regulatory body in Belgium.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The use of shock tactics, spam emails and dangerous sounds or visual effects, intimidation, pressure, including physical violence, inappropriate influencing in order to restrain or potentially limit the freedom of choice of the average consumer are prohibited under the general prohibition of aggressive market practices.

It is prohibited to use media personalities (live or animated) in such a way that the distinction is blurred between programs or editorial content on the one hand and sales promotion on the other hand.

Advertising cannot create a sense of urgency or inappropriate reduction of prices.

Specific rules apply to marketing communications aimed at children and/or young people:

- (a) Advertising cannot call upon children to persuade their parents or other adults to buy the products advertised.
- (b) Sales promotions aimed at children must specify the terms of the promotion in language that can be easily understood by children.

- (c) It is prohibited to undermine positive social behavior, lifestyles and attitudes, exploit inexperience or credulity, of children and young people.
- (d) Advertising must not include any statement or visual treatment that could have the effect of harming children or young people mentally, morally or physically.
- (e) Children and young people should not be portrayed in unsafe situations or engaging in actions harmful to themselves or others, or be encouraged to engage in potentially hazardous activities or behaviors.
- (f) Products unsuitable for children or young people should not be advertised in media targeted at them or suggest that possession or use of the promoted product will give a child or young person physical, psychological or social advantages over other children or young people, or that not possessing the product will have the opposite effect.
- (g) There are also detailed rules on broadcast advertising in relation to children with specific time restrictions and prohibitions. Rules also exist in relation to foodstuffs to ensure that children are protected from being misled about the nutritional value of food and from pester-power.
- (h) When advertising non-prescription medicines, advertisers should not target children or seek to distribute such products to them.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

The following industries are subject to specific advertising regulations:

- (a) **Medicines:** Sales promotion for drugs is highly regulated and complex, and requires pre-vetting and approval;
- (b) **Financial products:** Complex rules for advertising credit or financial products exist with rules including, amongst others, obligations when distance selling to mention the details of the supervising authority, the price, risks, and duration. Conditions must be specified and it must be stated that customers will have a reflection time of 14 calendar days in which they can cancel the purchase;
- (c) **Health and nutrition:** Special rules exist for claims made about therapeutic goods and services and for claims about foodstuffs regarding health, nutrition and weight control. European regulations implemented into Belgian law establish a list of health claims that are scientifically proven and approved for food. Claims which are not permitted may not be used. Some health claims, especially those on plants, are still under review and are, therefore, not currently included in the list. Belgian law also prohibits use, in commercials for foodstuffs, reference, denominations and pictures that mislead the consumer as to the nature, the quality, the composition, the manner of production, the origin or any other characteristic of the food product. In particular it is prohibited to use:
 - (i) the words 'sick', 'sickness', the name of diseases, the name or representation of disease symptoms, except when used in authorized health claims;
 - (ii) representations of people, clothing or equipment referring to healthcare services (including paramedical and pharmaceutical services);
 - (iii) references that could provoke or exploit fear;

- (iv) references to recommendations, approvals or medical certificates involving allegations that have not been authorized under the European regulation on nutritional claims; and
- (v) references to the Minister for Public Health or the competent public health authorities, unless expressly authorized by them.

Rules also exist covering food supplements, replacement foods, diet foods for medical use and infant food. Broadcast advertising for sweets containing sugars must display a stylized image of a toothbrush throughout the entire broadcast.

- (d) **Alcohol:** There is no specific law in Belgium which generally prohibits advertisements for alcoholic beverages. However, there is a self-regulatory code and legislation governs advertising on television and radio. The JEP established in co-operation with the industry a code with respect to advertising alcoholic beverages (*'Convenant inzake gedrag en reclame met betrekking tot alcoholhoudende dranken'*). This code applies to all beverages with more than 1.2 % alcohol content. According to this code, advertisement for alcoholic beverages is allowed, provided that the principles as set forth in the code are complied with. The code states, amongst other things, that:

- (i) the advertisement may not be aimed at minors (persons aged under 18 years);
- (ii) the advertisement is prohibited in newspapers and magazines which are mainly aimed at children;
- (iii) the advertisement may not refer to beneficial mental, physical or relaxing effects of drinking alcohol;
- (iv) the advertisement may show a connection between alcoholic beverages and a cozy or welcoming atmosphere, and may not show that alcohol consumption leads to social or sexual success; and
- (v) advertisements in newspapers, magazines, advertising posters and internet must mention the educative slogan(s) *'Ons vakmanschap drink je met verstand'/'Notre savoir-faire se déguise avec sagesse'/'Wir liefern das Know-How, genießen Sie mit Vernunft'*.

For advertising on billboards, on radio, TV and cinema, very similar educational slogans should accompany any beer advertisement. Broadcast advertising is banned for alcoholic beverages with more than 20% alcohol on French speaking radio and television.

Other important examples of industries where advertising is heavily regulated and/or restricted are health professionals such as dentists, automotive advertising and consumer credit offers.

1.6 Are any government pre-approvals required?

There is no government authorization or registration system for advertising. In relation to advertising on commercial television, the General Manager of the Second Television Authority may determine advertising categories which require prior approval before being broadcasted. Using these powers, the Second Authority pre-approves advertisements targeted at minors, advertisements with sexual content or sexual innuendo and other sensitive topics.

1.7 Does the media pre-clear advertising?

In the audio-visual sector, advertisements are vetted by the broadcasters before being aired. An advisory opinion can also be obtained from the JEP in respect of any advertising (irrespective of which media it will run in).

1.8 How does the government enforce advertising laws? What are the potential remedies?

Book VI of the CEL provides for the following remedies and penalties which are applied by courts and the Federal Service Economy: a warning procedure through a registered letter or minutes of findings; a cease and desist procedure; and administrative fines. Many infringements of the MPA can give rise to a public criminal procedure. The public prosecutor and the Federal Service Economy can also seize products. Civil claims for damages may also be pursued.

The Flemish Regulator for Media (VRM) and The *Conseil supérieur de l'audiovisuel* (CSA) are public authorities, with the mission to oversee and enforce the respect of the Flemish, Walloon-Bruxelles audiovisual regulation. The VRM and CSA can issue a warning with request to stop an infringement; issue an obligation to broadcast the decision; impose an administrative fine; impose a publication of the decision in journals or newspapers; and withdraw or suspend licenses of broadcasters or stations. The VRM and CSA also supervise the advertising, sponsoring and product placement rules by the audiovisual media and regularly publish decisions (mostly by imposing a fine).

An appeal before the court of appeal is available against a criminal judgment from the first degree court called *correctionele rechtbank or tribunal correctionnel*. An exceptional third degree review in law only is given under particular conditions before the Supreme Court called *Hof van cassatie/cour de cassation*.

1.9 When does a competitor have a right of action? What are the potential remedies?

Competitors will almost invariably seek a stop-order on the basis of a cease-and-desist procedure before the President of the commercial court as provided for in Heading 6 of the MPA, a procedure which has the shape of a fast-track referee procedure. In matters of absolute urgency, the President can pronounce an ex parte stop order. Cease and desist orders are accompanied by restraining payments as penalty to enforce the order. They accrue on an infringement, per infringement, or on a daily basis. This procedure can also lead to publication measures. Competitors can also start a procedure to obtain damages. This procedure is a normal matter before the court, not before the President of the court.

Besides civil remedies and administrative sanctions, the recent changes in the Belgian Trade Practices Act put an increased emphasis on criminal penalties.

1.10 When do consumers have a right of action? What are the potential remedies?

The reply to question 1.9 generally applies. As soon as a consumer has an interest to claim, he or she will have a right of action. A consumer protection association has the right to sue, provided that these associations are recognized by the Government and any legal person having an interest, including professional or branch organizations with legal personality. Advertising can also be challenged against a group of companies or a professional sector.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Belgium have a primary advertising self-regulation system?

Self-regulatory rules are of importance when marketing communications are assessed by self-regulatory bodies, such as the JEP, which is the main self-regulatory body for advertising in Belgium, by the VRM or by the CSA (these are, respectively, the two main Flemish and French regulatory bodies responsible for monitoring compliance with audiovisual regulations).

The JEP is responsible for controlling the conformity of publicity in all mass media and rules on complaints as well as offering opinion/advice upon request. The JEP bases its decisions on legislation and self-regulatory codes (see question 2.2 below).

2.2 Is there a self-regulatory advertising code? What are the key principles?

There are various self-regulatory codes which are sector/industry specific. The most important advertising codes are:

- (a) **Food and beverages:** Fevia's Advertising Code on Foodstuffs and the ICC Framework for Responsible Food and Beverage Marketing Communications 2012 contain the following general rules in relation to foodstuffs:
- (i) food products not intended to be substitutes for meals should not be represented as such (eg, snacks);
 - (ii) food and beverage marketing communications should not undermine the promotion of healthy balanced diets, or the importance of a healthy active lifestyle;
 - (iii) food and beverage marketing communications should not encourage or condone excess consumption and portion sizes should be appropriate to the setting portrayed;
 - (iv) text, sound and image of advertisements for foodstuffs must properly represent the characteristics of the product (taste, size, content, nutritional or health benefits);
 - (v) all marketing communications should be prepared with a due sense of social and professional responsibility;
 - (vi) nutritional information and claims should also be judged by the likely perception of the reasonable consumer, especially where children are concerned. Where claims or terminology used in marketing communications might reasonably be interpreted by a consumer as health or nutrition claims, they should be supported with appropriate scientific evidence;
 - (vii) marketing communications should not:
 - (1) misuse technical data, eg research results or quotations from technical and scientific publications;
 - (2) present statistics in such a way as to exaggerate the validity of a product claim; or
 - (3) use scientific terminology or vocabulary in such a way as to falsely suggest that a product claim has scientific validity;
 - (viii) consumer taste or preference tests should not be used in a way that might imply statistical validity if there is none;

- (ix) testimonials should be based on well accepted and recognized opinion from experts; and
 - (x) descriptions, claims or illustrations relating to verifiable facts in marketing communications should be capable of substantiation.
- (b) **Cosmetics:** The Advertising code for cosmetics and hygiene products (DETIC) has recommendations on references to illnesses, product presentation, permitted use of a specific list of words, claims on product composition and comparative testing and controls, labels, certifications and graphic presentations, use of medical or paramedical professions, witnesses, pictures and other elements of advertising.
- (c) **Other:** there are other self-regulatory rules on advertising in relation to the following:
- (i) slimming products and devices, treatments and methods;
 - (ii) isolation, fuel and heating energies;
 - (iii) medical references in advertising for bed linen;
 - (iv) ethics in charitable fundraising;
 - (v) alcoholic drinks (including a specific code for advertising of beers);
 - (vi) motor vehicles, spare parts and accessories; and
 - (vii) several financial products and services.

Theme-specific codes exist on the depiction and reference to human beings, humor in advertising and advertising to children related to children's parties Christmas, Easter and Saint Nicolas. Environmental advertising is also governed by a self-regulatory code.

A very detailed code of ethics also exists for medicinal products advertising.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The self-regulatory authority, the JEP, can demand that an advertiser stops or changes a particular advertisement. Such decisions are not only based on the applicable laws and regulations, but also on self-regulatory codes. The JEP can also request an advertiser to submit its next campaign for pre-clearance. If necessary, the JEP can request the media and/or professional federations to stop distribution of an infringing advertisement. The JEP can also decide to issue a recommendation in relation to an advertisement. In this case, the JEP will formulate advice with recommendations to the advertisers and media concerned. The Council of Advertising can also proceed with the publication of certain decisions. The JEP has no authority to issue legal advice or to act as arbitrator between competitors or between a seller and a purchaser, but upon request by both parties, the JEP can render confidential written advice. The jurisdiction of the JEP is limited to advertisements spread in mass media. A decision by the JEP can be appealed before the same JEP.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self-regulatory system is quite effective and widely used. An example of the scrutiny deployed by the JEP can be found in a detailed decision upon appeal by the JEP in the matter involving a TV advertisement for Nutella, using an animated film to highlight the seven ingredients of Nutella. The animated advertisement highlighted the high quality of the seven ingredients that led to the unique taste. For the ingredient palm oil, the natural and environmentally friendly elements were mentioned and briefly explained. The claim against the advertisement reproached the emphasis on the natural and balanced nature of the product. The claim further concentrated on palm oil which, allegedly, is an

ecological and future health catastrophe. The JEP ruled that no health claims could be found, but withheld a strict view on the use of the word 'natural' and found the use to be potentially misleading. Where the JEP found the environmentally friendly manner of cultivating and harvesting palm oil to be misleading in the first instance, this opinion was reversed on appeal upon receiving further background and argument from the advertiser.

2.5 Are the self-regulatory system's decisions reported?

Decisions are reported on the website of the JEP and can be consulted online by product category, advertiser or theme.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Not applicable.

2.7 Are there any other self-regulatory systems that govern advertising practices in Belgium?

Several professions and industries have ethical rules of their own (eg, the legal profession and accountants). The code of ethics for medicinal products is also very important.

Under Belgian law the assessment of environmental claims is subject to the self-regulatory Code for Environmental Advertising (CEA) (*'Code de la publicité écologique'—'Milieureclamecode'*), based on the ICC Code on fair advertising principles.

The CEA is self-regulatory. The CEA sets out the limits for advertisers, distributors and advertising agencies when promoting their products and services. The CEA is also aimed at protecting consumers against abusive use of their interest in the protection of the environment by advertisers and agencies.

The CEA is based on the advertising code adopted by the International Chamber of Commerce as implemented in Belgium by the JEP.

The CEA is applicable to all advertising referring to the consequences for the environment of a product, including its packaging, or a service, irrespective of the medium used, and throughout their life-cycle (ie, design, production, distribution, use and destruction).

The basic principles of the CEA are:

- (a) all advertising must be compliant with the applicable legislation;
- (b) all advertising must be decent, truthful and correct;
- (c) all advertising must meet with the applicable environmental regulations and mandatory environmental programs
- (d) all advertising must be compliant with the principles of fair trade practices generally accepted in commercial matters; and
- (e) no advertising may harm the trust or confidence of the public in the efforts of companies to improve their ecological performances and the educational efforts of social entities or the Government in order to sensitize the public for the protection of the environment.

The CEA basically covers similar provisions as those applicable following the ISO 14021 Code.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Belgium (eg, consumer protection laws; IP laws; unfair competition laws)?

The basic laws governing advertising claims in Belgium are found in Book VI of the CEL. This includes the MPA which deals with misleading and comparative advertising. The provisions are, all in all, a mere implementation into Belgian law of the European Directives 97/7/EG and 97/55/EG on advertising and European Directive 2005/29.

In short, it can be said that advertising is allowed, provided that is not considered to be misleading (eg, misleading concerning the characteristics, the origin and the composition of the product) or aggressive (eg, advertising in which children are directly encouraged to buy the advertised product or in which their parents or other adults are influenced to buy the advertised product for them).

Marketing communications cannot:

- (a) contain false information or be likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and cause or be likely to cause the average consumer to take a transactional decision that he would not have taken otherwise:
 - (i) the existence or nature of the product;
 - (ii) the main characteristics of the product;
 - (iii) the nature, attributes and rights of the trader; and
 - (iv) the consumer's rights;
- (b) create confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;
- (c) omit material information and, thereby, be likely to cause the average consumer to take a transactional decision that he would not have taken otherwise;
- (d) be an aggressive commercial practice; or
- (e) infringe upon any other of the list of forbidden practices listed in the legislation.

3.2 Is substantiation required for advertising claims?

An advertiser must have proof of the claims it makes in advertising before publishing. There are no recognized standards for the type of proof necessary to substantiate claims. This obligation to have proof of the claims does not entail a general obligation to have expert reports. An advertiser can provide substantiation itself as long as the study is objective and precise. There are many recognized scientific standards, mostly international and sector specific for the type of proof necessary to substantiate claims, but the standards are not provided by law and are not binding upon courts. Courts can appoint experts to conduct an expert proceeding. If the challenge originates from a competitor, the competitor will have to provide evidence for the challenge. The general rule remains, however, that a claimant has the burden of proof to substantiate a claim. There are no specific requirements for advertising claims based on the results of surveys. Claims suggesting tests and studies proving a product's superiority (*establishment claims*) do in principle not require higher or special degrees or types of proof, but, in practice, courts will request a higher degree of specific substantiation.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

The law itself does not clearly distinguish between ‘puffery’ and advertising claims that require support. It is widely admitted that advertising can use superlatives or hyperbolic wording without requiring support, provided it is not used in a comparative context and it can be assumed that the consumer will understand that it is puffery, ie, if the consumer will not take the literal wording too seriously.

If, however, an advertiser accompanies such puffery with supporting evidence, then it suggests that its words are more than just puffery and the advertisement will be misleading if the substantiation in fact is insufficient. The Market Practices Book of the Code on Economic Law explicitly mentions that exaggerations and other mentions in advertising should not be taken literally.

3.4 What are the rules governing the use of disclosures in advertising?

Not all material information has to be disclosed and the advertising medium used with its respective limitations in time and space are taken into account by courts when scrutinizing disclosure obligations in advertising.

As a general rule, applicable to any type of advertising on a product’s nature, the description of the product should not be false or misleading: all advertising that can mislead the consumer as to the identity, nature, origin, composition, or characteristics of the products and its effects on the environment is prohibited.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

There are no special rules for endorsements or testimonials by third parties, including statements of opinion, belief, or experience. No permission is required for using testimonials and no special rules for endorsements exist. However, the MPA provides that it is in all circumstances unfair to mislead by claiming or affixing a quality label without having obtained proper permission for such use. Advertising claims that a product/service is recommended or recognized, licensed or allowed by a public or private institution will also be unfair and misleading if this is not the case.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules on product demonstrations in advertising.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Yes. Comparisons with named competitors, either a group or an individual competitor, are allowed if the conditions are respected. Pursuant to Article 17 of Book VI, comparative advertisements should:

- (a) not be misleading;
- (b) relate to comparable goods or services;
- (c) compare relevant and verifiable features of goods and services, such as price;
- (d) not lead to confusion with goods or services of a competitor;
- (e) not disparage competitors or their goods or services;

- (f) get unfair advantage from the reputation of a competitor or the name of origin of competing products; and
- (g) not present goods or services as an imitation of goods or services of a protected trade.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

Yes, but identification of a competitor or particular products of a competitor through use of its name will prevail as a right. Beyond the identification, copyright and trade mark rules as well as rules on other distinctive signs (ie, trade names, company names, domain names and names of physical persons) can impact on comparative advertising (the Benelux Convention on Intellectual Property Rights grants an absolute protection to identical signs for the same products and services. For similar signs or for similar products and services, the risk of confusion is the decisive factor. A protection for very well-established trade marks can cover other products and services). As mentioned in question 3.7, comparative advertisements should not take unfair advantage of competitors.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

There are no specific rules governing all claims relating to geographic origin. Some specific indications of geographic origin are protected (they relate to regions, places and, exceptionally, a country). These specifically granted protections typically relate to foodstuffs or agricultural products. Some traditional specialties are also protected and guaranteed, such as traditional beers.

3.10 Are there any special rules governing product packaging?

Many product categories, such as foodstuffs and cosmetics, have detailed rules with obligatory information on labels. These rules generally do not deal with advertising. One example is the rules on tobacco packaging and labelling, whilst any advertising for tobacco products is prohibited. Claims on packaging are generally regulated in the same way as claims accompanying the products through other media or on other places.

4 PRICE ADVERTISING

4.1 What are Belgium’s rules regarding price advertising?

Not all advertising has to include the price, but, if a price is mentioned, particular conditions apply. Any company offering goods or services has to indicate their price in writing and in a clear, readable and unequivocal manner, at least in euros. The price to consumers has to be all inclusive. For some products, the price per measuring unit also has to be given.

4.2 What are Belgium’s rules regarding advertising ‘free’ products?

Advertising free products is permitted, as long as the promotion does not give rise to sales at a loss or to distortive practices, such as a massive give-away in an effort to oust a competitor from the market. A price reduction of a product or service may not be presented to the consumer as a free offer of a quantity of the product or of a part of the service.

4.3 What are Belgium's rules regarding sales and special offers?

From a price regulation point of view, the prices of almost all products are unregulated. Producers can increase or decrease prices freely. The following principles apply to quantitative promotions and discounts:

- (a) a producer has the right to alter the quantity of pre-packed products if the new quantity is mentioned in a legible, easily visible and unequivocal manner;
- (b) the price reduction has to be real; and
- (c) the announcement of a price reduction must refer to the price used during a continuing period of one month immediately preceding the date of application of the reduced price for the *same* products.

4.4 What are Belgium's rules regarding rebates?

In brief, the referenced price must be the lowest price applied for the same product in the same shop during the month preceding. The advertiser has to be able to evidence this. An announced rebate should be valid for at least one day and at most one month. The starting date of the promotion has to be mentioned and the rebate should not give rise to a sale at a loss, except in case of special exceptions such as clearance sales under conditions and sales of perishable goods.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

There are detailed rules on the manner of depicting price rebates, sales periods and liquidation sales.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

There is an absolute ban on sales promotion for tobacco. Sales promotion for drugs is highly regulated, complex and requires pre-vetting and approval.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Legislation regulates unsolicited marketing communications. The use of automated call systems without human intervention and the use of faxes for direct marketing without prior, free, specific and informed consent of the receiver of the message is prohibited. Consent can be withdrawn at any time without reasons being given and at no cost. Phone calls for direct marketing purposes to numbers that are part of specific databases are prohibited (the so-called 'do-not-call-me' and the Robinson lists).

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The rules on decency are principally those of self-regulation. Belgian law distinguishes between content that is 'contrary to the public decency' and content that is 'not contrary to the public decency'. The first is forbidden, the second is allowed. The supreme Belgian court (*Cour de cassation*) determined that content is 'contrary to the public decency' if the 'content's only aim is apparently to

stimulate in an extreme manner the sensuous feelings of the viewer or, if it violates the sense of shame of the average civilian because of the vicious, obscene, humiliating or perverse acts or positions on the sexual level’.

Today, and from a strict legal point of view, the depiction of nudity, of erogenous zones or of erotic acts as such is not contrary to the public decency. It is the particular manner of the representation that can harm public decency (eg, by the fact that violence is involved). A strict legal point of view is mentioned, because a more encompassing review up front or upon complaint of advertisements is conducted by the JEP. The scrutiny of the JEP is broader than strictly legal. The JEP can advise the media not to broadcast or run an advertisement—and the media will obey such advice. This broad ethical and moral scrutiny is typical for the audiovisual, outdoor and print advertising media.

However, just because content is allowed on the basis it is not contrary to public decency does not imply that this content can be made available to the whole Belgian population. Within the content allowed, distinctions must be made between content that does not consist of indecent images, pictures or subjects that can stimulate the imagination of minors (G-rating) and content that does consist of images, pictures or subjects that can stimulate the imagination of minors (X-rating). Whilst these ratings are not statutory in nature, advertisements which disregard ratings run the risk of being sanctioned, either by self-regulation or by the courts.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

In Belgium, all printed matter distributed must mention the responsible editor and his address. This obligation also applies to leaflets and other media. Non-compliance can lead to a criminal offence. A different manner of making the advertiser or sponsor identifiable applies in audio-visual adverts.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

As a rule, editorial content should be differentiated from advertising and one should disclose where advertisers have influenced the editorial content. It is considered to be an unfair market practice in all circumstances to mislead by broadcasting or publishing editorial content that has actually been paid for, unless the advertisement makes this clear through a message or by clearly identifiable images or sounds.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Besides the general obligation as described above, there are rules in place which relate to broadcast. Product placement is allowed in films, sitcoms, sport programs and entertainment programs, but is prohibited in programs for children.

When there is no payment but only the provision, free of charge, of goods or services, such as production props and prizes with a view to their inclusion in a program, this is allowed in all programs with the exception of programs for children broadcasted by the public broadcaster.

Sponsorship, is generally allowed, except in programs for children on the public broadcaster. For other children's programs it is prohibited to show the logo/say the name of the sponsor in the program or to mention the sponsor within a five-minute window before and after the program.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Legal controls apply to advertising and marketing published through social media in much the same way that they do for offline and other online media platforms. The general rules on market practices and consumer protection also play a central role in the context of social media advertising regulation.

The same applies in relation to the laws and rules on the protection of distinctive signs, such as trade marks and trade names, on privacy data, on fair market practices, on copyright and on media.

In cases where a competitor uses Adwords or other domains (such as ebay or twitter) to conduct advertising, this advertising can be challenged under the MPA. This states that a market practice can be considered misleading if the practice misleads the consumer on the geographical or commercial origin of a product and if a marketing practice, including a comparative advertisement, leads to confusion with another product, trade mark, trade name or other distinctive sign of a competitor. The catch-all prohibition of any disloyal market conduct through which a company damages the professional interests of another company can also be successfully relied upon in respect of marketing via social media.

There is still very little regulation or law in relation to social media. However, Opinion 5/2009 on online social networking, adopted by the Article 29 Data Protection Working Party, (an independent European advisory body on data protection and privacy) sets out provisions on contextual, segmented and behavioral marketing, the rules on retention of data and on children and minors. This has been adopted and endorsed by the Belgian Privacy Commission and should be considered in relation to advertising via social media.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

Potentially, yes, but not always. The simple inclusion of temporary technical copy or content posted on a social network or website by third parties without originating, selecting or modifying the content, does not necessarily open the advertiser to liability for the content. However, advertisers do not enjoy the same exemption from liability as that enjoyed by internet service providers. If an advertiser can show that he did not have knowledge of the illicit content and if the advertiser promptly acts with appropriate measures in case of such knowledge, mostly through a withdrawal or blocking of access to the illegal content, then the advertiser can escape liability. This differs to internet service providers, as an advertiser has, in principle, the obligation of supervising/monitoring the content he includes, copies or hosts.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

The European Court Google Adwords case, which ruled that where a company uses the trade mark of a competitor for promoting its own products and services there is no trade mark infringement unless the internet user is being misled, was confirmed in the Benelux Primakabin/Portakabin decision. It follows that the use of distinctive signs of competitors in social networks is not illegal as such/per se.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

The Belgian Copyright Act mentions that a person's image cannot be used without his or her consent. According to Belgian case law, a person's image rights are infringed when his/her image is used for commercial purposes without his/her prior consent. The consent to use an image of a person is interpreted restrictively and thus it must explicitly cover commercial use.

Private persons whose image has been used must establish that:

- (a) they are identifiable in the image; and
- (b) they did not give their prior consent to use the image.

For a person to be identifiable, it is not necessary that the whole person is depicted. Portraying a part of the body can be sufficient to establish an infringement of image rights. Moreover, it is not required that the person is depicted faithfully (eg, in a caricature, a drawing or a painting). A person can also be identifiable due to his/her special way of clothing, his/her attitude, his/her general posture or due to his/her usual habits.

9.2 Are there situations when permission is not required?

The image rights of public persons are limited by the right to information. Consequently, public persons cannot challenge the use of their image for current reporting in relation to their professional activities.

However, in the context of advertising, use of a person when reporting on events will still most likely be considered as an infringement of image rights if the person depicted is identifiable in the image and they are used without their prior consent.

The following elements might reduce the risk for claims or the exposure to infringement of image rights:

- (a) the person depicted is not identifiable in the image (but altered images in which the person is still identifiable, will not be sufficient to eliminate claims for infringement of image rights); and
- (b) use of an image which falls under the presumption of consent. There is a presumption of consent if the following cumulative conditions are met:
 - (i) the person concerned is used to being photographed or filmed in the framework of his professional activities;
 - (ii) the person concerned deliberately and willingly posed to have his/her photograph taken; and

- (iii) it concerns a photograph taken during or in connection or in the course of his/her professional activities and the photograph taken is used for related commercial purposes only.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Not applicable.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)? If so when?

See question 3.7 on comparative advertising. Otherwise, the use of recognizable products of other companies in advertising requires the prior consent of that other company.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Belgium which affect advertising (eg, Swedish gender equality law)?

Belgian law does not contain a general regulation dealing with the language used in advertising or promotional materials. However, particular rules affecting the use of language are found in the MPA. This contains a provision requiring that all mandatory notifications or information on the labels or packaging of products, and all user manuals and warranty cards, must be at least in the language(s) of the territory wherein the products are marketed.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

Not applicable.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Belgium?

Current major concerns of regulators are:

- (a) online advertising and social media advertising;
- (b) green advertising (ie, making environmental claims);
- (c) high fat, salt and sugar food advertising; and
- (d) financial services advertising.

Special caution is also needed in the area of food labeling.

Advertisers must ensure that there is a sufficient stock of products to satisfy the likely increase in demand due to the sales promotion. Stock levels should be calculated and increased in direct relation to the scale of the sales promotion.

BOLIVIA

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Bolivia?

Advertising in Bolivia is regulated by several laws and supreme decrees targeting different industries; for example, there are specific regulations for the advertising of tobacco products, alcoholic beverages, financial instruments, insurances, etc. There is no Advertising and Marketing law that can be generally applied to all products and services. However, the most important principles that regulate Advertising Law, such as the right of the consumer to obtain accurate information about the products publicized, can be found in Law 453 (Law for the Protection of Consumers). In addition, the municipal governments in several municipalities in the country have extensive regulations regarding the placement of advertising banners in public places.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

Because there is no general Advertising Law in Bolivia, the exact definition of what can be considered ‘advertising’ is unclear. The courts have also not defined the term. The closest definition can be found in Supreme Decree 115, regulating the promotion of breastfeeding and commercialization of its substitutes, which defines ‘Advertising’ (but only for the purposes of that regulation) as ‘any kind of communication made by natural persons or companies, through the radio, TV, cable, internet, press...’ This means that the term ‘advertising’ is broadly defined.

1.3 What is the basic regulatory framework for advertising regulation?

On the one hand, it can be said that Bolivia does not have a framework for the regulation of advertising. The advertising laws in Bolivia are dispersed among many different regulations that are intended to regulate specific industries. For example, the framework for the regulation of the stock market is established in the Stock Market Law, (which, by the way, dedicates only a couple of its articles to regulate the advertising of financial instruments). There is no similar framework for the general regulation of advertising per se.

On the other hand, Law 453 for the Protection of Consumers establishes some of the most important principles of advertising law, and this law will likely be the basis for future developments of specific regulations for advertising practices. However, to date, no such regulation exists.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The Telecommunications Law of 2011 establishes that advertising via email or other electronic media will be subject to specific regulations, but no such regulation has yet been applied to electronic advertising. Also, the placement of advertising banners in public places is regulated by the particular municipal government of the place where the banner is going to be displayed. The advertising of alcoholic beverages on television is also the subject of specific regulation. Other kinds of advertising practices are not specifically regulated in Bolivia.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Yes, there are several industries that have specific regulations:

- (a) **Tobacco Products:** The advertising of tobacco products is regulated by Law 3029 and several supreme decrees, intended to standardize the use of warning messages on tobacco packages and to regulate places where the advertising of tobacco is allowed, among other things.
- (b) **Alcoholic Beverages:** Advertising of alcoholic beverages is regulated by Law 259 for the Control of Alcoholic Beverages Consumption. The law establishes that a warning message must be used, and forbids the use of animated characters in advertising, among other prohibitions.
- (c) **Insurance Sector:** The Insurance Law of 1998 establishes that the advertising of any products offered by insurance companies must highlight the most important characteristics of the product in a manner that makes it easy for the average consumer to understand.
- (d) **Stock Market:** Law 1834 establishes that the Supervising Authority has the duty to ensure that the characteristics and risks of prospects are not misleading in advertisements.
- (e) **Film Regulation:** The advertising of products on movie theater screens is regulated by the Cinema Law of 1991. The law establishes, for example, a minimum percentage of advertisements that must be created by Bolivian producers.
- (f) **Drugs:** The advertising of drugs is regulated by Law 1737 and Supreme Decree 25235, which refers the advertisers to the regulations of the Ministry of Health. The advertising of drugs without the prior approval of the Ministry of Health is a serious infraction.
- (g) **Games and Promotional Activities:** Under Law 60 and Supreme Decree 781, the Gaming Control Authority is in charge of overseeing the promotional activities performed in the country. The law imposes registration and publicity requirements for companies that make use of promotional activities (such as competitions or raffles) for advertising purposes.

1.6 Are any government pre-approvals required?

Government pre-approvals are required for advertisements related to public health topics, which include advertising of alcoholic beverages, tobacco products and drugs. Also, laws that regulate specific industries authorize government entities to enforce the regulations. In the case of Tobacco, for example, the Ministry of Health has the duty to both pre-approving the advertisements and monitoring compliance with the law after the advertising has been released.

1.7 Does the media pre-clear advertising?

Yes, the media does pre-clear advertising. There are no legal norms that regulate the discretion of the press to pre-clear advertising.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The laws that regulate each industry appoint a specific government authority that is in charge of the enforcement of the laws for that industry. For example, for advertisements for tobacco products, the Ministry of Health has the authority to enforce the respective laws. The potential remedies are injunctions prohibiting the dissemination of the advertising, and the imposition of fines against the non-complying companies.

In the case of products or services that are not specifically regulated, the Vice-ministry for the Defense of Consumers Rights is authorized to file legal claims against the advertisers in court, acting on behalf

of the general public. The Vice-ministry is also authorized to adopt preventative and penal measures against the companies that break advertising laws, which include the temporary ban of the advertising.

1.9 When does a competitor have a right of action? What are the potential remedies?

The Common Intellectual Property Regime established by Decision 486 of the Andean Community is binding and fully applicable in Bolivia. As a consequence, competitors have a right of action based on articles 258 and 259 of the Decision, regarding unfair trade practices. Any acts which, by any means, are capable of causing confusion with respect to the business, goods, or industrial activity of a competitor, or any false affirmations that are capable of discrediting a competitor's business, goods, or industrial activity, are considered unfair trade practices. There is a 2-year statute of limitations for a right of action, and potential remedies include injunctions prohibiting the display of the advertising and the payment of damages.

1.10 When do consumers have a right of action? What are the potential remedies?

Under Law 453, consumers have a right of action against providers of products or services when the consumer has been the victim of misleading advertising and has suffered damages as a result. The affected consumer may file a claim in court, or file a complaint with the Vice-ministry for the Defense of Consumers Rights. This entity is authorized to perform further inquiries about the alleged infraction, and it may represent the consumers in legal actions against the advertiser of the product or service. The courts (or the regulating authorities, in the case of specific industries) may issue injunctions to stop the display of the advertisings.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Bolivia have a primary advertising self-regulation system?

Bolivia does not have an advertising self-regulation system.

2.2 Is there a self-regulatory advertising code? What are the key principles?

There is no self-regulatory advertising code.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

N/A

2.4 Is the self-regulation system effective? Is it widely used and followed?

N/A

2.5 Are the self-regulatory system's decisions reported?

N/A

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Because there is no self-regulation system in Bolivia, there are no key areas of focus that companies should be aware of at this point.

2.7 Are there any other self-regulatory systems that govern advertising practices in Bolivia?

There are no other self-regulatory systems in place.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Bolivia (eg, consumer protection laws; IP laws; unfair competition laws)?

The basic laws governing advertising claims are consumer protection laws, specifically Law 453 and Supreme Decree 65. These laws contain some of the most important principles of advertising law, and appoint the Vice-ministry for the Defense of Consumer's Rights as the entity in charge of the protection of consumers against misleading advertising, among other things. In addition, Decision 486 of the Andean Community establishes the basis for unfair competition claims.

3.2 Is substantiation required for advertising claims?

Because advertising claims are filed in court, substantiation for the claim is necessary. However, under the consumer protection law, any person may file a claim with the Vice-ministry for the Defense of Consumer's Rights alleging misleading advertising. In such a case, only a very brief explanation of the situation is required, and the authority will make further inquiries to substantiate legal claims against the advertiser. Regarding competitors claims for unfair competition, substantiation is also required under Decision 486 of the Andean Community.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

There are no specific regulations about this point and puffery is permissible in Bolivia, as long as the intent of the advertising is absolutely clear and no reasonable person would interpret the content of the advertising literally. If a consumer suffers any kind of damage as a consequence of what he believes to be a misleading advertisement, he may file a legal claim and the courts will determine whether the advertisement is capable of confusing the average consumer.

3.4 What are the rules governing the use of disclosures in advertising?

Under Law 453 for Consumers Protection, the supplier is required to provide accurate information regarding the characteristics, nutritional composition and conservation instructions for his goods and products. This is congruent with the general principle of veracity and truthfulness, established in the aforementioned law. The advertiser is required to disclose all material information to avoid misleading consumers.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

There are no specific rules governing the use of endorsements, so its use is allowed in advertising, as long as it does not constitute an unfair trade practice as defined in Decision 486 of the Andean Community. The use of false affirmations of any kind, including affirmations made by endorsements or testimonials, constitutes an unfair trade practice and creates a right of action for the affected competitor.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules governing the use of product demonstrations. The general principle of veracity and truthfulness, established in the consumer protection law, applies. Therefore, product demonstrations in advertisements cannot be misleading.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted in Bolivia, as long as it is not based on false affirmations or is capable of causing improper confusion with respect to the business, goods or industrial activity of a competitor. If the use of comparative advertising misleads the public, it is considered contrary to honest commercial practices under Decision 486 of the Andean Community, and it may also be considered a violation of consumer rights under law 453.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

The most important trademark regulation in Bolivia that impacts comparative advertising is Decision 486 of the Andean Community which regulates intellectual property-linked trade practices and condemns the use of unfair competition practices.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

N/A

3.10 Are there any special rules governing product packaging?

GMO labelling has been established in Bolivia by Supreme Decree No 2452, which states that 'Every product intended for human consumption, directly or indirectly, that is produced, contains or derives from genetically modified organisms shall be duly identified and shall remark this characteristic'. Despite the fact that the Supreme Decree was enacted in 2015, due to a lack of ruling, the same has only been compulsory since 1 January 2018.

This Supreme Decree is applicable to products manufactured locally and those that are imported. In this regard within the Bolivian market, GMO products can now be identified by placing a yellow triangle inside a white square on the upper part of the package. This yellow triangle contains the letters 'GMO' and the description 'Genetically Modified Organism'. Additionally, outside the triangle, it must be stated that 'This product is, contains or derives from genetically modified material'.

4 PRICE ADVERTISING

4.1 What are Bolivia's rules regarding price advertising?

There are no specific rules regulating price advertising.

4.2 What are Bolivia's rules regarding advertising 'free' products?

Supreme Decree 27053 prohibits the use of 'free samples' for the promotion of tobacco products. In addition, if the free product is offered as part of a promotional program, the company that is offering

the product must obtain authorization from the Gaming Control Authority. There are no other regulations regarding advertising of free products.

4.3 What are Bolivia's rules regarding sales and special offers?

The Gaming Control Authority is in charge of approving and monitoring the use of special offers. All kinds of competitions and promotions, where the consumer is offered a special reward, discount or free product if he collects something or acts in a certain way, are regulated by Law 060 and Supreme Decree 781, which, among other things, imposes registration requirements for companies to ensure that the promotional activity is transparent and fair for consumers.

4.4 What are Bolivia's rules regarding rebates?

There are no specific rules regarding rebates.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Although there are no specific regulations for retail advertising practices, it is important to note that the principles established in the Consumer Protection Law may be applicable to all retail advertising practices, because of the broad definition of what advertising means. Thus, rebates and special offers are allowed, but the lack of regulation does not mean that advertisers are immune to legal actions by consumers or by the Vice-ministry for Defense of Consumer's Rights, if retail advertising practices are considered misleading.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Most products do not have any kind of restriction, but there are some exceptions. Under Supreme Decree 27053, the advertising of tobacco products through television and radio broadcasts is expressly prohibited. Advertising of alcoholic beverages, on the other hand, is allowed, but is subject to specific restrictions established in Supreme Decree 1347.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

The advertising of tobacco products through television and radio broadcasts is prohibited. Besides this particular industry, there are no specific prohibitions for types of advertising of other products.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Yes, there are restrictions that can be found in Law 264 and in Supreme Decree 1436. These laws establish 'hours for the protection of minors', which are from 07:00 to 22:00. During these hours, the television and radio broadcasts (of both programs and advertising) cannot contain explicit violence, obscene language or explicit sexual content.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

There are no rules requiring that advertisements identify the advertiser. The Cinema Law establishes that the advertising of films must clearly identify the name of the director of the film, but makes no reference to any need to identify the advertiser or sponsor.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are no special rules regulating this practice.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no special disclosure obligations for these practices.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no special rules governing the use of social media for advertising purposes. However, a peculiar kind of social media advertising has been taking place in Bolivia. Many businesses (particularly Cinemas and Restaurants) offering little prizes, such as discounts, free meals or free tickets, through a 'Social Media Competition' which usually consisted of a question posted on a social network website (mainly in Facebook). The first person to answer the question correctly received a prize. The Gaming Control Authority has recently imposed registration and control requirements for these kinds of promotional games, and this kind of advertising has ceased almost completely.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

There is no specific regulation regarding this activity.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

There are no key decisions regarding this activity.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

The Political Constitution of Bolivia recognizes the right to privacy and establishes a legal 'Action for the Protection of Privacy', commonly known in other jurisdictions as Habeas Data. Any person that is

not able to eliminate or rectify data that affects his right to privacy or his good image may file an action for the protection of privacy. Although this constitutional provision is not particularly designed to govern the use of an individual's name in advertising, it creates a defense against harmful and unauthorized use of a person's name. There are no other rules governing the use of an individual's identity in advertising.

9.2 Are there situations when permission is not required?

As noted in the previous point, there are no specific rules governing the use of an individual's identity, but there is a constitutional right to privacy and a mechanism to enforce it. Therefore, permission is always required, because the unauthorized use of a person's identity may give rise to a cause of action. Besides this constitutional provision, there are no other applicable rules.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are no specific rules regarding this point.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

There is no specific regulation regarding this matter. The pejorative use of recognizable products may lead to civil actions by the affected companies, according to Decision 486 of the Andean Community, because it might be considered unfair competition. However, the incidental use of other companies' products (an actor wearing branded sneakers, for example) that does not compare the products in any way, is not prohibited by any regulation.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Bolivia which affect advertising (eg Swedish gender equality law)?

One of the characteristics of the Plurinational State of Bolivia is the existence of a diversity of 'nations' within the country, some of them with their own language and culture. The policy of inclusion of all these cultures led to the enactment of the 'Law Against Racism and all forms of Discrimination' (Law 045) in 2010. The second chapter of this law establishes sanctions against the media for public distribution of discriminatory content. There are still many unclear aspects regarding the scope of this law, but it is a law that may affect and influence the content of advertising because of its broad scope.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

There are no other cultural norms that should be considered.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Bolivia?

We consider it very important for advertisers to perform an exhaustive review of the legislation applicable to their specific industry, before placing advertisements of any kind. The fact that Bolivia does not have a general Advertising Law makes it more difficult for advertisers to stay updated about the regulation concerning advertising.

 BRAZIL 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Brazil?

The first regulations on advertising in Brazil were enacted in the 1960's—Law No 4.680 of June 1965 and Decree No 57.690 of February 1966—which regulated the advertising profession. Shortly after, in 1968, the military regime, which took over the government of Brazil in 1964 by means of a 'coup d'état', enacted the Institutional Act No 5, which granted unlimited powers to the dictatorship. Under such regime, all communication vehicles were under intense censorship, including advertising activity.

When the Institutional Act No 5 was revoked in 1978, the 3rd Brazilian Advertising Congress was held, with the participation of national advertising agencies, advertisers and the mass media. The result was the unanimous approval and enactment of the so-called Brazilian Advertising Self-Regulation Code (hereinafter referred to as the 'Self-Regulation Code'), which, to date, regulates advertising in addition to other general federal laws enacted thereafter.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

According to the Self-Regulation Code, any activity designed to stimulate consumption of products and services and promote institutions, concepts or ideas shall be considered advertising and subject to the rules under the Self-Regulation Code. Thus, any vehicle of communication, promoting products or services, including social networks, are required to observe the requirements applicable to the advertising activity.

1.3 What is the basic regulatory framework for advertising regulation?

In addition to the Self-Regulation Code, sparse laws and regulations form the regulatory framework on advertising. The Consumer Defence Code (Law 8,078/1990) includes primary consumer rights as well as principles and rules to be observed when advertising in Brazil.

The National Cinema Agency (ANCINE) is the regulatory authority with jurisdiction in relation to the Brazilian audio-visual advertising market. In this sense, ANCINE's Normative Instruction 95/2011 specifically regulates broadcasting of audio-visual advertisements.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

There is no law in Brazil specifically regulating mobile phone marketing at federal level. However, Brazil is a federative republic and there are some States in Brazil that have their own legislation providing for tools for consumers to block their telephone numbers from receiving telemarketing calls or text messages. In these cases, calls cannot be made to the blocked registered numbers as a general rule, unless express authorization is given, subject to the payment of the legal applicable penalty if otherwise.

The applicable block registration is usually made by consumers in the webpage of the Consumer Protection Office (PROCON) of the State where the consumer is domiciled. There are 27 State PROCONs, in addition to the PROCONs of the municipalities that may reach a number higher than 5,500. A few of the applicable State laws in this regard, among others, are the following:

- (a) Rio de Janeiro State Law No 7853/2018 (regulates time period for receiving telemarketing calls, among other things);

- (b) Minas Gerais State Law No 19,095/2010 (regulates active direct marketing and creates public consumer list);
- (c) São Paulo State Law No 13,226/2008 (regulates consumers' registry to cease receiving telemarketing calls);
- (d) Santa Catarina State Law No 15,329/2010 (regulates the registry for the receipt of telemarketing calls, among other things);
- (e) Mato Grosso do Sul State Law No 7,396/2009 (creates the block registry for the receipt of telemarketing calls, among other things); and
- (f) Porto Alegre Municipal Law No 9,053/02 (regulates telephone services users' rights regarding the receipt of offers to acquire products and services through telephone calls).

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Yes, many sectors of the industry are subject to comprehensive regulation in relation to advertising of its products and services. A few applicable laws and regulations were already mentioned in question 1.3.

In addition, the Brazilian National Sanitary Surveillance Agency (ANVISA) issued Resolution No 96 of 2008, which regulates advertising of legal drugs. Moreover, the Self-Regulation Code specifically regulates the advertising of many products and services, eg:

- (a) **Alcohol**
 - (i) Advertising of alcohol on radio and television is only allowed between 9:00 pm and 6:00 am;
 - (ii) the advertising cannot associate the product to Olympic and competition sports, to the healthy performance of any activity, to driving and to any image of success or sexuality; and
 - (iii) the labelling of the alcoholic beverages must contain the following terms 'Avoid excessive alcohol consumption'.

- (b) **Firearms, Weapons and Ammunition:** The advertisement for such products must make clear that the acquisition of the product depends on registration granted by the competent authority.

The advertisement should not include dramatic situations or news that make consumers believe that the product is their only defence.

The advertisement should not cause fear to the public, not make the possessor of a firearm in a situation of superiority, nor display children or minors.

The Self-Regulation Code also includes specific rules on the advertising of Education, Courses and Teachings; Employment and Opportunities; Real Property: Sale and Lease; Investments, Loans and Securities Market; Stores and Retail Sales; Medical and Hospital Services; Food, Soft Drinks, Juices; Pharmaceutical Products; Tobacco Products; Smoking inhibitors; Independent Workers; Mail Orders and Direct Mailing; Tourism, Trips, Tours, Hotels; Automotive Vehicles; Testimonials, Certifications, Endorsements; Crop Protection Products; among others.

1.6 Are any government pre-approvals required?

No.

1.7 Does the media pre-clear advertising?

Yes. Advertisements in Brazil should, ideally, but not as a requirement, be broadcasted or reach consumers only after a specialist lawyer has assessed and cleared the content of each advertisement. In this respect, a comprehensive framework of laws and regulations are applicable to the contents of the advertisements, and pre-clearing may avoid suspension of the campaign, fines as well as damages to the advertiser's reputation in Brazil; especially since Brazilian moral values do not always follow what is acceptable in other countries.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Government bodies or authorities may either request the filing of a procedure before the Brazilian Advertising Self-Regulation Council (Self-Regulating Council) or file a lawsuit with an injunction request aiming the interruption of the advertising and/or fines in relation to the campaigns that violate the Self-Regulation Code or Brazilian laws and regulations. Notwithstanding, authorities usually choose the request of the filing of the procedure before the Self-Regulating Council.

In the judicial sphere, the legal system sets forth both the individual action and a collective action. These are:

- (a) the Public Attorney's Office;
- (b) the Public Defendants;
- (c) the States (including the Federal, States and Municipal Governments);
- (d) certain entities of the public administration; and
- (e) associations and NGOs (for the consumer protection, for example.)

In view of the current legal framework, any judicial action would be based on the provisions of the Consumer Defense Code and the Brazilian Civil Code.

It is important to note that Public Attorney's Office, Public Defendants and Associations are very active institutions and usually do not hesitate in filing class actions on behalf of consumers. Sometimes, the filing of class actions happens even when the regulation of the subject is not clear, in an effort to generate new regulation. The object of civil and class actions may vary enormously, from misleading advertisements, lack of duty to inform, service defect and service vice, among others. The most common requests are for compensation for material damages (usually reimbursement of amounts paid or the double of such reimbursement, when an amount is wrongly charged) and pain and suffering.

1.9 When does a competitor have a right of action? What are the potential remedies?

As any person or legal entity associated with CONAR may submit complaints to the Self-Regulation Council when advertising laws and regulations are deemed to be violated, competing companies may also choose this option to interrupt their opponents' advertising, and many complaints ruled by the Self-Regulation Council were filed by competitors.

On the other hand, competitors may only file lawsuits in Brazil if they are able to substantiate their interest in the subject matter of the lawsuit. Therefore, in order to file lawsuits against competitors due to advertising campaigns, the plaintiff shall be required to demonstrate actual damages arising from the campaign in question, based on intellectual property infringement, unfair competition and so on. Such lawsuits may also include injunction requests so that the advertiser is required to interrupt or modify the campaign before a final decision is rendered. In this case, the court will analyse whether plaintiff's claims are likely to have grounds and whether a delay in the interruption of the campaign would cause additional damages to the plaintiff, in order to grant or not the injunction request.

1.10 When do consumers have a right of action? What are the potential remedies?

Any consumer may also submit complaints to the Self-Regulation Council when advertising laws and regulations are deemed violated, in order to seek the modification or interruption of advertising campaigns. In fact, the Self-Regulation Council encourages consumers to do so in its 'frequently asked questions' page.

In order to file lawsuits against advertisers, consumers would also have to substantiate their interest in the subject matter of the lawsuit. Therefore, the consumer would be required to demonstrate actual damages against him/her arising from the campaign in question, which would be possible in a few situations. One such situation would be in the case of advertisements that fail to promote positive relationships between parents and their children and the ad is actually watched by the child. The parent would be able to file a lawsuit seeking compensation for the damages caused by the campaign, although such lawsuits against advertisers are not very common in Brazil.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Brazil have a primary advertising self-regulation system?

The Brazilian Advertising Self-Regulation Code (Self-Regulation Code) was established in 1978, and in 1980 the Self-Regulation Council was founded as a non-governmental organization formed primarily of advertising agencies whose mission comprehended the enforcement of the Self-Regulation Code and assurance of a fast and objective solution for disputes involving the advertising industry.

Although designed primarily as an instrument of self-discipline of the advertising activity, the Self-Regulation Code is also destined for the authorities and courts as a reference document and subsidiary legislation in the context of advertising and other laws, decrees, ordinances, rules or instructions that directly or indirectly are affected by the announcement.

In this sense, the Self-Regulation Code establishes rules for the advertising industry. Violation to the rules thereof may lead to warning to the advertiser, staying or modification of the advertising campaign. If the advertiser does not obey the staying rule for example, the Self-Regulation Council may divulge its decision in the media.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The Self-Regulation Code basic key principles follow the same basic principles found in the Brazilian Consumer Defense Code, such as respect to human's dignity; enhancement of life quality; transparency; good faith; freedom of choice; adequate and clear information as to the different products and services; with the correct specification of quantity, characteristics, composition; and protection against abusive and misleading advertising.

In our opinion, The Self-Regulation Code's key principles are also found in the following general rules of the Self-Regulation Code:

- (a) Section 7 recommends that advertising campaigns are developed and produced by professionals based in Brazil, unless the impossibility of this is duly justified and also that a Brazilian agency intermediates the advertising in Brazil.
- (b) Section 37, II(a) determines that advertising must seek to contribute to 'a positive development of the relation between parents and their children, students and teachers, and of other social relationships'.
- (c) Section 20 determines that 'no advertisement shall encourage or stimulate any type of offense or racial, social, political, religious or national discrimination'.
- (d) Section 21 states that 'the advertisement shall contain nothing that may induce to criminal or illegal activities – or that may encourage, stimulate or incite such activities'.
- (e) Section 22 states that 'no advertisement shall contain statements or visual or audio presentations that may offend the decency standards of the audience it intends to reach.'

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Any person or legal entity may submit a complaint to the Self-Regulation Council regarding national advertising, regardless of whether it is addressed to consumers, professionals or to business entities. Once the complaint is made, the Board of Ethics will meet and judge it, ensuring full rights of defence to the accused. If the complaint has merits, the Self-Regulation Council can recommend suspension of the advertising or suggest corrections. In Brazil, self-regulation does not replace government and legislative regulation, therefore, the Self-Regulation Council only implements administrative penalties: warning, recommendation for an amendment or correction of advertising, suspension of the advertising, etc.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Although the Self-Regulation Code is not enshrined in federal law, the Self-Regulation Council's decisions, based on the Self-Regulation Code, are always followed by the agencies, advertisers, communication vehicles and any parties involved in the advertising practice in the Brazilian territory. In the few occasions when Self-Regulation Council's rulings have been challenged in a court of law, Self-Regulation Council's decisions have prevailed. Thus, the Self-Regulation Code is also used as a reference document and considered subsidiary legislation by Brazilian courts.

2.5 Are the self-regulatory system's decisions reported?

Yes. The Self-Regulation Council sends notifications regarding its decisions to both the advertiser and the party that submitted the complaint. If the Self-Regulation Council is acting ex officio notification will be sent only to the advertiser and in the event the advertising campaign needs to be interrupted or modified. Self-Regulation Council decisions are also published in its official magazine and website, which are available to the public for research and consulting.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

The Self-Regulation Code prohibits advertising which demerits positive social values such as, among others, friendship, generosity, and respect for people. In this regard, The Self-Regulation Council recently suspended a campaign in which one Brazilian retired soccer superstar (Ronaldo) placed a prank telephone call on another soccer superstar (Neymar).

As previously mentioned, Brazilian social values sometimes differ from what is acceptable in other countries which is a reason why local assessment by a specialist lawyer is strongly advisable prior to launching campaigns in Brazil.

2.7 Are there any other self-regulatory systems that govern advertising practices in Brazil?

Yes. The Standard Rules for the Advertising Activity (Standard Rules), edited by the Executive Council of Standard Rules (CENP) (an entity created by Advertising Agencies, Announcers and Communication Vehicles), mainly regulates the business relationship between the parties that created CENP.

According to the Standard Rules, the relationship between Agencies, Advertisers and Media is, at the same time of, professional, business and competitive nature aiming technical excellence and cost reduction between themselves by means of the Standard Rules' principles, ethics and the recommended practices.

It is also worth mentioning with regards to the Standard Rules that media outlets are required to publish commission rates and discounts that are due to advertising agencies. In this respect, such published discounts may only be granted to parties that qualify as advertising agencies pursuant to the definition of the Standard Rules.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Brazil (eg, consumer protection laws; IP laws; unfair competition laws)?

Apart from the Self-Regulation Code and the Consumer Defense Code mentioned throughout questions 1 and 2, advertising is also subject to restrictions arising from the following federal laws:

- (a) Industrial Property Law (Law No 9,279/96): Pursuant to the unfair competition provisions in Section 195 of the Industrial Property Law, in order to avoid infringement of third parties' intellectual property and possible suspension of the advertising campaign by intellectual property owners, patent and trademark searches should be conducted in the Brazilian Patent and Trademark Office data bases in relation to all patents and trademarks included in the advertising campaign that are not registered in Brazil. Additionally, making use of false statements, fraudulent means or third parties' advertising phrases is also considered unfair competition.
- (b) Copyright Law (Law No 9,610/98): An important aspect of the Brazilian Copyright Law is that assignments, or licenses, of copyrights shall be interpreted restrictively. Therefore, all copyrighted material included in advertising campaigns, registered or not, are required to have been specifically licensed by the copyright owners with clear and complete information in relation to the authorized uses, term, conditions, etc.
- (c) Brazilian Civil Code (Law No 10,406/02): The Brazilian Civil Code determines that the privacy, private life, honor and image of persons are inviolable. Therefore, previous authorization of the individuals appearing in advertisements is necessary.

3.2 Is substantiation required for advertising claims?

According to Section 31 of the Consumer Defense Code, the offer and presentation of products or services shall ensure correct, clear, accurate and ostensive information in Portuguese on their characteristics, qualities, quantity, composition, price, guarantee, validity terms and origin, among other data, and on the hazards they may cause to consumers health and safety.

Additionally, as a general rule, Section 27 paragraph 1, of the Self-Regulation Code, states that advertisers are subject to substantiation whenever so requested regarding descriptions, assertions and comparisons relating to facts and objective data.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Pursuant to Section 27 of the Self-Regulation Code, advertisers are subject to substantiation whenever so requested regarding descriptions, assertions and comparisons relating to facts and objective data. The substantiation rule does not apply to subjective statements such as puffery.

3.4 What are the rules governing the use of disclosures in advertising?

There are no specific rules on the use of disclosures other than general restrictions on 'misleading advertising'. In this sense, the offer and presentation of products or services shall ensure correct, clear, accurate and ostensive information in Portuguese on their characteristics, qualities, quantity, composition, price, guarantee, validity terms and origin, among other data, and on the hazards they may cause to consumers health and safety.

Therefore, in our understanding the Self-Regulation Code and the Consumer Defense Code prohibit misleading of consumers by means of including important information in disclosures that cannot be fully understood by consumers.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Testimonials and endorsements are required to be personalized, genuine and arising from past or present experience of the witness. Therefore, the advertiser must have the means to substantiate the testimonials and endorsements. In case models are used in the advertisement, models' statements must be included in a manner that avoids the audience's understanding that such statements consist of testimonials.

Advertisers are also required to obtain authorization of the person being depicted or imitated with respect to the use of look-alikes in advertisements. Additionally, misleading consumers is prohibited when uniforms and clothes pertinent to a profession are used.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules concerning product demonstrations other than general restrictions on 'misleading advertising'. In addition to the comments on misleading advertising provided in question 3.4, it should be noted that 'misleading advertising' consists in any form of advertising or communication that is misleading because it is entirely or partially false, or when in any other way, including by omission, it is capable of inducing the consumer in error with respect to the nature, characteristics, quality, quantity, properties, origin, price or any other data regarding the products and services. In short, a misleading advertisement is the one that leads the consumer to buy a product/service that, if he had been better informed, he would not have purchased. Advertising can also be misleading by omission when it fails to provide information on essential data regarding a product or service. However, essential data is an open concept to be defined in a case-by-case basis.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted, but many restrictions apply. In general terms, the comparison shall:

- (a) be capable of substantiation;
- (b) always have the purpose of protection or clarifying consumers;
- (c) not include subjective, psychological or emotionally based data;
- (d) be made with products manufactured the same year (unless in the event the comparison refers to the evolution of the products);

- (e) not include confusion of products and competitors' brands; and
- (f) avoid acts of unfair competition.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

In this regard, it must be noted that Section 32 of the Self-Regulation Code states that comparative advertising is subject to the provisions of the Industrial Property Law. Therefore, in order to include competitor's trademarks or commercial names in advertising campaigns, authorization from the owner of such trademarks and commercial names is required, which, in practical terms, impedes specifically identifying competitors in comparative advertisements. Some advertisers have taken aggressive measures and compared their products with those of competitors, by using their marks, and courts have decided in different ways, depending on the situation.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Geographic origin claims are regulated by the Brazilian Industrial Property Law, which differentiates indication of source from denotation of origin.

Indication of source is the geographic name of a country, city, region or locality in its territory, which has become known as a center of extraction, production or manufacture of a given product or of provision of a given service.

Denotation of origin is the geographical name of a country, city, region or locality in its territory, that designates a product or service whose qualities or characteristics are due exclusively or essentially to the geographical environment, including natural and human factors.

The protection is extended to the graphical or figurative representation of a geographical indication, as well as the geographical representation of a country, city, region or locality in its territory whose name is a geographical indication.

Once a geographical name has fallen into the common use as designating a product or service, it is not considered a geographical indication. As long as it is not inducing to a false origin, a geographical name that does not constitute an indication of source or denomination of origin may serve as a characteristic element of a product or service mark.

The use of the geographical indication is restricted to those producers and service providers who are established in that locality, and it is also demanded, concerning denominations of origin, that the quality requirements are satisfied. The BPTO establishes the conditions for registration of geographical indications.

The Industrial Property Law also determines penalties for crimes against geographical indications. The penalty for manufacturing, importing, exporting, selling, displaying or offering for sale, or having in stock a product that bears a false geographical indication, is imprisonment, from 1 to 3 months, or a fine.

3.10 Are there any special rules governing product packaging?

The general rule for information that must be printed in the packaging follows the Section 31 of the Consumer Defense Code: the offer and presentation of products or services shall ensure correct, clear, accurate and ostensive information in Portuguese on their characteristics, qualities, quantity,

composition, price, guarantee, validity terms and origin, among other data, and on the hazards they may cause to consumers health and safety.

Apart from that, some other products, by their peculiarities, have laws of their own requiring or prohibiting other elements that may appear on the packaging. Some examples are detailed below:

- (a) **Cigarettes:** Law No 9,294/1996 affirms that the cigarette packaging must contain messages warning about the danger of smoking with images, filling 100% of the packaging back. Recently, through the Resolution No 195/2017, the National Agency for Health Surveillance modified the images and messages to be used on the packaging.
- (b) **Alcohol:** As stated by the Law No 9,294/1996, alcoholic beverages must carry on their label messages warning the consumer to avoid the excessive consume of alcohol.
- (c) **Guns:** Law No 10,826/2003 demands the packaging for ammunition to carry a code bar to identify its manufacturer and buyer, among other information defined by this Law.
- (d) **Food:** Decree Law No 986/1968 establishes information that may or may not appear on food packaging.

It is prohibited to include names, designations, geographical names, symbols, figures, designs or indications which give rise to false interpretation, error or confusion as to the origin, provenance, nature, composition or quality of the food or which give it superior nutritional qualities or characteristics.

It must be shown in the packaging main panel, among other information: whether it contains flavoring, the correspondent common use name for scientific terms, name and/or brand of the food, name of manufacturer or producer, headquarters of the factory or place of production, and registration number of the food in the competent organ of the Ministry of Health.

- (e) **Medicines:** As stated by Law No 6,360/1976, in addition to the trade name or trademark, medicinal products must include, on the packaging and promotional materials, the Brazilian Common Denomination or, where applicable, the International Non-Denomination, at least half the size of the letters and characters of the trade name or brand.

The labels of medicines, drugs and related products should have characteristics that clearly differentiate them from each other and that inhibit errors of dispensing and administration, unwanted exchanges or wrong use. Packaging of products intended for use in children must have characteristics of labeling and packaging that enable their immediate and precise distinction from those intended for adult use.

It is prohibited to include designations, geographical names, symbols, figures, drawings or any indication which permit false interpretation, error or confusion as to the source, origin, nature, composition or quality, which assign to the product purposes or characteristics different from those that it actually possesses.

4 PRICE ADVERTISING

4.1 What are Brazil's rules regarding price advertising?

The Self-Regulation Code requires that advertisements must clearly state:

- (a) the total price of the product, avoiding unrealistic and exaggerated comparisons with other products—in the event discounts are offered the advertiser must be capable of providing substantiation regarding the previous applicable price;

- (b) down payments, fees, taxes, credit conditions, expenses and instalments, in case of long term transactions;
- (c) conditions regarding the delivery, product exchange or replacement; and
- (d) warranty conditions and limitations that apply to the products.

4.2 What are Brazil's rules regarding advertising 'free' products?

According to the Self-Regulation Code, the use of the word 'free' or a similar expression is only allowed when no costs are due to consumers in relation to the product advertised as free. When any payments, taxes or delivery fees are applicable, consumers must be fully informed regarding the costs that are due. This restriction on the use of the word 'free' is part of the concept against misleading advertising, which is found both in the Consumer Defense Code and in the Self-Regulation Code.

It is also important to note that previous authorization with the Brazilian National Savings Bank (CEF) may be required prior to advertising free products, pursuant to the rules and conditions provided by Decree Law No 70,951/72, regulating Law No 5,768/71.

4.3 What are Brazil's rules regarding sales and special offers?

There are no specific rules on special offers, although the restrictions against misleading advertising mentioned in questions 3.4 and 3.6, as well in this question 4, apply.

4.4 What are Brazil's rules regarding rebates?

As mentioned in question 4.1, the advertiser must be capable of providing documentary evidence regarding the previous applicable price, so that the actual discount can be verified. Provided that rebates are not contingent on chance elements, meaning that all customers under a same category are entitled to the advertised rebates, previous registration of the advertising campaign with the National Savings Bank is not necessary. In the event the rebates are distributed by means of gift certificates or any other means subject to chance elements, the advertising campaign falls within the scope of Decree Law No 70,951/72, regulating Law No 5,768/71, which requires previous registration with the National Savings Bank.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Yes, the use of expressions such as 'directly from the manufacturer', 'wholesale price' and 'no down payment' must not mislead the consumer and are also subject to substantiation by the advertiser.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

A recent hot topic in Brazil is the issuance of the Decree No. 8,262/2014, regulating Law No. 12,546/2011, which banned tobacco advertising in Brazil, (except for product display in points of sales,) and added several restrictions in relation to the packaging of the product. Said Decree shall be effective as of 29 November 2014.

With regards advertising of alcohol products, the campaigns shall be exclusively addressed to the adult public. Moreover, audiovisual advertisements of alcohol products may only be broadcasted in the Brazilian territory by means of cable TV or if on open TV channels, only from 9:30pm to 6:00am local time.

All firearms, weapons, and ammunition advertising shall not be directed to children or adolescents and is only permitted in specialized publications. In addition, such advertisements can only be aired on TV between 11:00pm and 6:00am local time. Restrictions similar to the ones mentioned herein apply to other products and services.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

There is a law in force in the City of São Paulo which prohibits advertising outdoors within the city, including in private buildings, and it regulates the size of sign boards. There are, however, designated areas allowed by São Paulo's City Mayor Office where it is still possible to advertise, such as: bus stops shelters, street sign boards and bus doors, etc. The City of Rio de Janeiro has also adopted a similar legislation, but it has been challenged by some advertisers who have obtained injunctions in State Courts to continue advertising outdoors. These lawsuits are pending.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Yes, the Self-Regulation Code states that advertisements shall not, by means of statements, audio or video presentations, offend prevailing decency standards in relation to the audience it intends to reach. Therefore, obscene or indecent advertising is restricted to media vehicles and venues aiming appropriate adult audiences. In this sense, advertisers and advertising agencies are required to take the necessary precautions to avoid obscene and indecent advertising to children, adolescents and the wrong audiences in general.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Yes, the Self-Regulation Code determines that the advertising shall always be ostensible, meaning that either the indication of the product, service, trademark, commercial name or elements associated thereto, must be present and identifiable in the advertisement. The exception to this rule is the 'teaser', which may be used by advertisers without the forms of identification mentioned herein.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Pursuant to Section 30 of the Self-Regulation Code, advertisements in the format of news, articles or similar formats that are published upon payment shall be identified as advertisements and distinguished from editorials so as to not confuse consumers.

In case an advertisement is produced in the format of entertainment content, such as a music video or a short film, the content must be registered with the National Cinema Agency as an advertisement and the corresponding fees duly paid, which are higher than fees for entertainment content. There are no restrictions, however, for merchandising in entertainment content.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

As mentioned in the previous question, advertisements in editorial format must be identified as such, although there are no specific requirements to be observed in relation to the corresponding disclosure. We understand that disclosures such as 'this content was produced under the request and for the

advertising of the company [name of the company]'s products or services' is sufficient for this purpose, although it is recommendable that an assessment on case-by-case basis is conducted in relation to each type of content.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

In Brazil, there are no specific laws or regulations addressing issues arising out of social networks services or use. The social media environment is, nevertheless, subject to the same legal and regulatory control applicable to general advertising.

The applicability of Consumer Defense Code provisions to social networks services was incidentally cited by Brazilian courts in lawsuits concerning cyber-bullying that took place in the social network environment provided by Google and Orkut. Said applicability of the Consumer Defense Code was based on the fact that Google receives indirect remuneration for Orkut services, therefore falling under the 'services provider' definition of the Consumer Defense Code. For the same reason, the Consumer Defense Code provisions on advertising also apply to campaigns in the social networks environment.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

The Internet Act (Law No 12,965/2014) was recently enacted and created many new requirements that are applicable to the Internet environment, which are also applicable to social networks.

In this regard, in order to avoid joint responsibility with the infringer (the user who makes comments on the advertiser's Facebook page) the Internet Act requires that take down content is performed by the parties responsible for the web page when notified by a specific court order. We understand that such court order would be notified to Facebook and not the advertiser, but in the event the advertiser is notified in this regard take down within the time frame therein specified would exempt the advertiser of any penalties.

Regardless in case of intellectual property infringement, removal of content shall be made within 24 hours, upon mere notification by the owner, in compliance with the current prevailing understanding of the Superior Court of Justice.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

In July 2012 unknown users created a prank advertising campaign including the condom brand 'Prudence', which suggested a diet based on sexual activity and gave the number of calories spent in each type. eg: 'taking off her underwear with her consent: 10 cal, without: 190 cal; opening her bra with both hands: 8 cal, with one: 32 cal, being beaten by her: 208 cal.' Although the campaign was user-generated and gone viral on the Internet and social networks, DKT International, owner of the Prudence brand, published the advertisement in its Facebook profile. Self-Regulation Council found that it encouraged sexual abuse and requested removal by DKT International. DKT complied and published an apology.

In Brazil, take-down responsibility regarding user generated content is usually imposed to social networks providers and not advertisers. No other decisions against advertisers due to user generated content in social networks were disclosed by our research.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

In view of the Brazilian Civil Code provisions, individuals appearing in any ad must have previously authorized the use of their image, voice or likeness for that specific purpose. In Brazil:

- (a) the privacy, private life, honor and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured (Section 5, item X of the Brazilian Constitution), and
- (b) unless authorized, the exhibition or use of an image of a person may be prohibited, without prejudice to any indemnification to which he/she may be entitled, if they affect the honor, the good reputation or the respectability of the person, or are intended for commercial purposes (Section 20 of the Brazilian Civil Code).

In addition, since Brazilian Copyright Law determines that assignments, or licenses, of copyrights shall be interpreted restrictively, actors hired to participate in advertising campaigns must be required to execute license agreements in relation to their participation, in which all details must be identified, such as term of the campaign, media vehicles and formats.

9.2 Are there situations when permission is not required?

In Brazil the concept of implied consent has been confirmed by local courts, which means that if the individual was aware that his image, voice or likeness was photographed or recorded for the purpose of an advertising campaign, the advertiser will be allowed to include the individual's participation without express consent.

For example, a student posed for a photograph taken by its prep course (for college admission tests) with all other students that passed the exam. The prep course used the photograph for advertising purposes and the student's parents filed a lawsuit challenging such use, however, the court understood that the student provided its implied consent and the lawsuit was rejected.

It is important to note, with regards implied consent, that many controversies may arise regarding the extent of the consent, reason why authorization in writing is deeply recommended in all cases.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

One of the exceptions in the Brazilian Copyright Law, which limits the author's rights, determines that 'the works permanently placed in public locations may be represented, freely, by means of paintings, drawings, photographs and audiovisual procedures.' However, the Superior Court of Justice understands that such exception is not applicable in the event of commercial use of copyrighted works placed in public locations. Therefore, provided that the copyrighted work is not in the public domain (70 years after the death of the author in most cases) previous authorization of the author is required.

Another exception is that if the advertising focuses on the public location as a whole and not specifically the copyrighted material, authorization of the author is also not required, although an assessment on a case-by-case basis is necessary in this regard.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Not without authorization, as the use of third parties' intellectual property in advertising requires previous consent of the owner. In this sense, both the Brazilian Industrial Property Law and the Copyright Law determine that use of third parties' trademarks or copyrighted material requires a license agreement. Moreover, the Self-Regulation Code specifically states that no advertisements shall violate third party trademarks and copyrighted material.

In the event advertisers make use of third-party intellectual property in advertising campaigns without previous license, the owner may file a lawsuit or a complaint with the Self-Regulation Council seeking the modification of the advertisement and compensation for the losses and damages caused (compensation for the losses and damages is only possible by means of the filing of a lawsuit).

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Brazil which affect advertising (eg Swedish gender equality law)?

There are no specific concerns other than subjective aspects such as decency, local moral standards and local socially acceptable conducts, which many times the public, authorities and Self-Regulation Council have different views in this regard.

A recent claim was brought to the Self-Regulation Council by consumers and the Women's Secretariat Representatives, against 'Hope's lingerie' advertising campaign. The campaign included several TV spots featuring model Gisele Bündchen trying to appease her husband after a series of marital blunders: crashing his car, exceeding his credit card limits and inviting his mother-in-law to live with them.

Clips showing Gisele making the confessions while fully clothed are followed by the Portuguese word for 'wrong', while clips in which she charmingly delivers the bad news while dressed in knickers, a bra and high heels are followed by the Brazilian word for 'right'.

Then, a voiceover adds: 'You are Brazilian, use your charm'. The complainants alleged that the advertisement was offensive and discriminatory to women, infringing articles of the Brazilian Constitution. The defense claimed the ad was only humorous, and not offensive. Self-Regulation Council decided the ad was not offensive to women and rejected the claim.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

The Self-Regulation Code determines that all advertising activity shall observe the dignity of the human being, privacy, social interest, national symbols and institutions and family. No advertisement shall encourage any type of racial, social, political, religious or national discrimination.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Brazil?

Since audiovisual advertisements must be registered with the National Cinema Agency (ANCINE), prior to broadcasting in the Brazilian territory, and considering that the fees for registering foreign audiovisual advertisements are much higher than fees corresponding to the ones produced in Brazil, hiring local production may be advisable.

 BULGARIA 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in the Bulgaria?

Bulgarian advertising law is not codified in a unitary legislative act, rather advertising regulations are dispersed among several statutes each one regulating different aspect of advertisement. The main requirements that should be complied by all advertisers, regardless of the communication channel used or the advertised product/service are that every ad should not be misleading and to be structured in way that does not have the potential to confuse the customers. Other important requirement for all types of advertisement is every commercial communication, regardless of its form or communications channel to be clearly recognizable as such and distinguishable for editorial content.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

There are several definitions for 'advertising' dispersed among several legislative acts depending on the communication channel used or the industry of the advertised product/service. However, the most relevant definition that is reproduced to a great extend in many of the statutes is the definition provided by the Bulgarian Protection of Competition Act (PCA), which defines 'advertising' as 'communication in any form connected to a trade, business, craft or profession that aims to promote the supply of goods or services, including or real estates, right and obligations.'

1.3 What is the basic regulatory framework for advertising regulation?

Advertising regulation in Bulgaria is dispersed among several legislative acts, containing different rules depending on the communication channel used or the industry of the promoted product/service. The main legislative act that sets forth the general framework for good faith presentation of commercial communication and prohibits misleading advertising content is the PCA. The PCA implements EU Directive 2006/114/EC and its provisions are applicable to any kind of commercial communication. Certain aspects of the TV and radio advertising are regulated by the Bulgarian Radio and Television Act (RTVA) and certain aspects of advertising online via websites, social network platforms, apps or otherwise is regulated by the Bulgarian Electronic Commerce Act (ECA). Print medias are not subject to specific statutory regulation, but they would still need to comply with the general rules of the PCA.

Additional limitations which should be observed in any advertising activity targeting Bulgarian audience are imposed by the Bulgarian Consumer Protection Act (CPA), which prohibits unfair, misleading or aggressive commercial practices. The CPA transposes into national legislation the rules of Directive 2005/29/EC.

Specific industry related requirements are introduced with the Wine and Spirits Act (WSA), the Tobacco, Tobacco and Related Products Act (TTRPA), the Medicinal Products in Human Medicine Act (MPHMA), etc.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Yes, the distribution of unsolicited e-mail and text commercial messages is specifically regulated by the ECA and the Law on Electronic Communications (LEC) as follows:

- (a) **Unsolicited e-mail messages:** The ECA provides that unsolicited e-mail commercial messages may be distributed to consumers only after the respective merchant has obtained

their prior consent to receive such unsolicited commercial messages. In regard to entities/persons that do not qualify as consumers, unsolicited e-mail commercial messages may be distributed only in case the respective entity/person has not entered its e-mail address into a special register kept by the Bulgarian Commission on Consumer Protection (CCP). The unsolicited e-mail commercial messages should be clearly recognizable as such as of the moment of receipt (that is to say the recipient should be able to recognize it as an unsolicited communication, without having to open).

- (b) **Unsolicited text messages:** The LEC allows unsolicited text message advertising only after the sender has obtained the consent of the recipient in advance or if s/he has obtained the contact details of the recipient during previous business relation. However, in case the contact details are obtained as result of preceding business relation, the recipient should have been provided with the opportunity to refuse his/her contact details to be used for the purpose of text message advertising, as well as s/he should be able at any moment to unsubscribe from the sending list. Even if the recipient does not object to the receipt of unsolicited text messages:
- (i) the sender of such text messages should be clearly recognizable;
 - (ii) the message should include an address which the recipient may use in order to be unsubscribed;
 - (iii) the message should be clearly recognizable as a commercial message; and
 - (iv) the message should not promote websites which are not clearly recognizable as marketing or promotional websites.

1.5 **Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?**

Yes, several industries should comply with specific regulations in regard to advertisement of the products or services supplied on the market, among others:

- (a) alcohol;
- (b) tobacco;
- (c) food;
- (d) gambling;
- (e) pharmaceutical;
- (f) finance, with regard to lending of loans to consumers; and
- (g) services provided by lawyers.

1.6 **Are any government pre-approvals required?**

Generally, Bulgarian legislation does not provide for government pre-approvals of ads; rather every advertiser/advertising agency should self-assess the ads for compliance with the applicable laws. However, advertising materials of medicinal products should be pre-approved by the sector-regulating authority (please see question 5.1 below).

1.7 Does the media pre-clear advertising?

There is no statutory requirement in this regard, but, as a matter of practice, in contracts for purchase of advertising space/provision of advertising services, every media includes clauses that allows it to refuse publishing/broadcasting via their platforms of an ad if, during internal assessment, is observed that the respective ad violates the applicable laws.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The Bulgarian Commission on Protection of Competition (CPC) is the state authority that is vested with the power to oversee the advertising and marketing practices of commercial entities and enforce the PCA rules with regard to misleading advertisements or prohibited comparative advertisements.

The CCP supervises compliance with the requirements of the CPA with regard to misleading and aggressive trading practices, including cases where such practices are implemented as an ad, as well as compliance of online advertising with the requirements of the ECA.

As regards TV and radio advertising, the Bulgarian Council for Electronic Media (CEM) has the power and obligation to monitor compliance with the requirements set by the RTVA.

Several other authorities, including the CCP and Regional Health Inspectorates are competent to monitor compliance of ads with regulations of specific industries (spirits, tobacco products, medicinal products).

All the above authorities are entitled to investigate alleged infringements of the applicable laws and, in case a violation is established, to impose monetary sanction and order termination of the infringements. Their penalty decisions are subject to appeal before the Bulgarian courts. The Bulgarian law does not provide for criminal prosecution with regard to infringement of the advertising regulations.

1.9 When does a competitor have a right of action? What are the potential remedies?

Any competitor may file a complaint with the CPC claiming that an ad of a competitor is misleading or represents prohibited comparative advertisement. In such a case, the CPC starts an investigation, and, in cases where an infringement is established, it imposes a monetary sanction in an amount of up to 8% of the Bulgarian turnover of the respective advertiser for the preceding financial year and, in certain cases, it can impose a fine also on the advertising agency responsible for the creation of the ad. In addition, in cases where a violation is established, the CPC will order suspension of the ad.

In addition to the complaint-based proceedings before the CPC, any person is entitled to inform a competent authority about an ad that in his/her/its view infringes the applicable legislation. However, in all cases the respective government authority decides on its own discretion whether to start administrative proceedings against the respective advertiser and whether to impose a sanction. The authorities are entitled only to impose monetary sanctions and to order termination of the infringement, and are not authorized to forbid future business activity of the advertiser or withdraw licenses/permissions for specific business activity.

1.10 When do consumers have a right of action? What are the potential remedies?

Pursuant to the CPA, advertising is considered as a ‘commercial practice’ and, if it is contrary to the requirements of good faith and professional diligence, and if it materially distorts or is likely to

materially distort the economic behavior (with regard to the specific product) of the average consumer to whom it is addressed or whom it reaches, it could be proclaimed by the CCP as an unfair trading practice and be prohibited. An ad could also be proclaimed as an unfair trading practice by decision of a court following a claim filed by an organization or customers. In such cases, individual consumers or consumer organizations have the right to claim damages that are in consequence of the application regarding the respective unfair trading practice.

When an ad is pronounced as an unfair trading practice by a CCP order/court decision that has entered into force (ie the order is not being appealed by the respective advertiser or it has been confirmed by a final court decision), every consumer affected by the application of that trade practice may terminate the agreement s/he has made with the merchant and claim damages. However, the consumer should demonstrate the relationship between the ad and the damages suffered, as well as justify the amount.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Bulgaria have a primary advertising self-regulation system?

The self-regulatory body in Bulgaria is the National Council for Self-Regulation (NCSR). The NCSR is a member of the European Advertising Standards Alliance and is the most influential self-regulatory organization in the Bulgarian media sector. Thus, most advertising and media agencies are its members, together with some of the major advertisers in Bulgaria.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The NCSR has adopted the National Ethical Rules for Advertising and Commercial Communication in Bulgaria (the Code) (available at <https://www.nss-bg.org/en/kodeks.php>). The rules of the Code are applicable to all forms of promotional communication. The purpose of the Code is to secure that advertising is exercised as a public service in such a way as to consider the impact it has on the consumer. The Code is constructed so as to ensure the discontinuation of activities which are in contradiction with its main purpose, even if such activities are formally within the framework of the applicable laws.

The Code is intended to achieve the following objectives:

- (a) to demonstrate responsibility and good practice in advertising and marketing communication in Bulgaria;
- (b) to enhance overall public confidence in marketing communication;
- (c) to respect privacy and consumer preferences;
- (d) to ensure special responsibility as regards marketing communication and children/young people;
- (e) to safeguard the freedom of expression of those engaged in marketing communication;
- (f) to safeguard the principles of the fair competition;
- (g) to provide practical and flexible solutions; and
- (h) to minimise the need for detailed governmental and/or inter-governmental legislation or regulations.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Enforcement of the Code is vested with the Ethical Committee of the NCSR, which reviews complaints from all interested parties. The decisions are binding for members of the NCSR; however, until recently, compliance with those decisions depended entirely on the good will of the infringer. For the time being, the RTVA provides that all TV and radio operators are required to observe the decisions of the competent bodies of the NCSR or face monetary sanctions by the CEM. However, no such rule with regard to online advertising, including via social media, exists.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Yes, the self-regulation system is widely used; however, as mentioned above, only TV and radio operators are required to observe the decisions of the Ethical Committee of the NCSR. For all other communication channels, compliance with the decisions of the Ethical Committee is more or less voluntary.

2.5 Are the self-regulatory system's decisions reported?

Yes, all decisions of the Ethical Committee are published on NCSR's website (<https://www.nss-bg.org/en/>). In addition, they are provided to the media that have broadcasted/published the respective ad, the advertising agencies involved in the ad production, and to the respective professional organizations.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

It should be mentioned that the Code includes a specific chapter concerned with the identification of commercial communications. Namely, every commercial communication should be clearly recognizable as such, regardless of its form or the communication channel used by the advertiser. The Code further clarifies that, in cases where an advertisement is broadcast on a platform that usually broadcasts news, editorial or personal content, it should be designed in such a manner to be clearly distinguishable as an advertisement.

2.7 Are there any other self-regulatory systems that govern advertising practices in the Bulgaria?

No, there are no other self-regulatory systems.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in the Bulgaria (eg, consumer protection laws; IP laws; unfair competition laws)?

As mentioned above, the main legislative act that regulates misleading advertisement is the PCA, although the CPA also provides for certain requirements with regard to substantiating advertising claims. As a matter of practice, advertising claims are mainly evaluated by the CPC with regard to alleged infringement of the PCA's provisions that regulate misleading or comparative advertisement. The CCP also has the power to evaluate advertising claims with regard to alleged infringement of the CPA's prohibition of unfair trading practices, but, as a matter of practice, such proceedings take place much more rarely than CPC investigations.

3.2 Is substantiation required for advertising claims?

Bulgarian legislation does not require an ad to contain explicit substantiation for the advertising claims. However, the PCA prohibits misleading advertisement, and the competent authority has developed a pretty large decisional practice in this regard.

The specific violation of misleading advertisement is defined on the basis of the ability of an advertising message to distort the economic behavior of consumers, thereby causing harm to competitors. According to CPC case law, the confusing potential of the message must be evaluated from the point of view of a general representative of the relevant customer group. However, in its recent decisions, the CPC has adopted a somewhat formalistic approach, analyzing first whether the statement is unconditional or not. Claims like ‘the lowest price’, ‘the best price’, ‘the best product’ are considered very suspicious and, in almost every case when such claims were evaluated by CPC, the ruling was that the respective ad was misleading, because the advertiser was not able to provide enough evidence that they were completely correct.

In the absence of qualifications (eg use of adjectives in superlative form, such as ‘the lowest price’ or ‘the best price’), the authority reviews whether there is any evidence of a situation (even if potential) where the statement is not correct and, if such a situation is found, the advertising is deemed misleading. For similar reasons, words signifying gratuitous offers (such as ‘gift’ or ‘free’) should not be used in relation to promotions, unless the product to which they refer is clearly provided for no consideration.

In its decisional practice, the CPC has defined that, with the aim of avoiding confusion and the misleading of consumers, ads should use clear and unambiguous wording and not claim features/specifications for the advertised product/service that are not correct or cannot be substantiated. An advertising claim will be deemed misleading where it is not based on objective characteristics of the product or service concerned. Normally, claims related to physical features, which are backed by laboratory analysis, would be regarded as genuine. Claims related to subjective perceptions would also be upheld to the extent they are supported by representative customer surveys.

Accordingly, although the legislation does not require substantiation, the CPC has accepted that every advertising claim concerning essential features of a product/service must be substantiated in sufficient manner. In the absence of such substantiation, the authority accepts that such a claim has the potential to mislead consumers and to affect their market behavior to the detriment of its competitors.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

As long as an advertising claim does not concern essential features of a product/service and is not capable of distorting consumer behavior, it does not require substantiation. However, this is decided on a case-by-case basis and, generally, there are no safe harbors on which advertisers can rely. It should be mentioned that the CPC has accepted that claims that are obviously puffery (eg ‘homemade’ used in regard to a food product that is offered in large quantities in the retail network) cannot be regarded as misleading. In the specific case, the authority has ruled that any prudent consumer is aware that food products offered in large quantities in the retail network cannot be produced in ‘home’ conditions or only with natural ingredients, without any food additives or preservatives that are normally used in the food industry.

3.4 What are the rules governing the use of disclosures in advertising?

There are no specific rules in this respect. The aim is that the disclosure should be clear enough to avoid any potential for consumers to be misled by the advertising claims used in the respective ad.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

There are no specific rules in this respect. Generally, pursuant to CPC's decisional practice, endorsements and testimonials are not accepted as sufficient proof that an advertising claim is correct and substantiated.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules in this respect. Product demonstration is allowed; however, it should be done in such a manner, and the product demonstrated should be with such specifics as do not allow for confusion of the consumer as to the specifics and qualities of the real product offered on the market.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Yes. In contrast to misleading advertising, comparative advertising is not prohibited per se, and can be implemented as a promotional technique as long as it provides fair and objective comparison between similar goods or services, and meets certain other specific criteria set out in the law. The PCA defines 'comparative advertising' as 'a form of commercial communication, which directly or indirectly identifies a competitor or the goods or services offered by a competitor'. To be in compliance with the law, every advertising message that uses comparative techniques must comply with the following requirements:

(a) Positive requirements

- (i) It must compare goods/services meeting the same needs or intended for the same purpose;
- (ii) for goods with designation of origin, it must relate in each case to goods with the same designation;
- (iii) it must compare in an objective manner one or more features of the relevant goods/services, which are substantial, comparable and representative for these goods/services (such as prices, durability, etc).

(b) Negative requirements

- (i) It must not be misleading—ie capable of creating confusion in consumers in respect of essential features of the products/services subject to comparison (such as their availability on the market, type, composition, mode of production, method of use, origin, suitability for use, price and delivery terms, etc);
- (ii) It must not be misleading, aggressive or otherwise unfair commercial practice;
- (iii) It must not create confusion among traders (eg between the advertiser and competitors);
- (iv) It must not create confusion between the trademarks, trade names, other distinguishing marks or goods/services of the advertiser and those of competitors;
- (v) It must not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities or situation of the competitors;

- (vi) It must not take unfair advantage of the reputation of the trademark, trade name or other distinguishing marks of the competitors or of the designation of origin of competing goods; and
- (vii) It must not present goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

There are no special copyright or trade mark rules that may impact comparative advertising. The Bulgarian authorities observe the European Court of Justice case law in this respect. Thus, under Bulgarian law, it is possible to use a competitor’s trademark for the purposes of comparative advertising, as long as the ad is in compliance with the requirements for permitted comparative advertising as set forth by the PCA (please see question 3.7).

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

The Bulgarian Law on Marks and Geographical Indications provides that geographical indications may be granted legal protection through registration with the Patent Office of Republic of Bulgaria.

Such legal protection shall consist in the prohibition of:

- (a) any commercial use of the geographical indication for goods that are similar to those for which it is registered in so far as the reputation of the registered geographical indication is exploited;
- (b) improper use or imitation of the geographical indication, even where the genuine origin of the goods is specified, use of a translation thereof or use in combination with terms such as ‘sort’, ‘kind’, ‘type’, ‘imitation’ or similar;
- (c) use of any other incorrect or deceptive indication as to the source, origin, nature or essential qualities of the goods designated on the packaging thereof in advertising material or papers concerning the goods, such indication being likely to mislead as to the genuine origin of the goods; and
- (d) any other action that may mislead consumers as to the true origin of the goods.

There are no specific rules with regard to advertising geographic origin, but, in its decisional practice, the CPC has held that an ad which, without specifically pointing out, but by its entire appearance, creates the impression that a product originates from a specific country/region that is famous for its production of such products (in the specific case, the promoted product was bruschetta and the ad created the impression that it is manufactured in Italy), could be considered as misleading advertisement if the product does not, in reality, come from that country/region. The CPC’s reasoning was that, when a customer perceives that a product is produced in a such country/region, s/he would expect that product to be of better quality because of the traditions in the manufacturing process that exist in that country/region. In CPC’s view, the false impression about the origin of the product created by the ad results in the ad being misleading.

3.10 Are there any special rules governing product packaging?

The CPC has held that information provided on product packaging or in product manuals (eg contents, instructions for use, etc) does not qualify as an advertisement, because its aim is not to promote the product, rather to describe essential characteristics of the product and to allow customers to make an

informed purchasing decision. In that regard, the advertising rules does not apply to the product packaging.

However, it should be mentioned that there are specific rules about product packaging, eg:

- (a) for food products, whose packaging should comply with the requirements of the EU Regulation on the Provision of Food Information to Consumers (No 1169/2011);
- (b) for tobacco product which packaging should comply with the TTRPA; and
- (c) for alcoholic beverages, which should comply with the WSA, etc.

4 PRICE ADVERTISING

4.1 What are the Bulgaria's rules regarding price advertising?

Price advertising is regulated by the PCA. The CPA also imposes certain requirements with regard to price announcements, but they concern matters such as announcement of price promotions, duration of the promotion and other specifics of the organization and implementation of discount promotions.

As a general note, price advertising is generally allowed in Bulgaria, as long as the respective ad provides, in a clear and unambiguous manner, all specifics and conditions of the advertised offer. Commercial practices such as:

- (a) advertisement of a product/service at a specific price, when there are very limited quantities of the respective product/services; or
- (b) implementation of a massive advertising campaign with clear emphasis on a specific high discount, when it is available only for a very limited period or in respect of very few products/services

are generally considered as misleading.

4.2 What are the Bulgarian's rules regarding advertising 'free' products?

Advertisement of provision of 'free' products is allowed, as long as the respective merchant is actually providing the respective products for no consideration and there are no hidden fees. In addition, the quantity of the products available should be comparable to the scale of the advertising campaign and presumptive demand. However, the wording of an advertisement should be carefully drafted. If a product/service is offered for 'free', but the invoice/sale receipt indicates that it has its own price (even though the price is negligible), the CPC could conclude that this is a case of misleading advertising.

The provision of a 'free' product should be distinguished from promotional activities where a product/service is provided for free or at a negligible price as a supplement to a main product/service purchase by the customer. Such promotions are considered to represent a form of unfair competition because the client is induced to make a purchase, not by the qualities of the principal product or service, but by the opportunity to receive something else for free. There are several exceptions of this prohibition:

- (a) Promotional items of negligible value: This exception is on the proviso that the advertising undertaking is clearly identified. 'Negligible value' is up to 10% of the price of the principal product and the supplement must bear the name, logo or other characteristic signs of the advertising entity.

- (b) Accessories: These are items or services which, according to commercial practices, are supplied and used together with the principal product/service bought by the customer. The term ‘accessory’ is interpreted to mean that the supplement should be functionally connected to the main product. The functional relation must be significant (if not exclusive), in order for a product to be regarded as an accessory.
- (c) Volume rebates: ie offering additional goods or services to induce purchasing of larger quantities. The supplements should be in the form of goods or services that are ‘identical’ with the principal goods/services sold.

4.3 What are the Bulgarian’s rules regarding sales and special offers?

The most important requirement regarding sales and special offers, compliance with which is monitored by both CPC and CCP, is that when a promotional discount is announced and the retailer communicates this to consumers by making a comparison between the old (‘regular’) and new (‘discounted’) prices, the ‘regular’ price, from which the promotional discount is calculated, should have been applied for a period of at least one month prior to the announcement of the promotional discount. It does not matter whether goods of this type were sold at the old/regular price or were only displayed at the shop and no sales were made—the important thing is to have them registered in the inventory list in order to be able to prove the initial date of application of the ‘old/regular’ price. The purpose of this rule is to prevent misleading commercial practices where prices are increased shortly before the start of the campaign, so that the discounts are artificially inflated.

Another important aspect is that sales (the period of time when specific goods are offered with a discount) cannot be shorter than a full day or last more than a month. The only exception when a longer period of application of the ‘discount’ price is allowed is a ‘clearance sale’ held due to planned suspension of operation for maintenance or repairs, reorganization, or termination of commercial activity, etc. In such exceptional cases the sale may last for a period of up to 6 months.

4.4 What are the Bulgaria’s rules regarding rebates?

All rules as identified above with regard to sales and special offers apply equally to rebates.

In addition to these rules, in all advertising materials the merchant should clearly communicate the main aspects of the promotional campaign, including the promotional period, the main specifics (ie the value of the discount (with signs like ‘discount up to ...%’), special condition (if any) etc) and the goods to which the discount shall be applied. All these aspects should be strictly observed by the merchant and cannot be amended without proper announcement. After the pre-announced period expires, the goods/services should be returned to the regular price.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

In cases where a promotion is specifically targeting Bulgarian customers, all advertising messages should be in Bulgarian. It is permissible for advertising messages like ‘Sales’ or ‘Promotion’ to be in a foreign language, but all other information, especially the essential details of the promotional offer, should be provided in Bulgarian.

It is worth mentioning that, in its decisional practice, the CPC has held that when a retailer announces offers with discounted prices and employs a massive advertising campaign to communicate them to the public, the respective retailer should ensure it has a large enough quantity of the promotional products to satisfy basic demand. In cases where there are not enough items in stock (the CPC has not

provide clear indication for ‘sufficient quantities’ and rather stated that this should be defined on a case-by-case basis), the merchant could be sanctioned for misleading advertisement, because a false expectation is created in costumers that they can purchase specific products at favourable prices, without ensuring enough stock to fulfil the promise. In that regard, every merchant, when announcing discounted pricing offers, should be prepared to satisfy the increased customer demand up to a reasonable point.

In another decision, the authority has ruled that an advertising campaign, where great emphasis is put on a very high discount (in the specific case the announced discount was in the amount of 70%), when, in reality, only a very limited number of the product are offered with such discount, and the regular discount is in the amount of 20%–30%, could be regarded as misleading, because consumers are attracted by the emphasis on the high discount, which has created a false impression about the benefits of the promotional campaign.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Pursuant to Bulgarian law, the following products and services cannot be advertised:

- (a) **Alcoholic beverages.** The Health Act (HA) imposes a full ban on direct advertising of spirits (hard liquors). Direct advertising of wine and beer, as well as indirect advertising of hard liquors is allowed provided that the communication:
- (i) is not targeted at minors (individuals under the age of 18) and is not broadcasted in programs or printed media intended for minors;
 - (ii) does not use minors as participants;
 - (iii) does not relate the consumption of alcoholic beverages to sports and physical achievements or driving; and
 - (iv) does not relate consumption to health benefits and social or sexual wellbeing, and does not present abstinence or moderation in negative light.

In addition, the indirect advertising of spirits on TV and radio stations is allowed only after 10:00 PM.

- (b) **Tobacco and tobacco related products.** The TTRPA prohibits advertising of tobacco and tobacco-related products, except:
- (i) on the territory of enterprises where tobacco or tobacco-related products are manufactured, and commercial outlets where tobacco and tobacco-related products are on sale;
 - (ii) when only a trademark is shown in the advertisement (ie no images of cigarette packs or cigarettes) and:
 - (1) participants in the advertisement do not include individuals under the age of 18, and
 - (2) the ad is not intended for or targeted at such persons by means of other external features of the advertising vision, which would be identifiable primarily or only by individuals under the age of 18;
 - (iii) at locations or events where access of persons aged under 18 is prohibited.

In addition, the TTRPA explicitly prohibits any TV, radio and print media advertisement, as well as advertisement via information society services. In practice, the only channel that may be used for advertisement of tobacco and tobacco-related products is out-of-home networks.

- (c) **Gambling.** Under the Bulgarian Gambling Act and the Code, the following are banned:
- (i) direct advertising of gambling,
 - (ii) advertising targeting minors, and
 - (iii) sending unsolicited electronic messages containing information about a gambling game to an unlimited number of persons.
- (d) **Medicinal Products .** Pursuant to the MPHMA, medicinal products which can be dispensed only on prescription by doctor cannot be advertised to customers—they can only be advertised to healthcare professionals (such as medical doctors, dentists, etc). Online advertising of prescription medicines is prohibited, with exception of vaccination advertising campaigns.
- Medicinal products which can be dispensed without prescription, and which do not contain narcotic substances, can be advertised to the general public subject to prior review and authorisation of the advertising materials by the Bulgarian Drugs Agency.
- (e) **Non-conventional healing methods.** The HA prohibits any advertisement of non-conventional healing methods.
- (f) **Genetically modified goods (GMF).** The Food Act prohibits advertising of GMF featuring children or targeting children.
- (g) **Guns and Weapons.** The Radio and Television Act prohibits content, which (in particular):
- (i) may inspire intolerance; or
 - (ii) violates the public morals, represents cruelty or violence.
- Under the Penal Code, any act of incitement to discrimination, violence or hatred, in relation to race, nationality or ethnicity is considered as a crime. In addition, the Code explicitly provides that any type of commercial communication should not depict, condone or incite violent, unlawful or anti-social behavior, and should not depict, condone or incite a threat to the life and health of people, nature, animals or to personal or public property. In that regard, although there is no explicit provision in this respect, it should be accepted that any kind of advertising of guns and weapons is prohibited, or at least carries high risk.
- (h) **Lawyers' services.** Pursuant to the Bar Act, attorneys-at-law or European Union lawyers are not allowed to advertise their services or solicit clients in a way contradictory to the provisions of the Bar Act and the rules of professional attorney-at-law ethics. However, the announcement of the legal field the lawyer practices in, education, professional experience, and membership of legal organisations are among exceptions from the abovementioned ban.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

As described above, the PCA explicitly prohibits misleading advertising. 'Misleading advertising', advertising which 'in any way, including by the manner of its presentation, misleads or may mislead the persons it targets or reaches and thus may influence their economic behavior, and thereby harms or may harm a competitor', is prohibited. For more detail see question 3.2.

Furthermore, certain types of comparative advertising are also prohibited if found to be confusing, misleading or unfair (for more details please see question 3.7).

There is also a statutory ban on aggressive advertising. Pursuant to the CPA, an advertisement is considered to be aggressive when, in its entire factual context, and taking account of all its features and circumstances, due to harassment, coercion, physical force or undue influence, it impairs or is likely to impair the freedom of choice or conduct of an average consumer with respect to a product or service, thereby causing a transactional decision that the consumer would not have taken otherwise.

Another prohibited advertising practice is the unfair solicitation of clients by granting or promising attractive (expensive) prizes. The PCA expressly prohibits the sale of goods or services if accompanied by an offer or promise of something the receipt of which depends on:

- (a) resolving problems, puzzles, questions, riddles;
- (b) the collection of a series of coupons, etc;
- (c) games of fortune with cash or object prizes, the value of which significantly exceeds the price of the product or service sold.

Pursuant to guidelines adopted by the CPC, the value of the prize ‘significantly exceeds’ the price of the goods or service sold where the value of the prize is more than 100x the price of the respective product/service. In any case the value of the prize should not exceed the sum of 15 minimal monthly wages (MMW). The MMW are set by a government decision and currently amount to BGN 510, thus the absolute limit on prizes is BGN 7,650 (€3,911).

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

- (a) The RTVA prohibits content which:
 - (i) may inspire intolerance;
 - (ii) violates the public morals, especially if it contains elements of pornography, praises or exonerates cruelty or violence, or inspires hatred on ground of race, sex, religion etc; or
 - (iii) does not preserve the purity of the Bulgarian language.

The RTVA rules, however, apply only to the broadcasting of audio-visual content over traditional electronic channels—radio or television. There are no specific statutory provisions regulating the use of profanity or swear words in online advertisements. There are also no specific controls or restrictions on the freedom of expression save for the fact that it is a qualified right.

- (b) Under the Code, any use of indecency or obscenity words in any commercial communications, including online ads is indicated as unacceptable. The Code explicitly provides that no commercial messages should contain statements or audio or visual elements which offend the standards of decency currently prevailing in the country or which could be defined as vulgar or repulsive according to the generally accepted in the country moral and cultural norms.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

The ECA requires that the natural or legal persons, on whose behalf online commercial communication is made, be clearly identifiable. With regard to other communication channels, there are no explicit requirements in this regard. However, as explained in more detail below, all advertising content, regardless of communication channel, should be clearly recognizable as such and distinguishable from editorial content.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

The RTVA and ECA impose specific restrictions on advertising material that matches the form and function of the platform upon which it appears. In addition, the PCA imposes a general requirement for the presentation of commercial communications to be done in good faith and prohibits misleading advertising content.

The RTVA provides that every commercial communication broadcast over TV or radio should be clearly recognizable as such and distinguishable from editorial content. The RTVA explicitly prohibits ‘hidden commercial communication’, which is defined as ‘any type of TV or radio broadcasting that with words, sound, images of goods, services, trade mark or of any kind of activity of a producer of goods or of a service provider aims to promote the goods, services or image of the said natural or legal entity and which due to the absence of clear indication might mislead the audience about the advertising nature of the respective TV/radio program’.

The ECA, on the other hand, is less restrictive, and only requires that commercial communication published online is clearly defined as such and that the advertiser is clearly identified.

In addition, the Code requires every commercial communication to be clearly recognizable as such, regardless of its form or the communication channel used by the advertiser. The Code further clarifies that in cases where an advertisement is broadcast on a platform that usually broadcasts news and editorial content, it should be designed in such a manner as to be clearly distinguishable as an advertisement.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no special disclosures that should be used. As explained above, the requirement, at all times, is that an advertisement be clearly recognizable as such and distinguishable from editorial content. As a matter of practice, media use disclosures as ‘Ad’, ‘Paid Content’, etc.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

All general advertising and marketing regulations apply equally to advertising and marketing via social media platforms. In addition, advertising via social media should comply with the requirement of the

ECA that any commercial communication published online should be clearly defined as such and that the advertiser should be clearly identified. Furthermore, the CPC's case law indicates that advertising via social media should be in compliance with all general advertising regulations, including, in particular, the prohibition to mislead the consumers (CPC Decision No 946/2016).

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

There is no statutory provision in this respect, but recent CPC case law has made it clear that an advertiser can be held responsible for advertising claims made in user generated content, unless it explicitly opposes such claims.

In one recent decision (CPC Decision No 1244/2017), the CPC sanctioned an online electronic gadgets retailer (the Retailer) for obtaining unfair benefit from two video vlogs made by a famous Bulgarian vlogger and posted on his YouTube channel. In these vlogs, the vlogger made several insulting statements about one of the Retailer's competitors, claiming that its products are of very low quality, while simultaneously praising the Retailer and its products. In its investigation, the authority found that the Retailer had not commissioned, nor requested in any other way, the vlogger to shoot the vlogs and make insulting statements or even discuss its competitor. It was also established that the Retailer did not have any control over the vlogger's channel and was not in a position to cancel or change the respective vlogs. However, despite the lack of intention or control, the CPC still held that the Retailer had committed an act of unfair competition because it was aware of the respective vlogs, their negative impact on its competitor and its potential to attract new clients frustrated by the vlogger's statement, and it did not expressly and publicly renounce the vlogger's behaviour, particularly the insulting negative claims made with respect to the competitor and its products.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

In addition to the decision discussed in question 8.2, above, the CPC has ruled two more times on issues related to advertising via social media. With a decision from 2016 (CPC Decision No 946/2016), the CPC imposed sanctions on an online book retailer for posts on its Facebook page that were found to be misleading. It was announced that a specific book was offered exclusively via the retailer's online shop, which was not confirmed in the proceedings. The defendant expressly argued that Facebook posts should not be regarded as advertising in its case because:

- (a) its Facebook page was not actively used and it had only few followers;
- (b) the page was created as a channel for direct communication with customers and was not intended to be a platform for advertising;
- (c) the posts could not be attributed to the defendant, because the access details for the user account were available to all employees and there was no access control so that even former employees could post.

The CPC dismissed all arguments considering that:

- (a) every Facebook page is easily accessible by all platform users and therefore it had the potential to reach an unlimited audience;
- (b) information posted on a Facebook page is capable of influencing the market behavior of customers, regardless of the intended purpose of the user;
- (c) lack of rules or control over posting in an official social media profile means that the respective advertiser accepts that every employee may manage the profile or post on its behalf, and the advertiser accepts to be bound by such posts.

With a decision from 2015 (CPC Decision No 250/2015), the CPC sanctioned a food producer for posting ads on its Facebook page using the images and names of famous Bulgarian athletes (Grigor Dimitrov and Tsvetana Pironkova—highly popular tennis players) without their consent. The defendant argued that the purpose of the publications was to congratulate the athletes for their successes and the images were freely available on the web. However, the CPC ruled that the fact that the images were published on a corporate Facebook page and were accompanied by the registered trademark of the respective undertaking misled customers that the athletes were brand influencers of the company. The CPC noted that the simple use of images of ‘celebrities’ is not a problem, as long as there is no trademark positioned on or near the photo. However, when the image is ‘branded’ it becomes a marketing material, which creates the impression that the respective person supports the products offered under the trademark present. Considering that the athletes never allowed such use of their images, the competition authority concluded that the practice represented misleading advertising.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

The Bulgarian Copyright and Neighbouring Rights Act (CNRA) explicitly requires that any photograph or painting that represents an individual may be created only after the author has obtained the consent of the respective individual. In addition, the author and the individual should agree on the conditions for the subsequent use of the work of authorship.

In addition, the use of an individual’s name, picture, likeness, voice and identity in advertising should be in compliance with the Bulgarian Personal Data Protection Act and the General Data Protection Regulation (GDPR). Pursuant to these acts, any data that might be classified as personal data may be used, including for marketing purposes, only with the explicit consent of the respective individual unless another of the grounds for lawful proceeding of personal data (as indicated in the GDPR) is at place (for example in where an individual participates in a video or radio ad for remuneration and the use of his/her image is allowed on contractual ground).

Finally, when using celebrity’s images etc, an advertiser should take into account CPC Decision No 250/2015 (as discussed in question 8.3 above) and avoid ‘branding’ such images, for example by positioning a trademark on them and, by this, creating the impression that the respective person supports the products offered, if this not so.

9.2 Are there situations when permission is not required?

The CNRA provides that consent from an individual is not required for the creation of a photograph or a painting, where:

- (a) the image made is one of public activity, or of a public place; or
- (b) the individual is just one element in the image, which is of a larger group, procession or landscape; or
- (c) the individual for remunerated for posing for the image.

However, in cases where the image or similar representation identifies the individual in detail, and he/she has not consented to this representation being used for marketing purposes, his/her permission should be obtained before the representation is used as an ad.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

- (a) Advertising of:
 - (i) non-prescription medicinal products to the general public is subject to prior review and authorization of the advertising materials by the Bulgarian Drug Agency;
 - (ii) prescription medicines to health care professionals is subject to prior notification of the draft advertising content to the Bulgarian Drug Agency.
- (b) Any use of images of prayer facilities, temples, monasteries, objects or persons related to religion for advertising purposes is subject to the explicit permission of the official representatives of the religion to which the objects are related.
- (c) Explicit authorization from the Council of the Ministers is required for use of the national coat of arms of Bulgaria for any purpose.
- (d) Use of images of coats of arms, historic buildings, emblems and other content that can be classified as a Bulgarian cultural heritage for commercial and/or advertising purposes is allowed only with explicit consent of the owner/manager of the respective cultural heritage site. The license should be provided by way of written agreement entered into between the respective site owner/manager and the person that shall use the respective images for commercial or advertising purposes.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Yes, subject to compliance with the rules concerning comparative advertising (please see question 3.7 above).

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of the Bulgaria which affect advertising (eg Swedish gender equality law)?

No.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

No. However, please be informed that a recent ad of a big commercial chain provoked enormous public reaction due to the removal, in the ad, of the crosses from couple of famous Santorini churches.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in the Bulgaria?

Pursuant to the PCA, both the advertiser and the advertising agency which produced an advertisement that is found to be misleading or presents non-permitted comparative advertising are liable for, and bear financial liability (pecuniary sanction up to 8% of company's turnover) for, infringement of the PCA rules.

 CANADA 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Canada?

Advertising is regulated at both the federal and provincial levels in Canada, as well as through self-regulatory bodies. Federal legislation governs deceptive marketing practices, including all manner of representations such as pricing, promotions, testimonials, telemarketing and bait and switch tactics. Provincial consumer protection legislation governs deceptive advertising and marketing practices. The federal Criminal Code prohibits illegal lotteries and other conduct related to promotional contests and sweepstakes. Quebec is the only provincial jurisdiction in Canada to regulate promotional contests and sweepstakes in addition to federal law, and also requires French in advertising (subject to limited exceptions). Intellectual property laws (copyright, trademark) also apply. There are sector and product-specific legislation as well, governing advertising for products such as alcohol, tobacco, cannabis, drugs, natural health products, food, cosmetics, and advertising directed to children. Additionally, consumer products are subject to federal and provincial labelling legislation, including bilingual requirements.

There is significant industry self-regulation requirements as well, administered by such industry self-regulatory bodies as Ad Standards and the Canadian Marketing Association.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

Advertising includes virtually any representation made to the public (including any subset of the public), in any media, intended to influence choice, opinion or behavior or otherwise promote, directly or indirectly, a product, service, company, or interest.

1.3 What is the basic regulatory framework for advertising regulation?

The Competition Act governs misleading representations.

Paragraph 74.01(1)(a) of the Competition Act is a civil provision that provides that anyone who makes a materially false or misleading representation to the public to promote the supply or use of a product or a business interest engages in ‘reviewable conduct’. When the Competition Tribunal or a court, on application by the Commissioner, finds that a person has engaged in reviewable conduct, it may order the person to not engage in such conduct, to publish a corrective notice, to pay an administrative monetary penalty and/or to pay restitution to affected consumers.

Subsection 52(1) of the Competition Act is a criminal provision that prohibits anyone from knowingly or recklessly making a materially false or misleading representation to the public to promote the supply or use of a product or business interest. Any person who contravenes this provision is guilty of an offence and liable to a fine and/or imprisonment.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Yes. Commercial electronic messages such as text messages, email and certain social media messages are regulated by Canada’s Anti-Spam Legislation (CASL), which (subject to limited exceptions) requires that the recipient consent to receive the message (implied or express consent), as well as certain disclosures in the message (including an unsubscribe function).

False or misleading representations as to the source, sender or subject matter of electronic messages are also specifically prohibited.

Canadian Wireless Telecommunications Association guidelines mandate disclosures related to text messaging, including disclosure of costs associated with short code campaigns and other material terms.

Certain advertising (eg food, alcohol, cosmetics, ads directed to children) must be precleared in order to be accepted by most networks to go to air.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Yes. The following categories of products are examples of those that have specific advertising restrictions: alcohol, tobacco, cannabis, food, cosmetics, marketed health products, prescription drugs and advertising to children:

- (a) Alcohol advertising is regulated provincially, with federal restrictions regarding broadcast alcohol advertising. Example prohibitions include directing such advertising to minors, depicting consumption of alcohol, and using imperative language to urge people to purchase or consumer the product.
- (b) Most forms of tobacco advertising to the public are prohibited, including advertising in broadcast media.
- (c) Cannabis advertising is also generally prohibited, unless the advertiser and type of messaging meet specific exceptions available by law.
- (d) Food advertising is heavily regulated. For example, claims about the nutritional content or characteristics of food and comparative food claims must comply with prescribed formats and restrictions on permissible claims. At the time of writing, legislation is proposed that new federal legislation will soon also either prohibit or restrict advertising of foods deemed 'unhealthy' directed to children under 13.
- (e) Cosmetic advertising is also regulated, and must not make drug-like claims about the performance or nature of the product.
- (f) The advertising of marketed health products is restricted to claims that comply with the product license or monograph.
- (g) Prescription drugs are also highly regulated. Branded prescription drug advertising is limited to the brand name, price and quantity of the product, and cannot state or imply the therapeutic indication of the drug or the affected disease state it seeks to remedy. It may be permissible to communicate, through advertising or otherwise, about a disease state, however this campaign must remain unbranded.
- (h) Where advertising includes references to credit or leasing rates, as is prevalent in the automotive advertising category, additional disclosures are required under provincial law which varies by jurisdiction. For example, credit advertising may require disclosure of the applicable annual percentage rate (APR), and leasing advertising requires disclosures such as the lease APR, length of the lease term, and amount of each payment other than the monthly payments.

- (i) Quebec prohibits advertising to children who are under 13 years of age. This applies to merchants that promote goods or services as well as those involved in the advertising process. It applies across all advertising media, including: online, radio, television, mobile phones, printed materials such as newspapers, magazines and flyers, signage, promotional items, and new media. When determining whether the communication will be considered to be 'directed at' children, the following contextual factors must be considered:
 - (i) the nature and intended purpose of the goods advertised;
 - (ii) the manner of presenting such advertisement; and
 - (iii) the time and place it is shown.

1.6 Are any government pre-approvals required?

Canadian governmental regulators have largely delegated pre-approval to industry self-regulatory bodies. See below.

1.7 Does the media pre-clear advertising?

For broadcast, networks generally rely on approved agencies, including Ad Standards, who provide pre-clearance services for advertising in the following categories: alcohol, children's advertising, cosmetics, food and non-alcoholic beverages, and consumer drugs. Additionally, the Pharmaceutical Advertising Advisory Board pre-clears advertising directed to healthcare professionals for prescription, non-prescription, biological and natural health products.

For broadcast advertising, broadcasters either pre-clear the commercials themselves, or use the clearance services of *thinktv* to do so on their behalf.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Enforcement is dependent on the type of advertising and the governing legislation.

For example, non-compliance with the civil prohibition against false or misleading advertising could result in a court order to no longer engage in the conduct, publish a notice to the public, pay an administrative monetary penalty up to \$10 million (for corporate defendants), and/or pay retribution to consumers. The penalties on a criminal conviction by indictment are a fine in the discretion of the court and/or imprisonment for up to 14 years. On a summary conviction, the maximum penalty is a fine up to \$200,000 and/or imprisonment for up to one year.

1.9 When does a competitor have a right of action? What are the potential remedies?

Remedies are dependent on the type of advertising and the governing legislation.

The Competition Act provides for a private right of action where the conduct meets the criminal standard for false or misleading advertising. The remedy is compensation for damages suffered, with no limit on the amount of an award to competitors that allege advertising is contrary to the Act.

Additionally, competitors can access a dispute procedure offered by Ad Standards to mediate competitive advertising disputes under the Canadian Code of Advertising Standards. This confidential process is offered on a fee basis as an alternative to court proceedings. The only remedy available is the withdrawal of the advertising, however, which may not be sufficient to compensate damages

suffered for false or misleading advertising. Note that, at the time of writing, this procedure is under review by Ad Standards and may soon be subject to change.

Lastly, competitors can seek remedy through a complaint to the applicable industry sector regulator (eg Health Canada, the Ontario Motor Vehicle Industry Council, et al) in an attempt to trigger a regulatory investigation and enforcement of the applicable requirements.

1.10 When do consumers have a right of action? What are the potential remedies?

Remedies are dependent on the type of advertising and the governing legislation. Consumers can seek damages through the private right of action available under the Competition Act (discussed above) or under applicable provincial consumer protection legislation.

Ad Standards offers a consumer complaint process pursuant through which consumers can complain about advertising alleged to be non-compliant with the Canadian Code of Advertising Standards. The only remedy available is the withdrawal of the advertisement.

Consumers may also make complaints to the applicable industry sector regulators to seek to trigger a regulatory investigation and enforcement against the advertiser.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Canada have a primary advertising self-regulation system?

The primary self-regulatory system in Canada is Ad Standards. Ad Standards is a national, not-for-profit that body administers the Canadian Code of Advertising Standards (Code), including the determination of both consumer and trade complaints thereunder.

A single consumer complaint is sufficient to trigger evaluation by Ad Standards. If Ad Standards determines that there is a potential issue under the Code, the advertiser has the chance to respond (in the case of safety or unacceptable depictions, the response is first directed to the complainant who may choose to withdraw their complaint). The complaint and response are reviewed by a Standards Council to determine whether there has been a Code violation. If the complaint is upheld, Council will instruct the advertiser to remove or amend the offending advertisement, and the decision will be reported in ASC's Advertising Complaints Report. If the ad was withdrawn or amended prior to a determination by Council, the report will be anonymous.

The advertiser dispute process is discussed below.

Ad Standards also offers advertising preclearance services for regulated products.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The clauses of the Code are:

- (a) Accuracy and Clarity;
- (b) Disguised Advertising Techniques;
- (c) Price Claims;
- (d) Bait and Switch;

- (e) Guarantees;
- (f) Comparative Advertising;
- (g) Testimonials;
- (h) Professional or Scientific Claims;
- (i) Imitation;
- (j) Safety;
- (k) Superstition and Fears;
- (l) Advertising to Children;
- (m) Advertising to Minors; and
- (n) Unacceptable Depictions and Portrayals.

Alleged inaccurate or misleading advertising under clause 1 of the Code continues to be the most active subject of complaint. This clause encompasses false or misleading representations, omitting relevant information, lack of clarity, adequacy of disclosures and disclaimers, that claims be adequately and properly substantiated and that the advertiser be clearly identified.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Trade disputes are currently evaluated under the Code under a confidential Advertiser Dispute Procedure. Complaints received which appear to raise a potential violation of the Code are accepted by Ad Standards. A first stage resolution meeting is held, giving the parties the opportunity to resolve the dispute before the matter is referred to a hearing. Disputes are typically resolved (or the allegedly offending advertising is withdrawn) at this stage. If not resolved then the matter will be set down for a hearing before a panel. Each party presents in the presence of the other, with an opportunity for both the panel and the other party to pose questions. Upon conclusion of the hearing, a decision is issued within five working days. Where the complaint is upheld, the advertiser will be required to declare in writing to Ad Standards within four working days of the decision that it will comply by either withdrawing or amending the offending ad, or notify Ad Standards of its intent to appeal.

If the defending advertiser fails to comply with the procedure, Ad Standards may waive the confidentiality of the process and publish its decision and/or notify advertising media of its determination concerning the ad.

As noted above, at the time of writing, this procedure is under review and may be subject to change.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Consumers are increasingly becoming aware of, and turning to, Ad Standards to register complaints.

The confidential nature of the trade advertising dispute procedure, as well as its potentially quick resolution, make it an appealing alternative to the courts for dispute resolution, and it is widely accepted.

The vast majority of advertisers do comply with the procedures and findings of Ad Standards.

2.5 Are the self-regulatory system's decisions reported?

As noted above, the findings of consumer complaints are reported where an ad is found to have violated the Code. If the ad is still in market when the Council meets to evaluate it, the advertiser and details of the ad are disclosed. If the ad was already amended or withdrawn, the report is anonymous. Ad complaint reports are published in the Ad Standards' website.

The decisions in competitor complaints remain confidential and are not reported, unless an advertiser does not comply with Ad Standards' finding.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

As consumer complaints about accuracy and clarity continue to increase, particular attention should be paid to disclosure of material terms. A disclaimer cannot be used to contradict the primary message, but only to add supplemental information. Advertising must also not omit information that is material to the offer in such a way as to be deceptive.

In evaluating the accuracy of the ad, Ad Standards will consider both the literal meaning of the ad and the general impression it creates.

2.7 Are there any other self-regulatory systems that govern advertising practices in Canada?

The Canadian Marketing Association has its own Code of Ethics and Standards of Practice which is binding on its members, and addresses principles and practices including include truth and accuracy, advertising to minors, consumer privacy, comparative advertising.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Canada (eg, consumer protection laws; IP laws; unfair competition laws)?

The Competition Act is the primary federal statute governing false or misleading advertising and deceptive marketing practices. Under the Act, one must not make a representation to the public that is false or misleading in a material respect. In evaluating an ad, the court or regulator will consider both its literal meaning, and the general impression it creates.

Copyright, trade-mark and other intellectual property laws are also governed federally.

Provincial consumer protection laws also govern false representations or deceptive marketing practices. In particular, consumer protection law in the Province of Quebec addresses marketing and advertising practices in detail, including false or misleading representations, restrictions on the prominence of a premium in an offer, inclusive price advertising, and generally prohibits advertising to children under 13. The Charter of the French Language in Quebec also mandates that advertising be in French, and creates prominence requirements for French when it appears with other languages.

3.2 Is substantiation required for advertising claims?

Yes, substantiation is required for advertising claims prior to making the representation to the public. The Competition Act prohibits representations to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an 'adequate

and proper' test thereof, the proof of which lies on the person making the representation. The phrase 'adequate and proper' is not defined in the Competition Act, and guidance must be drawn from case law and the context of the claim itself.

All product claims (performance, comparative, environmental or otherwise) must be truthful, accurate, fair and substantiated and such support must exist before any statement is made publicly. The onus is on the party making the representation to show that it is supported by adequate and proper tests.

In certain provinces it is also a specific deceptive practice to advertise a performance characteristic of a product that the product does not have.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Puffery is not subject to substantiation in Canada. However, puffery has a narrow scope compared to some other jurisdictions, as advertising claims in Canada are much more likely to be interpreted in a literal way. The rules for false and misleading advertising apply to all representations made to the public, and therefore even advertising containing a puffery claim must not create an inaccurate or erroneous general impression. To qualify as puffery, the statement should be clearly nonsensical, or excessive to the point that it is clearly intended as fantasy or humor.

3.4 What are the rules governing the use of disclosures in advertising?

The use of disclaimers is subject to the same rules with respect to false or misleading advertising. To avoid being false or misleading, disclaimers should be clear and conspicuous and clearly attached and/or in reference to the claim being modified. In order to determine whether a disclosure/disclaimer is clear and conspicuous, the type size, crawl speed, contrast, layout, volume and tone will need to be examined. In any case, a disclosure/disclaimer should be easily legible (or audible) from a reasonable distance in a single viewing (or listen) of the ad.

The Competition Bureau takes the administrative position that disclaimers which expand upon and add information to the principal representation do not raise an issue under the Competition Act. All required disclosures must be displayed in such a way that they are likely to be read. Further a disclaimer can only qualify a representation; it cannot cure or retract a false or misleading representation.

Canada's Code of Advertising Standards states that disclaimers and asterisked or footnoted information must not contradict more prominent aspects of the message and should be located and presented in such a manner as to be clearly visible and/or audible.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

The general impression created by the advertisement using the endorsement or testimonial must not be false or misleading. The Competition Act requires that testimonial must have (a) been previously published; or (b) prior to advertising the advertiser must obtain consent to use testimonial from person making the testimonial.

Additionally, in its administrative guidance, the regulator has provided examples of how to avoid a false or misleading general impression:

- (a) The person providing the testimonial must have actually used the product.
- (b) Continued use of a product or service must occur if the testimonial implies such continued use (must discontinue use of testimonial if views or experience changes).
- (c) The third party's experience must be relevant to the views expressed (use of the product should be akin to typical consumer use).
- (d) To avoid impression of impartiality, must disclose financial or other interest/connection to advertiser, product or service.
- (e) Must disclose payment where such payment would not be expected by consumer.
- (f) Results/testimonials selected must be representative of a fair sampling of opinions expressed.

3.6 What are the rules governing the use of product demonstrations in advertising?

Product demonstrations are not specifically regulated. The laws applicable to false or misleading advertising, including the general impression created by the ad, will apply. In this vein, the demonstration must not create an inaccurate impression as to the nature, performance or other attributes of the product. Tools such as time lapse, dramatizations, and the like should be disclosed.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permissible, with certain caveats. See the discussion regarding intellectual property concerns in question 3.8 below.

The Code requires that advertisements must not unfairly discredit, disparage or attack one or more products, services, advertisements, companies or entities, or exaggerate the nature or importance of competitive differences.

There are certain sector-specific requirements regarding comparative advertising. For example, there is a prohibition on comparative advertising of pharmacists.

When advertising food, for example, there are specific requirements that must be met, including that the comparison must be complete, the foods must be similar in character, and the composition or other attributes of the food must be relevant to the comparison being made. Additionally, the comparison of one food with another should not create doubt about the value of the other food.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Canadian law distinguishes between marks used in association with wares, as opposed to marks used in association with services. A trade mark registered in association with wares may appear in comparative advertising (off packaging, and away from the point of sale) without constituting an unauthorized use. In the case of marks registered in association with services, however, 'use' includes use in advertising. Use of such marks in advertising may therefore trigger claims of unauthorized use of the mark if it appears in comparative advertising in any media.

In addition, depicting a competitor's packaging or logo may constitute copyright infringement.

In the case of any comparative advertising, it is important to avoid disparaging the competing brand, or depreciating the goodwill of the competitor's mark.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Yes. Canadian regulators have developed guidelines addressing 'made in Canada' and 'product of Canada' claims for both food and consumer products. Generally, 'Product of Canada' may be said when all or virtually all major ingredients/components, processing, and labor used to make the product are Canadian. 'Made in Canada' can be used with a qualifying statement (eg 'with domestic and imported ingredients') when the last substantial transformation of the product was performed in Canada.

Canadian trademark law also recognizes that marks may be deceptively misdescriptive if the trademark is, or includes, a geographic name and the associated goods or services do not come from that location.

3.10 Are there any special rules governing product packaging?

Yes. Packaging for most consumer products is regulated under the Consumer Packaging and Labelling Act. This legislation governs requirements for declaration of standard of identity, net quantity, dealer declaration and on-pack claims. The packaging for certain products is specially regulated. For example, tobacco and cannabis have plain packaging requirements. Permissible claims and presentation of nutrition and ingredient information on packaging is specially regulated for all food products.

4 PRICE ADVERTISING

4.1 What are Canada's rules regarding price advertising?

The primary rules regarding price advertising related to 'ordinary' or 'regular' price claims, are discussed in question 4.3 below. An advertiser is also prohibited to charge more than the advertised price.

All-inclusive price advertising is mandated in certain sectors, such as automotive and airline travel. At the provincial level, Quebec's consumer protection legislation also requires that:

- (a) no greater emphasis be put on the price of a part of a set, or instalment, than on the total price; and
- (b) no greater emphasis be put on a premium than on the primary offer.

4.2 What are Canada's rules regarding advertising 'free' products?

Where a 'free' claim gives a general impression regarding the ordinary selling price of a product, the below ordinary selling price requirements will apply.

The general prohibition against making false or misleading representations will also apply. As such, the context offer must truly be 'free'. For example, where a bonus item is provided on the purchase of a product 'free', the cost of the product must not be inflated to account for the bonus item.

4.3 What are Canada's rules regarding sales and special offers?

The ordinary selling price (OSP) provisions of the Competition Act apply any time that reference is made to an 'ordinary' or 'regular' price to in comparison to the sale price represent some type of savings or bargain to the consumer. A seller cannot advertise that a product is on sale or discounted relative to an 'ordinary' or other price unless the regular price is substantiated using either a time or volume test.

The time test is met if the product in question is offered for sale in 'good faith' at the ordinary price (or a higher price) for a 'substantial period of time' prior to (or following) the representation. In its administrative guidance, the Competition Bureau has interpreted a 'substantial period of time' to mean more than 50% of a six-month period prior to (or, if specifically identified, after) the making of the representation. This period may be shorter depending on the nature of the product in question (eg seasonal merchandise).

The volume test requires that the supplier have sold a substantial volume of the products at the represented ordinary price. The Competition Bureau considered a substantial volume to be more than 50% of products sold over 12 months.

If an ordinary price fails both tests, it may not raise issues under the Act if the seller can establish that the representation was not otherwise false or misleading in a material respect. An example of this are 'clearance' claims, which are not required to meet the time/volume tests provided that certain conditions are met.

4.4 What are Canada's rules regarding rebates?

Rebates are not expressly regulated, and the general prohibition against making false or misleading representations will apply. The Competition Bureau has issued administrative guidance, however, regarding consumer rebate promotions and when they will be found to be false or misleading. There are two types of rebates common in the Canadian market:

- mail-in rebates that consumers apply for via mail or online, and receive after purchase of a product, and
- instant rebates that consumers receive at the time of purchase.

Any material restrictions on the redemption of a mail-in rebate must be clearly and conspicuously disclosed so that consumers are aware of the restriction prior to purchasing the product. The following conditions are likely to be material:

- (a) having to provide information beyond proof of purchase and contact information;
- (b) a deadline to submit a claim;
- (c) an obligation to purchase another product in order to qualify for the rebate;
- (d) geographic limitations within Canada restricting eligibility for the rebate;
- (e) restrictions as to the eligibility of certain mailing addresses, such as rural addresses;
- (f) having to forgo the right to confidentiality or allowing personal information to be shared with others in order to receive the rebate;
- (g) any limits on the number of rebates that can be claimed; and

(h) a rebate that is only valid if the purchase is made at certain eligible retailers.

Additionally, where a rebate promotion representation creates the general impression that a product is on 'sale', it is likely to be found misleading in the case of mail-in rebates. A mail-in rebate should not give the impression that the rebate is instant, or otherwise, that the rebated portion of the purchase price of the product will be received at the time of purchase.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

The Bureau has recently focused its enforcement on false/misleading pricing claims. Based on this recent enforcement, where the main message of an advertisement makes a pricing claim, it is likely insufficient to disclaim additional fees elsewhere in the ad. Where discounts are offered, or pricing claims are otherwise subject to conditions, statements identifying the discount must be easily readable and in close proximity to the prices quoted.

In Quebec, retail prices must be displayed on each item offered for sale where, unless optical scanning technology is used, there is an exception that allows the price to instead be displayed on the shelf next to the item. Minimum font size and label sizes apply.

Prices quoted in media are assumed to be in Canadian funds unless otherwise clearly identified.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

As noted above, tobacco advertising, cannabis, and prescription drug advertising are significantly restricted by law. Under federal law, tobacco advertising must be limited to informational or brand-preference ads in publications mailed to identified adults, or publications with at least 85% adult readership, or signs in places where minors are not permitted by law. Branded prescription drug advertising is limited to the brand name, price and quantity of the product, and cannot state or imply the therapeutic indication of the drug or the affected disease state it seeks to remedy.

It is prohibited to advertise a drug, natural health product or medical device that is not licensed for sale in Canada.

Advertising products which cannot be obtained by minors in media that target minors is also prohibited. For example, provincial alcoholic beverage legislation (or industry guidelines) restrict media placement for alcohol advertising.

Advertising to children under the age of 13 is generally prohibited in all media (subject to limited exceptions) in the province of Quebec. In future, advertising certain foods deemed to be unhealthy to children under 13 may also be prohibited at the federal level.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

While there are no advertising practices that are prohibited, several forms of marketing are regulated. Those engaged in direct selling may be subject to licensing obligations. Multi-level marketing plans

may also require licensing in certain jurisdictions, and this may in turn require approval of the structure of the program by the Competition Bureau. Telemarketing is also regulated and, among other requirements, callers must scrub their lists against Canada's Do Not Call registry. As noted above, it is also contrary to anti-spam legislation to send commercial electronic messages without the consent of the recipient.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

While not governed at law (except in the case of pornography), the Canadian Code of Advertising Standards governs standards of decency. Specifically, advertising must not:

- (a) condone discrimination based upon race, national origin, religion, sex or age,
- (b) appear in a realistic manner to condone or encourage violence,
- (c) demean, denigrate or disparage a person or group of persons, or
- (d) undermine human dignity, or offend standards of decency prevailing among a significant segment of the population.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

There is no specific regulation governing advertiser/sponsor identification. The general rules against false or misleading advertising (including the general impression test) would apply. The Code, however, does provide that the advertiser must clearly be identified in any advocacy advertising (Clause 1), that no advertisement be presented in a way so as to conceal its commercial intent, which may apply in the case of certain native advertising (Clause 2), and that no advertiser imitate another advertiser so as to mislead the consumer (Clause 9).

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are no specific regulations governing branded content, and the rules concerning general false or misleading advertising would apply (including the general impression test). Note that certain tax incentives available for productions could be lost if the programming is deemed to be advertising, rather than entertainment.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

In accordance with the general laws governing false and misleading representations (and the general impression test), and the Code, the commercial intent of a communication should not be disguised. If incentives were offered for the feature of the advertised item within the content, it may be necessary in some contexts for this to be disclosed.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no laws which specifically govern social media in Canada, and so laws of general application will apply. Apart from the terms and conditions of each particular platform, there are no rules governing the use of social media for advertising.

CASL applies to commercial electronic messages sent through social media platforms. While general posts will be outside of the scope of this legislation, direct messages and potentially other forms of communication will be captured. This triggers the requirements for certain consent requirements, and disclosures within the message itself.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

An advertiser may be held responsible for advertising claims made by users. To the extent that an advertiser either screens user generated content prior to posting, or monitors direct posts made by consumers, or if the advertiser solicited the content, it could be held responsible. The potential for liability may depend upon the jurisdiction, and the extent to which the advertiser may be found responsible, directly or indirectly, for the content.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

In 2015, Bell Canada agreed, by way of a consent agreement with the Competition Bureau, to pay an administrative monetary penalty of \$1.25M. The offending conduct consisted of posted reviews by Bell employees, giving positive comments and ratings, without disclosing their affiliation with the company.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

There are both common law and statutory rights to personality in Canada. The common law tort of appropriation of personality prohibits the use of an individual's personality—including name, picture, likeness, voice and identity—without permission, although is relatively nascent in development. Additionally, some provinces have enacted specific legislation providing a cause of action for appropriation of personality. The following elements make up the statutory cause of action across all jurisdictions:

- (a) Only certain traits can be appropriated (voice, name, and likeness),
- (b) Defendant must be identifiable,
- (c) Appropriation must be intentional,
- (d) Defendant must gain from the appropriation, and
- (e) Plaintiff must show that damages were suffered as a result of the appropriation.

Where the individual consented to the use of personality, it will constitute a defense in all jurisdictions where there is a statutory cause of action for appropriation of persona.

9.2 Are there situations when permission is not required?

Most provincial legislation requires that the individual be identifiable. Additionally, some provinces extinguish persona rights on the death of the individual. In all jurisdictions, there is a defense to the appropriation (or it is not an appropriation) where it was in the public interest, or where the appropriation was fair comment on a matter of public interest. It is unlikely, however, for commercial advertising to be considered a matter of public interest.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are no specific rules at law requiring preclearance of materials to be used in advertising, except for the general application of intellectual property laws. To use materials owned by a third party, one must secure the necessary rights. In some instances, owners of buildings or other landmarks may claim rights in and to the images of the buildings and require permission for commercial use of any photograph or other image.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Depicting a competitor's packaging, logo, or mascot in advertising may constitute copyright infringement and, in the case of the use of a competitor's trade-mark for services in advertising, trade-mark infringement. If a trade-mark is used in association with wares, then it may be permissible to use that brand's trade-mark (eg the trade-mark appearing on the branded sneakers) in advertising provided that such a use does not create confusion as to the ownership of the mark, or disparage the brand.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Canada which affect advertising (eg Swedish gender equality law)?

While no cultural considerations are prescribed by law, the Code does mandate that advertising should not offend standards of decency prevailing among a significant segment of the population.

As noted above, Quebec language laws require that advertising be in French. Further, advertising may be viewed differently in French Canada than in English Canada, whether due to linguistic or cultural differences.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

See question 11.1 above.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Canada?

As noted above, CASL is new and has a broad reach across the use of electronic communications to interact with consumers. CASL is in addition to private sector privacy legislation governing the collection, use and disclosure of personal information. In particular, the application of CASL to many social media platforms has yet to be resolved or expanded upon by the regulators.

When creating advertising for Canada, be aware that Canadians may view advertising more literally than in some other jurisdictions (ie restricted scope for puffery), and that both the literal meaning and the general impression created by the advertising are to be considered.

Finally, the Supreme Court of Canada ruled in 2012 that, under Quebec's consumer protection legislation, the general impression of an ad should be considered from the perspective of the 'credulous and inexperienced' consumer. It is therefore important that the meaning of the advertisement be clear, and disclosures and disclaimers used appropriately.

CHILE

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Chile?

Advertising is not regulated by only one body of law. Provisions about the subject are scattered throughout legislation. Free speech and the right to engage in any legal economic activity are expressly protected by the Chilean Constitution. Important provisions about the subject are found in:

- (a) Law 19496, the Consumers' Rights Protection Act;
 - (b) Law 19039, the Industrial Property Act;
 - (c) Law 17336, the Copyright Act; Law 20169, the Unfair Competition Act; and
 - (d) Law 19628, the Data Protection Act,
- among others.

Besides these, general rules regarding private and criminal law should also be considered.

There is also a self-regulating entity known as the Self Regulation and Advertising Ethics Counsel, also referred to as CONAR for its Spanish initials. One of its functions is to serve as an Honor Court that resolves disputes regarding advertising ethics according to the Chilean Code of Advertising Ethics.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

According to the Consumers' Rights Protection Act, advertising is any communication made by a provider to the public to inform and motivate the purchase of a good or hire of a service.

Throughout legislation there are other definitions of advertising that are applicable for specific situations. For example, regulations issued by the Health Agency provides a different definition of advertising, which is applicable for pharmaceutical products.

On the other hand, according to the Chilean Code of Advertising Ethics, advertising is any activity or communication directed to the public or a segment of the public, with the purpose of influencing its opinions or behaviors, through any means, including promotions, placement and other activities or events done with promotional, commercial or competing ends.

1.3 What is the basic regulatory framework for advertising regulation?

Advertising is not regulated by only one body of law. Provisions about the subject are scattered throughout legislation. Arguably, the most important provisions regarding advertising are in Law 19496, the Consumers' Rights Protection Act. As said before, there are also relevant provisions in other laws, such as:

- (a) Law 19039, the Industrial Property Act;
- (b) Law 17336, the Copyright Act;
- (c) Law 20169, the Unfair Competition Act;
- (d) Law 20,606 on Nutritional Composition of Food and Food Advertising;
- (e) Law 20,606 on Nutritional Composition of Food and Food Advertising; and

(f) Law 19628, the Data Protection Act.

Besides these, general rules regarding private and criminal law should also be considered.

The self-regulatory system is ruled by the Chilean Code of Advertising Ethics.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Yes, unsolicited advertising communications are specifically regulated. Any advertising done by email shall point out its matter or subject, the sender's identity and a valid email address to which the receiver may request the ceasing of all advertising sent this way. From that point onward, emailing that consumer with advertising ends will be prohibited.

When advertising is done through traditional mail, fax, telephone calls or text messages, the advertiser shall indicate to the receiver an expeditious way to request the stoppage of all advertising. As in the case of email advertising, if a person requests not to receive any more advertising communications, they will be prohibited from that moment.

According to the Data Protection Act, data subjects may request the elimination of their data from data bases that are used for commercial communications.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There are certain industries whose advertising is specifically regulated: pharmaceutical and cosmetic products, according to the Sanitary Code; tobacco products, according to Law 19419; alcoholic beverages, according Law 19925; certain kinds of food, according to Law 20606; and credit services, according to Law 19496.

Under Chilean Law, there are pharmaceutical products that require a medical prescription before they can be obtained (prescription drugs) and others that may be sold directly to a consumer without a prescription from a healthcare professional (over-the-counter drugs). Prescription drug advertisement through mass media is prohibited. Free drug samples and advertising or any incentive mechanism aimed at medical professionals and people related with the sale and administration of medicines is strictly regulated. On the other hand, over-the-counter drugs may be publicly advertised, but the terms under which they can be advertised are strictly regulated by the Health Authorities. Advertising of these products shall not be deceptive or detrimental to public health.

Cosmetic product advertising is regulated by regulations issued by the Health Agency. Cosmetics shall not be distributed, even for advertising purposes, before having obtained a sanitary registration. Advertising of these products must be truthful. It shall not be misleading or contain claims regarding the product's effects that are false or unable to be substantiated.

Direct or indirect advertising of tobacco products is prohibited by any means, including through .cl internet domain names. People smoking or pointing out the advantages of tobacco consumption for advertising purposes shall not be broadcasted through television or radio (however, there is a safe harbor for adult programming, whereby actors and actresses may be shown smoking or discussing tobacco products positively).

Enticing underage consumption of alcoholic beverages through advertising is criminally sanctioned. According to television broadcasting regulations, advertising for these products is only allowed during the safe harbor for adult programming (22:00 to 06:00). However, trademarks related to alcoholic beverages, but not the products themselves, may be mentioned during television broadcasts, if the owners of said trademarks are sponsoring a cultural, sport or similar event.

Foods that the Health Agency has determined contain excessively high levels of certain ingredients shall not be advertised inside elementary, middle and high schools. Promotional hooks, such as the use of toys, and any other form of advertising of those foods that entice its consumption by minors or is directed towards children under 14 years old are also prohibited. In addition, although it has not been settled in Court, the health authorities have consistently interpreted that the use of certain figurative trademarks (eg depiction of cartoon characters on cereal boxes) constitutes advertising. Consequently, advertisers should be aware that the use of figurative elements, even if properly registered under trademark law, could be questioned by the authorities if these are used in connection with packaged food which has a high content of fat, sugar, calories or sodium.

With respect to credit services, there is an indicator called the Annual Equivalent Rate (AER), which expresses in a percentage the total annual cost of a credit. This allows consumers to compare different credits. Credit service providers must inform the AER in any credit advertising claiming reference interest rates. In credit advertisements, AER information must have the same treatment as the reference interest rate, regarding typography, extension, positioning, duration, diction, repetitions and volume.

1.6 Are any government pre-approvals required?

Government pre-approval of advertising campaigns is not generally required. Pharmaceutical product advertising could be considered an exception though.

Obtaining a sanitary authorization prior to commercialization of this kind of product is mandatory. That authorization specifies, among other things, the content of the informative booklets attached to the products which are directed to patients. Advertising must reproduce the exact content of those booklets. Therefore, this is an indirect way in which health authorities pre-approve the advertising of pharmaceutical products.

1.7 Does the media pre-clear advertising?

There is no entity in charge of advertising pre-clearing. Nonetheless, there have been occasions when television networks, radio broadcasters and other media have refused to issue certain advertisements. Said refusals have been founded in different reasons (eg: morals, legal issues, etc).

1.8 How does the government enforce advertising laws? What are the potential remedies?

The Consumer Protection Agency, known as SERNAC for its Spanish initials, is the government agency that monitors the enforcement of the Consumers' Rights Protection Act. This Agency serves as a mediator between consumers and providers of goods and services. On the other hand, SERNAC has the power to report infringements of said Law to other authorities or Courts of Law with the faculty to order sanctions.

Health authorities may order administrative inquiries aimed at ascertaining possible infringements to the Sanitary Code, including infringements to drug advertisement provisions. The infringer may be sanctioned with fines of up to 1000 UTM (a monetary unit of measurement used in Chile for fines and tax effects, updated according to inflation. To this day, 1 UTM is equal to approximately US\$ 100). Health authorities also monitor the enforcement of other regulations related to the advertising of some products, such as cosmetics, tobacco products and foods determined to have excessively high levels of certain ingredients.

The enforcement of Law 19925, including its provisions about alcohol advertising, is monitored by the Police and Municipal Inspectors. As stated above, enticing underage consumption of alcoholic beverages through advertising is criminally sanctioned with imprisonment and fines.

Television broadcasting regulations are enforced by the National Council of Television. Said regulations contain the previously mentioned rules regarding alcohol advertising through television and vague rules about television broadcasting content. The respect of abstract principles such as democracy, peace, pluralism, human dignity, equality and human rights, among others, may be enforced by the Council through its power to fine television broadcasters. Transmissions, including advertisements, containing excessive violence, cruelty, pornography or the participation of minors in immoral acts may also be sanctioned with fines by the Council.

Finally, although uncommon in practice, copyright infringements may be prosecuted ex officio by the Public Prosecutors Office. Said infringements are criminally sanctioned with fines and even imprisonment.

1.9 When does a competitor have a right of action? What are the potential remedies?

Under the Unfair Competition Act (Law 20169), competitors have a right of action when another competitor performs any behavior contrary to good faith or morality that seeks to divert consumers from another market agent. Advertising that meets the above requirements may be considered an act of unfair competition. For example, misleading or false advertising; inaccurate or false claims that may damage a competitors' reputation; comparative advertising which is based upon information that is not truthful and verifiable; among other things. This action is, essentially, a special tort. Competitors of the infringing agent may request the following of the Court: (i) the ceasing of the behavior or an injunction to prohibit future behaviors; (ii) the declaration that certain conduct represents an act of unfair competition; (iii) the publication of the judicial decision against the tortfeasor or other acts aimed to remedy the unfair competition behavior; (iv) and/or damages.

Trademark and copyright infringements may also allow tort actions against a competitor. In addition, said infringements may allow criminal actions against the infringing person. Trademark infringements may be sanctioned with fines from 25 to 1000 UTM. Copyright infringements may be punished with up to 1000 UTM in fines or even a prison sentence.

Actions before CONAR's Honor Court should also be considered an effective alternative to judicial actions.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers have a right of action when any form of advertising infringes the Consumers Protection Act. This Act regulates the information that must be given to the public when advertising goods or

services, spam, price advertising and special offers, among others. Any kind of false or misleading advertising is an infringement of said Act.

The Consumers' Protection Act allows the consumer to request damages and a fine for the infringing provider of goods or services. Fines may reach 1000 UTM.

It must be noted that consumers may also action against a market agent under the Unfair Competition Act provisions, if they are personally and directly threatened or injured by an act of unfair competition.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Chile have a primary advertising self-regulation system?

Yes, Chile has a primary self regulation system for advertising. The entity in charge of it is the Self Regulation and Advertising Ethics Counsel, known as CONAR for its Spanish initials. This entity is a private nonprofit legal body whose main objective is to regulate advertising practices according to the principles and rules of the Chilean Code of Advertising Ethics.

The Chilean self regulation entity is composed of the most important organizations regarding advertisement and the media: the National Association of Advertisers, the Chilean Association of Advertising Agencies, the Association of Broadcasters from Chile, the National Association of Television and the Interactive Advertising Bureau.

CONAR has a didactic function and a dispute resolution function. With regard to its first function, this entity gives recommendations and publishes materials aimed at spreading the principles of the Chilean Code of Advertising Ethics. Regarding the second function, CONAR serves as an Honor Court that resolves disputes over advertising ethics and practices.

The Chilean Code of Advertising Ethics is based on the Consolidated ICC Code of Marketing and Advertising.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Arguably, the key principles of the Chilean Code of Advertising Ethics are: legality, honesty, morality and truthfulness. The purpose of these principles is to safeguard public interest and healthy free market competition.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

There is no way to enforce decisions obtained through the self regulatory system dispute resolution mechanism. If the Honor Court establishes that an advertisement infringes the Chilean Code of Advertising Ethics, then it issues a decision recommending the modification or ceasing of the infringing material.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Although it is not enforceable, the self regulatory system has proven to be very effective. When a claim is presented before CONAR, advertisers usually accept to be subject to the Honor Court procedure. The vast majority of the decisions issued by the Honor Court are complied with.

In judicial litigation, a decision issued by CONAR's Honor Court is a valuable element to have in one's favor.

2.5 Are the self-regulatory system's decisions reported?

Yes, all decisions issued by the Honor Court of CONAR are publicly available on its website. Also, every year CONAR publishes a report informing about the jurisprudence of the Court. Said publications are very important in order to satisfy the didactic function of CONAR and to facilitate the solution of new claims being presented.

One of the possible sanctions that may be issued by CONAR's Honor Court is the publication, at the expense of the infringer, of the decision. This is another way in which these decisions are informed to the public.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

It is important that companies abide by the basic principles of the Chilean Code of Advertising Ethics: legality, honesty, morality and truthfulness. Also, being aware of the Honor Court's jurisprudence is valuable in order to avoid sanctions or damages to the public image of a company.

During 2013, the most litigious article of the Chilean Code of Advertising Ethics was the one that regulates false advertising, exaggeration and puffery. This is a trend that has been sustained from, at least, 2010. Therefore, this is an aspect of the Code that companies should take into special consideration.

2.7 Are there any other self-regulatory systems that govern advertising practices in Chile?

No, there are not.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in(eg, consumer protection laws; IP laws; unfair competition laws)?

Advertising claims are mainly regulated by Law 19496, the Consumers' Rights Protection Act. This Act prohibits false or deceptive advertising claims related to some important aspects of the products or services being offered and misleading advertisements in regard to the identity of the provider. Price advertising, substantiation and the manner in which important information may be advertised (eg: language, currency, measure units, etc) are also regulated by this Law.

There are relevant provisions on this subject in Law 19039, the Industrial Property Act; Law 17336, the Copyright Act; and Law 20169, the Unfair Competition Act. Besides these rules, the ones already mentioned regarding the advertising of certain industries (eg: pharmaceutical products, cosmetics, foods determined to have excessively high levels of certain ingredients by the Health Agency, credit services, etc) should be considered.

The jurisprudence of the CONAR Honor Court and the Chilean Code of Advertising Ethics are not legally binding, but should be taken into account. Although it is not enforceable, the self regulatory system has

proven to be very effective. Furthermore, the rules and jurisprudence of said system are more comprehensive than the legal provisions, and may be useful to interpret the latter.

3.2 Is substantiation required for advertising claims?

Yes, the Consumer's Rights Protection Act provides that advertising claims must be verifiable and shall not be misleading or deceptive. On the other hand, the Unfair Competition Act provides that comparative advertising based upon information that is not truthful and verifiable is a form of unfair competition.

The Chilean Code of Advertising Ethics also refers to this matter, and specifies the way in which scientific and technical information must be used and the claims that are considered mere puffery. It provides that when advertising contains descriptions, assertions or illustrations regarding facts or any kind of objective data, these facts or data must be verifiable. The evidence supporting the claims shall be available at the request of CONAR.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

This matter is regulated in the Chilean Code of Advertising Ethics. Puffery is regarded as an advertising resource that expresses subjective views that are extreme or metaphorical in nature, and therefore should not be taken literally by a reasonable person. Therefore, it is allowed and requires no substantiation. Nonetheless, exaggerated claims that are deceptive or misleading are not acceptable.

Dramatization, in certain cases, is considered an acceptable form of puffery.

3.4 What are the rules governing the use of disclosures in advertising?

There are no special provisions for disclosures, but the general rules of the Consumer's Protection Act regarding advertising claims may apply. Basic information about the products or services being offered to the public must be clear and timely. Furthermore, this basic information must be advertised in Spanish and in easily understandable and legible terms. On the other hand, deceptive or misleading advertising is prohibited. Thereby, disclosures must be reasonably clear and conspicuous in order to not infringe general rules about advertising claims.

Moreover, the Chilean Code of Advertising Ethics contains special rules regarding this subject. It provides that disclosures in the form of footers and explanatory notes shall not alter, contradict or modify in a substantial way the principal message. When disclosures substantially modify the principal message, it is necessary to communicate it in a clear, understandable and prominent way. The use of small size letters in disclosures is also regulated. The principles underlying the above rules are applicable to any kind of advertising.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Chilean Law does not regulate this subject. Nonetheless, testimonials, in particular, are regulated in the Chilean Code of Advertising Ethics. According to the Code, testimonials must be authentic and related to actual experiences of the person who testifies or of the person being personified. Testimonials shall always be verifiable and current and shall not be deceptive or misleading.

The use of models dressed in uniforms, costumes or clothing of a profession, occupation or trade must not mislead or deceive the public, and must always be limited by the ethical standards of the profession, trade or occupation represented.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no special rules regarding this subject, but provisions related to substantiation and comparative advertising should be considered.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is allowed, but it has to meet certain requisites in order to be considered licit. The Unfair Competition Act provides that comparative advertising based upon information that is not truthful and verifiable is a form of unfair competition. Furthermore, Courts of Law have ruled that comparative advertising shall be truthful, objective and verifiable, and must not be deceptive or derogatory for the competitors.

The Chilean Code of Advertising Ethics regulates the subject in a detailed way. It defines comparative advertising as any advertising that claims superiority or advantages over another product, service, brand or industry, through the explicit or implicit comparison of their characteristics, attributes or benefits. Thus, comparative advertising may explicitly identify competition; suggest it indirectly; or refer to a specific industry.

According to the Code, this kind of advertising shall be based upon objective and verifiable facts. Puffery or any type of exaggeration shall be avoided in comparative advertising. The evidence supporting the claims shall be available at the request of CONAR. The Code also establishes certain principles regarding this matter, for example, comparison shall be between goods or services meeting the same needs or intended for the same purpose; it must not create confusion in the public with respect to the advertiser and the competitor; it shall not be done in derogatory terms; etc.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

No, there are no special copyright or trademark rules regarding comparative advertising. Nonetheless, this subject is regulated in the Chilean Code of Advertising Ethics. In the context of fair comparative advertising, according to the Code, it is acceptable to use the trade name or other distinguishing marks of a competitor's brand for identification purposes.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

The Consumers' Rights Protection Law requires that all information provided by a seller regarding a product or service must be accurate and truthful. Consequently, stating false geographic origin of products will be sanctioned by the Consumer Protection Authority. In addition, Appellations of Origin (DO) officially recognized by the Chilean State have full legal protection under the Industrial Property Law.

3.10 Are there any special rules governing product packaging?

Yes, there are basic and general provisions on product packaging contained in the Consumers' Rights Protection Law, which make mandatory the use of Spanish in all product packaging. In addition, specific industries, such as tobacco and high calorie packaged food, have additional provisions regarding information shown on packaging. In that respect, it is relevant to note that the health authorities have consistently interpreted that the use of certain figurative trademarks (eg depiction of cartoon characters on cereal boxes) constitutes advertising. Consequently, advertisers should be aware that the use of figurative elements, even if properly registered under trademark law, could be put into question by the authorities if these are used in connection to packaged food which has a high content of fat, sugar, calories or sodium.

4 PRICE ADVERTISING

4.1 What are Chile's rules regarding price advertising?

Suppliers of goods or services shall inform the public about the prices of the goods and services that they offer, except for prices that must be established on an individual negotiation basis. Price information ought to be clearly indicated, written in Spanish and include the total amount in Chilean pesos, as well as taxes.

Advertising that provides misleading price information is an infringement of the Law that allows consumers to request damages and may be sanctioned with a fine of up to 750 UTM.

4.2 What are Chile's rules regarding advertising 'free' products?

There are no special rules regarding the advertising of free products. The price advertising provisions aforementioned must be complied with, though.

4.3 What are Chile's rules regarding sales and special offers?

It is necessary to inform the public about the terms and conditions of any special offer that is advertised. In the event that the provider that advertises a special offer refuses to perform the conditions offered, he or she may be forced to do so by a Court of Law, or must pay damages.

When special offers involve any kind of contest or raffle, the adviser shall inform the amount or quantity of prizes and the term in which they will be reclaimable. The adviser also must communicate the results.

4.4 What are Chile's rules regarding rebates?

There are no special rules regarding rebates. Provisions regarding price advertising, sales and special offers shall be complied with.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

No, there are not.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Yes, the advertising of prescription drugs, tobacco, alcoholic beverages and certain kinds of food is restricted.

Prescription drug advertisements through mass media is prohibited. Free drug samples and advertising or any incentive mechanism aimed at medical professionals and people related with the sale and administration of medicines is strictly regulated.

The direct or indirect advertising of tobacco products is prohibited by any means, including through .cl internet domain names. People smoking or pointing out the advantages of tobacco consumption shall not be broadcasted for advertising purposes through television or radio (however, there is a safe harbor for adult programming, whereby actors and actresses may be shown smoking or discussing tobacco products positively).

Enticing underage consumption of alcoholic beverages through advertising is criminally sanctioned. According to television broadcasting regulations, advertising for these products is only allowed during the safe harbor for adult programming (22:00 to 06:00). However, trademarks related to alcoholic beverages, but not the products themselves, may be mentioned during television broadcastings, if the owners of said trademarks are sponsoring a cultural, sport or similar event.

Foods considered by the Health Agency to have excessively high levels of certain ingredients shall not be advertised inside elementary, middle and high schools. Promotional hooks and any other form of advertising of those foods that entices its consumption by minors or is directed towards children under 14 years old is also prohibited.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Unsolicited advertising communications via email, traditional mail, fax, telephone callings or text messages are prohibited, only if the receiver expressly requested to the advertiser not to contact him or her.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Indecent or obscene advertisements may be sanctioned according to the Criminal Code. But, in practice, criminal provisions related to indecency or obscenity are rarely applied. On the other hand, the National Council of Television is very active in its enforcement of television broadcasting regulations. As stated above, those regulations are especially vague and may be enforced through fines. The respect of abstract principles such as democracy, peace, pluralism, human dignity, equality and human rights, among others, may be enforced by the Council through its power to fine television broadcasters. Transmissions, including advertisements, containing excessive violence, cruelty, pornography or the participation of minors in immoral acts may also be sanctioned with fines by the Council.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

The only rule expressly related to the identification of the advertiser is in the Consumer's Rights Protection Act. Said Act provides that in false or deceptive advertising cases, the complainant may request the competent Court to order the respective media or the corresponding advertising agency to identify the advertiser or the person responsible for the advertisement.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Chilean Law does not regulate this subject. Nonetheless, it is regulated in the Chilean Code of Advertising Ethics. According to the Code, advertisements shall not be confusingly integrated with news or editorial content. To that extent, advertising must clearly identify its nature in order to be distinguished from news or editorial content.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no other special rules, besides the ones outlined above.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

No, there are not.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

General rules of responsibility are applied to internet service providers. Therefore, the rule of thumb is that an advertiser is only responsible for those negligent or willful actions or omissions committed by itself that effectively causes harm to a person.

In order to establish the liability of the advertiser for claims made by third parties through social media, proof that the person that made those claims is under the advertiser's care would be necessary.

There are special rules regarding copyright infringements that exonerate internet service providers from liability. If the infringement is committed by a third party (eg: user generated content) and certain requisites are met, then this exemption from liability applies.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

There are no important Court or CONAR decisions regarding this subject.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

There are no special rules regarding this matter, but Courts apply constitutional provisions in order to regulate the subject. Based on the constitutional right to privacy, Courts have ruled that the use of an individual's image for advertising purposes needs prior consent from him or her. Consent may be given in any form in order to be valid.

An individual's name, pseudonym or depiction is not allowed to be registered as a trademark, unless there is consent from the individual or from the individual's estate. Also, consent is not necessary when the individual has been dead for more than 50 years and the trademark would not damage the individual's honor.

9.2 Are there situations when permission is not required?

As this matter is not regulated by statutes, it is not easy to predict Court decisions on the subject. The conservative answer would be that it is always necessary to obtain consent from the individual whose name, picture, likeness, voice, and identity will be used in advertising. However, the need of consent when the individual is deceased or when the use of his or her image is incidental to the advertisement is debatable.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are no special rules in this regard. Anything that could involve intellectual property of third parties should be previously cleared.

The reproduction of architectural works through photography, video recordings and the like is allowed without the authorization of the author's rights holder or the obligation to pay any fee. The same is applied to the reproduction of the works of art that embellish public places.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Using third parties' trademarks in commercial communications in a way that is misleading to the public is considered an infringement to the Industrial Property Act, the Unfair Competition Act and the Consumers' Rights Protection Act.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Chile which affect advertising (eg Swedish gender equality law)?

No, there are not.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Chile is a particularly conservative country. Therefore, Chilean consumers and authorities are more likely to be shocked by advertisements that may be considered normal in other places.

Advertising containing references to sexual orientation, religious sensibilities, or other similar topics are best avoided.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Chile?

The approval of the new food labeling law has banned the use of certain marketing tools targeted at children, which are popular in other jurisdictions; such as the use of toys or cartoons in connection to food products. Consequently, we would recommend that advertisers seek legal counsel in connection to marketing campaigns, in the food industry, targeted to children as there are common practices which are no longer permitted in our jurisdiction.

CHINA

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in People's Republic of China (PRC)?

Advertising in the People's Republic of China (PRC) is primarily regulated by the 1995 Advertising Law (as revised in 2015) and the 1987 Regulation on the Administration of Advertisements, along with numerous regional and subject-specific regulations, such as the Interim Measures for the Administration of Internet Advertising issued in July 2016 (Interim Measures), directed at advertising and marketing via the Internet within the PRC.

The State Administration for Market Regulation (SAMR) is the primary regulator of the advertising industry. Through its local bureaus, the SAMR issues advertising permits and approves advertising entities. Several other agencies also work alongside the SAMR in this area, including the Ministry of Industry and Information Technology (MIIT), the National Radio and Television Administration (NRTA), the National Copyright Administration (NCA), the National Health Commission (NHC) and State Administration of Traditional Chinese Medicine (SATCM).

1.2 What types of communications are considered to be 'advertising'? How is this determined?

Under the Advertising Law, an 'advertisement' is 'anything that publicizes, directly or indirectly, through various media and in whatever form, commodities or services at the expense of the supplier of the commodity or service'. This is the general standard for determining whether an action should be recognized as advertising.

The Interim Measures for the Administration of Internet Advertising provide a specific definition of 'Internet advertising', stating that 'any commercial advertisement promoting commodities or services, directly or indirectly, via Internet media such as websites, webpages and Internet application programs in the form of text, picture, audio, video or other forms should be deemed an 'Internet advertising' and be governed by special rules under the Interim Measures'.

1.3 What is the basic regulatory framework for advertising regulation?

Please see question 1.1 above.

1.4 Are there certain types of advertising practices that are specifically regulated (eg text message advertising)?

- (a) **Emails:** According to the Measures for the Administration of E-mail Service on the Internet, organizations and individuals may not send emails containing advertisements without explicit approval from the recipient. Where a receiver explicitly agrees to receive emails containing advertisements, but subsequently refuses to continue to receive them, the sender must stop sending.
- (b) **Radio and television:** Advertisements are governed by the Measures on the Administration of Broadcasting Radio and Television Advertisements. In part, such advertisements may only be broadcast within the proper time/channels and should have a properly limited duration.
- (c) **Outdoor advertisements:** According to the Regulations on the Control of Advertisement, the installation and posting of outdoor advertisements is under the supervision of the local

administrative departments for industry and commerce. In part, advertisements may not be installed or posted in controlled areas near government organs or cultural relics under special protection, nor in areas where the installation and posting of advertisements is prohibited by local governments.

- (d) **Social media advertisements and other Internet advertisements:** These are regulated by the Interim Measures. For example, Article 8 of the Interim Measures requires that an Internet advertisement be clearly identifiable as an ‘advertisement’ to consumers. Moreover, advertisements published on the Internet, such as pop-up windows, must be clearly marked with a ‘close’ sign to ensure that such may be closed by the user with a single click.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg drug advertising)?

There are numerous industry-specific advertising regulations. Some of the most important include the following:

(a) **Medical advertisements, medical apparatus advertisements, drug advertisements:**

- (i) Advertisements for medical institutions may only contain the following content:
- (1) the name and address of the medical institution;
 - (2) the type of medical institution;
 - (3) clinical subjects handled by the institution;
 - (4) the number of beds;
 - (5) the time for admissions; and
 - (6) contact information.
- (ii) The following drugs may not be advertised:
- (1) narcotics;
 - (2) psychotropics;
 - (3) poisons for medical use; and
 - (4) drugs specifically supplied to the army.

Further, advertisements for prescription drugs may only be published in professional medical or pharmaceutical publications designated by both the public health administrative authority and the drug administration under the State Council. This of course means that such advertisements cannot be published by any mass media or in any other public form.

Any advertisement for medical treatment, pharmaceuticals or medical devices may not contain the following items:

- (i) any assertion or guarantee of efficacy or safety;
- (ii) any statement on the rate of cure or other effectiveness;
- (iii) comparison with the efficacy or safety of other pharmaceuticals or medical devices or with other medical institutions;
- (iv) advertisement endorsements or testimonials; or
- (v) other items as prohibited by law and administrative regulations.

Advertisement content for pharmaceutical products must be consistent with those indicated on the instructions approved by the drug administration under the State Council, and contra-

indications and adverse reactions must be marked conspicuously. Any advertisement for prescription medicines must conspicuously state 'the advertisement is intended for medical and pharmaceutical professionals only', and any advertisement for non-prescription drugs must conspicuously state 'please follow the instructions or purchase and use the medicine according to a pharmacist's suggestions'.

Any advertisement for medical devices intended for personal use must conspicuously state 'please read the product specifications carefully or purchase and use the product according to the suggestions of medical personnel'. If any registered certificate of a medical device product contains any contra-indication and precaution, the advertisement for the product must conspicuously state 'for the contra-indication and precaution, please refer to the specifications'.

(b) **Healthcare food advertisements:** By way of background, in the PRC, 'healthcare food' means food claiming to have medicinal or other health functions. In this respect, the Interim Regulations on the Inspection of Healthcare Food Advertising specifies that healthcare food advertisements must not:

- (i) contain assertions or guarantees about the product's efficacy,
- (ii) contain expressions suggesting that the product can make a consumer healthy,
- (iii) overstate or exaggerate a state of health or disease, or describe the risks of a disease in a manner that could cause public concern, fear or misunderstanding about a consumer's health if the consumer does not use the advertised product, etc.

The notice 'this product is not a substitute for pharmaceuticals' must also be included on any healthcare food advertisement.

(c) **Alcohol advertisements:** According to the Advertising Law, advertisements involving alcohol may not contain any of the following items:

- (i) encouragement or instigation to drink or promotion of excessive drinking;
- (ii) appearance of the act of drinking;
- (iii) indication of conducting activities such as driving a car, or steering a boat or airplane; and
- (iv) express or implied statements that drinking has the effects of eliminating stress, anxiety or enhancing strength.

(d) **Agricultural and veterinary chemicals advertisements:** According to the Advertising Law, advertisements for agricultural chemicals, veterinary medicines, feed and feed additives may not include any of the following items:

- (i) any assertion or guarantee for efficacy and safety;
- (ii) use of the names or images of medical research institutes, academic institutions, technology promotion institutions, industry associations or professionals and users for recommendation or as proof of efficacy;
- (iii) any statement on the effective rate;
- (iv) words, oral assertion or images that violate the safe use procedures; or
- (v) other content as prohibited by laws and administrative regulations.

- (e) **Tobacco products advertisements:** It is prohibited to post tobacco advertisements in mass media or in public places, including on public transportation and outdoor spaces. It is prohibited to distribute any form of tobacco advertisements to minors. It is prohibited to use advertisements for other products or services or non-commercial advertisements to publicize the names, trademarks, packages, decorations or other similar contents of tobacco products. No names, trademarks, packages, decorations or other similar contents of tobacco products may be contained in the notices published by the producers or sellers of such tobacco products regarding its relocation, change of the name or recruitment, etc. In any other venues, the publication of a tobacco advertisement must be pre-approved by the competent provincial advertisement supervising and managing authority or other authorized agencies.

- (f) **Real estate advertising:** Real estate advertising must provide authentic housing source information and indicate the building or room dimensions, and may not contain any of the following items:
 - (i) any promise of appreciation or investment return;
 - (ii) indication of the project location with the actual distance by the time required between the project and a specific reference location;
 - (iii) violation of the relevant national provisions on price administration; or
 - (iv) misleading publicity on any traffic, commercial, cultural and education facilities, and other municipal amenities that are planned or under construction.

- (g) **Infant dairy product advertising:** It is prohibited to publish, in mass media or in public places, advertisements for infant dairy products, consumable liquids and other consumable products claiming full or partial substitution of breast milk.

More generally, advertisements for medicines, medical apparatuses, pesticides, veterinary medicines and similar items made through the radio, film, television, newspapers, magazines and other media must be approved by the competent administrative authorities before publication.

1.6 Are any government pre-approvals required?

No specific advertisement-related license is required for advertisers (meaning the supplier/seller of the advertised product/service). Since 2005, advertising agents in China have not been required to obtain a permit to engage in commercial advertising activities. A business license with a scope covering advertising will suffice, though there are certain requirements for an entity seeking such a business scope.

Mass-media entities (eg radio, television stations, newspaper and magazine publishers), public institutions and certain other bodies must still undertake specific examination and approval procedures in order to obtain an advertising operating permit before engaging in advertising activities.

Furthermore, according to the Advertising Law, advertisements for medical treatment, pharmaceuticals, medical devices, agricultural pesticides, veterinary medicines and healthcare food, and other advertisements required to be reviewed by laws and administrative regulations must be

reviewed by competent authorities before they are published. Such advertisement may not be published without first being reviewed.

1.7 Does the media pre-clear advertising?

Yes. Under the Advertising Law, advertisement publishers (eg mass media) must review any advertisements they intend to publish to ensure compliance with the law. Publishers can be subject to administrative sanctions and penalties if the content of an advertisement they publish violates the law.

In addition, for broadcast media, the NRTA has, since 2004, advocated a program of self-censorship and self-inspection, which has now been formalized in the Measures on the Administration of Radio and Television Advertisement Broadcasts. These measures explicitly require broadcasting entities to establish a formal management and censorship system for their advertising operations. Broadcasters are also now encouraged to tighten their compliance with the various registration, examination and approval systems for their advertising operations.

Certain types of advertisements (eg for medicine, medical apparatuses, pesticides and veterinary medicines) must also receive clearance by the competent administrative authorities before publication or broadcast.

1.8 How does the government enforce advertising laws? What are the potential remedies?

There are a number of industry-specific authorities that work alongside the SAMR to issue rules and policies related to advertising. Among them, the most important is the MIIT (formerly the Ministry of Information Industry), which is responsible for regulating advertisements published on the Internet and via electronic products.

The administrative authorities will not directly grant any remedies to a consumer whose rights and interests have been infringed, as their powers are limited to the punishment and administration of the advertisers and advertising agencies. Typically, administrative sanctions include ceasing the publication of the advertisement, ordering the wrongdoer to advertise a correction or make a public apology reaching the same audience and spending the same amount of money as the original unlawful advertisement, and levying a fine equivalent to one to five times the cost of such advertisement, among other measures.

1.9 When does a competitor have a right of action? What are the potential remedies?

According to the Advertising Law, no advertisement may include any content that denigrates the commodities or services of other producers or operators. In addition, the Anti-Unfair Competition Law also stipulates that a business operator may not fabricate or disseminate any false information or misleading information to damage the reputation of its competitor or the competitor's commodities. If a competitor finds any suspected illegal advertisements, then they can challenge the advertisement in the following ways:

- (a) administratively: report to the SAMR, the NRTA or their local bureaus; and
- (b) judicially: file a civil lawsuit.

Note that the two approaches are not mutually exclusive. Compared with the judicial option, administrative remedy is more cost efficient and expeditious.

For administrative action, the Advertising Law and the Anti-Unfair Competition Law set forth various penalties for illegal advertising, ranging from fines for minor transgressions to criminal liabilities for severe violations. The SAMR takes its enforcement obligations seriously, and regularly issues fines. Specifically, according to the Anti-Unfair Competition Law, where an advertisement causes injury to the reputation of its competitor or the competitor's commodities, the advertiser will be ordered to cease the illegal act and pay a fine of between CNY 100,000 and 3 million.

Under judicial action, according to the Anti-Unfair Competition Law, the amount of compensation granted to competitors by the court is determined based on the actual losses suffered as a result of the infringing advertisements; if the actual losses are difficult to calculate, then such amount will be determined in accordance with the benefits obtained by the infringer from the infringing advertisements. If it is truly difficult to determine the actual losses or the benefits, then the competitor may obtain compensation up to a maximum of CNY 3 million.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers whose legitimate rights and interests are infringed due to false or deceptive advertisements have the right to request the competent administrative departments to punish the advertising agency and/or the advertiser, and ask for compensation. If any party concerned disagrees with the decision made by the administrative departments, they may initiate a lawsuit before the court. Consumers may also directly lodge a lawsuit before the courts.

Typically, administrative sanctions include ordering the wrongdoer to:

- (a) cease publication of the advertisement;
 - (b) advertise a correction or make a public apology reaching the same audience and spending the same amount of money as the original unlawful advertisement; and
 - (c) pay a fine equivalent to one to five times the cost of such advertisement,
- among other measures.

2 SELF-REGULATORY FRAMEWORK

2.1 Does PRC have a primary advertising self-regulation system?

Industry self-regulation in China is comparatively weak. That said, there are various self-regulatory associations at the national level (eg the China Advertising Association (CAA)) and at the municipal level (eg the Shanghai Advertising Association). These associations can issue individual codes of practice, most of which are similar.

The CAA is one of the largest of the self-regulatory agencies. It is overseen by the SAMR and issued a code of practice in 2008. Participants in the advertising industry (including advertisers, advertising agencies and advertising publishers) can join the association as members. Other self-regulatory organizations include the Association of Accredited Advertising Agencies of China (China 4A), which is overseen by the Department of Commerce. All members of the China 4A are expected to follow the regulations stipulated in the China 4A Standard Operation Manual.

2.2 Is there a self-regulatory advertising code? What are the key principles?

As mentioned above, the CAA issued a code of practice, the China Advertising Industry Self-Regulation Code, in 2008.

Key principles under this code include honesty, trustworthiness and self-regulation. This is meant to cover advertisers, advertising agents, advertisement publishers and other entities or individuals who participate in advertising activities.

For advertising content, the code of practice stipulates that advertisements should comply with relevant regulations in the Advertising Law and other laws and regulations. Advertisements should also conform to the needs of ‘socialist spiritual civilization’ and foster ‘social public order’ and establish good ‘social practice’.

As to advertising activities, the code emphasizes that competition should be fair, and contracts should be performed honestly. Improper deal-making, such as bribes or defamation, are prohibited, as is improper marketing and the impairment of the legal advertising activities of others.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

According to the CAA code of practice, entities and individuals may file complaints with the CAA or its local associations regarding any advertising content or activities that they suspect of violating the law or any self-regulation codes.

In terms of enforcement, the code empowers the CAA to take a series of escalating measures, including:

- (a) a recommendation to comply;
- (b) reprimands;
- (c) cancellation of any honorary titles;
- (d) cancellation of membership;
- (e) downgrading or cancellation of any advertising enterprise qualification degree recognized by the association; and
- (f) reporting of the non-compliance to the authorities.

There is also an appeal process, by which a party subject to an enforcement action may file an appeal with the CAA executive committee.

2.4 Is the self-regulation system effective? Is it widely used and followed?

In the PRC, the big advertising associations usually have a government background or connection. For example, the CAA is a public institution directly supervised by the SAMR. In this sense, self-regulation in the advertising industry is supplemental to government administration, but it is voluntary. There have been reports of some advertisements being pulled from publication following self-regulatory action, but government-driven administrative enforcement is still the main avenue for regulation in China.

2.5 Are the self-regulatory system's decisions reported?

The CAA publishes notices, news, updates, etc on its website (<http://www.cnadtop.com>), but enforcement decisions are not reported there. Some mention of enforcement of decisions is made in CAA newsletters, as part of a general report on the CAA's work during the month/year, but such newsletters are not published at regular intervals.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

As mentioned above, self-regulation in the advertising industry is supplementary to government administration. Therefore, the key areas of focus for the CAA's code of practice are basically the same as for the Advertising Law.

2.7 Are there any other self-regulatory systems that govern advertising practices in PRC?

Yes, there are other advertising associations in the PRC, such as the China Association of National Advertisers (CANA), which was established in 2005. CANA is approved by the State Counsel, registered with the Ministry of Civil Affairs and overseen by the State-owned Assets Supervision and Administration Commission. In 2006, CANA joined the World Federation of Advertisers (WFA), becoming the only PRC representative. CANA has its own self-regulation requirements. Unlike the CAA, which is open to all types of participants in the advertising ecosystem, CANA focuses solely on advertisers.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in PRC (eg, consumer protection laws; IP laws; unfair competition laws)?

China's Advertising Law, Unfair-Competition Law, and the Law of the People's Republic of China on the Protection of Consumer Rights and Interests (Consumer Protection Law) are the basic laws governing advertising claims in China.

For example, the Consumer Protection Law stipulates that:

- (a) Consumers whose legitimate rights and interests are infringed when commodities or services are supplied by business operators, by means of false advertisement or otherwise, have the right to claim compensation from the business operator.
- (b) Consumers also have the right to request the competent administrative departments to punish advertising agents and publishers who publish false advertisements.
- (c) Further, if the advertising agent or publisher fails to provide a real name, address and effective contact information for the relevant business operator, it shall be responsible for any compensation owing to the consumer.
- (d) In addition, advertising agents and publishers who design, produce and publish false advertisements related to life or health, and thereby cause damage to consumers, will bear joint liability with the supplier of the advertised commodities or services.
- (e) Social organizations or other organizations and individuals can also be liable; ie if they recommend commodities or services in false advertisements or other false propaganda

related to life and health and thereby cause damages, they will bear joint liability with the supplier of the underlying commodities or services.

3.2 Is substantiation required for advertising claims?

According to the Advertising Law, in designing, producing and publishing advertisements, whether through the efforts of the advertiser or through entrustment to other parties, the advertiser must possess or provide the following authentic, legal and valid certifications:

- (a) business licenses and other documents certifying production and management qualifications;
- (b) certificates as to any advertising content related to quality, issued by relevant quality inspection organizations; and
- (c) other documents certifying the truthfulness of the advertisement contents.

In addition, article 10 of the Advertising Law requires that all sources of data, statistics, survey results, excerpts or quotes used in an advertisement be clearly identified.

In addition to these various requirements relating to the accuracy of statistics and general descriptions of the products and services featured in the advertisements, there are also industry-specific regulations. For example, in the medical industry, there are a number of different government agencies involved in the regulation of advertising related to pharmacies, pharmaceutical products and medical products, all of which have issued their own specific regulations, and advertisers are subject to strict content accuracy and certification requirements.

3.3 Are there certain types of advertising messages that do not require substantiation (eg puffery)?

Chinese advertising law does not distinguish between ‘puffery’ and advertising claims that require support. In general, only statements or representations that can be supported by accurate facts are legitimate. The Advertising Law simply states that advertising content published in the PRC must be truthful, lawful and not misleading to consumers.

3.4 What are the rules governing the use of disclosures in advertising?

Articles 3 and 4 of the Advertising Law set forth the general rules on this, stating that the content of advertisements must be true, lawful, and the content advertised should be expressed in a healthy form of representation and consistent with the ‘socialist spiritual civilization’ and ‘good traditional culture of the Chinese nation’, and not contain false information, or deceive or mislead consumers.

The law does not require all material information to be disclosed if the non-disclosure will not deceive or mislead consumers. In other words, non-disclosure is permitted if ordinary consumers will not be deceived or misled.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

In general, any third-party endorsements or testimonials must be based on valid scientific studies. In addition, advertisers must retain not only the evidence of the endorsement or testimonial, but also the evidence of the scientific studies upon which the conclusions are made.

Moreover, in certain industries, endorsements or testimonials by specified third parties are prohibited. For instance, medical institutions and medical practitioners cannot offer endorsements in medical advertisements.

Further, advertisements related to quality standards are also strictly regulated. If an advertiser intends to advertise that a product meets specific quality standards, it must provide a certificate issued by a standardization department at or above the provincial or municipality level, or by an accredited quality inspection body.

Lastly, the Advertising Law also provides that endorsers who make endorsements or testimonials for products or services in advertisements may only do so based on factual information, and not make endorsements or testimonials for products or services that have never been used or accepted by the endorser him/herself. Moreover, minors under the age of ten may not be used as advertisement endorsers.

3.6 What are the rules governing the use of product demonstrations in advertising?

There is no specific rule governing the use of product demonstrations in advertising. However, any product demonstrations must comply with the general principle that no advertisement may contain any false information or deceive or mislead consumers, and such demonstrations must be accurate, clear and explicit.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Generally, comparison is allowed, but the comparison must be objectively accurate, capable of being scientifically proven, and may not identify the competitor by name. The Advertising Law states that no advertisement may include any content that denigrates commodities or services offered by other suppliers. Otherwise, the comparison may violate the Anti-Unfair Competition Law.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg whether the use of a competitor's trade mark or products may be used)?

There are no special copyright or trademark rules that impact comparative advertising. A general rule is that comparative advertisements should not identify the competitor's name, trademark or products. If a comparative advertisement has copyright or trademark issues, the general rules of copyright and trademark would apply.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

There are no special rules governing claims relating to geographic origin. According to PRC Advertising Law, it is not mandatory to claim geographic origin in advertisements, but if there are statements relating to geographic origin of the products, such statements must be accurate, clear and explicit.

3.10 Are there any special rules governing product packaging?

There are no special rules governing the product packaging. If product packaging contains any advertising content, it will be deemed an advertisement and must comply with the general rules of the Advertising Law.

4 PRICE ADVERTISING

4.1 What are PRC's rules regarding price advertising?

There are no specific rules pertaining to price advertising. However, according to Article 8 of the Advertising Law, if the advertiser indicates a price of goods or services in an advertisement, that indication should be definite, clear and accurate, without the possibility of misleading consumers.

4.2 What are PRC's rules regarding advertising 'free' products?

As a general rule, the advertising of 'free' products should not constitute false advertising. Therefore, the nature of 'free' should be accurate and true. Further, PRC Advertising Law stipulates that if an advertisement contains any statements about additional 'free' products or services, then the type, specification, quantity, time limit and form of such 'free' products or services must be expressly indicated.

4.3 What are PRC's rules regarding sales and special offers?

There are no specific rules pertaining to sales and special offers. However, sales and special offers can be subject to the Measures for the Administration of Sales Promotion Acts of Retailers, under which a retailer, when undertaking sales promotion activities:

- (a) should clearly indicate the reasons, forms, rules, time limits, commodity scope and any relevant restrictive conditions pertaining to the special offers in the advertisements;
- (b) may not, unless the change is caused by force majeure, change the content of the advertisement after it has begun to undertake the special offers; and
- (c) may not cheat or induce consumers to buy commodities by giving them a discount on the basis of a false original price or by marking a misleading price or by using a misleading price method.

4.4 What are PRC's rules regarding rebates?

As noted above, the Measures for the Administration on Sales Promotion Acts of Retailers stipulate that a retailer, when undertaking sales promotion activities, may not cheat or induce consumers to buy commodities by giving them a discount on the basis of a false original price or by marking a misleading price or by using a misleading price method.

Rebates can also be subject to the Circular of the Ministry of Commerce Regulating Sales Promotions in Online Shopping, which states that:

- (a) price fraud and false promotion is prohibited;
- (b) false original prices to give the impression of a discount, or the use of misleading price marking or price methodologies for the purpose of cheating or inducing consumers, is forbidden;
- (c) the quality of after-sales service for goods (including prizes and gifts for rewarded sales) on sale must not be lowered; and
- (d) promotion may not be taken as a reason for refusal or the establishment of obstacles for the replacement or return of any products.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

In addition to the above, it is also stipulated in the Measures for the Administration on Sales Promotion Acts of Retailers that:

- (a) retailers must clearly indicate which items are not on sale, and may not declare a whole-store promotion;
- (b) when clearly indicating any excluded commodities or promotion rules with restrictive conditions or additional conditions, the related words, characters and pictures must be clear and definite;
- (c) a retailer, when undertaking sales promotion activities, must clearly mark the prices on the price tags; and
- (d) retailers may not sell any goods by increasing the marked price, nor charge any fee that is not indicated in the advertisements.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media (eg guns, medicines etc)?

- (a) **Tobacco:** The Advertising Law prohibits advertisements for tobacco in mass media or in public places, include on public transportation and outdoors. It is prohibited to distribute any form of tobacco advertisements to the minors. It is prohibited to use the advertisements for other products or services or non-commercial advertisements to publicize the names, trademarks, packages, decorations or other similar contents of tobacco products. No names, trademarks, packages, decorations or other similar contents of tobacco products may be contained in the notices published by the producers or sellers of such tobacco products regarding its relocation, change of the name or recruitment, etc. In any other venues, the publication of a tobacco advertisement must be pre-approved by the competent provincial advertisement supervising and managing authority or other authorized agencies.
- (b) **Medicines, drugs etc:** No advertisement may be made concerning narcotic drugs, psychotropic drugs, toxic drugs for medical use, radioactive drugs or other specific drugs, pharmaceutical precursor chemicals, as well as drug addiction treatment medicines, medical devices and treatment methods. For prescription medicines other than those as set out above, advertisements may be made only in the medical or pharmaceutical journals as jointly designated by the public health administrative authority and the drug administration under the State Council. Further, an advertisement for prescription medicines may not be published via the Internet, and advertisements for medicine, medical apparatuses, pesticides, veterinary medicine and similar items through radio, film, television, newspapers, magazines and other media must be approved by the competent administrative authorities before publication.
- (c) **Infant dairy products:** It is prohibited to publish in mass media or in public places advertisements for infant dairy products, consumable liquids and other consumable products claiming full or partial substitution for breast milk.

- (d) **Illegal activities:** In addition, any advertisements for illegal activities, such as gambling for a profit, or possessing, manufacturing, or transporting guns, are prohibited, and there are several measures explicitly prohibiting such advertisements.
- (e) **Advertisements aimed at minors:** As stipulated in Article 40 of Advertising Law, no advertisements for medical care, medicine, veterinary medicine, medical apparatuses, cosmetics, alcoholic drinks, cosmetology and online games which are harmful to minors' physical and psychological health may be published in mass media targeted at minors. Further, Advertisements for products or services targeted at the minors under the age of 14 must not contain any content likely to:
 - (i) induce such minors to ask their parents to buy the products or services advertised; or
 - (ii) cause such minors to imitate unsafe acts.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

- (a) **Mobile phone/email advertising:** Under current legislation, mobile phone and email advertisement is prohibited where recipient permission has not been received or where the recipient has specifically refused. Where a recipient explicitly agrees to receive e-mails containing advertisements, but then later refuses to receive them, the sender must stop sending unless otherwise agreed by both parties.

In addition, advertisers must provide contact information to receivers to enable them to stop receiving emails containing advertisements at any time. The sender must guarantee that the contact information is valid at least for 30 days.

- (b) **Advertising disguised as news or health information:** As a separate matter, advertisements taking the form of news reports, published for medical treatment, pharmaceuticals, medical devices and healthcare food or otherwise disguised by the introduction or use of knowledge on health or health maintenance are prohibited under the Advertising Law. However, in practice, advertorials and similar advertising formats are relatively common in the PRC.
- (c) **Advertising to minors:** There are special rules regarding advertising to minors. For instance, Article 39 of the Advertising Law provides that advertising activities are strictly prohibited within nursery schools or primary and middle schools, and the teaching materials, teaching supporting materials, stationery, teaching tools, school uniforms and school buses cannot indicate any advertisements either, except for public service advertisements.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Article 3 of the Advertising Law stipulates that the contents of advertisements must be good for the physical and mental health of the people and may not contain obscene, superstitious, terrorizing, violent or evil content. Some of these terms may seem vague, but they are used consistently in various content regulation laws in several industries, including publishing and video gaming. For any violation of these rules, the local Administration for Industry and Commerce has the right to order the advertisers to cease publication, and impose a fine equivalent of one to five times the advertisement fees. In case of serious violation, the business license of the advertising agents and/or

publishers may be revoked. Where the violation constitutes a criminal offense, the offender may be prosecuted criminally.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

There are no special rules requiring that advertisements identify who the advertiser/sponsor is. However, pursuant to Article 43 of Advertising Law, if an advertisement is sent via electronic messaging (for instance, via email or text messages), then it must explicitly demonstrate the authentic identity and contact information of the sender, together with an option to opt out of future advertisements.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are no special rules governing the integration of advertising content and entertainment content. Nevertheless, under the Advertising Law, the mass media may not publish advertisements in the form of news reports. Moreover, advertisements released through the mass media must be marked as advertisements to distinguish them from non-advertisement information and to avoid misleading consumers. Where advertisements in the form of news reports are published, the local Administration for Industry and Commerce may order the publisher of the advertisement to make corrections and impose a penalty.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no special rules governing disclosure or other obligations when integrating advertising content with other content.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Social media used for advertising purposes is governed under the Interim Measures for the Administration of Internet Advertising, according to which an advertisement published via social media must be clearly identified as an 'advertisement' so that consumers can identify it is such. No entity or individual may induce users to click on the contents of an advertisement through deceptive means. In addition, advertisements must not disturb the normal use of the network by users and must be clearly marked with a 'Close' sign in the form of pop-up or other form to ensure the 'Click to Close' right of users. No entity or individual may distribute advertisements through electronic means to others without consent, or attach advertisements or links to advertisements in an email sent by an internet user without consent.

Social media usage is also considered a form of telecoms-based internet or mobile network service, and is thus subject to the Telecoms Regulations and the Regulations on Internet Information Services. Under these regulations, advertisers may not publish any of the following content:

- (a) content that is inconsistent with the basic principles set forth in the Constitution;
- (b) content that jeopardizes national security, divulges state secrets, subverts the government or undermines national unity;
- (c) content that is detrimental to the dignity and interests of the State;
- (d) content that indicates ethnic hatred or racial discrimination, or that damages inter-racial unity;
- (e) content that damages the State's policies on religion, or that advocates for cults or feudal superstitions;
- (f) content that spreads rumours, disrupts the social order or undermines social stability;
- (g) content pertaining to obscenities, pornography, gambling, violence, or murder, or that is terrifying, or that generally incites criminal activities; and
- (h) content that insults or slanders other people, or that infringes upon their lawful rights and interests.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg statements that a consumer makes on an advertiser's Facebook page)?

There are no specific rules addressing advertiser responsibility for user generated content. In general, any platform host (such as a social networking site) must ensure that any posted content complies with the general provisions of the Administrative Measures for Internet Information Services, which stipulate that content meeting any of the following criteria is prohibited:

- (a) it opposes the fundamental principles determined in the Constitution;
- (b) it compromises State security, divulges State secrets, subverts State power or damages national unity;
- (c) it harms the dignity or interests of the State;
- (d) it incites ethnic hatred or racial discrimination or damages inter-ethnic unity;
- (e) it sabotages State religious policy or propagates heretical teachings or feudal superstitions;
- (f) it disseminates rumours, disturbs social order or disrupts social stability;
- (g) it propagates obscenity, pornography, gambling, violence, murder or fear or incites the commission of crimes; or
- (h) it insults or slanders a third party or infringes upon the lawful rights and interests of a third party.

As such, a social networking platform would have an obligation to delete any such content platform. An advertiser with a page on the social network platform would not bear responsibility. However, if an advertiser hosted comments on its own webpage or user/customer community, then it would bear responsibility, and would need to monitor and delete any illegal content.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

According to the Administrative Measures for Online Trading issued by the State Administration for Industry and Commerce, if a related service operator is paid for the provision of promotional services, comments on commodities or services via online social contact tools including blogs and micro blogs, the service operator must disclose the nature of the promotion so as to not mislead customers. This rule expressly prohibits the paid promotion (including by public figures) of certain products or services via social media without mentioning that they were paid to do so.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

PRC law does not have the concept of ‘right of publicity’, but PRC civil law does address this issue more generally, by providing rights in name and portrait.

According to the Advertising Law, the name or image of a person can only be used in an advertisement with that person’s prior written approval. Using the name or image of persons without capacity for civil conduct or with limited capacity for civil conduct (.ie children) can only be done with written approval of the person’s guardians.

The Tort Law of the People's Republic of China stipulates that any infringement of a person’s civil rights and interests (including civil rights in name and portrait) will incur liability.

There is no specific law regulating the use of an individual’s voice in advertising.

9.2 Are there situations when permission is not required?

There is no exemption from permission.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg historic places)?

There is no specific rule governing the types of materials that must be cleared before they may be used in advertising, but the general rules are addressed in questions 8.1 above and 11.2 below. In practice, advertisements containing images of national leaders or officials, sensitive historic/political/religious topics and the like can be prohibited by the competent administrative authorities.

10.2 Is it permissible to use other companies’ recognizable products in advertising (eg an actor wearing branded training shoes)?

There is no specific rule prohibiting the using of other companies’ recognizable products in advertising. Nevertheless, the Advertising Law prohibits content that denigrates the commodities or services of other producers or operators. In addition, the Anti-Unfair Competition Law provides that market participants may not disseminate falsehoods in order to damage or defame other

people/entities or their products. Thus, the use of other companies' recognizable products in an advertisement must not serve to denigrate that product.

Further, the SAMR requires more generally that advertisements should respect other parties' rights. In case of advertisements that contain another's name, image, statement, registered trademark or other legitimate right, such use in the advertisements should be approved in written form by the rights owner before publication.

One other concern is that the use of other companies' recognizable products must not mislead consumers as to the origins of the products in the advertising. For instance, if the advertiser's product or business area is similar to the other company's products, the use of the other company's product could easily cause confusion as to the product's origin, or consumers might believe the two products have similar origins. In this respect, as mentioned, misleading consumers is specifically prohibited.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of PRC which affect advertising (eg Swedish gender equality law)?

Under the current Advertising Law, an advertisement must not contain any content that jeopardizes social stability, public order or social morals; or that contains ethnic, racial, religious or sexually discriminatory content, etc. The interpretation of the former category (social stability, public order or social morals) is somewhat broad and ad hoc, so care must be taken with any controversial content.

In addition, in order to protect the Chinese language, foreign languages may not be used alone in any advertisements. Thus, even if using a foreign language in an advertisement is necessary, it can only play a secondary role.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

As discussed above, under the current Advertising Law an advertisement may not contain obscene, superstitious, terrorizing, violent or evil content. Advertisements also may not use the national flag, national emblems or national anthem of the PRC or the names of any government organs or government functionaries or officials.

Regulations on Control of Advertisement also require advertisements must not contain content that impairs the national dignity of the State.

In addition, there are rules against heresy, pornography, gambling and other content that harms social morality or traditions in radio and television advertisements, as per the Measures on the Administration of Broadcasting Radio and Television Advertisements.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in PRC?

Following nearly five years of discussion, revision and solicitation of public opinion, the E-Commerce Law of the People's Republic of China ('E-Commerce Law') was approved by the Standing Committee

of the National People's Congress on 31 August 2018. The law becomes effective on 1 January 2019 and is the first e-commerce specific law in the PRC. It includes strict requirements and liabilities impacting e-commerce platforms including their responsibilities on advertising. It provides that commodities or services ranked under competitive bidding (eg paid search listings) are to be distinctively marked with the word 'advertisement'. The measures also make reference to the Advertising Law in respect of obligations when sending advertisements to consumers: namely, advertisements sent through electronic means should expressly indicate the true identity and contact information of the e-commerce operator, while recipients should be provided with the option to opt out of future advertisements.

The E-Commerce Law further provides that platform operators should not engage in false or misleading commercial promotion by fabrication and dissemination of transactions and consumer reviews, which would constitute unfair competition behavior under the PRC Anti-Unfair Competition Law revised in late 2017. For example, under Article 8 of the Unfair Competition Law, false or misleading commercial promotions related to product function, quality, sales, consumer reviews, and honours received are deemed anti-competitive.

Potential liability under the E-Commerce Law with respect to online advertisements includes fines of up to CNY 2,000,000 and business license revocation.

 COLOMBIA 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Colombia?

Various laws regulate advertising in Colombia.

- (a) Law 1480 of 2011 (Consumer Protection Statute) introduced guidelines regarding the accuracy and truthfulness of advertising, which are mandatory. Misleading advertising is expressly forbidden. In such cases, the advertiser will be liable for the damages caused. The media may be jointly liable, if fraud or gross negligence is proved.
- (b) Unique Circular No 10 of the Superintendence of Industry and Commerce (SIC) regulates all matters pertaining to the SIC, including consumer protection.
- (c) Certain behaviors involving advertising may be deemed as unfair competition under Law 260 of 1996 (Unfair Competition Law) (eg misleading comparative advertising and certain types of conduct related to ambush marketing). The Organic Statute of the Financial System and the Basic Legal Circular regulate the advertisement of financial products, services and institutions.
- (d) Self-Regulatory Code on Advertising, amended on 16 October 16 2013,
- (e) Finally, there are specific rules concerning health related products issued by the Ministry of Health and/or the Health Authority (eg tobacco, medicines, infant formula, alcoholic beverages, etc).

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

According to article 5.7 of the Consumer Protection Statute, ‘advertising’ is every type of content and means to inform consumers about the nature, origin, manufacturing process, parts, uses, volume, weight or measure, price, instructions, quality, quantity, or any other relevant characteristic of a good or service offered in the Colombian market. Advertising consists of every content and means aimed at influencing the buying decision process.

1.3 What is the basic regulatory framework for advertising regulation?

The framework under which all advertising lays upon is constituted by the principals included in the Consumer Protection Statute. According to these principals, all relevant information must be disclosed and must be clear, truthful, adequate, timely, verifiable, understandable, accurate and suitable for the products or services that are offered.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

All advertising is guided by the general rules. Consequently, if not expressly prohibited, advertising methods are permitted so 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 under the Personal Data Protection Statute. All advertisements delivered directly to a consumer, using the consumer's personal data, must have been previously authorized and must follow the requirements of the Personal Data Protection Statute.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

- (a) **Alcoholic Beverages:** The advertising and marketing of alcohol has been regulated in Colombia for the last 30 years, aiming to protect minors and prevent the consumption of alcoholic beverages by means of warnings and restrictions within the advertisements, and limitations on how and when alcohol can be advertised.
- (b) **Gambling:** All gambling activities must be previously approved by the competent authority, which depend on the scope of the gambling activity—either national or regional. Once authorized, the gambling activity has to state such authorization on each of its tickets and adverts.
- (c) **Contraceptives** (condoms, the morning after pill, etc): Contraceptives that are not considered medication do not have special advertisement rules. Notwithstanding, contraceptives that are medications, either 'over-the-counter' or prescribed, must follow the advertising rules for that kind of medication.
- (d) **'Over-the-Counter'/Non-Prescription Medication:** It is permissible to promote 'over-the-counter' medication; nonetheless, the advertisement has to be approved by the Health Authority before it reaches the public.
- (e) **Prescription Medication:** Prescription medication can only be advertised or promoted in technical or scientific publications, addressed exclusively to health professionals.
- (f) **Financial Services** (banks, other): For the advertisement of a financial product or service, the Organic Statute of the Financial System applies.
- (g) **Lotteries** (state run and otherwise): All lotteries must be previously approved by the competent authority, which depends on the scope of the lottery—either national or regional. The adverts have to be approved by the entity in charge of authorizing the gambling activity.
- (h) **Herbal and Dietary Supplements; Protein Shakes:** Advertisement concerning dietary supplements must meet the requirements set forth by the health authority.
- (i) **Infant formula:** All advertisement, information, outreach and educational materials concerning infant feeding, aimed at any public, should meet the requirements set forth by the health authority.
- (j) **Political speech** (by individuals, organizations, businesses, and governmental entities): There are two types of political propaganda, each with specific regulation:
 - (i) political disclosure, which tends to disseminate and promote the principles, programs and achievements of parties and movements: this type of advertising cannot seek support for any election and can be done at any time, and
 - (ii) electoral propaganda, which promotes candidates to be elected, seeking public support.
- (k) **Tobacco and toy guns:** The advertising of tobacco and its derivatives, and toy guns, is prohibited.

1.6 Are any government pre-approvals required?

There are some goods and services whose advertisement must be pre-approved.

- (a) **Gambling and Lotteries:** All advertisement has to be approved by the entity in charge of authorizing the gambling activity.
- (b) **Health:** The Health Authority (INVIMA), issues the health registrations required for the commercialization of certain specific goods and requires pre-approval for the following products:
 - (i) Over-the-counter medicines;
 - (ii) Over-the-counter homeopathic medicines;
 - (iii) Dietary supplements;
 - (iv) Certain medical devices advertised only through specialized channels; and
 - (v) Infant formula.

1.7 Does the media pre-clear advertising?

The media is not obliged to do so, but most of them have a pre-clear area devoted to the review of advertising in specific cases: Medicines, alcoholic beverages, political advertising, advertising addressed to children, contests that must be authorized by the competent authority, etc.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The appropriate Authority can act *ex-officio* to review any advertising material.

The SIC is entitled to enforce the Consumer Protection Statute. Hence, it is empowered to initiate investigations and sanction the infringers.

The corrective measures available are:

- (a) corrective advertising;
- (b) fines of up to 2,000 x the minimum monthly wage in force at the time of the imposition of the sanction (approximately USD\$550,000);
- (c) Temporary closure of the party's business establishment for up to 180 days (website or any internet access to the platform);
- (d) In cases of recidivism, and depending on the wrongdoing, closure of the establishment (website or any internet access to the platform) or final order of removal of a website portal on the internet or media used;
- (e) temporary or permanent prohibition to produce, distribute or offer to the public certain products;
- (f) destruction of a particular product that is detrimental to the health and safety of consumers; and
- (g) successive fines of up to 1,000 x the minimum legal monthly wage (approximately USD\$275,000) for failure to comply with the SIC's orders.

The Health and Food Institute and the Superintendence of Finance are also entitled to pursue advertising infringements and can order monetary and non-monetary sanctions.

1.9 When does a competitor have a right of action? What are the potential remedies?

Competitors may bring action against other advertisers on the grounds of infringement of the Unfair Competition Statute (eg comparative advertising, misleading advertising, etc), under which they can request compensation for damages and lost profits; and the advertiser can be sanctioned with monetary and non-monetary obligations.

Competitors may also file complaints against other advertisers for infringement of the Consumer Protection Statute before the SIC as administrative authority. The investigated competitor may be subject to sanctions as described in question 1.8 above.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers may bring an action against advertisers on the grounds of their infringement of the Consumer Protection Statute before the SIC:

- (a) as a jurisdictional authority: Consumers can request compensation for damages and lost profits; moreover, the authority may impose monetary and non-monetary sanctions;
- (b) as an administrative authority; the investigated advertiser may be subject to sanctions as described in question 1.8 above.

Consumer associations (among others) also may bring actions against advertisers on the grounds of infringement of the Unfair Competition law (eg comparative advertising, misleading advertising, etc) under which they can request compensation for damages and lost profits; and the advertiser can be sanctioned with monetary and non-monetary obligations.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Colombia have a primary advertising self-regulation system?

The self-regulation system is comprised of different professional associations, which are gathered in a commission called CONARP (the National Commission for Self-Regulation Advertisement). This entity is in charge of developing and issuing the ethics code for advertisement activities.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The main principles of the Code are the following:

- (a) Good faith;
- (b) Truthfulness;
- (c) Decency; and
- (d) Social Responsibility.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The Self-Regulatory Code introduced a proceeding that may be initiated upon request of an interested person or *ex officio*. The competent authority within the advertising trade must investigate whether or not an advertiser has abided by the terms of the Code. The investigated party may be subject to sanctions, such as the amendment or suspension of the advertising piece, public or private reprimands, etc.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The Code is used only as a reference when remedies are filed before the respective authorities. It is a very useful guideline for judges and experts within unfair competition and consumer protection proceedings. It is mostly an ethical standard.

2.5 Are the self-regulatory system's decisions reported?

The self-regulatory system only issues decisions on ethical matters, which are more likely to be recommendations. The decisions have no legal effect.

Decisions can be published at the discretion of the CONARP.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

These are the same as the general rules, that is, all relevant information must be disclosed and must be clear, truthful, adequate, timely, verifiable, understandable, accurate and suitable for the products or services that are offered.

2.7 Are there any other self-regulatory systems that govern advertising practices in Colombia?

There are no other self-regulatory systems which govern advertising in Colombia.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Colombia (eg, consumer protection laws; IP laws; unfair competition laws)?

The basic laws which govern advertising claims are:

- (a) the Consumer Protection Statute;
- (b) Unique Circular No 10 of the SIC;
- (c) the Unfair Competition Statute;
- (d) Organic Statute of the Financial System and the Basic Legal Circular;
- (e) specific rules concerning health related products issued by the Ministry of Health and/or the Health Authority;
- (f) the Personal Data Protection Statute; and
- (g) the Self-Regulatory Code on Advertising.

3.2 Is substantiation required for advertising claims?

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

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

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

'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.

3.4 What are the rules governing the use of disclosures in advertising?

The information provided must be clear, truthful, adequate, timely, verifiable, understandable, accurate and appropriate with regard to the goods or services being offered.

If the disclosure refers to a promotion, it must include a clear statement referring to the time, duration and place of validity and conditions of the same (conditions of time, mode and place).

These disclosures must be made in a readable size and location within the advertisement.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

The advertiser must have each testifier's release and authorization to use its name in association with the brand. The testifier can be jointly and severally liable for its claims or opinions 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 last publication, so that it can be made available to the SIC if required.

3.6 What are the rules governing the use of product demonstrations in advertising?

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:

- (a) the goods or services must satisfy the same necessities;

- (b) the comparison must refer to objective or verifiable characteristics;
- (c) the comparison must therefore be made between one or more relevant, verifiable and representative features thereof; and
- (d) the advertising must indicate the characteristics of the compared products and services, without being misleading.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted as long as:

- (a) it refers to analogous goods or services (eg yogurt and yogurt, not yogurt and milk);
- (b) it refers to objective rather than subjective features or properties of the compared goods/services; and
- (c) the comparison's results are real, truthful and verifiable.

Otherwise, the comparative advertising could be deemed as misleading and an act of unfair competition.

In addition, comparative advertising may explicitly refer to a competitor or may suggest its identity by any means that could be associated to said competitor. However, it cannot be used to denigrate competitors or to mislead consumers.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Trademarks may be used in comparative advertising as a means to explicitly identify the competitor subject to comparison.

However, with regard to copyright, the situation is not that clear. Whether it is possible to use the copyrighted work will depend on the specific situation or manner, and must be studied on a case-by-case basis.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

There are special rules concerning the determination of origin of goods or services. Nonetheless, as regards advertisement, claims relating to geographic origin must follow the general rules, that is, the information must be clear, truthful, verifiable, understandable, accurate and suitable for the products or services that are offered.

3.10 Are there any special rules governing product packaging?

Yes. There are specific rules, issued by the Ministry of Health and/or the Health Authority, concerning packaging and labels of products that may have effects on human health (eg tobacco, medicines, infant formula, alcoholic beverages, etc).

Moreover, there are also special rules concerning the packaging content of toys or goods intended for infants.

4 PRICE ADVERTISING

4.1 What are Colombia's rules regarding price advertising?

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 prices must comply with the rules of comparative advertising.

4.2 What are Colombia's rules regarding advertising 'free' products?

The basic rule for 'free' product advertising is that it has to be real; the good must be 100% free. In the event of a promotion in which a free item is attached to the purchased good, the total cost must be exactly the same as the usual cost and should not be increased in any way.

4.3 What are Colombia's rules regarding sales and special offers?

The advertisement must include the conditions of time, mode and place and fully state the conditions to be fulfilled to make the offer applicable. It must also make reference to the quantity of the goods available under the special offer.

4.4 What are Colombia's rules regarding rebates?

Rebates are regulated by the Consumer Protection Statute; however, there is no direct reference to advertising.

The rebate must comply with the basic rules of advertising: it must be accurate, truthful and not misleading.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

No.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

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.

- (a) **Visual outdoor advertising**, however, is subject to several rules about size and location in order to avoid visual pollution.
- (b) **Tobacco and toy guns**: The advertising of tobacco and its derivatives, and of toy guns is prohibited.

- (c) **Advertising to minors (under 18 years old):** 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.
- (d) **Alcoholic beverages:** 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:
- (i) Promotional advertising for a cultural or sporting event that is directed exclusively to promote or sponsor that event that uses graphic designs or audible or visual characterization of a company, brand, product or service, without mentioning its attributes and is permitted within the 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.
 - (ii) For an implied or indirect advertisement, which uses the product, brand or graphics and audio or visual characterization 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.
 - (iii) Direct advertising (in which the product, company, brand or service is identified by a graphic design or audible or visual characterization, with the express purpose of encouraging or inducing consumption or maintaining their presence) that involves the action of ingesting an alcoholic drink, is forbidden from being broadcast at any time by television services.
 - (iv) Promotional and implied advertising shall not exceed 60 seconds for every 30 minutes of programming.
 - (v) Each operator that broadcasts advertisements for alcoholic beverages shall transmit, without cost, an explicit prevention campaign on the risks and effects of consumption of alcohol, for half the time spent weekly on advertising alcoholic products.
 - (vi) Programs whose content is aimed specifically at minors shall not include any advertising regarding alcoholic beverages.
- (e) **Medicines and Health products:** The ethical code establishes that the goods which by their nature are directed to professionals, technicians or scientists, can only be advertised in specialized media. Advertising cannot be addressed to children and youth.

All advertisement is forbidden for health products sold by formula or prescription.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

As a general provision regarding personal data protection, all advertising that requires the use of personal data, such as cell phone numbers, addresses or any other personal information, requires the previous authorization of the consumer to receive such information.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The Self-Regulatory Code on Advertising contains decency as one of its general ruling principles. Advertising must respect the dignity of people, institutions, authorities and patriotic symbols. It must not offend, denigrate or harm equal rights, and must not discriminate in terms of race, gender, age, religion, sexual preferences, origin, social, cultural or economic conditions.

The code also includes a provision which states that all advertising that is intended exclusively for adults cannot be shown in any media, space or time in which children or adolescents can easily receive it.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

As a mandatory rule for all advertising, the person, company or entity who is offering the goods or services must be clearly indicated for consumers.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

No, there are not. In such cases, the general rules apply. According to a recently issued document drafted by the SIC, editorial content is treated as an equivalent of advertising. Hence, all consumer protection rules apply.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

No, there are not. In such cases, the general rules apply.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

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, the Self-Regulatory Code on Advertising contains a special chapter on social media advertising, which indicates that social media advertising must respect public interest groups and should have acceptable standards of commercial behavior. It must not interfere with what the consumer normally does in the interactive media.

In addition, such advertisements should comply with the provisions relating the Habeas Data Law.

This chapter also addresses:

- (a) identification of the commercial origin of studies and recommendations,

- (b) respect for public groups and search sites,
- (c) messages to children and youth,
- (d) respect to the sensibility of a global audience,
- (e) provisions on on-line commercial messages based on the browsing habits on Internet and the use of cookies.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

The advertiser is responsible for all the content which is uploaded on its page. Liability will be based on whether it is possible for the advertiser to control the content and whether it takes the necessary measures to avoid such content being exposed on its page.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

There are no decisions within the context of a judicial proceeding publicly discussed in the press. However, the SIC has issued a legal opinion concerning marketing through social media, in which it is clarified the scope of liability of social networks when they are operated by the users as a selling platform. The main arguments of the legal opinion concerning social networks are highlighted as follows:

- (a) An advertiser is liable for any claim, since the regulation refers to the manufacturer and/or provider which advertises the goods or services. However, the platform on which the advertisement is promoted would be liable in cases where it is possible to demonstrate bad faith or guilt from the social network (in this case) concerning the deceiving advertisement.
- (b) The SIC considered that social networks do not have a commercial interest, but a social one. Hence, it is not possible for a social network to determine or affect a consumer in his/her decision-making process.
- (c) If social networks act as advertisers, then the Consumer Protection Statute would be applicable to them, not only as a platform in which the advertisement is promoted, but as a manufacturer and/or provider.
- (d) When a user commercializes goods or services, only the user would be liable for what it is advertised, as social networks cannot be held accountable for the use made of the accounts.

This is not a decision per se, and curiously enough it does not bind the SIC. Nonetheless, it is the latest opinion issued related to social media marketing.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

The use of images or references to people by imitation, personification or dubbing in a commercial message requires the individual's previous written consent.

9.2 Are there situations when permission is not required?

Exceptions to the above rule are:

- (a) images obtained from large groups in which the people who appear are not identifiable;
- (b) the announcement of books, pictures or works in which the image or reference of the author is made; and
- (c) when the use of the image relates to the purpose of news, culture or didactic material, or when it relates to facts or events of public interest.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

According to one of the Laws which refer to copyright (Law 23 of 1982), it is permitted to reproduce, by painting, drawing, photography or cinematography, works that are permanently located in public highways, streets or squares, and to distribute such reproductions or works and communicate them to the public.

The only exception refers to works of architecture, when different to outward views.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

There is no specific rule which forbids the use of recognizable goods. The basic rule indicates that the use of third parties' trademarks requires previous consent. However, the 'appearance' of the trademark or product may not be considered as trademark use. Therefore, the possibility of using the recognizable product would have to be studied in a case-by-case basis.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Colombia which affect advertising (eg Swedish gender equality law)?

There are no particular advertising rules regarding our culture. Any issue which could arise involving the same would be treated according to the basic governing laws of advertising.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Advertising should be made in such a way that it contributes to the improvement of the society, the economy and the environment, without losing its main objective.

Advertising must provide positive messages; it must not discriminate or encourage violence, illegal acts or anti-social behaviors.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Colombia?

Within the scope of advertising in Colombia, a general piece of advice would be to refer to its content and particular topics in which Colombian public results to be very sensitive. All humor regarding drug trafficking or consumption, religious positions and mockery as well as explicit nudity, are not well received.

 COSTA RICA 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Costa Rica?

There is no general advertising Law in Costa Rica. However, several laws contain different regulations addressing advertising. The most important of these laws is the Consumer Protection Law. Other regulations addressing advertising are contained in several other Laws, such as the Civil Code, the General Health Law, the Law to protect the Image of Women, the Criminal Code, and several product regulations.

Other laws, although aimed at other purposes, apply to advertising as well, such as the Laws protecting Intellectual Property Rights.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

The legal definition of advertising is very broad. Legally, it is defined as ‘any type of message that is disseminated in any way, in the exercise of any commercial, industrial, artisan, or professional activity with the purpose of promoting the sale of any good, the transfer of any right and obligation, or the rendering of services, as well as the dissemination of ideas’.

1.3 What is the basic regulatory framework for advertising regulation?

The most important law regulating advertising is the Consumer Protection Law, which regulates issues like the prohibition of misleading and abusive advertising, as well as promotions, comparative advertising, and others.

In addition, different laws regulate other issues related to advertising, like the use of personal image, data protection, intellectual property, unfair competition, the portrayal of women, etc.

There are some regulated products that have advertising regulations that are specifically applicable to them, and other laws regulate the use and operation of certain media, particularly broadcasting.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Advertising laws and regulations apply to all media and to all forms of advertising.

As an exception, emails and text messaging have specific regulations that can be summarized as follows:

- (a) It is forbidden to send email messages with the purposes of making direct sales, promotional marketing and/or advertising. This same general prohibition applies also to faxes and to automated telephone calls.
- (b) As exceptions to this rule, commercial email communications are allowed:
 - (i) when the client has previously expressed its willingness to receive such communications.;
 - (ii) when, in the context of a previous sale or commercial relationship, that same supplier uses the information provided by the client to promote the sale of similar products or services.

- (c) Any marketing communication made through email must clearly identify the sender. It must also be done simple enough to easily identify the purpose of the message.
- (d) All messages must include a valid email address to which the recipient of the message may send a request to suspend any further message, at no cost to the recipient.
- (e) The following forms of conduct are expressly mentioned in the regulations as forms of unfair and/or fraudulent activities:
 - (i) unsolicited advertising ('adware');
 - (ii) unsolicited communications;
 - (iii) unauthorized operation, access and monitoring a terminal;
 - (iv) spreading viruses; and
 - (v) unsolicited massive emails (SPAM).

In addition, the following rules apply to advertising made by electronic means (websites, social media, etc):

- (a) Advertising must always be identified as such, including identity of advertiser.
- (b) Advertisers must always identify their (true) identity, location, and contact information.
- (c) Information used for the domain name registration must be accurate.
- (d) Mentions to self-regulatory bodies must include link to verify membership and conditions.
- (e) Information must be disclosed in an 'easy and clear language'.
- (f) There are certain mandatory disclosures for all e-sales.
- (g) Special rules apply for children's advertising, including filters for inappropriate contents.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

The following products have specific advertising regulations:

- (a) alcoholic beverages;
- (b) prescription drugs;
- (c) food;
- (d) dietary supplements;
- (e) milk and dairy products;
- (f) baby formulas;
- (g) natural products with medical properties; and
- (h) financial products and services.

1.6 Are any government pre-approvals required?

Government pre-approval is required for the following advertising:

- (a) alcoholic beverages;

- (b) prescription drugs;
- (c) baby formula; and
- (d) any advertising that uses the image of women in a sexually suggestive way.

1.7 Does the media pre-clear advertising?

No, the media does not pre-clear advertising in Costa Rica.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Depending on the applicable subject matter, different governmental offices are in charge of enforcing Advertising Laws, mainly the Consumer Protection Office, the Ministry of Health, and others.

Potential remedies applicable to any infringing advertising are:

- (a) suspension of the advertising;
- (b) corrective advertising;
- (c) fines;
- (d) annulment of sales and other contracts; and
- (e) monetary damages.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor has a right of action in two possible scenarios:

- (a) When an advertisement violates applicable regulations protecting consumers and/or other rules of public order, in which case the remedies available do not contemplate monetary damages.
- (b) If an advertisement amounts to unfair competition and/or a violation of any right of the competitor (such as intellectual property), in which case, in addition to any other applicable remedies, the competitor may seek compensation for the damages caused.

1.10 When do consumers have a right of action? What are the potential remedies?

Any person has legal standing to file a complaint against any advertising violating the laws.

Also, if the consumer shows damages or specific harm, he/she may seek compensation in Courts of Law.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Costa Rica have a primary advertising self-regulation system?

Yes. There is a self-regulation system established and control by the *Cámara de la Comunicación Comercial* (CAMCO).

CAMCO has issued a self-regulation code, and also has a panel of neutrals in charge of its enforcement. The system is completely voluntary. However, the self-regulatory system is not operational, and it exists on paper only.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Yes. There is a self-regulatory advertising code. The main principles covered by the code are:

- (a) Truthfulness;
- (b) Legality;
- (c) Decency;
- (d) Good Faith;
- (e) Social responsibility;
- (f) Respect for the environment; and
- (g) Health and safety.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

CAMCO has a panel of neutrals in charge of carrying out the procedure. The process is mostly in writing, but the parties may request a hearing if they wish.

After hearing both parties and analyzing the evidence, the panel may declare the advertisement in violation of the code, and impose certain penalties.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The system is not effective and is very rarely relied upon by the advertisers.

2.5 Are the self-regulatory system's decisions reported?

Decisions are not reported, but in grave cases or in issues involving general interests, the panel may order the publication of specific decisions.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

The code covers the basic principles applicable to all advertising.

2.7 Are there any other self-regulatory systems that govern advertising practices in Costa Rica?

No, there are no other self-regulatory systems. Some industries have self-regulatory codes, but they are not enforced by any specific body.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Costa Rica (eg, consumer protection laws; IP laws; unfair competition laws)?

Advertising claims are governed by the Law to Promote Competition and the Effective Defense of Consumers (Consumer Protection Law), and its regulations.

Also, product-specific regulations deal with the advertising claims related to the respective products. For example, advertisements of medicines must not only comply with the general principle of truthful advertising, but also with specific requirements of any health-related claims.

3.2 Is substantiation required for advertising claims?

Yes, substantiation is required for all advertising claims.

The advertiser has the burden to prove the truthfulness of all that is said in the advertising.

Also, substantiation is required both to express and implied claims. The implied claims are deducted from the 'global impression' caused by and advertisement.

All advertising claims are legally incorporated into all sales agreements, and in case of confusion, all doubts will be resolved in favor of consumers.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

The regulations do not mention this issue expressly. However, the legal standard is whether an advertisement is likely to generate confusion, so the consumer perception is always evaluated. Hence, although not always discussed expressly, the concept of puffery has been applied in some cases by referring to whether consumers are being misled or not.

3.4 What are the rules governing the use of disclosures in advertising?

All disclosures must be clear, easy to read and to understand. The general message of the advertisement may not contradict any information made in a disclosure.

Disclosures and warnings are mandatory when the use of the product may generate health or safety risks.

Certain products with specific regulations require mandatory health warnings and disclosures. Examples of this are alcoholic beverages, medicines, energy drinks, milk and milk substitutes, etc.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

All testimonials and endorsements must be genuine, verifiable, and based on prior experience or knowledge.

The testimonial or endorsement may be used as long as the advertiser has reasons to believe in good faith that the views of the endorser have not changed.

Testimonials in advertising must also follow these rules:

- (a) They require prior consent to be used, unless a quote from a previously published source.
- (b) They must refer specifically to the advertised product.
- (c) If there is a partial reproduction, it may not alter the sense and context in which the testimonial was rendered.
- (d) They may not be misleading, even if literally true.
- (e) If the endorser has any commercial interest in the advertised product, this link must be disclosed.
- (f) No testimonials are permitted in the name of large unidentifiable groups.
- (g) Parodies, representations and fictional testimonies must be clearly signaled.
- (h) Testimonials by themselves are not sufficient evidence to support advertising claims made on the product.
- (i) It should be clarified whether the testimonial is made on a personal condition or as representative of an organization.
- (j) If the testimonial is rendered on behalf of an organization, that organization must authorize it previously.
- (k) Characterizations of professionals must be clearly disclosed, and will be subject to the ethical rules of that profession.
- (l) All testimonials must be supported by a signed and dated document. This document must be kept for as long as the advertisement may be divulged.

In electronic communications and social media, advertising must be clearly and expressly identified as such.

3.6 What are the rules governing the use of product demonstrations in advertising?

Product demonstrations do not have specific rules. The general rules about truthfulness, good faith, etc should apply.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted, and it must comply with the following:

- (a) the information compared must be relevant;
- (b) all information must be objectively verifiable;
the comparison must be made between products of the same kind; and
- (c) the comparison must be made with reference to products known by the public, or with significant participation in the market.

Comparisons are inadmissible when they are limited to a general proclamation of the own product's superiority. Information necessary to determine the real value of the products cannot be omitted.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

Comparative advertising is a recognized ‘fair use’ of a competitor’s trademark. However, the trademark may not be altered, and the compared product may not be disparaged. This would become a form of unfair competition.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

No, there are no special rules governing geographic origin claims.

3.10 Are there any special rules governing product packaging?

Yes. There is some mandatory information that must be included in packaging in general, as well as specific regulations for certain products (food, pharmaceuticals, alcohol, cosmetics, chemical products, etc).

4 PRICE ADVERTISING

4.1 What are Costa Rica’s rules regarding price advertising?

The main rule is that all advertised prices must be final, including all charges, taxes, and any other amount that must be paid.

4.2 What are Costa Rica’s rules regarding advertising ‘free’ products?

If the offer is for a free gift, it must be completely free of any purchase or any obligation. If the gift is conditioned upon purchasing a product, it must be clearly stated in the advertising, and not via disclaimer.

4.3 What are Costa Rica’s rules regarding sales and special offers?

Any advertising mentioning a special offer must mention the advantage that is being offered to consumers.

All conditions must be disclosed prior to the purchase, or they would not be enforceable.

All special offers must be for limited time, which must be disclosed, and the advertiser must ensure the availability of the offer during that time.

If the offer is made ‘while quantities last’ (or similar expressions), the advertiser must disclose the number of products available.

4.4 What are Costa Rica’s rules regarding rebates?

In addition to the rules set out in the answer to question 4.3, the advertiser must disclose the previous price and the rebate price, so consumers may easily evaluate the amount of the savings.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

No, there are no other key restrictions.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

The following are prohibited or restricted:

- (a) Tobacco products may not be advertised at all.
- (b) Alcoholic beverages may not be advertised in TV or radio programs directed to minors, or on billboards close to schools, sports venues, medical facilities, etc.
- (c) Baby bottles may not be advertised (to avoid discouraging breast feeding).

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Other than the practices mentioned in question 1.4, there are no advertising practices that are completely prohibited, although certain forms of advertising are regulated, and others are forbidden for specific products.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Yes. There is a law issued to avoid disparagement based on gender, which also covers indecency and obscenity.

This law allows a governmental office to suspend and destroy any advertising material considered obscene that is not previously cleared by them.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Yes. The identity of the advertiser must always be disclosed, with the exception of so-called 'expectation campaigns'.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are no special rules on this issue (except for the ethical rules of journalism, where applicable).

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no special rules on this issue (except for the ethical rules of journalism, where applicable).

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no special regulations for the use of social media. However, there are rules applicable to electronic advertising in general, which includes social media (see question 1.4 above).

Also, there is a ‘safe harbor’ regulation to avoid liability for IP violations made through electronic means (including social media). This safe harbor is specific to IP issues only.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

There are no specific rules addressing this situation. However, through the application of general rules, it may be construed that the administrator of the page has an obligation to exercise due care and avoid legal violations made in any media controlled by it.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

There are no relevant decisions directly dealing with this issue.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

The general rule is that prior consent is needed in order to use one’s portrait, name, likeness, etc.

The key parameter to determine whether consent is required is whether the individual can be recognized or not.

9.2 Are there situations when permission is not required?

There are some exceptions to the general principle requiring consent, but none of them apply to advertising. They do apply to editorial content, publications of general interest, etc.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are no rules requiring clearance of certain materials (except for some regulated products).

Advertisements that will be broadcast on TV or radio need to be registered and pay a nominal fee, but the content is not cleared.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Recognizable third-party products may be used as long as the rules for 'Fair use' of trademarks are respected.

That means that the third-party product must be incidental to the ad, and that the advertiser may not take unfair advantage of the other trademark's fame.

Also, reference to third party products is admissible to show compatibility with a product, or to show possible uses of a product.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Costa Rica which affect advertising (eg Swedish gender equality law)?

Legally all information conveyed to consumers must be in Spanish language. Other languages may be used concurrently, but in case of contradiction the Spanish version prevails.

Also, all measurements must follow the metric system.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

It is always good to adapt the advertisements to local idiosyncrasy, but without any major diversion from what applies to most Latin American countries.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Costa Rica?

No, nothing additional.

CROATIA

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Croatia?

Advertising in Croatia is regulated in several Acts. The principal acts that deal with advertising are:

- (a) the Prohibited Advertising Act,
- (b) the Media Act and
- (c) the Electronic Media Act.

Other relevant acts include:

- (d) the Consumers' Protection Act,
- (e) the Trade Act, and
- (f) the General Product Safety Act.

For specific types of advertising, or, more precisely, for the advertising of specific goods and services, the following acts may apply amongst others:

- (g) the Act on Food,
- (h) the Act on the Reduction of Tobacco Products Use and
- (i) the Drugs and Medical Products Act.

Although they do not apply to advertising specifically and directly, the following acts are often cited in advertising cases:

- (j) the Trademark Act and
- (k) the Copyright and Related Rights Act.

In addition to that, the advertising industry has implemented a series of self-regulatory rules, which also apply; namely the Code of Conduct of the Association for Marketing (the Code) and the Code of Conduct of the HURA (as to which see question 2.1, 2.2 and 2.7).

1.2 What types of communications are considered to be 'advertising'? How is this determined?

Croatian law does not define what specific types of communications are considered to be 'advertising'. Instead, Article 3 of the Prohibited Advertising Act defines advertising as follows:

'Advertising is any expression, in any form, which is made by someone in the performance of their business, or profession, which is directed towards promotion, with the aim of improving the sale of goods or services, and includes real estate rights and obligations.'

1.3 What is the basic regulatory framework for advertising regulation?

The basic regulatory framework for advertising in Croatia consists of legislation and self-regulation. Legislation includes the Prohibited Advertising Act, the Media Act, the Electronic Media Act, the Consumers' Protection Act, the Trade Act, and the General Product Safety Act.

Self-regulation is provided by bodies which have created codes of conduct for their members, such as the Croatian Chamber of Economy and the Economic Interest Grouping of Companies for Trade Communications (HURA).

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Certain types of communications are regulated in Croatia, such as electronic communications. Unsolicited electronic communications are regulated by Article 107 of the Electronic Communications Act. According to this provision, the use of automated calling and communication systems without human intervention, facsimile machines or electronic mail, including short text messages (SMS) and multimedia messages (MMS), for the purposes of direct marketing and sale, shall only be allowed if service subscribers or users have given their prior consent.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There are several regulations that may apply in this sense, such as the Act on Food, the Act on the Reduction of Tobacco Products Use and the Drugs and Medical Products Act, which all contain provisions relevant to specific industries. Like in many other countries, such restrictions refer to tobacco products, prescription pharmaceuticals and alcoholic drinks, except for beer and selected wines.

Certain advertising restrictions are a direct consequence of the restricted trade of certain goods, such as weapons or pornographic material. The advertisement of certain services is restricted as well, such as the advertisement of lawyers and law firms.

Most of the restrictions apply to the advertisement of certain goods or services regardless of the media.

1.6 Are any government pre-approvals required?

There are no government pre-approvals prescribed within the Croatian legal system.

1.7 Does the media pre-clear advertising?

In Croatia, there is no prescribed formal pre-clearance procedure for advertising. Advertisers/agencies do not have to get any formal approval for a particular advertisement from the media channel or any other body before it is shown. However, media owners can make a selection of the material that will be published since they are within their rights to refuse to publish certain material. However, this happens exceptionally and rarely, and we are not aware of any such cases in recent years.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The Government enforces provisions that relate to advertising by imposing fines for activities that are prohibited. For example, fines may be imposed when brands advertise products that are not permitted to be advertised, or when companies/agencies use prohibited advertising practices, such as misleading advertising.

The fines usually amount to few thousand euro, although they can even amount to tens of thousands of euro. The advertising material has to be removed and no longer published. This is usually done voluntarily by the agency itself or the advertiser.

In the case of advertising products or activities which are not permitted to be advertised by law, a misdemeanor procedure is initiated against the entity or person that violated the relevant provision and the procedure is usually conducted by the misdemeanor courts through a first and, potentially, second instance procure, if an appeal is filed.

For unlawful advertising activities (where the advertising practice is at issue rather than the fact of advertising itself), the advertiser is considered responsible and the advertiser is the party in the procedure. If, however, the courts decide that unlawful advertising activities have been used, then the client-advertiser will normally seek to recover any fines from its advertising agency.

1.9 When does a competitor have a right of action? What are the potential remedies?

While the procedure for the violation of a relevant provision is initiated by the Government through a misdemeanor procure, a competitor would usually have to start a separate court action in order to enforce its rights. The rights of the competitors usually consist of intellectual property rights, either trade mark rights or copyright, although a competitor may also base its claim on unfair competition.

The procedure started by the competitor is usually conducted by the commercial court. In most cases this is a litigation procedure with a plaintiff and a defendant.

If a competitor does not have a right of action, but thinks there is a problem with another brand's advertising, it is not able to start a litigation procedure, but may instead simply notify the authorities of the misconduct. The authorities would then start a misdemeanor procedure ex officio. In other words, the competitor can notify the authorities of prohibited advertising practices (in which case the Government will investigate and enforce the laws through the misdemeanor courts). In addition to that, the competitor can seek to enforce its own rights by bringing an action in the commercial court.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers have specific rights of action as set out in the Croatian Consumers' Protection Act. This provides for the protection of the collective rights of consumers, although this type of action is intended primarily for more general application and is not necessarily used in connection with advertising. If a group of consumers wishes to bring an action relating to advertising, the Consumers' Protection Act allows them to do so if the advertising violates other specific advertising regulations, such as the Electronic Media Act.

Actions can be brought when consumers consider their rights have been breached. Most claims usually seek monetary refunds or compensation by way of damages. Actions tend to be brought by a group of consumers or their associations. This said, to our knowledge, very few such actions have been brought in Croatia during the past few years. Among those actions that were brought, we are not aware that any related to advertising material.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Croatia have a primary advertising self-regulation system?

The major self-regulatory bodies in Croatia are those acting within the Croatian Chamber of Economy. This is divided into sectors and associations, including the Association for Marketing. The Association for Marketing was established by the Croatian Chamber for Economy in 2001. The main purpose of the Association is to articulate the interests of the chamber's members involved in marketing in general and advertising in particular. The Association for Marketing has its own code of conduct (the Code).

There are also other professional associations, such as the HURA, which has its own codes of conduct and guidelines applying to members. The code of conduct of the HURA almost entirely corresponds to the Code mentioned above. Likewise, all the members of the HURA are also members of the Association for Marketing of the Croatian Chamber for Economy.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The self-regulatory process works primarily through the implementation of the Code. The Code represents the minimum standard of ethics with which parties should comply in advertising and other forms of trade communications. The Code is, by its form and content, comparable to the Code of Standard Advertising Practice which was accepted by the International Chamber of Commerce in 1973. The Code and national laws are harmonized, which means that the Code elaborates on certain provisions of the law and should never be contrary to it.

The key principles of the Code focus on honest advertising which does not mislead. Other key principles focus on comparative advertising, which although generally permitted, must abide by particular rules which protect competitors and their rights. The Code promotes advertising which respects and reflects the ethics and cultural rules of Croatia, which are generally accepted throughout all parts of the country and the whole population.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

If a dispute arises where a challenge is made by a brand or advertising agency against an advertiser or its agency, and a solution cannot be reached otherwise, conflicts relating to the Code can be brought before the Court of Honor. The procedure before the Court of Honor is comparable to a litigation procedure. No monetary fines can be imposed, but warnings can be made.

If a party is unsatisfied with the ruling of the Court of Honor, it can request the convocation of the so-called 'Group of Agencies for Trade Communications', which also acts within the Croatian Chamber of Economy. The Group of Agencies for Trade Communications has the power to decide if a particular member should be expelled from the group. In practical terms, however, there are no real consequences to expulsion, as both advertiser and agency could continue to operate even if they had been expelled.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self-regulation system is effective and used. However, there are not many disputes per year, according to the information we have received. In fact, in most years, there are no disputes at all.

2.5 Are the self-regulatory system's decisions reported?

The self-regulation system's decisions are not reported or published.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

In Croatia, the general principles of modern advertising legislation apply. As an example, misleading advertising is prohibited, while comparative advertising is allowed, but under certain circumstances only. There are several rules in this regard and, generally, they focus on respecting the rights of competitors. Morality and decency should be respected, as in most other European countries, and this applies to all industries, especially those that are not regulated specifically, such as tobacco and advertising of alcohol. Also, Croatia is part of the EU as of 1 July 2013, so EU standards may serve as guidelines too.

2.7 Are there any other self-regulatory systems that govern advertising practices in Croatia?

Besides the bodies acting within the Croatian Chamber of Economy and the Association for Marketing, there is another professional association, which is the HURA. This is an association of advertising agencies, which has its own code of conduct and guidelines. However, this code of conduct and guidelines apply only to the members of the association, and membership of the association is not mandatory. Most of the Croatian advertising agencies, however, are member of HURA.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Croatia (eg, consumer protection laws; IP laws; unfair competition laws)?

See question 1.1. above.

3.2 Is substantiation required for advertising claims?

Substantiation is not prescribed as a requirement for advertising claims in Croatia.

If a claim is challenged for having a misleading claim, it has to be determined whether the claim misleading/false or true. This is finally determined by the judge based on the evidence that the parties presented during the procedure.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

There are no such types of advertising messages.

3.4 What are the rules governing the use of disclosures in advertising?

The Croatian legal system does not contain rules that would specifically govern the use of disclosures in advertising.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

The Croatian legal system does not contain rules that would specifically govern the use of endorsements and testimonials in advertising.

3.6 What are the rules governing the use of product demonstrations in advertising?

The Croatian legal system does not contain rules that would specifically govern the use of product demonstrations in advertising.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Article 6, Prohibited Advertising Act, allows comparative advertising, where:

- (a) it is not misleading;
- (b) it compares products/services that meet the same needs or are intended for the same purpose;
- (c) it objectively compares features of the product/service which are material, relevant, comparable and verifiable (including price);
- (d) it does not identify traders with other advertisers /competitors, or with other services, trade marks, protected names or other distinguishing features of advertisers/competitors;
- (e) it does not discredit or devalue the products/services of competitors, their trade marks, protected names or other distinguishing features, activities or relationships;
- (f) it compares products with designation of origin, to products of the same origin;
- (g) the comparison is not directed towards unfair exploitation of the reputation of a trade mark, protected name, designation or origin or other distinguishing feature of a competitor product/service; and
- (h) it does not refer to advertised products/services as imitations of products/ services bearing a protected trade mark or name.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Trade mark regulations may apply to these types of cases, although it depends on the specific circumstances of the case. In the case where someone's trade mark is shown or depicted while comparing products for advertising purposes, the rights holder may be able to claim trade mark infringement. A lot, however, depends on the specific circumstances and how that trade mark is shown. However, there are no general rules to answer whether another trade mark or name can be used in advertising. This depends on the specific circumstances of the case and how the trade mark or name is used.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

The Croatian legal system does not contain rules that specifically regulate advertising using claims relating to geographic origin. In general, the untruthful use of claims referring to geographic origin would be considered misleading, and thus unlawful.

3.10 Are there any special rules governing product packaging?

Product packaging is not specifically regulated in Croatia. Certain segments are regulated, such as labeling and the information that has to be contained on the product packaging. However, the packaging *per se* is not regulated.

4 PRICE ADVERTISING

4.1 What are Croatia's rules regarding price advertising?

The basic Act regulating price advertising in Croatia is the Consumer Protection Act, which determines the retail selling price as the final price in Croatian currency for a unit of the product, or a given quantity of the product, including VAT. The retail selling price and the unit price must be unambiguous, easily identifiable and clearly legible. A trader who provides a service must have a price list highlighted in the premises easily accessible to the consumer. With the price of services, the trader is required to specify the type and scope of services.

Also, regarding price display, the Regulations on the highlighting of the retail selling price and the price for a unit of measure of products and services issued by the Minister of Economy may also apply.

4.2 What are Croatia's rules regarding advertising 'free' products?

The Croatian legal system does not contain rules that would specifically regulate the advertising of 'free' products.

4.3 What are Croatia's rules regarding sales and special offers?

According to applicable local provisions, 'special sales' are sales of certain products on offer for a period longer than 30 days. Products on sale must be unambiguously, visibly and legibly marked with the word 'SALE' and the duration of the offer.

'Clearance sales' include selling for purposes of:

- (a) business termination;
- (b) business termination in the current business premises;
- (c) the termination of sale of a particular product; or
- (d) performing complex construction within or on premises.

'Seasonal sales' are sales after the expiry of the season and cannot take place more than three times a year.

Sales of defective products must have unambiguous, visible and legible labeling on the product stating that they are defective.

4.4 What are Croatia's rules regarding rebates?

The Croatian legal system does not contain rules that would specifically regulate rebates.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Unfair commercial practices include misleading and aggressive commercial practices, and are prohibited.

In general, a trader is misleading if it communicates false information and is, therefore, untruthful in any way. This will include the overall presentation of an advertisement, and whether it deceives or is likely to deceive the average consumer in relation to price or the manner in which the price is calculated (even if the information is factually correct).

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

According to the Media Act advertising is not permitted for weapons and ammunition, or pyrotechnic products, none of which can be advertised, without exception. Drugs and medical procedures that are available only on prescription cannot be advertised either, though, those which are available without prescription may be advertised. Alcohol and alcoholic beverages can be advertised, unless a special law provides otherwise.

The above applies to all types of media and all forms of advertising.

The Act on the Reduction of Tobacco Product Use prohibits any advertising activity that may encourage the consumption of tobacco and tobacco products. Based on the formulation of the relevant rules, this includes direct and indirect advertising.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Article 107 of the Electronic Communications Act regulates unsolicited electronic communications. This bans the use of automated calling and communication systems without human intervention, facsimile machines or electronic mail, including SMS and MMS, for the purposes of direct marketing and sale, unless subscribers or users have given their prior consent.

The following practices are also prohibited:

- (a) sending electronic mail, including SMS and MMS, for purposes of direct marketing and sale;
- (b) misrepresenting or concealing the identity of the sender on whose behalf the communication is made;
- (c) sending electronic mail or text messages without a valid electronic address or a number to which the recipient may send a free request for the termination of any further communication; and
- (d) sending an electronic mail or text message that encourages a recipient to visit a website.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

According to the Croatian Media Act, it is forbidden to publicly display and advertise publications with a cover showing pornographic content. This includes all public places, and refers especially to newspapers and magazines when displayed for sale. The prohibition does not apply to the sale of pornographic publications in special stores. Newspapers and magazines with pornographic content must have a visible warning indicating that they contain pornography, as well as a warning that its distribution is prohibited to minors.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Advertising and sponsorship in Croatia are regulated by the Media Act and the Electronic Media Act. According to the Media Act, an 'advertisement' is 'paid-for information whose disclosure is ordered by a natural or legal person with the intention to thereby enhance the legal trade of goods, services, rights or obligations'. Sponsorship, therefore, falls under the definition of 'advertising' in Croatia. Advertisements should be clearly marked as such, separated from other program content, and should not give the impression that they are content. The identification of the advertiser is not compulsory.

On the other hand, sponsored program content should be clearly labeled with the sponsor's name, mark or other symbol. In other words, when it comes to sponsorship of program content, identification of the sponsor is compulsory at the beginning, during or at the end of the program.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Integration of advertising content and entertainment (or editorial) is regulated by the Croatian Electronic Media Act and the Croatian Radio and Television Act.

According to the Electronic Media Act, which applies to non-national and satellite channels, the duration of short television advertisements and short teleshopping advertisements, in general, must not exceed 12 minutes within each hour. There are exceptions for television channels exclusively devoted to advertising, teleshopping and self-promotion.

Advertising and teleshopping in audiovisual programming should be inserted between the programs themselves. Broadcasting of films (excluding series, serials and documentary programs), cinematographic works and news can be interrupted only once in each designated period of 30 minutes. Advertising cannot be inserted during the transmission of religious services. Programs for children lasting for less than 30 minutes should not be interrupted by advertisements. These rules do not apply to radio advertising.

There are special advertising rules that apply to the Croatian national radio and television, provided by the Croatian Radio and Television Act. The duration of advertisements in radio programming channels should not be longer than nine minutes per hour of the program. In general television programs, the advertisement duration also should not be longer than nine minutes per hour of the

program, while in the period from 6pm to 10pm the duration of advertisements should not be longer than four minutes per hour of program. The Croatian national radio and television may interrupt films by advertising messages only once during the broadcasting of the film. This applies to Croatian national channels only.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

According to the Croatian Media Act, the advertisement should be clearly marked as such, should be clearly separated from other program content and should not give the viewer, listener or reader the impression that it is programming content. Free-of-charge advertising (when the media space is provided free) must be specially marked as such. Under the Media Act, 'disguised advertising' implies any journalistic form (eg, written text, photo, painting, drawing) that is paid for by any means and is not clearly labeled as advertising. Such advertising is not permitted.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no special rules in Croatia governing the use of social media for advertising. Generally, the provisions of Croatian laws that regulate advertising also apply to advertising on social media.

The Electronic Media Act, which is in compliance with relevant European Union regulations, is the Act covering this field. This Act regulates the rights, obligations and responsibilities of legal and natural persons providing audio/audiovisual media services and electronic publications by electronic communications networks. According to the Electronic Media Act, 'advertising' is 'any form of an advertisement broadcasted in return for payment or similar remuneration or broadcasting for the purpose of self-promotion in connection with trade, business and crafts or in order to promote the purchase of goods or services, including real estate, rights and obligations in return for payments'.

The Croatian Prohibited Advertising Act should also be mentioned. This Act prohibits 'misleading advertising' defining it as 'any advertising which misleads or is likely to mislead the persons to whom it is addressed in order to influence their economic behavior'. Under the Croatian Media Act, disguised and misleading advertisements are not permitted.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

Pursuant to the relevant Croatian laws and regulations in force, an advertiser is not responsible for advertising claims made in user generated content, such as statements made by a consumer on the advertiser's Facebook page. In the context of advertising on social media, Croatian legislation does not contain any provision that would impose responsibility on the advertiser for statements made by the consumer.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

There are no key court or self-regulatory decisions in Croatia that advertisers should be aware of regarding the use of social media and user generated content. We are not aware of any court decision in relation to advertising in social media.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

Privacy rights in Croatia are regulated, in general, by the Obligations Act, the Criminal Code and the Code of the Marketing Group at Croatian Chamber of Economy.

The Obligations Act defines 'personal rights' as 'the right to live, physical and mental health, reputation, honor, dignity, name, privacy, personal and family life and freedom'. The violation of personal rights is a non-pecuniary loss and everyone who suffers this loss has the right to require the court or other competent authority to order the termination of infringing acts and elimination of their consequences, which may, for example, include the destruction of materials. In the case of violation of personal rights, the court shall decide on the amount of monetary compensation which the injured person may be awarded.

Unauthorized use of personal data is considered a crime in Croatia and is regulated by the Croatian Criminal Code. For unauthorized use of personal data, the Criminal Code provides a maximum penalty of imprisonment up to one year and/or a monetary fine.

The Croatian Criminal Code determines, regarding privacy, that advertising should not feature personal data without the relevant individual's consent. This applies to both Croatian and foreign citizens.

9.2 Are there situations when permission is not required?

In relation to privacy rights, there is one situation in which it could be considered that permission of the individual is not mandatory. As previously stated, the Criminal Code provides that in advertising messages individuals should not be recorded without their consent. However, the Code provides one exception in that respect. The exception is the recording of a group of people in the background to the main characters in the scene, and only applies if the context of the advertisement is not offensive or compromising. In the case of justified complaints from the recorded individuals, the advertiser must withdraw the advertisement.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

The Croatian legal system does not provide for any specific rules that would govern the types of materials that must be cleared before they are used in advertising.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

There is no general rule or provision that would govern this type of situation. So there is no general prohibition on this type of activity. However, based on the description provided, this type of activity may represent a trade mark infringement; more precisely, the rights owner may claim trade mark infringement, or the infringement of other rights, under the described circumstances. However, even

in that case, this type of situation does not necessarily represent an infringement, as it may easily be categorized a fair use, which is evaluated on a case by case approach.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Croatia which affect advertising (eg, Swedish gender equality law)?

Advertisements published locally should use local language, which is Croatian, and local script, which is Latin. Although this is recommendable, it is not something that is particular to the culture of our country, as the use of local language and script applies elsewhere as well.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

There are no cultural norms that would specifically apply to our country. Norms of ethics common to all civilized countries should apply, which means that advertising should respect civil and moral rules, religious beliefs and human dignity. At the same time, any kind of indecency and violence should be avoided.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Croatia?

It is advisable to seek local legal advice before starting to operate.

CYPRUS

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Cyprus?

In Cyprus advertising is regulated by both legislation and self-regulatory codes. Much of the legislation is influenced by European Union directives. There are a variety of consumer protection laws (such as the Control of Misleading and Comparative Advertising Law of 2000, the Unfair Business-to-Consumer Practices Law of 2007), as well as industry specific legislation and the Advertising Code published by the Cyprus Advertising Regulation Organization (CARO).

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

There is no fixed definition of ‘advertising’ in Cyprus law. The Control of Misleading and Comparative Advertising Law of 2000 defines an advertisement as ‘the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including the transfer of immovable property, rights and obligations’. The Radio and Television Broadcasting Stations Law of 1998 distinguishes between television advertisement, radio advertisements and political advertisements. The CARO Code defines advertising as including, but not limited to, ‘any form of advertising and communications for all sorts of products and services’. Advertising is considered by CARO in its wider context, and includes advertisements carried by the media, as well as other activities for presenting and promoting products and services, and all forms of marketing and social communications irrespective of the medium used, produced directly by or on behalf of marketers intended primarily to promote products or to influence consumer behavior.

1.3 What is the basic regulatory framework for advertising regulation?

The two main regulatory bodies are the Consumer Protection Service (CPS) and the Cyprus Radio Television Authority (CRTA) which regulates private broadcasting and media organizations in Cyprus and oversees adherence to its Broadcasting Code regarding the characteristics of advertisements. There is also CARO, an industry-founded, non-profit organization, whose Advertising Code is voluntary and has no statutory enforcement. However, a significant number of advertisers in Cyprus are members of CARO and must, therefore, abide by its Code. Moreover, the majority of Cyprus’s media and advertising agencies have already signed up with CARO and are committed to abide by its Code.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

- (a) **Prohibited commercial practices**—Annexes I and II of the Unfair Business-to-Consumer Practices Law of 2007 contain a list of prohibited commercial practices (based on the EU Unfair Commercial Practices Directive);
- (b) **Political advertisement**—the Radio and Television Broadcasting Stations Law of 1998 provides the required conditions for broadcasting political advertisements during election periods;
- (c) **Alcohol**—the Radio and Television Broadcasting Stations Law of 1998 provides the required conditions for advertising and telemarketing of alcoholic drinks;
- (d) **Children’s toys**—the Radio and Television Broadcasting Stations Law of 1998 contains a list of hours/periods during which advertisements of children’s toys are prohibited.

The above list is non-exhaustive.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There are industry specific Laws and Regulations which are briefly summarized as follows:

- (a) **Insurance practices**—the Insurance and Reinsurance Business and Other Related Issues Law of 2016 prohibits the advertising of insurance and reinsurance business, or the exercise of any professional activity from such business, before the granting of the required license;
- (b) **Smoking**—the Health Protection (Control of Smoking) Law of 2017 prohibits, subject to exceptions, the advertising and/or sponsorship of tobacco products in every form of message: written, oral, printed, radio broadcasting, cinematographic or of information society services; and
- (c) **Medicines**—the Medicinal Products for Human Use (Control of Quality, Supply and Prices) Law (70(I)/2001) prohibits, inter alia, advertisements of medicinal products which have not been granted a marketing authorisation.

Again, the above list is non-exhaustive.

1.6 Are any government pre-approvals required?

There are no government pre-approvals required for individual advertisements, but there are requirements that certain specific types of advertising must contain pre-approved warnings or disclaimers in order to be permissible. These include political advertisements, financial services advertising and product placement advertising.

1.7 Does the media pre-clear advertising?

CARO offers copy advice, not pre-clearance. Copy advice is confidential, non-binding, pre-publication advice about a specific advertising proposal. Non-binding means that the advertiser, agency or media organization requesting CARO's advice is free to disregard it. Conversely, in the event of a subsequent complaint, CARO's Complaints Committee is not bound by advice previously given by the Secretariat; however, the Complaints Committee will take into consideration any advice given and whether or not it was followed. In practice, copy advice is mostly taken into account and the advertisement amended accordingly. The main difference between copy advice and pre-clearance is the binding nature of pre-clearance.

In general, media outlets do not pre-clear advertisements. However, upon receipt of an advertisement, if they consider there is an issue with it, they alert the advertiser and/or ask CARO to advise them accordingly.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The CRTA, which was established by the Radio and Television Stations Law of 1998, is an independent body whose decisions are directly enforceable without the need for approval of any other body or the state. It is the body responsible for monitoring, inter alia, adherence to its Broadcasting Code regarding the length, content and placement of advertisements. The CRTA can, amongst other things, impose administrative sanctions against an offending broadcasting service provider for breaches of the 1998 Law and of the Broadcasting Code. Also, the CRTA can initiate court proceedings for injunctive relief seeking an order directing the offending broadcasting service provider to do or refrain from a specified act or behavior.

The CPS is empowered by the Unfair Business-to-Consumer Practices Law of 2007 and the Control of Misleading and Comparative Advertising Law of 2000 to investigate and deal with complaints

regarding issues such as unfair commercial practices (whose definition encompasses advertising) and misleading and comparative advertisements. The CPS can impose administrative sanctions for any breach of the abovementioned laws as well as initiate court proceedings for injunctive relief seeking an order directing the offending party to do or refrain from a specified act or behavior.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor can file a complaint to CRTA for breach of the Radio and Television Stations Law of 1998 regarding a broadcasting. It can also file a complaint to CARO, though CARO's powers are restricted to issuing recommendations based on the relevant Cyprus advertising legislation and on its own Advertising Code. However, following a recent Memorandum of Understanding signed between these two bodies, in cases of non-compliance with CARO's recommendations/decision, CARO may brief the CRTA accordingly, indicating any advertising points that, in its opinion, violate the CRTA Broadcasting Code and/or the Radio and Television Stations Law of 1998. Following such a briefing, the CRTA may instigate its own proceedings. Also, the CRTA may request CARO's opinion in relation to complaints it receives and then CARO may inform the CRTA about the steps it has taken to resolve the issue and/or the outcome of the investigation it has carried out in relation to the complaint in question.

A competitor is also free to use the Cypriot courts should it feels its legal rights have been breached by an advertisement. The courts offer various remedies depending on the legislation on which the claim is based.

1.10 When do consumers have a right of action? What are the potential remedies?

The Unfair Business-to-Consumer Practices Law of 2007 and the Control of Misleading and Comparative Advertising Law of 2000 allows consumers to challenge advertising and commercial practices in the Cypriot courts for injunctive relief seeking an order directing the offending party to do or refrain from a specified act or behavior.

It is, however, more common for a consumer to bring their complaint to the CPS. Although it offers no provision for damages to the consumer, it offers a free, non-risky, complaints service to consumers who can bring their complaint without the accompanying risk and cost of court proceedings. Similarly, complaints are frequently brought to the CRTA regarding broadcast advertising for the same reason— it offers a free, non-risky, complaints service.

A consumer can also file a complaint with CARO, however, being a self-regulatory body, it does not offer compensatory remedies to the complaining consumer. Recommendations to amend or withdraw the advertisement are the usual sanctions imposed by CARO.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Cyprus have a primary advertising self-regulation system?

Cyprus has an established advertising self-regulation system in place. The main body responsible for the self-regulation of advertising across all media is CARO. CARO is a voluntary, non-profit organization and a member of the European Advertising Standards Alliance. Its aim is to promote ethical standards in advertising through industry self-regulation in Cyprus according to Cyprus legislation and its own Advertising Code and guidance notes. CARO's advertising code follows the respective code of the International Chamber of Commerce.

2.2 Is there a self-regulatory advertising code? What are the key principles?

CARO has introduced its own Advertising Code which is founded on the corresponding code of the International Chamber of Commerce. The Advertising Code's main principles are that advertisements should:

- (a) be legal, decent, honest and truthful;
- (b) be prepared with a sense of responsibility to consumers and society;
- (c) respect the principle of fair competition; and
- (d) deal fairly with consumers.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

CARO's committee is convened whenever a complaint is filed relating to any advertisement that the applicant considers to be offensive, misleading or contrary to CARO's code. Within three business days, CARO invites both parties to submit their views either orally or in writing, and within 2 working days following this CARO's committee issues a decision which is placed on its website.

If CARO's committee concludes that an advertisement is not compliant with the provisions of the Code, they may request:

- (a) the withdrawal of advertising or
- (b) modifying the advertisement in order to comply with its Advertising Code. CARO is then entitled to review amended version of the advertisement before it is published to determine whether their decision has been complied with.

If there is non-compliance with the decision or if it is determined that delaying tactics are used by the advertiser, CARO informs the media where the advertisement is displayed, requesting its immediate withdrawal, and proceeds to make a special reference on its website. The majority of media have already signed up with CARO and are committed to enforcing CARO's decisions and protecting their audiences from non-ethical advertising. CARO may also proceed to inform other state agencies such as the CPS or the CRTA requesting that the decision is published designating the non-compliant entity.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Generally, the system is quite effective, taking into account the speed with which complaints are processed and dealt with. Moreover, the majority of Cyprus media and advertising agencies have already signed up with CARO and are committed not only to supporting CARO economically but also to ensuring that its decisions are complied with in order to protect the public from non-ethical advertising. As a result of the above, CARO is quite able to enforce its decisions through mainstream media as opposed to social media and the internet.

2.5 Are the self-regulatory system's decisions reported?

The decisions are publicly reported and can be accessed through CARO's website. The decisions do not disclose the details of the complainant but will disclose the details of the advertiser in breach of the Code.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

It is advisable that companies observe CARO's Advertising Code and the key principles identified above and take particular notice of the guidance notes published regarding children, alcohol and food in

general. Moreover, companies should engage with the CARO procedures and obligations, providing detailed responses to any requests. Additionally, CARO offers the service of reviewing advertisements before they are published in order to determine whether the advertisement breaches its Advertising Code. This service is offered to members for free, or is available to non-members on the payment of a fee.

2.7 Are there any other self-regulatory systems that govern advertising practices in Cyprus?

Yes, the CRTA publishes its own Regulations with a specific Broadcasting Code regarding advertisements in Cyprus television and radio stations. This Broadcasting Code amongst other things stipulates the general principles to which advertisers should adhere in forming their advertisements. To an extent these mirror CARO's Advertising Code, setting out products for which advertising is prohibited as well as the form and duration of advertisements, with a specific focus in advertisements addressed to children.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Cyprus (eg, consumer protection laws; IP laws; unfair competition laws)?

The most important piece of legislation governing advertising claims in Cyprus is the Unfair Commercial Practices Law of 2007 to 2013 which transposed the EU Unfair Commercial Practices Directive into Cyprus law. This legislation is dedicated to the protection of consumers. The Misleading and Comparative Advertising Law of 2000 to 2008 (which is in accordance with Directive 2006/114/EC) aims to protect traders involved in commercial, industrial, craft or professional activity against misleading advertising and its unfair consequences.

Advertising campaigns that are broadcast via the media (radio and television) must satisfy the requirements of the Radio and Television Broadcasters Law of 1998 and the requirements of secondary legislation (Broadcasting Code) deriving from this law.

In terms of the intellectual property laws when it comes to advertising claims, of importance are the Trade Marks Law (Cap 268) and the Trade Description Law of 1987 to 1992.

Finally, claims for unfair competition can also be initiated under the tort of passing-off which is regulated by the Civil Wrongs Law (Cap 148).

3.2 Is substantiation required for advertising claims?

The advertiser should be in a position to substantiate as a matter of fact any claim in an advertisement when this is requested by a body or authority reviewing the advertisement. Under the CARO Advertising Code, it is a requirement for advertisers to be able to substantiate any claims made in their advertisements and for this purpose, they must have in their possession such documentary evidence as to prove that a claim is true and correct. A similar requirement also exists under the Broadcasting Code for which the CRTA has competence. The same is true in case of an examination of a complaint by the CPS which is the competent authority for the implementation of the Unfair Commercial Practices Law. This law lists some commercial practices that are considered as unfair, but, in addition, in the general context of consumer protection, it gives the Consumer Protection Commission the authority to deal with misleading advertising as a commercial practice.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

The general principle both in the Broadcasting Code and in the CARO code, is that the claims in the advertisement must be substantiated and advertisements in general must not contain hyperbolic or

exaggerating allegations. There are no provisions regulating puffery specifically but there is case law which shows that in a civil action before a court of law for misrepresentation, it might be possible to argue that a statement was obviously untrue so that it was not intended to be believed; but each case will ultimately depend on its own facts.

3.4 What are the rules governing the use of disclosures in advertising?

There are no general rules governing the use of disclosures, and it is difficult to provide an exhaustive list of disclosure requirements. The disclosures required will ultimately depend on the product being advertised. Therefore, only indicative examples are provided in this paragraph, namely:

- (a) Loan advertisements have specific disclosure requirements, and when it comes to housing loans there are even more specific requirements.
- (b) Alcohol and gambling are other products for which specific disclosure requirements apply.
- (c) The Advertisement Code of the CRTA also includes some disclosure requirements. For example, in an advertisement for a weight loss method, it is a requirement to disclose that its effectiveness is subject to diet and/or exercise where applicable.

Finally, it is worth mentioning that the information being disclosed must be presented in a specific way, depending on the type of advertisement. Legibility of letters and duration for which the disclosed information must be available are some of the issues under concern.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

CARO's Advertising Code explicitly regulates the use of testimonials in advertisements. Testimonials are allowed, provided that they are genuine and are based on the actual personal experience of the person making the statement. Further, testimonials or confirmations that, as a matter of fact, have become obsolete, are inaccurate or misleading must not be used in the advertisement. Also, under the Unfair Commercial Practices Law, it is considered as unfair commercial practice for a trader to claim that a product has been authorized, approved or endorsed by a public or private body, when this is not the case.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no separate provisions regulating product demonstrations. Such demonstrations will be regulated by general advertising provisions. In this respect, it is advisable that exaggerations are avoided and that representations in respect of the product are true and accurate. Finally, if such demonstrations are presented in lengthy television advertisements, the Broadcasting Code provisions on lengthy advertisements might apply and which provide, inter alia, for specific times within the day during which such advertisements can be broadcast.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted provided that it is made in accordance with the provisions of the Unfair Commercial Practices Law and the Misleading and Comparative Advertising Law. The CARO and Broadcasting Codes also include provisions that regulate comparative advertising. In general, comparative advertising statements must not be misleading, nor defamatory for the products or services of a competitor. In addition, an advertisement must not create confusion between the products, trademarks, trade names and other distinguish marks of the advertiser and a competitor. Products or services being compared must meet the same needs or be intended for the same purpose. A comparative advertisement must objectively compare one or more characteristics which are material, relevant, verifiable and representative of the said products or services, and price can also be

one of these characteristics. Finally, for products with designation of origin, the advertisement must relate to products with the same designation.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

Comparative advertising shall, as far as the comparison is concerned, be permitted when:

- (a) it does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor;
- (b) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
- (c) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;
- (d) it does not create confusion among traders, 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.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

The Unfair Commercial Practices Law includes a general provision that a commercial practice is considered misleading if it contains inaccurate information and as such is untrue, or when, in any manner, including the overall presentation of the practice it deceives or it may deceive the average consumer with regards to one or more characteristics mentioned in the Law. Among those characteristics is the geographic origin of the product.

More specific provisions relating to claims for geographic origin are those which are covered by the schemes for the ‘Protected Designation of Origin’, in accordance with EU Regulation 1151/2012, the provisions of which apply in Cyprus as well. In order for a product to use the protected designation of origin scheme, it must comply with certain specifications relating to such designation.

3.10 Are there any special rules governing product packaging?

The rules governing product packaging are those set contained in Directive 94/62/EC which has been transposed into domestic law by the Packaging and Packaging Waste Law of 2002. In general, this law sets general rules for packaging, such as:

- (a) the concentration of heavy metals in the packaging;
- (b) the need to recover certain amounts of packaging from the market for recycling purposes; and
- (c) the labelling on the packaging.

More detailed provisions can be found in other pieces of legislation and which regulated more specific issues such as food packaging.

4 PRICE ADVERTISING

4.1 What are Cyprus’s rules regarding price advertising?

Section 5 of the Unfair Business-to-Consumer Practices Law of 2007 states that a commercial practice will be deemed misleading if incorrect information is provided to consumers concerning the ‘price of

the product, the manner in which that price is calculated or the existence or nature of a specific price advantage’.

Also, section 3 of the Control of Misleading and Comparative Advertising Law of 2000 states that in determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided.

Section 6 of the Law on the Display of the Sale Price states that any advertisement which mentions the selling price of products shall also indicate the unit price. The CPS has published guidelines on price advertising to assist retailers with this.

The CPS can investigate complaints on price advertising on the basis that the advertisement was misleading. Its case reports constantly contain details of complaints regarding pricing.

4.2 What are Cyprus’s rules regarding advertising ‘free’ products?

The Unfair Business-to-Consumer Practices Law of 2007 includes in its list of prohibited commercial practices the description of a product as ‘free’, ‘without charge’ or similar 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 item. The CARO Code permits the use of the term ‘free’ only in certain circumstances, for example where the offer involves no additional payment or obligation, or where the only consumer obligation is to pay handling and delivery charges which should not exceed the cost estimated to be incurred by the marketer etc.

4.3 What are Cyprus’s rules regarding sales and special offers?

Section 5 of the Control of Misleading and Comparative Advertising Law of 2000 provides that any comparison referring to a special offer must indicate in a clear way, unreceptive of misconceptions, the date on which the offer ends or, where appropriate, that the special offer is subject to availability of goods and services, and, where the special offer has not yet started, the date of the period during which the special price or other special terms apply.

Under section 6(1) of the Unfair Business-to-Consumer Practices Law of 2007, a commercial practice will be deemed misleading if it omits material information that the average consumer needs, according to the context, in order to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. In the case of an invitation to purchase, ‘material information’ includes the price, inclusive of taxes, or, where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be required.

There is a general freedom on the seller to set the duration of the promotion—provided that this is reasonable—in order to avoid misleading consumers that the promotion is valid indefinitely. In practice, a long-lasting promotional offer may render the product’s promotional/discounted price to be considered as its selling price.

Additionally, section 9(c) of The Electronic Commerce Law of 2004 states that:

- (a) offers such as sales, special prizes and gifts must be clearly identifiable,
- (b) the access to the terms under which one can benefit from the offers must be easy, and
- (c) the terms must be presented clearly and precisely.

4.4 What are Cyprus’s rules regarding rebates?

There are no specific rules regarding rebates in the Unfair Business-to-Consumer Practices Law of 2007 or the Control of Misleading and Comparative Advertising Law of 2000. However, certain industries whose advertising practices are specifically regulated provide for rebates to consumers. For example, Regulation (EC) 261/2004 provides for a right to reimbursement of tickets issued by air carriers.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

There are no key restrictions. Any retailer would be advised to consider the guidelines published by the CPS to avoid any issues arising.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

The CRTA’s Broadcasting Code and Regulations specifically prohibit the advertising of the following products amongst others:

- (a) any form of tobacco products;
- (b) prescription drugs and medical treatments;
- (c) betting predictions;
- (d) betting and betting agencies with the exception of the national lottery and OPAP—Greek Organisation of Football Prognostics SA bets;
- (e) firearms, weapons and shooting organizations;
- (f) pornography;
- (g) the granting of loans other than from banks and other financial institutions;
- (h) wedding agencies;
- (i) businesses in relation to death or funeral agencies;
- (j) services of fortune tellers and similar services;
- (k) non-licensed private employment seeking agencies; and
- (l) hypnotism, hypnotherapy and spiritual services.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Annexes I and II of the Unfair Business-to-Consumer Practices Law of 2007 refer to and contain a list of prohibited commercial practices. Moreover, the Unfair Business-to-Consumer Practices Law of 2007 includes in its list of prohibited commercial practices the description of a product as ‘free’, ‘without charge’ or similar 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 item.

CARO’s Advertising Code contains similar provisions to this effect which detail prohibited advertising practices and, in particular, provide that any reference to the word ‘guarantee’ in advertisements is prohibited where consumers are not afforded rights beyond those already provided by the law.

Advertisements can contain the word ‘guarantee’ as long as the services, terms, and the process for obtaining the benefit of the guarantee are clearly visible in the content of the advertisement and are readily available in writing to the buyer at the point of purchase.

The CRTA Broadcasting Code also contains a list of prohibited advertising practices such as subliminal and surreptitious advertising. Additionally, advertisements should not attempt to exploit sentiments of fears and superstitions.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

There are no specific laws for advertising relating to indecency or obscenity. CARO’s Advertising Code contains a specific section on decency which states that ‘Advertisements should not contain statements or visual/audio representations that offend the morals and the prevailing perceptions of decency’. Similarly, the CRTA’s Advertising Code for advertisements contains provisions regarding decency and propriety and specifically prohibit the advertisement of any pornographic content.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

CARO’s Advertising Code specifically states that the advertiser’s identity must be clearly visible and where possible, advertisements must include the advertiser’s contact information so that consumers can readily contact the advertiser. However, this section does not apply to advertisements whose sole purpose is to attract interest in future teaser communications.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

The CRTA’s Broadcasting Code and Regulations provide special rules for the integration of advertising content and entertainment. Specifically, it is provided that the duration of television advertisements must not exceed 12 minutes each hour. Moreover, for certain categories of products and services other rules apply in their integration with other content. Advertising of alcohol is prohibited during broadcasting breaks either before, during or after children’s programs or programs with religious content. Additionally, advertising in relation to games of chance is prohibited either before or after children’s programs or programs addressed to individuals under the age of 18. Similarly, advertisements of a movie which has been rated as over 15 or 18 cannot be advertised in children’s programs.

Additionally, it is also stipulated that intermissions of programs for the purpose of advertising must not exceed 3.5 minutes. In relation to advertisements which exceed the display time of 1 minute, it is vital to ensure that there is no risk of confusion between the content of the advert and that of the program, and therefore announcements of advertisement must be displayed both before and after the advertisement.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

CRTA’s Broadcasting Code and Regulations and for advertisements provides for detailed and specific rules relating to the identity of the sponsor of an audio-visual broadcasting. Specifically, sponsorship of programs is permitted and it is specified that sponsored programs broadcasted must identify the name of the sponsor and/or the sponsor’s trade mark both at the beginning and at the end of the

specific program. The relevant regulations also provide for the duration of the announcement of the sponsor and also state which types of programs are not allowed to be sponsored.

Further, programs containing product placement must be adequately designated both before and after the end of the broadcasting and then display in the end credits of the broadcasting the details of the companies who have paid for product placement in the respective programming. Additionally, sponsorships of religious programs, political news broadcasts and news broadcasts in general is strictly prohibited.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Advertising via social media is currently treated in the same way as other kinds of advertising. Therefore, there are no specific legal controls that address advertising and marketing via social media. In Cyprus, the dominant advertising legislation are the Control of Misleading and Comparative Advertising Law (92(I)/2000) and the Unfair Business-to-Consumer Practices Law (103(I)/2007).

It is worth mentioning that the Competition and Consumer Protection Service (CPS) is the competent authority responsible for the enforcement of the law on misleading and comparative advertising as well as the law on unfair commercial practices. The role of the CPS is to monitor the market in order to ensure that clear and adequate information is provided to consumers, protecting consumer's economic interests and improving consumers' education, information and awareness of their rights.

Consumers who are misled through social media marketing campaigns or find a particular online advertisement offensive have the right to file a complaint to the CPS or, alternatively, to CARO where the complainant considers that CARO's Advertising Code has been breached.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

There is nothing in Cyprus's laws and regulations which imposes liability on an advertiser for advertising claims or statements created by users in its social media pages or any other service the advertiser may use which allows for consumer input. However, if a complaint is made to any authority or the courts regarding user generated content, it is likely that the approach described in question 8.3 will be followed regarding the degree of control over the medium used for the advertisement and the actions taken by the advertiser to remedy the situation once it became aware of the infringing content. Moreover, in cases where the advertiser has incorporated the content in its overall marketing strategy it will also be examined whether the advertiser solicited the comments prior to them being used.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

The laws surrounding social media, advertising on social media and user generated content have not been actively tested by the Cypriot courts. However, the law of defamation as set out in sections 17–19 of the Civil Wrongs Act (Cap 148) may prove to be useful. In the recent first-instance judgment *Christos Clerides a.o v Arktinos Publishings Ltd 5208/2010*, dated 31/01/2017, the Court endorsed the approach of the English courts and of the European Court of Human Rights in the case *Delfi AS v Estonia (2015) ECtHR 64669/09* in general regarding user generated content posted on websites. Essentially the court, in assessing the responsibility of the host, will examine the degree of control over the user generated content, the actions taken once it became aware that infringing user generated content had been made, the ability of the host to remove the infringing content as well as the nature of the content complained of.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

CARO’s Advertising Code prohibits the use of an individual’s name or picture in advertisements unless their permission has been sought and obtained in advance. However, this issue has to be assessed within the general context of the EU General Data Protection Regulation, the provisions of which are applicable in Cyprus. In this context, the consent of the individual must be obtained in relation to any of such uses and such consent must be clear and unequivocal. In addition, it must be valid at the time of the broadcasting of the advertisement (ie not have been withheld) and the content of the advertisement must be within the boundaries of the consent.

9.2 Are there situations when permission is not required?

Under the Broadcasting Code, where this is justified in terms of public interest, scenes which make use of an individual’s image etc can be broadcast without his or her permission. However, in the context of advertising, such permission must always be obtained.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

The Antiquities Law (Cap 31) prohibits commercial exploitation or other use of pictures, cinematographic or other visual material however produced which depicts antiquities, archaeological places or ancient monuments without the written permission of the Director of Antiquities. It follows that the written permission of the Director should be obtained for the use of such type of material in an advertisement.

Further, even though a clearance in advance is not required, the Broadcasting Code states that for advertisements related to educational services or medicinal products, the CRTA has the right to ask the opinion of the responsible Ministries (ie the Ministry of Education and Ministry of Health respectively) on the content of the advertisement. However, the Broadcasting Code makes it clear that the CRTA is not obliged to opine on the content of an advertisement in advance of its broadcasting.

10.2 Is it permissible to use other companies’ recognisable products in advertising (eg, an actor wearing branded training shoes)?

Use of other companies’ recognisable products is allowed, but in such cases the intellectual property rights of the other company, especially trade mark rights as safeguarded by the Trade Marks Law (Cap 268), must be respected.

As already pointed out in question 3.8 above, use of another company’s product can be made in comparative advertisement provided that the advertisement is in accordance with the requirements of the applicable legislation.

Further, under the Trade Marks Law, it is prohibited to use the trade mark of another party without consent. However, the Law allows the use of someone’s trade mark to indicate the purpose of goods or services, for example as spare parts or accessories of another branded product. Such use of a third party’s trade mark must be made with honesty and be necessary in order to indicate the intended use of someone’s own product.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Cyprus which affect advertising (eg Swedish gender equality law)?

The Cypriot Penal Code (Cap 154) prohibits any advertisements offering a reward for the return of stolen property which may imply that no question will be asked as to how the stolen property came into the possession of such person or that the person will have no consequences whatsoever.

Further, any statement made by anybody which can be taken as an insult to any religion is prohibited. Consequently, such statements must be avoided whether in an advertisement or otherwise.

Finally, the Penal Code has been recently amended so as to make it an offence to advertise means which can artificially terminate a pregnancy.

Another point to be mentioned is that the National Betting Authority has issued guidance on the advertisement of betting activity. According to the Authority, all advertisements must contain messages for responsible gaming and such messages must be reviewed and approved by the Authority.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Gender equality is of particular concern to the Cypriot society and any advertising campaigns that discriminate against women or show disrespect by promoting women as objects for the promotion of goods or services will not be appreciated by the Cypriot audience.

Another point to be mentioned is that the Church has a strong presence and influence on a large portion of Cypriot society and with a role to play in terms of the educational affairs of Cyprus. Further, as discussed at question 11.1 above, the insult of any religion is a criminal offence.

Finally, Cypriot society approaches with great respect issues of the LGBT community, and, in that respect, the Cypriot Parliament, with a significant majority, approved the Civil Partnership Law which allows same-sex couples to enter into a legal agreement known as civil partnership which confers similar rights as those conferred in a marriage.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Cyprus?

It is advisable for advertisers to obtain domestic legal advice as Cyprus lacks a uniform legal framework regarding advertising. Advertisers should also endeavor to abide by CARO's Advertising Code, the CRTA's Broadcasting Code and consumer laws. While there is currently no specific legislation relating to social media, consumer protection laws are applicable and therefore advertisers should refrain from engaging in any kind of advertising practices contrary to Cyprus legislation.

DENMARK

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Denmark?

Advertising is regulated by the following:

- (a) the Danish Marketing Practices Act (*Lovbekendtgørelse 2017-05-03 nr. 426 om markedsføring*);
- (b) the guidelines and practice of the Danish Consumer Ombudsman (see www.consumerombudsman.dk);
- (c) the Danish Consumer Protection Act (*Lov 2013-12-17 nr. 1457 om forbrugeraftaler*);
- (d) the Act on Radio and Television Transmissions (*Lovbekendtgørelse 2014-03-20 nr. 255 om radio- og fjernsynsvirksomhed 2014*);
- (e) the Danish Act on advertising Tobacco (*Lovbekendtgørelse 2008-10-21 nr. 1021 om forbud mod tobaksreklame m.v.*); and
- (f) the Executive Order on advertising for medicines (*Bekendtgørelse 2014-10-22 nr. 1153 om reklame mv. for lægemidler*); and
- (g) the Executive Order on commercials, sponsoring etc of programs in radio, television and on demand-audiovisual media services (*Bekendtgørelse om reklamer og sponsorering m.v. af programmer i radio, fjernsyn og on demand-audiovisuelle medietjenester samt indgåelse af partnerskaber nr. 801 af 21/06/2013*).

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

All communications used for marketing purposes will be considered to be ‘advertising’. This applies regardless of the form of media used, whether it appears on television or on radio, in magazines, films, on the internet, or in any other place where businesses may want to promote their products. It also applies regardless of the nature of the product/service promoted and whether the commercial communication is targeted to consumers or businesses.

1.3 What is the basic regulatory framework for advertising regulation?

The basic regulatory framework is provided by the Danish Marketing Practices Act and guidance papers from the Danish Consumer Ombudsman, in addition to the Executive Order on commercials, sponsoring etc of programs in radio, television and on demand audio-visual media services.

The Danish Consumer Ombudsman is an independent public authority that supervises compliance with Danish marketing law and is responsible for regularly issuing guidance concerning specific/general marketing issues. This is done in close collaboration with industry and consumer organizations.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The Danish Consumer Ombudsman is responsible for issuing guidelines and guidance papers that give an interpretation of the rules applicable in various economic sectors and within different areas of marketing, eg the Danish Consumer Ombudsman’s guidelines for price information in marketing, guidelines for social media marketing, guidelines for ‘spam’ (unsolicited commercial communications to targeted recipients) and guidelines for hidden advertisement. Many of the guidelines and the guidance papers give a good and specific interpretation of many of the sections of the Danish

Marketing Practices Act, which is the single most important piece of legislation in relation to how professionals shall act in relation to advertising addressed to consumers.

Furthermore, the Danish Marketing Practices Act specifically regulates the following (a non-exhaustive list):

- (a) unsolicited communication with consumers (section 10);
- (b) marketing directed at children and young people (section 11); and
- (c) commercial practices which are always considered misleading or aggressive (appendix 1 of section 9).

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

- (a) **TV and Radio:** The Danish Radio and Television Board is an independent regulatory authority in charge of supervising the Danish broadcasting legislation. The Act on Radio and Television Transmissions contains special provisions for advertising and sponsorship on radio and television.
- (b) **Food:** According to section 14 of the Danish Act on Foodstuffs (*Lovbekendtgørelse 2014-05-15 nr. 467 om fødevarer*), food may not be sold with trade names, images, claims, advertising, or anything that does not match the food content or that is misleading to the public/consumer.
- (c) **Medicines:** Part VII of The Danish Medicines Act (*Lovbekendtgørelse 2018-01-16 nr. 99 om lægemidler*) contains special provisions regarding the marketing of medicine.
- (d) **Tobacco:** Section 3 of the Danish Act on Advertising of Tobacco (*Lovbekendtgørelse 2008-10-21 nr. 1021 om forbud mod tobaksreklame m.v.*) generally prohibits marketing in relation to all sorts of advertising for tobacco, although some exceptions apply in relation to professionals.
- (e) **Gambling:** Section 36 of the Danish Act on Gambling (*Lov 2010-07-01 nr. 848 om spil*) lays down very specific requirements in relation to the marketing of games connected to gambling, eg any marketing directed against children and young people is illegal.
- (f) **Alcohol:** Section 12 of the Executive order on commercials, sponsoring etc of programs in radio, television and on demand audio visual media services lays down specific requirements in relation to the advertising of alcohol.

1.6 Are any government pre-approvals required?

There is no requirement under the Danish Marketing Practices Act for advertisers to obtain a license, or to have a marketing campaign pre-approved.

Special rules apply to the advertising of medicine under Part 7 of the Danish Medicines Act. A medicinal product may only be marketed or dispensed in Denmark when a marketing authorization has been granted either by the Danish Medicines Agency (pursuant to the Danish Medicines Act) or by the European Commission (pursuant to the provisions of Community law laying down Community procedures for authorization and 'pharmacovigilance' of medicinal products for human and veterinary use).

Foreign companies running sweepstakes in Denmark, where the outcome is partially or fully dependent on chance, must register with the Danish Tax Administration so that they may pay the appropriate tax.

1.7 Does the media pre-clear advertising?

Advertisement run on the state-owned partial-commercial TV station, TV2, are screened by TV2's own legal department.

According to section 30 of the Danish Marketing Practices Act, traders can obtain an advance indication from the Danish Consumer Ombudsman regarding the legality of contemplated marketing arrangements.

The Danish Consumer Ombudsman will give a statement regarding his/her view of the lawfulness of contemplated marketing arrangements, unless an opinion would be subject to unusual doubt, or other special circumstances exist (such as a request for an opinion on an entire business concept). An advance indication does not amount to an actual opinion of the lawfulness of the arrangement concerned. The Danish Consumer Ombudsman can decide that:

- (a) a submitted marketing arrangement does not conflict with the Danish Marketing Practices Act and/or other relevant legislation;
- (b) a submitted marketing arrangement is clearly in conflict with the law; or
- (c) the legality of the marketing arrangement is questionable.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Violations of some of the provisions of the Danish Marketing Practices are punishable by fines, although a more severe penalty may be imposed for the same act under other legislation. For example, violations of section 5 on misleading information, as well as section 6 on covert advertising, and section 3 (2) concerning marketing targeted to children and young people, are punishable by fines.

Injunctions may be imposed if it is considered necessary to ensure compliance with a prohibition. Agreements deemed to be entered into which conflict with a prohibition are invalid, and restitution of the state of affairs existing before the unlawful action can be granted, including the destruction or recall of products and the issue of information or correction of statements. The Danish Consumer Ombudsman may also issue an injunction if an action is clearly in conflict with the Danish Marketing Practices Act and cannot be negotiated.

The Danish Consumer Ombudsman can, in some cases (eg where a normal court case would take too long and the purpose for filing the case would be at risk) impose an interim injunction. He/she can also, in some cases, issue an administrative fine. Furthermore, the Danish Consumer Ombudsman can impose liability to pay damages and remuneration under the general rules of Danish law.

Non-observance of a prohibition or injunction imposed by the court or an injunction imposed by the Danish Consumer Ombudsman is liable to a fine or imprisonment.

1.9 When does a competitor have a right of action? What are the potential remedies?

Competitors, both those who are resident and those non-resident in Denmark, have access to lodge complaints with the Danish Consumer Ombudsman if they come across misleading marketing activities emanating from Denmark or receive unsolicited commercial communication. Lodging a

complaint with the Danish Consumer Ombudsman does not require legal interest in a case or standing according the Danish Civil Code.

The Danish Consumer Ombudsman is, however, not obliged to, nor able to, look into all complaints which have been lodged with him/her for evaluation. When deciding which consumer protection issues to look into, the Danish Consumer Ombudsman seeks out issues which can be solved to benefit the collective interests of consumers.

The complainant is not required to lodge a complaint with the Danish Consumer Ombudsman before he/she is able to initiate legal proceedings in the Danish Courts. However, in order to bring a civil action before the Danish Courts, legal standing is required. This means that the plaintiff has to prove that the action (or the non-performance) taken by a company affects or may reasonably affect the plaintiffs legal interest. Consumer organizations and trader organizations have standing to sue on behalf of their members.

At the normal Danish courts, competitors can demand that the counterparty is ordered to:

- (a) take certain actions or abstain from taking certain actions;
- (b) pay damages and/or remuneration under the general rules of Danish law; or even
- (c) pay a fine to the state.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers, both those who are resident and those non-resident in Denmark, have access to lodge complaints with the Danish Consumer Ombudsman if they come across misleading marketing activities emanating from Denmark or receive unsolicited commercial communication. Lodging a complaint with the Danish Consumer Ombudsman does not require legal standing.

The Danish Consumer Ombudsman is, however, not able to look into all complaints which have been lodged with him/her for evaluation. When deciding which consumer protection issues to look into, the Danish Consumer Ombudsman seeks out issues whose solution will benefit the collective interests of consumers.

The consumer is not required to lodge a complaint with the Danish Consumer Ombudsman before he/she is able to initiate legal proceedings in the Danish Courts. However, in order to bring a civil action before the Danish Courts, legal standing is required.

At the normal Danish courts, consumers can demand the court to order the counterparty to:

- (a) pay damages and/or remuneration under the general rules of Danish law; as well as
- (b) issue an injunction.

The Consumer Ombudsman may initiate a class-action on behalf of certain consumer groups.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Denmark have a primary advertising self-regulation system?

There is no single primary advertising self-regulation system in Denmark.

- (a) **Medicine:** In relation to medicine, the supervisory activities of the Danish Medicines Agency in the advertising area are supplemented by self-regulatory bodies in the industry, which

monitor the lawfulness of the companies' advertising activities in parallel with the Danish Medicines Agency. There are five self-regulatory bodies:

- (i) the Ethical Board for the Pharmaceutical Industry (*Etisk Nævn for Lægemiddelindustrien* (ENLI));
 - (ii) the Marketing Board of VINordic (*VINordics Markedsføringsnævn*);
 - (iii) the Danish Board of Pharmacies (*Apotekernenævnet*);
 - (iv) the Danish Medical Association Ethical Council (*Lægeetisk Nævn*); and
 - (v) the Ethical Board of the Danish Association of Suppliers to the Health Industry (*Helsebranchens Leverandørforenings Etiske Nævn*).
- (b) **TV and radio:** The Radio and Television Board, (RTB), is the independent regulatory authority in charge of supervising the implementation of the Danish broadcasting legislation. The RTB has the following tasks:
- (i) to issue licenses to private national and local broadcasters;
 - (ii) to monitor whether private and public broadcasters are fulfilling their legal obligations; and
 - (iii) to administer grants for non-commercial local radio and television.
- (c) **Alcohol:** The Danish Board of Advertising of Alcohol is an independent authority which decides whether advertisers and businesses comply with its guidelines. Furthermore, the board's task is to hear and determine complaints relating to the marketing of alcoholic beverages in Denmark. Both consumers and businesses can make complaints about the advertising campaigns of other businesses.

2.2 Is there a self-regulatory advertising code? What are the key principles?

There is no self-regulatory advertising code as such.

The Danish Board on Advertisement of Alcohol has its own guidelines, but the Board also makes its decisions with regard to the Danish Marketing Practices Act.

The Danish Consumer Ombudsman and/or the Danish courts can, in their interpretation of Danish law, or in the evaluation of a specific problem, look into the standards that exist within the different trades.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

As there is no primary advertising self-regulation system and no self-regulatory advertising code in general, there is neither any enforcement or dispute resolution mechanism that deals with advertising. However:

- (a) **TV and radio:** The Radio and Television Board has the power to decide on, for example, the identification, location and extent of advertising, and on matters of sponsorship and product placement.
- (b) **Medicine:** In relation to medicine and the decisions of the self-regulatory bodies, a decision made by one of the self-regulatory bodies cannot, as such, be referred to the Danish Medicines Agency. However, a dissatisfied party is not prevented from bringing a case before the Danish Medicines Agency even though it has already been before one of the self-

regulatory bodies. In this case, the decision passed by the self-regulatory body will be taken into consideration when the Danish Medicines Agency assesses the case.

- (c) **Alcohol:** The legal remedy of the Danish Board on Advertisement of Alcohol is to pronounce criticism in relation to the marketing/advertising which the Board finds has violated the Board's guidelines and/or the Danish Marketing Practices Act. In particular, in the case of serious and repeated cases/violations, the criticism will be published in a press-release. All decisions are published on the Board's website. The Board expects that its decisions will be followed by immediate action by the trader/advertiser. If, however, the trader does not follow the instructions/criticism of the Board, the Board will request the Danish Consumer Ombudsman to take legal action.

Decisions by any executive authority can always be appealed to the Danish courts unless the parties have agreed not to do so.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Decisions issued by self-regulatory bodies are normally respected by opposing parties, and followed by the Danish courts, since the self-regulatory systems/boards are highly specialized.

2.5 Are the self-regulatory system's decisions reported?

The decisions of the Radio and Television Board can be found on its website. Furthermore, the decisions of the Danish Board on Advertising of Alcohol can be found on its website. The Decisions of the Danish Medicines Agency are not available on its website, but people with knowledge of a specific case can apply for right of access to the documents. Some of the decisions of the other self-regulatory bodies are made available to the public on their respective web-sites.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

The role of hidden advertisement and use of influencers in marketing is a hot topic. Furthermore, the fines on performing spam are very severe and thus the distribution of even a small number of spam e-mails may be heavily fined.

2.7 Are there any other self-regulatory systems that govern advertising practices in Denmark?

Not applicable.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Denmark (eg, consumer protection laws; IP laws; unfair competition laws)?

The Marketing Practices Act is the single most important piece of legislation to be observed by Danish businesses and trade when planning the content of their marketing activities.

Furthermore, the guidelines and practice of the Danish Consumer Ombudsman; the Danish Consumer Protection Act; the Act on Radio and Television Transmissions; the Danish Act on advertising of Tobacco; the Executive Order on advertising for medicines; and the Executive Order on commercials, sponsoring etc of programs in radio, television and on demand audio-visual media services should be considered as basic and important laws in relation to advertising.

3.2 Is substantiation required for advertising claims?

Under section 5 of the Danish Marketing Practices Act, factual statements must be capable of being substantiated by documentation. The trader must ensure that such documentation is available before statements are used in any marketing material.

Factual statements must be distinguished from mere 'claims'. A claim is a statement that is so subjective and greatly exaggerated that the recipient/consumer knows that the statement should not be taken at face value or attached with any importance, or that it is so vague and unverifiable that it makes no sense to require any documentation. Claims, such as 'indestructible pants', 'everlasting carpets' or 'the best buns in town' do not need to be substantiated by documentation. In contrast, 'double wear-resistant paintwork' is a factual statement that must be capable of being substantiated by documentation.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

A statement may be so general in its presentation, or so clearly a result of a personal opinion, that it is obvious to the ordinary consumer that it is not a claim (puffery). In such a situation, the statement will be legal even if it cannot be substantiated.

3.4 What are the rules governing the use of disclosures in advertising?

Under section 5 of the Danish Marketing Practices Act, traders may not use misleading or undue indications or omit material information if this is designed to significantly distort the consumers' or other traders' economic behavior at the time of making a purchase decision.

Any disclosures must be correct, clearly formulated and relevant. Misunderstandings or misinterpretations should not arise from the use of disclosures, and the advertisement/disclosure should not contain any unnecessary information. Where restrictions and exceptions may apply, they should appear prominently.

Any information must be easily accessible, ie the consumer should be able to easily understand the applicable terms before any purchase. The duty to ensure availability means, as a basis, 'at the same time and in the same medium in which the marketing activity takes place'. More specific requirements as to availability may apply, depending on the nature of the product, the promotion and the medium used for advertising.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

The subject is covered by sections 3 and 5 of the Danish Marketing Practices Act. According to section 3, traders must exercise good marketing practice in relation to consumers, other traders and public interests. According to section 5, traders must not use misleading or undue indications or omit material information if this is designed to significantly distort consumers' or other traders' economic behavior in the market.

It is, therefore, permissible to use third-party testimonials/opinions that recommend a particular product. However, the testimonial/opinion of a third party can only be used if it is verifiable, accurate, relevant, non-misleading, satisfactory and not outdated.

Furthermore special requirements may apply in relation to marketing of alcohol, medicine and foodstuffs. This, however, has to be evaluated in each specific case and in relation to the regulation of these products.

According to article 22 of the Executive order on commercials, sponsoring etc of programs in radio, television and on-demand audio-visual media services, children under the age of 14 may not endorse products or services of any kind.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no special rules for advertising, depicting or demonstrating product performance. According to section 3 of the Danish Marketing Practices Act, traders must exercise good marketing practice with reference to consumers, other traders and public interests. According to section 5 of the Danish Marketing Practices Act, traders must not use misleading or undue indications or omit material information if this is designed to significantly distort consumers' or other traders' economic behavior in the market.

The marketing must not be designed to unfairly exploit consumers' concern for the environment or any lack of knowledge on their part about the environment or ethical matters.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

According to section 21 of the Danish Marketing Practices Act, 'comparative advertising' means 'any advertising which explicitly or by implication directly or indirectly identifies a competitor or a product or service offered by a competitor'.

Comparative advertising is permitted under certain circumstances eg if the advertising material:

- (a) is not misleading;
- (b) concerns products meeting the same needs or intended for the same purpose;
- (c) objectively compares one or more specific, relevant, verifiable and representative features of these products, which may include price;
- (d) does not create confusion in the market between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks or products and those of a competitor;
- (e) does not discredit or denigrate the trade marks, trade names, other distinguishing marks, products, activities or circumstances of a competitor;
- (f) (for products with designation of origin) relates in each case to products with the same designation;
- (g) does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products; and
- (h) does not represent products as imitations or replicas of products bearing a protected trade mark or trade name.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

The Danish Act on Trademarks and the Danish Copyright Act will apply in most cases where another person's/company's trademark or copyright protected material is used. Therefore, traders must be very careful if they choose to show/use the characteristics of trademarks/copyright material in advertising without the permission of the copyright holder or the trademark owner. Use of a competitor's trademark or company name may be used in comparative advertisement if it is fair and relevant and does not create an indication of a connection between the parties. As a general rule the

consent of the trademark/copyright owner must be obtained before any use in commercial advertising.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

In principle, products may be freely labelled with information as to geographic origin. However, under the Danish Marketing Practices Act sections 5 (B2C) and 20 (B2B), a trader's commercial practice must not contain false information or in any other way be likely to deceive the average consumer or other traders. It should be mentioned that the principle of this provision is contained in other laws, and, in spite of a difference in wording, the content is the same in those provisions.

In addition, for some product groups rules may exist that requires the company responsible for the marketing of the product to provide information regarding the geographical origin of a product, or the obligation not to use a particular geographical indication (see below).

If a product is protected under Regulation (EC) No 510/2006 of 20 March 2006 as a designation of origin or a geographical indication (agricultural products or foodstuff), it is also protected under the Danish Marketing Practices Act section 21(6), which implies that the Geographical Indication may not be used by others.

Furthermore, under Regulation (EU) No 1169/2011 of 25 October 2011, articles 9(1)(i) and 26(5)(a)–(f), the following products must contain mandatory information of country of origin on the packaging:

- (a) beef, fresh meat from pigs, sheep, goats or poultry;
- (b) most product groups in fruit and vegetables;
- (c) extra virgin and virgin olive oils;
- (d) fresh fish and honey;
- (e) wine; and
- (f) eggs.

3.10 Are there any special rules governing product packaging?

The Danish Marketing Practices Act sections 5, 20 and 21(6) apply in the same way as mentioned above in question 3.9.

Furthermore, there is more restrictive legislation when it comes to medicine and tobacco:

(a) **Medicine:** the Executive Order for labeling, etc of drugs (*Bekendtgørelse 2011-07-21 nr. 869 om mærkning m.m. af lægemidler*) contains the following provisions:

- (i) Section 6: The label and package leaflet of a medicinal product must not contain elements of advertising character.
- (ii) Section 7: Labeling and package leaflet must not be misleading and must not be suitable to provoke confusion with other medicinal products or strengths.
- (iii) Section 8: The packaging of a medicinal product must not cause confusion with foodstuffs or cosmetics.

Tobacco: the Danish Act on Tobacco Products (*Lov 2016-06-07 nr. 608 om tobaksvarer*), Section 20, states: 'Anyone who markets a tobacco product in this country must ensure that each package and any outer packaging does not contain any features that:

- (i) promotes a tobacco product or calls for its use by giving an erroneous impression of the characteristics, effects, risks or emissions of the product,
- (ii) gives the impression that a particular tobacco product is less harmful than others or is intended to reduce the effect of certain harmful ingredients in the smoke,
- (iii) gives the impression that a particular tobacco product has vitalizing, energetic, healing, rejuvenating, natural, ecological or other positive purposes or other positive health or lifestyle effects,
- (iv) refers to flavors, fragrances, flavors or other additives or states that the product contains no such,
- (v) makes the product look like a food or a cosmetic product or
- (vi) gives the impression that a particular tobacco product has improved biodegradability or other environmental benefits'.

4 PRICE ADVERTISING

4.1 What are Denmark's rules regarding price advertising?

Under sections 3, 4 and 5 of the Danish Marketing Practices Act, traders must exercise good marketing practice in relation to consumers, other traders and public interests. Marketing in respect of consumers' economic interests should not be designed to significantly distort their economic behavior. Traders may not use misleading or undue indications or omit material information if this is designed to significantly distort consumers' or other traders' economic behavior in the market. If a trader offers products/services at a particular price and has reasonable grounds to believe that he will not be in a position to satisfy demand that is reasonable in relation to the offer, the trader must include a clear proviso to this effect in such marketing.

Price information provided to consumers must include the applicable VAT.

The Consumer Ombudsman has issued extensive rules about the use of particular price indications such as 'before/now', 'outlet sales' etc. Comparison between a normal price and a reduced price may not be misleading. A price may only be marketed at a reduced price for a short period of time. The trader must be able to provide documentation to support the fact that the product has been sold or offered on sale at the stated normal price for a longer period of time.

See, further, the Danish Consumer Ombudsman's guidance paper (in English) regarding price information, which can be found on its website, www.consumerombudsman.dk

4.2 What are Denmark's rules regarding advertising 'free' products?

There are no special rules for describing something as 'free', but the subject is covered by sections 3 and 5 of the Danish Marketing Practices Act.

The use of phrases that promise consumers that a product or service is free is only allowed in cases where the consumer is not required to pay any amount of money at all except for the cost necessary to order the product or have the product shipped to him/her. It is also misleading to use the expression 'free' if the consumer is required to incur an expense in the form of a subscription fee. It should also be clearly stated in the offer if the services or benefits are included free of charge but only for a limited period of time.

See, further, the guidance paper from the Danish Consumer Ombudsman regarding price information which can be found on its website, www.consumerombudsman.dk

4.3 What are Denmark's rules regarding sales and special offers?

There are no specific rules on sales and special offers. The offers thus must adhere to the general principles of good marketing practice in the Marketing Practices Act.

4.4 What are Denmark's rules regarding rebates?

The subject is covered by sections 3, 4 and 5 of the Danish Marketing Practices Act. Traders must exercise good marketing practice in relation to consumers, other traders and public interests and must not use misleading or undue indications or omit material information if designed to significantly distort consumers' or other traders' economic behavior in the market.

The trader is allowed to compare a reduced price of a product with the normal price of a product, eg by using the expression 'was/now', provided that the general rules regarding periods of reference have been complied with. However, the use of the expression 'was/now' in connection with a price reduction may become misleading if the price reduction only covers a decrease in value, and is not an actual offer.

The expression 'sale' may only be used for products that have been for sale in a shop at the normal price. The shop may not supplement its inventory for a 'sale'.

Before/after price may only be used if the product has been offered for sale in the shop at the 'before' price for a certain amount of time.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Use of promotional expressions such as 'factory sale', 'factory price', 'wholesale price', 'stock sale' and 'factory outlets' may only be used provided that the consumer is not going to pay more than the wholesale price to retailers.

The trader must be able to substantiate his profit calculations by documentation, and these may not include an extraordinarily large producer's profit.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

- (a) Cigarettes and other products containing tobacco may not be advertised.
- (b) Prescription-only drugs may not be advertised to the general public, but maybe advertised to the relevant trade.
- (c) Alcohol may not be advertised in marketing aimed at children under the age of 18 years.
- (d) According to section 76 of the Act on Radio and Television Transmissions, specific requirements apply in relation to religious movements, political parties, political movements and elected members or candidates for political assemblies and advertisements for political messages leading up to an election.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Section 10 of the Danish Marketing Practices Act limits traders' ability to distribute marketing material. For example, as a rule, there is a ban on unsolicited distribution of marketing material by means of email, SMS text messages, MMS messages and fax both towards consumers and businesses. However, it is legally possible to distribute marketing material by letters, addressed marketing material or other direct marketing methods to targeted recipients, unless a recipient has declined such communications by request. Unaddressed, door-to-door distributed marketing material as well as marketing material on the internet is not covered by the provision. Delivery of unsolicited marketing to inboxes on social media is also prohibited.

It is not legal to contact consumers directly by means of telecommunication unless the business is offering either insurance coverage, safety equipment or book/newspaper subscriptions.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

According to section 3 of the Danish Marketing Practices Act, traders must exercise good marketing practice in relation to consumers, other traders and public interests. Under section 5, traders must not use misleading or undue indications or omit material information if this is designed to significantly distort consumers' or other traders' economic behavior in the market.

The marketing must not be designed so as to exploit consumers' concern for the environment or ethical matters in an unfair manner.

Under section 9 of the Executive Order on commercials, sponsoring etc of programs in radio, television and on demand-audiovisual media services, advertisements must not violate the respect for human dignity or include/promote any discrimination based on sex, racial or ethnic origin, nationality, religion or other belief, disability, age or sexual orientation.

Finally, the Danish Consumer Ombudsman has published its guidelines regarding gender-related advertising. These can be found on its website (see question 4.2 above). In general, gender-related advertising is legal and the use of nude people in advertising is legal. The advertisement may not show people—men or women—in indecent postures or in situations that may be considered gender discrimination.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Advertising should be clearly recognizable, irrespective of the form or medium used. If not, it is considered an example of covert advertising, and thus a violation of section 6 of the Danish Marketing Practices Act, which makes it an offence to employ covert marketing methods.

Depending on the circumstances, covert advertising activities may also violate section 5 of the Danish Marketing Practices Act on misleading and improper statements and methods.

In general, all advertisement activities must clearly have a sender.

Section 72 of the Danish Radio and Television Broadcasting Act indicates that advertising should be easy to distinguish from regular programs. Sponsored programs must be clearly identifiable by appropriate credits appearing at the beginning/end of the program, showing the sponsor's name or trademark (logo).

According to Part IV of the Executive Order on commercials, sponsoring etc of programs in radio, television and on demand-audiovisual media services, specific requirements apply in relation to the sponsoring of programs.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Editorial content and advertisements in magazines, newspapers and television programs must be separated clearly so that the two cannot be confused. For example, the publisher of a newspaper or magazine may be held liable for the content and layout of an advertisement in the newspaper/magazine, if the advertisement is not clearly marked as an advertisement and thus distinguishable from the editorial content (see the principles set out in section 6 of the Danish Marketing Practices Act). Similarly, it is the responsibility of the newspaper to ensure that an advertisement is distinguishable and does not form part of, or get mixed up with, editorial content.

Advertising concealed as editorial content may be considered covert advertisement, which is illegal according to the Marketing Practices Act.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Any individual viewing an advertisement, or who is in any way exposed to commercial communications, must not be left in doubt as to the nature of the communication. This applies regardless of the form of the media, whether it appears on television or on radio, in magazines, films, on the internet, or in any other place where businesses may want to promote their products. It also applies regardless of the nature of the product/service promoted and whether the commercial communication is targeted to consumers or businesses.

The identity of the company responsible for the advertisement must be disclosed in connection with the advertisement. Furthermore, product-specific rules may also apply, such as the rules regarding advertising of pharmaceuticals, where information about possible serious side effects must be displayed in connection with the advertisement,

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no special laws for using social media for advertising, but, in general, the rules set out in the Danish Marketing Practices Act apply. However, the Danish Consumer Ombudsman has issued guidelines about marketing via social media and on the internet.

Because social media is perceived as a platform for all consumers, traders must pay particular attention to the fact that it must at all times be possible to identify marketing. If a private profile is used for marketing purposes, it should be clearly stated.

Furthermore, it means that the ban on direct email marketing also applies to social media. This states that a trader must not approach anyone by means of electronic mail, an automated calling system or facsimile machine with a view to the sale of products, real property, other property, labor or services unless the party concerned has requested him to do so.

More stringent restrictions are applied to marketing targeted at children and young people. This means that traders should pay special attention to children and young people's natural credulity and inexperience and lack of critical thinking when producing marketing material.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

If a trader rewards a user, or creates a particular incentive for the user to share or spread commercial messages, the Danish Consumer Ombudsmen will consider such messages to be sent from the trader, and the user's friends must therefore be able to opt out of receiving such messages. The advertiser may also be held liable for such content. It is not necessary that there is an actual agreement between the user and the advertiser for the advertiser to become liable. The issue is the extent to which the advertiser has had a commercial intent to have the 'advertisement' spread.

Statements on the private profiles of a company's employees may also be considered advertisements and should thus also be marked as such, to the extent that the employee acts as employee. Content uploaded by an employee purely for private reasons will not be considered advertising for which the company may be held liable. If the spreading or sharing thus depends solely on the user's own decision, the Danish Consumer Ombudsmen will not consider the message to fall within the rules on unsolicited communications.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

In Case no 13/11062, a trader marketing travel for young people using his Facebook page was reported to the police by the Danish Consumer Ombudsman. The text and pictures used on both the trader's website and Facebook page included alcohol (people drinking and advertising for pub-crawls) and thus the marketing was a breach of section 11 of the Danish Marketing Practices Act because people under 18 had unlimited access to the Facebook page (there was no age-filter).

Furthermore, several administrative cases exist on advertisements performed by influencers as part of an agreement with a company to publish comments and endorsements of a product.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

If advertisers disclose data about an individual and take pictures of that individual, they must comply with the regulations set out under Danish law. In most cases, advertisers are subject to the Act on Processing of Personal Data and the General Data Protection Regulation (GDRP) rules. A picture of an individual is considered to be personal data if the individual in the picture can be recognized by the public. It may be personal data even if the individual's name is not apparent.

Use of an individual's name and picture in an advertisement without the consent of that individual may be an infringement of:

- (a) that individual's right to his/her own picture (eg a picture where the individual is depicted),
- (b) his/her name, and
- (c) a possible copyright.

This applies even when the image itself is neutral (ie where the individual is not necessarily the main focus) and whether or not the individual is a well-known person in the public eye.

Failure to obtain consent to use a picture of an individual in commercial activities is an infringement of the individual's rights, and the individual may request the advertiser to remove the image from the advertisement and to pay monetary compensation. The rule only applies to living persons, but may also apply to recently deceased people, especially to the extent that the use of the image may lead to confusion in the market.

9.2 Are there situations when permission is not required?

Consent is always required in relation to the use of an individual's photo, voice and or in any commercial activities, unless the individual is not identifiable.

This subject/area will, in most cases, be regulated and/or evaluated in relation to general principles of law and marketing law.

In some cases, depending on the circumstances and whether the depiction is faithful and relevant, use without consent can be permitted (eg use of a picture in an encyclopaedia). This is, however, always dependent on the circumstances, and the main rule is that consent is always required.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

The Danish National Bank has issued specific guidelines in relation to the replication of money. Furthermore, any material which has the benefit of copyright protection or trademark protection can, as a general rule, only be used with the prior consent of the rights holder.

Pictures of well-known distinctive buildings, or protected artwork, or items protected by copyright, such as applied art, must always be cleared before used in advertisement, This is because publication of such items would be considered replication and thus covered by copyright protection. In this connection it should be born in mind that the Danish copyright protection for applied art is particularly strong.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Without the permission of the copyright or trademark owner, traders must be very careful if making use of a particular product's 'characteristics' (such as well-known trademarks/ copyright).

In a recent case, a supermarket chain was found liable for copyright infringement by having used and published pictures of foodstuffs for sale using protected table wear, even though the tableware was not the main object of the pictures taken, but was predominantly used to present the foodstuffs to the public.

Comparative advertising is permitted if the comparison is relevant and fair and does not create a relationship. This follows from section 5 of the Danish Marketing Practices Act.

Depending on the circumstances, it can be illegal under Danish law to use 'characteristics' and trademarks in advertising. As a general rule, the prior consent of the rights holder should always be obtained.

In a well-known case which was presented to the Danish Supreme Court, a company had incorporated a prize offer in the form of a dinner at the famous Danish restaurant, NOMA, in their

own advertisement. There was no agreement between the company and NOMA regarding the advertisement or the prize. The court found that the prize had been chosen due to the high brand value of NOMA, thus creating more attention for the small brand company in question. As the 'NOMA' brand is a registered trademark, and also enjoys enhanced recognition, such use constituted a violation of the trademark laws and marketing practices.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Denmark which affect advertising (eg Swedish gender equality law)?

The Danish Gender Equality Law also applies in relation to commercials. Furthermore, according to section 9 of the Executive Order on commercials, sponsoring etc of programs in radio, television and on demand audio-visual media services, advertisements must not violate the respect for human dignity or include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or other belief, disability, age, or sexual orientation. However, the rules are fairly relaxed compared to most countries of the world, particularly Sweden. In general, use of nude people in advertisements is not considered illegal, even if the nudity has no relation to the actual product which is the subject of the advertisement.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Not necessarily. As in most countries, Denmark has protected the right to freedom of religion and other constitutional rights.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Denmark?

Advertisers should be aware of the guidelines from the Danish Consumer Ombudsman which can be found at: www.consumerombudsman.dk.

 DOMINICAN REPUBLIC 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Dominican Republic?

The Dominican Republic does not have a specific advertising code or legislation. Dominican advertising regulation, however, is addressed across several laws, including:

- (a) Consumer Protection, (involving all the economic rights of the consumer including the right to be ‘well informed’),
- (b) Antitrust (with the first legal referral for comparative advertising),
- (c) Copyright, Trademarks (with the regulation since year 2000 of unfair competition and the use of third party’s trademarks), and
- (d) special regulations for specific industries, such as health, telecommunications, banking, defamation, and raffles.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

In an auto-regulation code of beer producers, ‘advertisement’ is defined as ‘any written, radial or audiovisual communication aimed at consumers with the aim of motivating the selection of a product or service by consumers’.

There is no specific regulation for social media interaction; basically all offers, and sales through the internet, are specifically regulated by the Consumer Protection Law. There are no legal obstacles on the approval of internet transactions and advertising activities because, as in many countries, the Dominican Republic has an electronic commerce law that permits the treatment of digital communication as valid.

1.3 What is the basic regulatory framework for advertising regulation?

In the Dominican Republic the main regulatory work is as follows:

- (a) Consumer Protection Law;
- (b) Antitrust Law;
- (c) Health Law;
- (d) Law related to Breastfeeding;
- (e) Telecommunications Law; and
- (f) Presidential rule Commission for Public Spectacles.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The advertising on public billboards in Santo Domingo is regulated by resolution of the City Mayor. The billboards need to comply with several requirements, including safety, and the billboards need the approval of the Mayor. Billboards have been a growing business in Santo Domingo and other cities in the past 15 years.

There are no special regulations for online advertising or text message advertising, but there is legislation regarding 'spam'. Such regulations state that 'spam' messages are not permitted unless:

- (a) they come from a previous provider of such message to the consumer or
- (b) they come from a person/company that has had previous commercial relations with the recipient or
- (c) there is a formal and previous acceptance of the recipient.

Also, if the message is an advertisement, it has to be identified as an advertisement. An opt-out option and instructions need to be included in every 'spam' advertising message.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

The pharmaceutical and health industries are heavily regulated. All promotional materials need to be approved by the Health Agency—not only the materials to be exposed to the public but also the ones designated for the health professionals. Text and illustrations to be presented to professionals need to be in accordance with the official data of the medicine held by the Health Agency. Also, direct marketing efforts to health professionals and financial support provided to conferences and congress is regulated by the Health Agency.

In the Telecommunications arena, the INDOTEL, as Telecommunications Agency, has enacted resolutions to set out fair advertising practices.

1.6 Are any government pre-approvals required?

Pre-approvals are required for pharmaceuticals and cosmetics. The approval needs to be submitted 30 days in advance of the start date of the campaign, although, in practice, authorization for such requests for approval is taking up to 4 months.

The decision to have pre-approvals came about because of abuse by some manufacturers regarding newspaper and TV ads for prescribed medicines. However, the authorities did not come to a complete consensus on these requirements and they still could change.

1.7 Does the media pre-clear advertising?

No. In Dominican Republic, there is no regulator for advertising across media which could give a pre-clearance that could prevent misleading, harmful or offensive advertisements.

Having said that, technically the only regulation that exists (but not enforced) is regarding the authority of a 'Commission for Public Spectacles' for pre-clearance of:

- (a) all types of advertising, script for ads, books, recorded music and songs; and
- (b) specifically, the advertising of films, such as posters, pictures, advertisements in newspapers and billboards.

This Commission was used in the 1970s to prohibit certain political or anti-religious films. The Commission still exists but does not enforce the pre-authorization of advertising.

1.8 How does the government enforce advertising laws? What are the potential remedies?

In accordance with each area, the government agencies that can enforce advertising regulations are:

- (a) Antitrust Commission (PROCOMPETENCIA);
- (b) Consumer Protection Agency (PROCONSUMIDOR);
- (c) Health Ministry (MISPAS);
- (d) Telecommunications agency (INDOTEL);
- (e) National Commission of Breastfeeding; and
- (f) Commission for Public Spectacles.

Only the Consumer Protection and Telecommunications agencies have the authority to impose administrative fines (calculated with reference to the minimum wage). Only the Antitrust Commission has authority to declare the advertisement to be unfair competition.

In addition, these agencies can require the advertiser issuing false advertising to withdraw the ad or campaign, make a rectification, and replace the products and/or services that were acquired by consumers as consequence of the false advertising.

1.9 When does a competitor have a right of action? What are the potential remedies?

The remedies depend on the forum.

- (a) Judicial courts: Civil courts do not impose fines, but are entitled to order payment of damages.
- (b) Antitrust Commission (PROCOMPETENCIA): Claims for unfair competition can be initiated by a non-competitor. The claimant does not need to be a direct competitor of the defendant. PROCOMPETENCIA has the authority to declare the advertisement to be unfair competition and to order the unfair competition to cease.
- (c) Telecommunications agency (INDOTEL): This agency is also entitled to receive claims from competitors. INDOTEL has the authority to order the unfair competition to cease and impose administrative fines.

INDOTEL has the experience to handle unfair competition claims in false advertising cases among telecommunications companies and it can place the campaign or ads temporarily on hold until the case is decided.

1.10 When do consumers have a right of action? What are the potential remedies?

The Consumer Protection Agency has the authority to act *ex officio* or in response to a claim from a consumer. Consumers are entitled to initiate a claim when there is a violation to the law. When there is a claim, there is always a preliminary procedure of 'conciliation' of the parties.

The liability for a Consumer Law violation can be imposed upon the manufacturer, importer, distributor, retail store and all the persons that intervene in the production and commercialization of the product or service.

The Consumer Protection Agency can issue:

- (a) warnings;
- (b) prohibition of the product sale;
- (c) destruction of the ads and promotional campaign banners or materials; and/or
- (d) seizure of advertising materials.

If there is a false claim with the intention to cause harm, the harmed party is entitled to claim damages.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Dominican Republic have a primary advertising self-regulation system?

In the Dominican Republic there are auto-regulation codes, but there is no institution or council that renders decision on particular practices or advertising.

Beer producers in the Dominican Republic have a self-regulatory agreement.

The major advertising agencies formed LIDAP (*Ligas de Agencias Publicitarias*), which, in the beginning, they saw as a real self-regulation policy maker, but these efforts have vanished. LIDAP has changed its name and is now known as the Association of Commercial Communication Companies (ADECC).

The Consumer Protection Law of 2005 encourages bodies to form an advertising self-regulation system.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The former LIDAP created a self-regulatory advertising code. This refers to the principles of:

- (a) legality, decency and truth in advertising;
- (b) encouraging agencies and advertisers not to infringe the rights of competitors;
- (c) the prohibition of subliminal advertising;
- (d) the prohibition of discrimination of all kinds,
- (e) that advertising cannot lead to illegal activities, and
- (f) respect for institutions, family and intimacy of persons.

The code contains several topics:

- (a) Honesty: advertising should not exploit lack of knowledge or experience;
- (b) Topics of fear, superstition and violence should be avoided; and
- (c) Truth: all facts must be accurate. The advertisement should not contain information or visual presentation which, by implication or ambiguity, omission or exaggeration, may lead directly or indirectly to deception of consumers regarding the product announced, the advertiser or its competitors.

The code also gives guidelines for the correct use of the word 'free' and how to show the correct price of objects and services advertised. Testimonials are also discussed, with rules to avoid confusion of the public and consumers.

In cases of violation of the self-regulation code by one of its members, the organization can take measures such as recommending the correction or removal of the ad, a private or public reprimand, and other disciplinary measures.

Advertising Agencies in the Dominican Republic are in discussions to create a real self-regulation mechanism via a complete CONAR.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The Beer Producers' Code has a dispute resolution mechanism, which starts with a complaint letter addressed to the Beer Producers Association. Every member of the association is consulted. If there is no consensus, a dispute resolution committee will decide.

The possible remedies are:

- (a) warning advice to the Beer Producer and the Agency;
- (b) rectification or changes in the advertisement; or
- (c) withdrawal of the advertisement.

However, this dispute resolution mechanism has not been enforced.

2.4 Is the self-regulation system effective? Is it widely used and followed?

No—The self-regulation system is not effective and has not been implemented.

2.5 Are the self-regulatory system's decisions reported?

No decisions have been made by this system. However, the self-regulation code does not mention that decisions would be public.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

The former LIDAP code establishes two 'critical' topics:

- (a) **Minors:** The code recognizes the sensibility of children and encourages advertisers to avoid the exploitation of the capacity of imagination of children. Advertisements should not stimulate unreasonable expectations about the qualities or performance of a product.

Minors should not act in ads showing situations that may involve danger in real life. Ads targeted to minors must not be active performances in an atmosphere of war and personal violence.

Advertisements should not directly encourage minors to ask their parents or other adults to buy products or services targeted at adults.

- (b) **Tobacco and Alcohol:** messages should not encourage to excessive consumption of those products and should not promote health benefits being received from the consumption.

2.7 Are there any other self-regulatory systems that govern advertising practices in Dominican Republic?

Beer producers have a self-regulatory agreement for not to using beer logos and trademarks on clothes, toys, games or other materials oriented to children.

They have as main principles:

- (a) responsible consumption;
- (b) protection of minors;
- (c) ethics in advertising; and
- (d) strict compliance with the law.

The content of the code is focused on these principles and it has a dispute resolution system (see question 2.3 above).

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Dominican Republic (eg, consumer protection laws; IP laws; unfair competition laws)?

- (a) **Consumer Protection Law:** One of the basic concepts is the clarity of information submitted to the consumer. Specifically for advertisements, this law states that advertising activities should be compatible with fair competition and must not mislead the consumer.
- (b) **Copyright Law:** An advertising campaign and its content might have copyright protection. Copyright law gives to the author economic rights for its exploitation. Work of employees must be specially assigned to the employer, as the regular rule (that the employer keeps the ownership of the work) does not apply in the Dominican Republic. Violations of copyright can be prosecuted as criminal actions.
- (c) **Industrial Property Law (Trademark Law):** The same legislation that includes patents and designs, also include trademark law and all together is called Industrial Property Law. It has rules on the protection of trademarks and the way others can use third parties' trademarks. It is also important to mention that it contains the basic rules regarding unfair competition, mostly based on the violation of intellectual property rights.
- (d) **Antitrust Law:** This legislation also includes unfair competition, specifically addressing comparative advertising, and creates the agency of PROCOMPETENCIA that acts as an administrative body to resolve cases on unfair competition in advertising.

3.2 Is substantiation required for advertising claims?

Regulations in Dominican Republic imply that the information must be accurate. This language is found in the Consumer Protection Law, Industrial Property Law and in the Antitrust Law. The Antitrust Law indicates that comparative advertising is forbidden if it is not based on 'objectively demonstrable' facts or if it contains inaccurate or false information.

The beer producers' auto-regulation code refers to three cases where substantiation is required in claims:

- (a) In comparative advertising, claims must be true and of value to consumers;
- (b) Beer producers may not claim in an unfounded manner that the beers of competitors contain objectionable ingredients or additives (an exception is made in the event that the Public Health Minister or WHO have reported that these ingredients, other than alcohol, are detrimental to health).
- (c) Advertisements must not make statements about health aspects that are not scientifically verifiable.

In the LIDAP self regulation code, that has not been enforced, it says that in every ad, all descriptions, argumentation with facts, or objective data, must be verifiable. Advertisers and agencies must help in presenting the evidences.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

The Antitrust Law refers to comparative advertising. In stating that this advertising should be objective, it mentions that unfair competition rules do not apply when the information or expressions used are such that, by their nature, they are received by a reasonable consumer as reflecting a subjective opinion, and thus not subject to the requirement of proof.

3.4 What are the rules governing the use of disclosures in advertising?

There are no specific rules for disclosures, only the general principles contained in the law: namely that information must be accurate and cannot be misleading.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

There are rules about testimonials. In the self-regulation code:

- (a) testimonials must be current and verifiable;
- (b) the advertising should only include personalized and genuine testimonials related to past or present experiences of the persons involved;
- (c) the use of actors dressed in the uniform of one profession or type of work must not mislead the consumer and the ad will always be limited by the ethics of that profession or occupation mentioned; and
- (d) the use of actors is always dependent on the authorization of the imitated person and should not mislead the consumer.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules for product demonstrations, only the general principles contained in the law: Information must be accurate and cannot cause any misleading.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising in the Dominican Republic has been always a topic of discussion.

The Consumer Protection and Antitrust laws refer to comparative advertising. The main principle is objectiveness.

The Antitrust law indicates that comparative advertising must be forbidden if it is not based in 'objectively demonstrable' facts or if it contains inaccurate or false information.

In the same way, the Consumer Protection Law includes the concept of 'arbitrary', in reference to referring that the offer to the consumer needs to be with reasonable objective bases. The message should not be arbitrary, meaning that the advertising message must be proven.

The Antitrust law also includes principles that all information and messages that by their nature are perceived by reasonable consumer as subjective and only reflect an opinion that is not subject to verification.

Besides the above-mentioned rules, the self-regulation code includes others, such as:

- (a) comparison should only be made between products manufactured in the same period. It is not acceptable to compare different models from different times, unless it is a reference to demonstrate the evolution of the product;
- (b) comparison cannot denigrate or defame products or another company's brand image, or contain statements or insinuations against the good name of third parties, or, generally, against the principles and rules of loyalty in commercial competition; and
- (c) if the comparison is with products of different level, this must be clearly indicated in the advertisement.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

The main point of the discussion mentioned above in question 3.7 is because the Trademark Law prohibits the use of a competitor's trademark in advertising. Article 86 of the Trademark Law gives to the owner the exclusive use in commerce of the trademark and expressly states that this use includes advertising.

It is not clear whether the rules which refer to exhaustion of rights limit the exclusive use of the trademark, because the language in that article does not expressly accept the use of the trademark and, at the end, states that all use of the trademarks under that article must be in good faith, not subject to create risk of confusion and, moreover, must not create unfair competition.

The lack of clarity of this article serves to generate the discussion about the use of third parties' trademarks.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

With the exception of rum, there are no express regulations indicating certain characteristics to indicate that it has been done in the Dominican Republic. However, it is mandatory for all products to indicate the country of origin.

3.10 Are there any special rules governing product packaging?

Other than labeling requirements, the Dominican Republic does not have special regulations for packaging, for example for food or beverages, although there are some initiatives in the Dominican Congress.

The Spanish language is mandatory in labelling on all products in the Dominican Republic.

Alcohol and Tobacco products only need a mention that the product harms human health. In fact, the Dominican Republic is one of the few countries that have taken a formal claim to the World Trade Organization against legislations on 'plain packaging' for tobacco products.

Pharmaceuticals, disposable medical devices, personal hygiene products and cosmetics have heavy mandatory labeling regulations. Dominican regulations establish minimum content for food labels, namely:

- (a) food name,
- (b) ingredient list,
- (c) net content and weight,
- (d) name and address of manufacturer,
- (e) number on sanitary and industrial registry,
- (f) country of origin,
- (g) lot identification,
- (h) marking of date, and
- (i) maintenance instructions/instructions for use.

4 PRICE ADVERTISING

4.1 What are the Dominican Republic's rules regarding price advertising?

The Consumer Protection Law prohibits the use in advertising campaigns of images, texts, dialogs, sounds or descriptions that direct or indirectly cause or might cause any kind of misleading on prices, conditions of the sale of the product or services advertised.

Other rules in the Law include:

- (a) prices must be in Dominican pesos;
- (b) prices should be marked in a clear and not confusing manner. Prices cannot be indicated in a malicious way to induce the sale; and
- (c) prices cannot be changed depending on the form of payment used by consumer.

The self-regulation code includes two additional rules:

- (d) If a product can be purchased individually or by package, such form of purchase must be clearly indicated in the advertised price for each case.

- (e) All items that are included in the price must be clearly disclosed; this is also the case with separate accessories, especially in campaigns for children products and services.

4.2 What are Dominican Republic's rules regarding advertising 'free' products?

The Consumer Protection Law does not have provisions on the use of the word 'free'.

The self-regulation code indicates that the word 'free' or any other expression with the same meaning should only be admitted in advertising when there is really no cost involved for the consumer. All incidental costs, such as freight, taxes, etc, must be clearly noted.

4.3 What are Dominican Republic's rules regarding sales and special offers?

Sales events, promotions and special offers must have precise terms, including duration of the offer and volume of articles offered. The revocation or sooner termination of an offer is only valid if it has been announced in the same channels or media. The conditions of the special offer must be honored until such announcement.

It is prohibited to make offers to the public for a product or services not previously required by the consumer where an automatic charge is generated or whereby consumer silence could be interpreted as an acceptance of the charge.

Also if a gift is delivered to the consumer at the moment of a product purchase, the consumer is not obligated to return the gift if that sale is void in the future.

4.4 What are Dominican Republic's rules regarding rebates?

Rebate campaigns must comply with the Consumer Protection Law. Advertisers must provide very detailed information on the mechanism of the rebate, including when and how the consumer receives it.

The Consumer Protection Agency is entitled to verify the veracity and exact compliance of these kind of offers, and it has the authority to adopt all necessary remedies to obtain positive results for the consumer with respect to the specific rebate.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

The Consumer Protection Law prohibits the offer of any kind of benefits that could induce error in the consumer as to the price level or quality of the goods or services offered, in particular when it could be difficult to evaluate that specific offer against other alternatives.

A consumer cannot receive a free gift that in any circumstances will generate the obligation to buy or pay for a subscription.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

- (a) As in many countries, there is restrictive legislation in the Dominican Republic on advertising breastfeeding substitutes. Dominican Law prohibits the advertising and promotion of:
- (i) breast milk substitutes, including infant formula;
 - (ii) other milk products, foods and beverages, including bottle-fed complementary foods that might be marketed or otherwise represented to be suitable, with or without modification, for use as a partial or total replacement of breast milk;
 - (iii) feeding bottles teat, udder and pacifiers.

The Dominican Law has stronger prohibitions than the International Code of Marketing of Breast-milk Substitutes of the World Health Organization.

- (b) Pharmaceuticals by prescription cannot be advertised to the public, only promoted with medical doctors.
- (c) Also in the health sector, it is prohibited to grant, offer or promise premiums, cash benefits and benefits in kind to persons qualified to prescribe pharmaceuticals. This prohibition is extended until the second degree of kinship.
- (d) Narcotics are specially banned from advertising. This prohibition includes all messages intended to encourage the use of those substances.
- (e) The reproduction of money bills and coins is prohibited. Such printing has not been allowed by the Dominican Central Bank, even in cases in which it has been obviously very different in size and color of the Dominican currency (peso).

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

There are no prohibitions for specific types of advertising practices. However, in the draft currently before in Congress regarding 'spam', it would be prohibited to send commercial messages without authorization of the recipient.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The Commission for Public Spectacles' main duty is to monitor the decency all content in radio and TV. However, when, in September 2018, an operator of a public video screen briefly displayed a pornographic movie instead of advertising to passing traffic, the company was fined by the City Council and not the above-mentioned Commission (the City Council is the institution that leases the public space for advertising).

At least one TV commercial has been banned for indecency. The ad was for CLORETS chewing gum and it was entitled 'War of kisses'. In this ad, one group of men and another of women were preparing to initiate combat, and the 'attack' is kissing the opponent. The claim in this case was initiated by the Consumer Protection Agency.

In August 2014, a Miley Cyrus concert was suspended on the basis of immoral behavior and bad influence for Dominican society.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

The self-regulation code indicates that all advertisement must clearly identify the advertiser either by the product or by the name of manufacturer or distributor.

When developing the advertisement, the advertiser or the agency must be clearly identified to the media. This is very important information because of the liabilities that arise from the ad campaign. The media should not accept ads where parties involved are not identified.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

In Dominican Republic there is no specific regulation for brand-produced content.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There is no special disclosure or other obligation for the integration of advertising with other content.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

In the Dominican Republic, there are no special rules for online or social media advertising. General rules apply, such as intellectual property (counterfeit stores have been detected in the Dominican Republic using social media), pharmaceuticals advertising laws, and unfair competition laws (when using trademarks and copyright content of others). The Consumer Protection Agency has acted in some cases and a specialized police department in computer crimes has acted as well.

For promotions, the Consumer Protection Agency has rules and guidelines addressing promotions in general that of course apply to internet and social media.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

As there are no specific rules for online advertising, the general rules apply. If there is a call to action by the advertiser (rules of promotion, messages to users, etc) that invites or encourages the violation of rights of third parties, then the advertiser will be liable for the user generated content. Other than that, the advertiser will not be responsible.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

A well-known Dominican Republic advertising agency created a campaign for the cigar industry that was very similar to a Mexican campaign for ChapStick that was developed in 2005 (graphics and concept—both related to ‘kisses’).

Both campaigns received national and international awards in the years that they were presented. The Mexican company did not start or even threaten to start litigation against the Dominican company. However, Dominican blogs started to comment about it on the internet, and two people created a group on Facebook to criticize the Dominican campaign and encouraged others to do so. Direct comments were posted by two people and followed by a group of Facebook users.

The Dominican advertising agency started judicial investigation into the two people who formed this group on the grounds of defamation. The group was deleted and parties settled.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

In the Dominican Republic all ‘personality rights’ have been recognized by the Constitution of 2010. There are rules in other legislation too, and all of them apply for advertising as well.

- (a) **Image and copyright:** the Copyright Law creates the right of image, in which an individual is entitled to prevent the use of its photograph (real image) in commerce without his or her authorization.

In one case related to advertising, courts recognized that the image right is very personal and an organization without previous and express authorization does not have the right to claim injustice for each of its members. In this case, a picture of the Dominican volleyball team was used without authorization in advertising for telephone cards. The volleyball federation acted as plaintiff in that case.

Celebrities have been protected by court decisions regarding their right of publicity. Also courts have also had the opportunity to consider what can constitute an ‘image’, in order to determine its violation. Courts have considered that it does not need to be the exact picture of a person and that the ‘image’ of a person can result from other elements (words, sounds, etc).

- (b) **Unfair competition:** Dominican Trademark Law considers unfair competition and prohibits the use in advertising of:
- (i) unfair advantage of the prestige or reputation of a person; or
 - (ii) acts capable to harm or dilute the prestige or reputation of a person, even if confusion is not caused.

9.2 Are there situations when permission is not required?

It is important to mention that the Copyright Law permits the publication of a photograph if it relates to scientific, educational or cultural purposes in general, or to facts or events of public interest or that have occurred in public.

However, such use is very restricted by Dominican courts. In one case, a Dominican show business person was at a product launch event in a bar of Santo Domingo. The event was filmed and the video was later edited and used as infomercial. The courts recognized the right of image of the claimant.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There is no pre-clearance of advertising in general, only for pharmaceuticals and cosmetics.

Among the requirements for advertisements for pharmaceuticals and cosmetics are:

- (a) Media where the advertising is going to be shown: Electronic and hard copies of the project, such as texts, draws, announcements, flyers, signs and all elements to be used should be specified.
- (b) If the advertising is going to be in radio, TV, movies or other visual medias: The Health Authorities should review all specific materials, such as videos, tapes or electronic media with all the sequences and scenes.

Additionally, buildings that are architectural works protected by the copyright must have copyright owner's consent to film the area.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

In addition to any Intellectual Property concerns that may apply, the self-regulation code states that advertisers cannot use third party 'concepts', especially when there are well-known elements associated with other advertiser.

Similar rules concern the avoidance of plagiarism and confusion with previous copyright works.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Dominican Republic which affect advertising (eg Swedish gender equality law)?

Other than the general equality rights provision included in the Dominican Republic Constitution, and the international treaties against the discrimination of women, the Dominicans do not have these kind of rules.

There is a bill passing through Congress about 'General Law on equality and non-discrimination', that defines the assumptions that constitute 'discrimination' and classifies them. It then envisages a number of implementation-guarantee mechanisms, and puts into the hands of citizens a series of mechanisms to protect and ensure respect for the rights of all.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

There are no religious concerns for advertising practices in the Dominican Republic.

However, the Commission of Public Spectacles has the power to prohibit any publicity contrary to morals and good religious customs.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Dominican Republic?

The Consumer Protection Agency has become a very important agency in the Dominican Republic. PROCOMPETENCIA, the Dominican antitrust agency, by law has the obligation to oversee unfair competition on advertising. However, up to 2018, it has not decided a complaint on advertising. There have been a couple of unfair competition cases, but not related to advertising.

 DUTCH CARIBBEAN 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in the Dutch Caribbean?

There is no general law on advertising in the Dutch Caribbean. Rules on advertising can be found in several laws, eg:

- (a) Civil Code (misleading advertising);
- (b) legislation on Intellectual Property (copyright and trademarks);
- (c) packaged pharmaceutical products;
- (d) e-commerce;
- (e) games of chance;
- (f) broadcasting; and
- (g) public order.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

According to the Civil Code ‘advertising’ is a public announcement regarding goods and services offered in the conduct of a business or profession. The E-commerce Ordinance uses the term ‘commercial communication’ which includes all forms of offering and advertising goods and services through electronic means targeted at the conclusion of agreements.

1.3 What is the basic regulatory framework for advertising regulation?

The basic regulatory framework for advertising regulation is mainly civil and administrative legislation. Some topics (eg advertisements visible from a public street, and samples of pharmaceutical products) are further regulated in policy guidelines.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Type of advertising practice that are specifically regulated are:

- (a) Packaging and labelling of food products,
- (b) Advertising of strong alcoholic beverages (over 21% of alcohol) via media,
- (c) Advertisements on public streets,
- (d) Commercial communication via electronic means,
- (e) Advertising of packaged pharmaceutical products,
- (f) Chance-based promotions, and
- (g) Distance selling.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

The following industries have their advertising practices specifically regulated:

- (a) pharmaceutical products;
- (b) strong alcoholic beverages;
- (c) food and drink; and
- (d) games of chance.

1.6 Are any government pre-approvals required?

Government pre-approvals are required if, eg, a chance-based promotion is not aimed at stimulating sales or increasing turnover, or payment of a monetary sum is required to take part in a chance-based promotion that is not aimed at stimulating sales or increasing turnover.

Pre-approvals are also required for advertisements that are visible from a public street and for certain packaged pharmaceutical products.

1.7 Does the media pre-clear advertising?

Pre-clearance is not required, but the media may refuse to broadcast advertisements that do not comply with legal requirements or with generally accepted international advertising standards.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The law of public order (advertisements visible from a public street), telecommunication (broadcasting), packaged pharmaceutical products, food and drink and games of chance are enforced by the competent government authorities of the respective territories.

Remedies include a penalty and removal of the advertisement at the cost of the advertiser.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor can bring legal action in case of misleading advertising or violation of advertising rules in other legislation, arguing that it constitutes a wrongful act, usually unfair competition.

Legal remedies include a prohibition on continuing the advertisement, a penalty, rectification, and damages.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers can bring legal action in case of misleading advertising or violation of advertising rules in other legislation, arguing that it constitutes a wrongful act.

Legal remedies include a prohibition on continuing the advertisement, a penalty, rectification, damages.

In the case of distance selling, consumers can, in principle, dissolve the purchase agreement.

Consumers may also alert the competent government authorities and consumers' rights organizations of violations.

2 SELF-REGULATORY FRAMEWORK

2.1 Does the Dutch Caribbean have a primary advertising self-regulation system?

No.

2.2 Is there a self-regulatory advertising code? What are the key principles?

N/A

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

N/A

2.4 Is the self-regulation system effective? Is it widely used and followed?

N/A

2.5 Are the self-regulatory system's decisions reported?

N/A

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

It is advised to adhere to generally accepted international standards.

2.7 Are there any other self-regulatory systems that govern advertising practices in the Dutch Caribbean?

N/A

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in the Dutch Caribbean (eg, consumer protection laws; IP laws; unfair competition laws)?

The following are the basic laws governing advertising claims in the Dutch Caribbean:

- (a) Civil Code;
- (b) Decree on Labeling Food Products;
- (c) Decree on Packaged Pharmaceutical Products;
- (d) Decree on Promotion of Pharmaceutical Products on Television 2000;
- (e) Decree on Advertising Strong Alcoholic Beverages on Television;
- (f) Copyright Ordinance;
- (g) Trademark Ordinance;
- (h) Public Order Ordinance;
- (i) Police Ordinance;
- (j) E-Commerce Ordinance; and
- (k) Personal Data Ordinance.

3.2 Is substantiation required for advertising claims?

Yes, substantiation is required—particularly to avoid advertising claims from being misleading, dishonest, untruthful and unverifiable.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

This is not provided for by law.

3.4 What are the rules governing the use of disclosures in advertising?

There are no specific rules for disclosures. The general rule governing advertisements applies; namely, that they must be honest, truthful and verifiable and may not be misleading.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

There are no specific rules for endorsements and testimonials. The general rule governing advertisements applies; namely that they must be honest, truthful and verifiable and may not be misleading.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules on product demonstrations in advertising. The general rule governing advertisements applies; namely that they must be honest, truthful and verifiable and may not be misleading. Further, it is recommended to observe generally accepted international standards.

However, certain industries have specific rules, eg alcohol advertisements may not target minors; and special rules apply for the distribution of samples of packaged pharmaceutical products.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

There are no specific rules on comparative advertising. The general rule governing advertisements applies; namely that they must be honest, truthful and verifiable and may not be misleading. Generally accepted international standards and good commercial practice apply.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Unauthorized use of copyright or trademarks could constitute infringement and exposure to damages among other things.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

No special rules apply, but the advertisement must not be misleading and must be honest, truthful and verifiable.

3.10 Are there any special rules governing product packaging?

Packaging of food products must include information on:

- (a) the product designation (eg common product denomination, product description or clear description of the use of the product);
- (b) the use of statements (eg list of ingredients, place of origin) or representations; and
- (c) expiration date of food products.

Packaging of packaged pharmaceutical products must include information regarding:

- (a) the name of the product;
- (b) the name and place of establishment of the manufacturer of importer;
- (c) quantitative composition of active ingredients in usual language and in clearly legible letters and numbers;

- (d) instructions for use and storage; and
- (e) the date by when the product must be used.

4 PRICE ADVERTISING

4.1 What are the Dutch Caribbean's rules regarding price advertising?

The price of advertised products and services, or the manner in which this is calculated, must be stated clearly, including costs and commissions. The price of products and services advertised to consumers must include taxes. If specific conditions apply, they must be mentioned in clear language. In the case of distance selling, the costs of delivery and the costs for use of technology for distance communication must be mentioned, the latter if a higher fee than the basic fee is being charged.

4.2 What are the Dutch Caribbean's rules regarding advertising 'free' products?

Free products may be advertised. Samples of pharmaceutical products for which a doctor's prescription is required may only be offered to healthcare providers. Alcoholic beverages may not be offered to minors.

4.3 What are the Dutch Caribbean's rules regarding sales and special offers?

The general rule of advertisements apply: advertisements for sales and special offers must be honest, truthful and verifiable and may not be misleading. The applicable conditions must be stated in clear language.

4.4 What are the Dutch Caribbean's rules regarding rebates?

The general rule of advertisements apply: advertisements regarding rebates must be honest, truthful and verifiable and may not be misleading. The applicable conditions must be stated in clear language.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

It is advised to observe general internationally accepted standards and good commercial practice.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

- (a) Strong alcoholic beverages may not be advertised to minors. Advertisements on television and radio may, in principle, only be broadcast between the hours of 10pm and 1.00am.
- (b) Pharmaceutical products may be advertised only under certain conditions.
- (c) Products and services that are in conflict with the law or moral standards may not be advertised.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Advertising on public streets is prohibited unless this has been pre-approved.

Marketing to e-mail addresses and to mobile telephones is not allowed if the consumer has indicated that such is not desired.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

There is no specific regulation on indecency or obscenity in advertisements. However, action can be taken if the advertisement is in conflict with general principles of law (eg a criminal offence or in conflict with public order or moral).

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

The identity of the advertiser/sponsor must be revealed for transparency reasons and to avoid misleading advertising. Advertisements can be misleading in relation to the identity, capacities, capability or authority of the advertiser, and the person who manufactures or offers the products or provides the services, or under whose leadership or supervision or with whose cooperation the products are manufactured or offered or the services are provided.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are no special rules governing the integration of advertising content and entertainment (or editorial) content. The general rule of advertisements applies; namely that they must be honest, truthful and verifiable and may not be misleading. It is further recommended to observe general accepted international standards.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no specific rules for disclosure or other obligations when integrating advertising content with other content. The general rule governing advertisements applies; namely that they must be honest, truthful and verifiable and may not be misleading. The generally accepted international standards apply.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no specific laws for advertising on social media. However, it is advised to particularly observe the rules of distance selling of the Civil Code and the E-Commerce Ordinance, eg:

- (a) clear identification of the advertiser and the seller and the products and services advertised;
- (b) description of the main characteristics of the product;
- (c) provision of a clear and simple way for the consumer to object against receipt of the advertisement; and
- (d) identification of the region to which the advertisement pertains.

In addition, rules for authorized use of intellectual property must be observed, as well as the protection of personal data of individuals. The general rule governing advertisements applies; namely that they must be honest, truthful and verifiable and may not be misleading.

Generally accepted international standards must also be considered.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

Advertisers are responsible for communications regarding products and services offered in the conduct of a business or profession, this is also the case if such is done through electronic means, eg the advertiser's website and Facebook page. Advertisers must ensure that advertisements of their products and services are honest, truthful and verifiable and not misleading.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

N/A

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

The advertiser must obtain prior authorization from the individual concerned for use of his name, picture, likeness, voice and identity in advertising.

9.2 Are there situations when permission is not required?

Although there may be situations where, according to Dutch case law (which is generally followed in the Dutch Caribbean) permission would not be required to use the picture and identity of individuals, it is nonetheless recommended to seek the individual's prior authorization to use his name, picture, likeness, voice and identity in advertising. The perception in the Dutch Caribbean regarding the use of such qualities of individuals, mainly public figures, in advertisements without their prior consent could differ. However, there have been no court cases on the subject as yet.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Trademarks and works protected by copyright must be cleared prior to use in advertisements. There are no specific rules for use of historic places in advertisements. Buildings that are permanently visible on a public street can be reproduced if the size thereof or the procedure by which they are produced shows a clear difference with the original work and reproduction is limited to the exterior thereof.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

The use of other companies' recognizable products in advertising is not possible without prior authorization, as this can lead to infringement of copyright or trademark rights. Although limited use of copyrighted works may be possible under certain conditions, advertisers are nonetheless encouraged to seek prior consent, particularly considering the commercial purpose of advertisements.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of the Dutch Caribbean which affect advertising (eg Swedish gender equality law)?

There are no specific rules that affect advertising. It is advisable to observe local moral standards and acceptable social conduct.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Caution should be exercised in advertisements to avoid them offending ethnic, gender, cultural, disability or religious groups in the community.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in the Dutch Caribbean?

The legislation of and practices in the territories of the Dutch Caribbean (Aruba, Curacao, St Maarten and the Caribbean Netherlands (Bonaire, St Eustatius and Saba)) is basically the same across the board, but deviates on specifics. Advice should be sought for the specific territory of the Dutch Caribbean in which will be advertised. Advertisements may be in Dutch and English (and additionally Papiamentu where Aruba, Curacao and Bonaire are concerned), as these languages are official languages, whereas Spanish is widely spoken in Aruba, Curacao and Bonaire.

ECUADOR

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Ecuador?

There are three principal areas of law and regulation pertaining to advertising in Ecuador. Firstly, the main regulator is the Organic Law of Communication (June 2013), and its Regulatory Statute (January 2014). Additionally, the Organic Law of Consumer Protection (July 2000) and its Regulatory Statute (March 2001) also serve to regulate advertising. Finally, there are sector-specific laws that concern advertising for particular goods or services, such as tobacco, alcohol, processed food, health products, among others.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

The Organic Law of Consumer Protection defines advertising as ‘any commercial communication or ad directed by an announcer to consumers, using any suitable means, to inform and motivate them to purchase a good or hire a service’ (article 2). Similarly, the Regulatory Statute of the Organic Law of Communication states that advertising is ‘any paid form of communicating ideas, goods, products or services by any person or entity with commercial purposes’ (article 38).

1.3 What is the basic regulatory framework for advertising regulation?

There are two main regulatory bodies that provide the legal framework for advertising. First, the Organic Law of Communication, in Section V, regulates general aspects of advertising, while Section VI addresses the topic of domestic production. Additionally, its Regulatory Statute, in Chapter 6, further explains the norms established by the Law and delineates the scope of certain advertising concepts.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

In Ecuadorian legislation there are a few types of advertising practices specifically regulated, particularly data messages advertising and comparative advertising:

- (a) Data message advertising is regulated by the Law of Electronic Commerce, Signatures and Data Messages which establishes that when sending data messages, either individually or through mailing lists, the issuer must provide means for the recipient to confirm the subscription and he/she must be able to request to unsubscribe at any time. The issuer must comply with a request to unsubscribe immediately.
- (b) For comparative advertising:
 - (i) Decision 486 of the Andean Community establishes that a trademark does not confer the right to prevent third parties from using the brand for advertising—including comparative advertising, offering for sale or indicating the existence or availability of products or services—as long as the use of the trademark is made in good faith.
 - (ii) However, the Regulatory Statute for the Regulation and Control of Advertising and Promotion of Processed Food Products prohibits comparative advertising for processed food products.

- (iii) In addition, the Organic Law of Regulation and Control of the Market Power states that the comparison of activities, services or products—including comparative advertising—is considered unfair when the comparison refers to extremes that are not similar, relevant and verifiable.
- (iv) Comparative advertising regarding processed food products is forbidden.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There are several industries that are subject to specific laws which govern their advertising, and/or there are specific provisions that apply to these industries in the laws that address general advertising. The following are some of the main ones:

- (a) **Alcohol:** The Organic Law of Communication and its Regulatory Statute prohibit advertising of alcoholic beverages; advertising is only allowed inside the place where the product is being marketed, where access is exclusively for people over the legal drinking age. Only beverages with a moderate degree of alcohol (beers) can be advertised through alternative channels.
- (b) **Tobacco:** According to the Organic Law of Communication, all forms of tobacco advertising are prohibited, and, as with the alcohol industry, advertising is only allowed inside places where the product is marketed.

The Organic Law for the Regulation and Control of Tobacco establishes that packing and labeling of cigarettes must contain a warning highlighting that smoking causes cancer. This message has to occupy at least 40% of the front and back of the pack.

- (c) **Food:** According to the Regulatory Statute for the Regulation and Control of Advertising and Promotion of Processed Food Products:
 - (i) The advertising of processed food products must be in Spanish and cannot induce or promote harmful habits, nor should it distort or contravene the provisions of education regarding nutrition, hygiene and health established by the Public Health Ministry.
 - (ii) The appearance of minors in advertising material is prohibited as well as the use of images that idealize the products.
 - (iii) In terms of processed products with high levels of fat, sugar and salt, the health authority shall apply restrictions so that the advertisement does not negatively influence the consumer, particularly children (eg such products may not be sold or advertised in schools).
 - (iv) Comparative advertising regarding processed food products is forbidden, although comparisons regarding nutrient properties and content, as well as health properties, are allowed on the labeling of the products.
 - (v) The advertising must be based specifically on the characteristics or specifications of the food approved by the Sanitary and Control Agency. (ARSCA).
 - (vi) Advertising of processed food with mandatory sanitary registration must be adjusted to its nature, composition, origin and quantity of the food packaging in such a way as to avoid any misunderstanding of its qualities or benefits.

- (vii) Advertising of processed foods should include preventive messages, as well as messages promoting a balanced diet and good hygiene habits.
- (viii) It is essential that the advertising of processed foods include indications of correct handling of the product, and promote the practice of sports and the consumption of natural foods.
- (ix) The advertising of energy drinks or other similar products will use the warning described below and will specify that this product has a direct impact on the health of the people by the consumption of them: 'Product not recommended for diabetics, minors, pregnant women, people sensitive to caffeine, and elderly people with cardiovascular and gastrointestinal diseases'.
- (x) Advertising of processed foods is prohibited from:
 - (1) claiming that the product, on its own, fulfills nutritional requirements;
 - (2) attributing to industrialized foods a superior or different nutritional value to the one they really have;
 - (3) making comparisons disadvantaging the properties of natural foods;
 - (4) indicating or suggesting that the consumption of a processed food determines physical, intellectual or sexual characteristics of the individuals;
 - (5) exaggerating characteristics or properties of processed foods;
 - (6) associating, directly or indirectly, the consumption of processed foods with alcoholic beverages;
 - (7) attributing health properties that cannot be verified or attribute properties that heal, treat or cure diseases; or
 - (8) suggesting that the product has ingredients or properties that it lacks;
- (xi) There are also several restrictions regarding labeling such as the use of minors, celebrities, comparisons, quality certifications, etc.

1.6 Are any government pre-approvals required?

No government pre-approvals are generally required for advertisements, except for:

- (a) food and health products which must have an authorization granted by the Ministry of Health;
- (b) promotional contests, sweepstakes, raffles, etc, which need pre-approval from the Ministry of Internal Affairs when based on chance (otherwise a 'simple notification' will suffice). The following must be provided when applying for pre-approval:
 - (i) petition brief;
 - (ii) certified copy of the document of legal existence of the company and the appointment of its legal representative;
 - (iii) terms and conditions for the promotion including its term, territory, mechanics and details of the draw;
 - (iv) certified copy of the invoice for the prize(s) to be awarded, or declaration and attached documents proving existence of the prize and its market value;
 - (v) bank warrant or mortgage for the total value of the prize(s) to be awarded;

- (vi) copy of the ticket or document handled by the consumer as evidence of the sweepstake; and
- (vii) payment of official fee.

1.7 Does the media pre-clear advertising?

In the Ecuadorian system, the media does not pre-clear advertising; there is no institution, either public or private, in charge of this activity.

Nonetheless, the media, along with the announcer and the producer of an advertisement piece, is also liable for the broadcasting of advertisements that are contrary to the Communications Law and its Regulatory Statute. Therefore, even if the media is not required to pre-clear advertising, clearance procedures may be in place to prevent future liabilities.

1.8 How does the government enforce advertising laws? What are the potential remedies?

There are some state institutions that regulate and control advertising and communication issues. The main one is the Superintendence of Information and Communication, which is a technical organization that audits, intervenes and controls the regulation of information and communication. This entity has punitive capacity and ample authority to enforce current rules. Some of its roles are to:

- (a) supervise, monitor and manage the compliance of communication rules;
- (b) attend, investigate and resolve complaints or claims made by users;
- (c) request information from citizens and institutions related to communications;
- (d) apply the penalties provided by the Organic Law of Communication; and
- (e) other functions established by law.

Another governmental entity is the Board of Regulation and Development of Information and Communication, which is an academic legal body that has the following functions:

- (a) to establish mechanisms to exercise users' rights;
- (b) to develop universal access to communication;
- (c) to regulate rating content and slots;
- (d) to conduct studies on the behavior of the community regarding media content; and
- (e) other functions established by law.

This entity has an Advisory Council that acts as a consultant in processes about information and communication.

Finally, the Contravention Judge may impose sanctions regarding advertizing that has affected consumer rights by not complying with the general principles: namely, that the advertising be adequate, truthful, clear, complete, well-timed.

1.9 When does a competitor have a right of action? What are the potential remedies?

- (a) According to the Organic Law of Regulation and Control of Market Power, any competitor whose rights have been violated can initiate a procedure before the Superintendence of Control of Market Power. Once the complaint is filed, the authority validates it and informs the presumed infringer who has to submit explanations in fifteen days. After this time, if the body of substantiation believes that the offense might exist, an investigation process is initiated. Once research is completed, the substantiation body notifies the defendant in order for it to respond in fifteen days. If there is no answer, the procedure continues in absentia; the investigatory period is opened ex officio for the term of sixty days and, if it is considered necessary, a hearing can be scheduled. Finally, the resolution body of the Superintendence of Control of Market Power gives a reasoned decision within ninety days. This resolution can be challenged by administrative review.

Potential remedies include corrective advertisement, fines, or the temporary close of business of the infringer in addition to fines.

- (b) Also, a competitor can file a complaint under the Organic Law of Consumer Protection, and bring the issue before a Contraventions Judge, but only when consumer rights may be at stake. The procedure is similar to that of a civil suit.

Potential remedies include fines, removing the broadcasting of the infringing content, among other kinds of corrective action to remedy the damages caused.

- (c) In any case, if compensation for damages is to be sought, it must be done independently through a civil lawsuit.

1.10 When do consumers have a right of action? What are the potential remedies?

According to the Organic Law of Consumer Protection, any consumer whose rights have been violated can file a complaint before the Public Defender or go directly to the Contravention Judge, who is the competent authority to resolve disputes relating to this law (the exhaustion of the first stage is not mandatory, and the Public Defender does not issue a resolution but only an opinion that may be considered by the judge).

In the event that the consumer decides to go to the Public Defender, a procedure is followed in accordance with the regulations established by the Organic Law for Public Defense. This procedure concludes with the issuance of a report that will serve as evidence in the procedure before the Contravention Judge.

Regarding the judicial procedure, once the lawsuit is filed, the defendant is served and the Judge sets a date and time to hold a hearing. During the hearing, parties submit their evidence after which a judgment is rendered. If judgment is not rendered, the judge can present his decision in the peremptory term of three days.

Also, consumers are entitled to file a complaint before the Superintendence of Communication for possible infringements to this law, and may act as parts within the procedure.

Remedies are the same as explained in the box above, and compensation for damages must be sought through civil actions as well.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Ecuador have a primary advertising self-regulation system?

Today, Ecuador doesn't have a primary advertising self-regulation system.

All regulations are State mandated through the laws previously referred to, and the systems currently in place are also State controlled.

A self-regulation system had been in place since 1982, through the Association of Announcer and Advertising Agencies, which is a private association of the most prominent announcers and agencies. This system was abandoned, however, with the enactment of the current Consumer Law in 2000.

An Association of Advertising Agencies exists (and comprises most if not all of the agencies organized and operating in Ecuador), and one of its objectives is to ensure its members comply with advertising regulations and ethics. However, any resolution by this association can only concern its members and any sanction is privately decided and upheld.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The Ecuadorian Code of Ethics and Self-Regulation of Advertising (the Code) issued in 1982 by the Ecuadorian Associations of radio, television advertising agencies and announcers was accepted as a legal mean of self-regulation and control by the Consumer Protection Law in force at the time (article 12).

This Code was designed primarily as an instrument of self-discipline for the advertising industry. For instance, there were rules about the respectability and honesty of advertising and how ads should be presented to children. It also contains regulations regarding comparative advertisement, ethical practices between the agencies, non-appropriation or misuse of others' campaigns, especially those designed to create expectations (ie 'coming soon'), etc.

However, with the issuing of a new law, which is currently in force, all references to the Code were dropped, and the Code itself has been left mostly in disuse, although its members are still bound to it, and it may be applied privately to them by the Association.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The Code does not have a mechanism of dispute resolution per se. Under the previous Law of Consumer Protection (1990), the Special Committee of Advertising, an entity that could apply the rules contained in the Code, was in charge of dispute resolution in advertising. However, with the current legislation on consumer protection and advertising, no general self-regulatory systems are in place, and all disputes are to be brought to and handled by the official institutions, namely the Contraventions Judges, the Superintendence for the Control of Market Power, and the Superintendence of Communications, through the legal procedures mandated by the laws and regulatory statutes in these areas.

2.4 Is the self-regulation system effective? Is it widely used and followed?

As mentioned, since the only self-regulatory system is privately administered and applicable only to the members of the Advertising Agencies Association, we cannot affirm that the system is widely used or if it is actually effective, as it is not a public system.

2.5 Are the self-regulatory system's decisions reported?

The decisions adopted by the Special Committee of Advertising were not made public, and were reported only to the parties themselves.

Currently, the decisions adopted by the Advertising Agencies Association are also privately reported only to the parties.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Under the Code, the principles that companies should be aware of are:

- (a) respectability,
- (b) honesty,
- (c) genuine presentation of products and
- (d) following parameters that do not lead to violence, superstition or fear.

Additionally, there are some areas that advertisers should consider such as:

- (e) the use of promotional expressions,
- (f) environmental protection,
- (g) privacy protection and
- (h) how advertising should be directed to children.

Finally, the last part of the Code focuses on

- (i) the responsibility of the advertiser, advertising agency and the media.

Although the Code is no longer enforceable, the principles contained therein are considered common practices of the trade, and can be presented as evidence in an official proceeding.

2.7 Are there any other self-regulatory systems that govern advertising practices in Ecuador?

No.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Ecuador (eg, consumer protection laws; IP laws; unfair competition laws)?

As mentioned in question 1.1, the basic laws governing advertising claims are the Organic Law of Communication, its Regulatory Statute, the Organic Law of Consumer Protection and the Organic Law of Regulation and Control of Market Power.

Other rules may be found in particular pieces of legislation. Among the most relevant are such as the Intellectual Property law and its Regulatory Statute, the Andean Decisions on Industrial Property, Copyright and Breeders Rights (Decisions 486, 351 and 351 respectively), the Health Code, and the regulatory Statute for the Promotion and Advertising of Processed Food Products.

3.2 Is substantiation required for advertising claims?

Under the Organic Law of Consumer Protection, consumers have the right to receive adequate, accurate, clear, timely, complete and true information about the goods and services offered in the market. Thus, providers must have all the technical, practical and scientific data that support their advertising material and claims. This implies that consumers are protected against improper and misleading advertising.

Also, the Organic Law of Regulation and Control of Market Power indicates that disseminating incorrect or misleading information constitutes a deceitful act. Therefore, the advertiser must possess evidence to validate all claims, as this is information that can be required by the authorities in order to substantiate advertising claims.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Article 50 of the Regulatory Statute to the Communications Law says that advertising that uses creative resources to emphasize or promote the characteristics of a product is not considered misleading as long as it does not induce the consumer to misinterpret the composition, quantity, certification, prize, origin, benefits, consequences, contraindications and uses of the good or service.

Article 50 can be interpreted as a way to justify the use of puffery and other similar claims, so long as their use does not actually cause confusion among consumers, and can be construed as a creative way to enhance the appeal of a good within the legal boundaries.

3.4 What are the rules governing the use of disclosures in advertising?

There are no particular rules governing the use of disclosures in advertising in Ecuadorian legislation, and thus all use of disclosures must follow the same general rules of communication and advertising, such as veracity, truthfulness and the adequate use of advertising in a way that is not misleading or misrepresents the product or services. etc.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

There are a few rules that relate to endorsements or testimonials in advertising in Ecuador. For instance:

- (a) The Regulatory Statute for the Regulation and Control of Advertising and Promotion of Processed Products mandates that advertising of alcoholic drinks cannot be associated with sporting success. Therefore, recognized athletes cannot participate in the advertising of alcoholic beverages in order to promote teams, sporting facilities or sports equipment.
- (b) Private trading companies of infant formulas cannot sponsor public events.
- (c) Similarly, the tobacco industry cannot sponsor sporting events; this includes manufacturers, importers or distributors of cigarettes or snuff products.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules governing the use of demonstrations in advertising. Therefore, advertisers must follow the general parameters pertaining to truthful advertising. Consequently, all information given to consumers must be supported with technical, practical and scientific data.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

The Ecuadorian system allows comparative advertising; however, there is no particular law that deals with comparative advertising specifically. Rather, a group of laws may inform advertisers about best practices:

- (a) According to Decision 486 of the Cartagena Agreement, the owner of a trademark does not have the right to prevent third parties from using the trademark in comparative advertising.
- (b) The Organic Law of Regulation and Control of Market Power establishes that the comparison of activities, services or products—including comparative advertising—is considered unfair when it refers to extremes that are not similar, relevant and verifiable.
- (c) Under the Regulatory Statute for the Regulation and Control of Advertising and Promotion of Processed Food, comparative advertising is prohibited for these types of products.
- (d) Offensive comparisons are prohibited, as they may be deemed an act of unfair competition.
- (e) The Regulatory Statute for the Promotion and Advertising of Medicines expressly prohibits the comparison of medicines of all kinds (including natural or homeopathic medicines).

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

According to Decision 486 of the Cartagena Agreement, the owner of a trademark doesn’t have the right to prevent third parties from using the brand or the name of brand, even in comparative advertising. Any advertiser may advertise the existence or availability of lawfully trademarked goods or services. Nonetheless, the use of the brand must be in good faith and with the sole purpose of informing the public, and it must not mislead or confuse consumers about the commercial origin of the goods or services.

Likewise, the use of a third party’s trademark, even in advertising, cannot cause commercial or economic damage to its owner, or the dilution of the distinctiveness or value of the trademark.

Also, competition laws prevent the use of the name or brands of a competitor in a degrading way, as this can be an act of unfair competition.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

Although there is no specific norm that regulates claims relating to geographical origin, such a claim must be subject to the general requirements of advertising (mandated by the Consumer Protection Law and the Communication Law), that the information provided must be true and that does not generate deception in the consumer.

3.10 Are there any special rules governing product packaging?

The basis for the regulation on product packaging is found in the Regulatory Statute for the Regulation and Control of Advertising and Promotion of Processed Food Products and in the Sanitary Regulation of Food Labeling Processed for Human Consumption (November 2013).

Since 2014 it has been mandatory that the packages of processed food include traffic light labels, framed, and placed on a white or gray background and proportional in size to the front panel of the product package. The label shows in colour the amounts of sugar, fat and salt in processed foods using a traffic light signal, where red indicates high content, yellow indicates medium content; and, green indicates low content.

4 PRICE ADVERTISING

4.1 What are Ecuador's rules regarding price advertising?

The Organic Law of Consumer Protection establishes that all information related to the price of goods and services must account for taxes, so that consumers are aware of the final total price of a good or service. Also, if the nature of the product permits it, its unit price expressed in measures of weight must be also included. In this way, suppliers must give the public information about the final price of goods or services they are offering, with the exception of products that have characteristics that are conventionally regulated. The final price has to be indicated in a clearly visible manner that allows consumers to exercise their right to choose, before making a purchase.

Pharmacies, drug stores and similar companies have to exhibit, in addition to the final price of the medicine, a list of official prices of generic medicines that are approved by the competent authority.

4.2 What are Ecuador's rules regarding advertising 'free' products?

Regarding 'free' products, the Organic Law of Consumer Protection states that delivery to the consumer of any good or service without the consumer requiring it is considered to be a free sample of the goods or services supplied.

Nonetheless, no further provisions exist regarding the advertisement of free products, and thus, any advertising in this sense must comply with the general rules, and must not mislead the consumer regarding the final price of a product.

4.3 What are Ecuador's rules regarding sales and special offers?

Any promotion or special offer must indicate its duration, the previous price of the good or service and its new price, or the benefit offered. If the promotion involves a competition or sweepstake, the advertiser must inform the public about the amount or number of prizes and the time and place at which they can be claimed. The advertiser is obliged to disseminate the result of the contest or sweepstakes.

Moreover, public tenders contained in circulars, catalogs and advertisements impose an obligation to fulfil on the person who makes them, unless the offer includes a disclaimer specifying the time period during which the offer is valid, or it explains that the conditions of the original offer can be modified by a subsequent one.

Special offers by way of sweepstakes, raffles or promotional contests require notification or pre-approval from the Ministry of Internal Affairs, depending on the case (see question 1.6).

4.4 What are Ecuador's rules regarding rebates?

Ecuadorian legislation makes no distinction between rebates and special offers. Therefore, the aforementioned rules apply for rebates as well.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

No.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

There are a few products for which advertising is specifically prohibited. For instance, the Organic Law of Health bans the advertising of prescribed medication. Also, according to the Regulatory Statute for the Regulation and Control of Advertising and Promotion of Processed Food Products, advertising of instant formulas for infants under six months old is prohibited. Finally, the Regulatory Statute of the Organic Law of Communication prohibits all forms of advertising of drugs and psychotropic substances.

Likewise, advertisement for alcohol and tobacco products are banned from certain media, and may only be advertised at points of purchase, mainly for information purposes to the customer. Beers (and other so-called 'moderation beverages' such as alcopops or wine coolers) can be advertised through 'alternative media' (ie all media other than traditional TV, radio and print media).

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Ecuadorian legislation does not prohibit specific types of advertising practices. Although, according to the Organic Law of Consumer Protection using subliminal messages is considered abusive advertising, and is thus absolutely restricted.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The Regulatory Statute of the Organic Law of Communication prohibits the dissemination of advertising that contains sexual material in which children are involved. Also, if advertising is directed to children, it cannot depict sexual acts or make any sort of reference to sex or sexuality.

Moreover, the Constitution and the Organic Law of Consumer Protection bans all advertising capable of inciting violence, exploiting fear, taking advantage of the immaturity of children and adolescents, altering the peace and public order or inducing consumers to behave in a disruptive way.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

There are no special rules regarding the identification of the advertiser. Therefore, the general parameters that are established for all types of advertising must be followed. This way, information received by consumers has to be adequate, accurate, clear, timely and complete. This may include information regarding the commercial provenance of the advertisement piece, to guarantee that the consumer is not confused regarding the origin of the goods.

Nonetheless, as long as no confusion occurs, it may be possible to withhold the identification of the announcer.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Advertising content must be identified as such in TV, radio or print media. Also, TV and radio media must indicate the beginning and ending of the advertising spaces between their programming with a clear message for the viewers/listeners.

The only exception to the requirement to identify advertising content occurs in radio, when transmitting live or taped sporting or other events, where integration is expressly allowed in the law.

Related to this subject is the definition of an 'infomercial' provided by the Regulatory Statute of the Organic Law of Communication. An 'infomercial' includes all promotions of trademarks or any business activity in exchange for any form of payment. Also, broadcasting programs must identify infomercials as such during the beginning, middle and end of the program. It is worth highlighting that infomercials have to abide by the rules established by the Organic Law of Communication and other laws that apply to general advertising.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

As mentioned above, all advertising must be identified as such within the media:

- (a) in audio-visual media, the identification is made by placing a letter 'P' in the corner of the screen (for 'Publicidad': advertising in Spanish);
- (b) in radio, the identification is made by clearly broadcasting a message at the beginning and end of the advertising space; and
- (c) in print media a letter 'P' must also be placed in the corner of the advertising piece.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no specific rules governing the use of social media for advertising purposes. However, there are general rules that regulate alternative channels for the dissemination of advertising. Alternative means or channels have the same rights and obligations as the general media. Also, direct marketing activities that use alternative channels must follow certain rules, such as:

- (a) proving legal possession and authorized databases of the clients that receive advertising,
- (b) people included in the databases must give consent to that effect and,
- (c) people who are in the database of alternative channels must have the option to remove their name in order to stop receiving advertising.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

As mentioned above, there are no specific rules regarding social media.

Nonetheless, from the general rules in our legislation, the advertiser would be responsible for claims made by third parties only if it were to use those claims in the production of advertisement pieces; otherwise, Ecuadorian law is unable to extend its reach to user generated content in social media.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

To the best of our knowledge there are no such decisions.

Ecuadorian advertising legislation is fairly new. Before the Communications Law and its Regulatory Statute, the main governing law was the one on consumer protection, with several scattered rules among a handful of codes, laws and regulations, with no mention of social media; thus, we have not been able to find any decisions or pending cases related to social media.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

Image and voice rights are protected by the Constitution, which recognizes the protection but delegates the regulation to the laws.

The Intellectual Property Law mandates that the author of a picture of a person must have authorization from the person, and after his/her death the authorization of his/her heirs, to exercise rights over said picture. The authorization must be in writing and must set out the extent of the authorization granted over the image.

No particular rules exist regarding the use of the voice, likeness, or name of a person, but general rules regarding misleading advertising are to be applied, so that the voice, image or likeness of a

person may not be used if such use may cause the public to mistake a partnership with or sponsorship of a product or service by that person.

9.2 Are there situations when permission is not required?

According to the Intellectual Property Law, the use of images without permission is exclusively allowed in the following cases:

- (a) when photographs or recordings have been taken in the course of public events and serve cultural or information purposes or,
- (b) when photographs or recordings are used in connection with news or events of public interest.

For commercial use of an image, the authorization of the person depicted must always be procured.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are no specific rules regarding special clearance concerns in Ecuadorian legislation.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

According to the Ecuadorian system, the use of other companies' products in advertising is permitted as long as it is made in good faith, meaning it has to be honest, not unfair, not demeaning and it cannot involve misappropriation of the trademark. Also, advertising material cannot violate any intellectual property right concerning the product.

Finally, advertising pieces may not be misleading for the consumer and must comply with all principles and mandates in the legislation.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Ecuador which affect advertising (eg Swedish gender equality law)?

No particular rules exist; but, in general, advertising cannot include discriminatory, violent, sexual, sexist or racist content. Also, scenes that threaten the moral, psychological or physical integrity of children and adolescents cannot be used.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Other than the general ones mentioned above (discriminatory, violent, sexual, sexist or racist content; or, scenes that threaten the moral, psychological or physical integrity of children and adolescents), no other particular cultural norms should specifically be considered.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Ecuador?

According to the Organic Law of Communication there are certain requirements that all advertising must follow:

- (a) All advertising has to be produced by an Ecuadorian person or a company whose stock is majority owned by Ecuadorian nationals or foreigners legally settled in Ecuador.
- (b) The payroll for the development and production of an advertisement piece or campaign must be comprised of at least 80% of Ecuadorian nationals or foreigners legally settled in the country.
- (c) Import of advertisement pieces is prohibited.
- (d) Only up to 20% of an advertisement piece may be comprised of images or sequences produced abroad, in certain special cases detailed by the law.

EGYPT

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Egypt?

Egypt is viewed as the most popular country in the region in terms of media and advertising. Arabic is the official language, while English and French are widely spoken amongst the educated class. Islam is the main religion of the State (about 90% of the population are Muslims).

There are five major regulations for advertising in Egypt:

- (a) Article 5 of the Civil Code (Law No 131 of 1948) which stipulates that: 'The exercise of a right is considered unlawful in the following cases:
 - (i) If the sole aim thereof is to harm another person;
 - (ii) If the benefit it is desired to realize is out of proportion to the harm caused thereby to another person;
 - (iii) If the benefit it is desired to realize is unlawful';
- (b) Decree No 220 of 1976 (which censors several acts and topics within artistic works including advertisements);
- (c) Law No 66 of 1956 for Regulating Advertising;
- (d) Executive Regulation for Law No 66 of 1956 for Regulating Advertising; and
- (e) Consumer Protection Law No 181 of 2018.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

Television, radio, print, billboards, social media, text message advertising, sweepstakes & contests.

1.3 What is the basic regulatory framework for advertising regulation?

There are generally no restrictions on advertisement for non-sensitive topics (ie food & drink supplements, nonprescription medication, prescription medication, financial services, herbal and dietary supplements, real estate, and electronics). However, any non-sensitive topic must fulfil certain criteria, such as ensuring their registration under the jurisdiction of the Arab Republic of Egypt, as well as obtaining all the necessary licenses for producing and selling the product and/or services in question.

Furthermore, any advertisement should be compliant with the terms set out in Decree 220 of 1976 and not conflict with Article 5 of the Egyptian Civil Code.

It should be noted that any advertisement regarding drugs or cosmetics should carry a permit number issued by the Ministry of Health. Similarly, advertising food and beverage products requires a permit number provided by the Ministry of Trade and Supply.

In Egypt, generally, all media (TV, broadcasting and newspapers) require proof of trademark ownership before approving the advertisement. Television in Egypt has an Informal Code of Ethics in respect of advertising.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Television and radio are regulated by Ministerial Decree 220 of 1976. Billboard advertising is regulated by Law No 66 of 1956 and its Executive Regulation.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Yes, for example, advertisements on medication are generally not subject to any specific restrictions or bans; however, the medical product being advertised must be licensed in Egypt and approved by the Ministry of Health. Again, the advertisement must not violate Decree 220 of 1976. However, the medicinal product also has to be portrayed in a positive light without causing widespread offence.

Furthermore, advertisements should not target minors in order to avoid conflicting with Article 5 of the Egyptian Civil Code.

1.6 Are any government pre-approvals required?

As a general rule, any product to be advertised in Egypt must carry all licenses, permits or approvals required for the production or selling of that product. For example, it is not permitted to advertise for any real estate property without obtaining the building licenses and approvals from the competent authorities.

1.7 Does the media pre-clear advertising?

Yes, as the use of profanity and swear words under Egyptian law is subject to a complete ban under several different articles of legislation.

- (a) Article 5 of the Egyptian Civil Code will definitely interpret any clear use of profanity or swear words as causing more harm to the general public than benefit.
- (b) Decree 220 which stipulates that advertising should not contain:
 ‘use of **phrases**, gestures, or meanings that are obscene, in poor taste, or vulgar, or failure to maintain good taste and judgment when **using phrases** intimately related to sexual life or illicit sexual relations.’

Overall, the use of swear words or profanity in Egyptian media is subject to absolute censorship.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The enforcement of advertising laws differs depending on each individual case. In other words, some advertisements may be banned if they do not comply with the relevant laws and decrees, whilst, in other cases, the competent authorities may penalize the advertiser for such violation as well as banning the advertisement, etc.

1.9 When does a competitor have a right of action? What are the potential remedies?

Comparative advertisement is not permitted in Egypt. Therefore, if the producer/supplier of a certain product advertises that product by comparing it with other competitive products, the harmed party will have the right to take legal action in accordance with the Consumer Protection Law and the Protection of Competition and the Prohibition of Monopolistic Practices Law.

1.10 When do consumers have a right of action? What are the potential remedies?

If the advertisement results in creating a wrong impression or misleading consumers, consumers have the right to take legal action against the advertiser, supplier or producer of such product.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Egypt have a primary advertising self-regulation system?

No, Egypt does not have a primary advertising self-regulation system.

2.2 Is there a self-regulatory advertising code? What are the key principles?

N/A

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

N/A

2.4 Is the self-regulation system effective? Is it widely used and followed?

N/A

2.5 Are the self-regulatory system's decisions reported?

N/A

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

N/A

2.7 Are there any other self-regulatory systems that govern advertising practices in Egypt

There are no specific self-regulatory system that govern advertising in Egypt other than Ministerial Decree No 220 of 1976. In other words, Advertisements shall not include any material conflicting with the religious or moral principles of the Egyptian society, advertisements shall not include any misleading information, advertisements shall avoid images of violence, etc.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Egypt (eg. consumer protection laws; IP laws; unfair competition laws)?

- (a) Law No 66 of 1956 for Regulating Advertising;
- (b) Executive Regulation for Law No 66 of 1956 for Regulating Advertising;
- (c) Ministerial Decree No 220 of 1976;
- (d) Egyptian Civil Code Law No 131 of 1948;
- (e) Consumer Protection Law No 181 of 2018; and

(f) Law No 3 of 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices.

3.2 Is substantiation required for advertising claims?

Substantiation is required for all claims in Egypt.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

N/A

3.4 What are the rules governing the use of disclosures in advertising?

N/A

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

N/A

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no rules governing the use of product demonstration, other than that the advertisement should be compliant with the terms set out in Decree 220 of 1976.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

No—comparative advertising in Egypt is completely prohibited.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

No—comparative advertising in Egypt is completely prohibited.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

As long as such information is not misleading, there are no rules to govern claims related to geographic origin.

3.10 Are there any special rules governing product packaging?

N/A

4 PRICE ADVERTISING

4.1 What are Egypt’s rules regarding price advertising?

There are no specific rules regarding price advertising; however, if the price is mentioned in any advertisement, it should not be misleading to the consumer.

4.2 What are Egypt’s rules regarding advertising ‘free’ products?

Under article 14 of the Consumer Protection Law, any competitions or sweepstakes that are being advertised in Egypt must be notified to Consumer Protection Agency at least three days prior to the date of the advertisement.

4.3 What are Egypt’s rules regarding sales and special offers?

There are no rules regarding sales and special offers as long as it is not misleading to the consumer.

4.4 What are Egypt’s rules regarding rebates?

N/A

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

N/A

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

(a) In Egypt, there are certain regulations restricting advertising for specific products, like tobacco and alcoholic beverages:

(i) **Tobacco and Cigarettes:** Article 4 of Law No 52 of 1981 forbids government organizations and public institutions, sporting clubs and other places for public entertainment to participate in any kind of advertising related to cigarettes and tobacco products.

Article 5 of this Law restricts the advertising of these products to include only the trademark with a list of the product’s components and its price. The ad must bear the sentence ‘Smoking is very harmful to your health’.

(ii) **Alcoholic beverages:** Although completely legal, alcohol consumption in Egypt is viewed in a negative light due to the fact that Egypt is a Muslim country.

There is a complete ban on the advertisement of alcoholic beverages on national TV, national radio and print media (with the exception of a partial ban on wine in print media). In conclusion, advertising alcoholic beverages in Egypt is completely banned.

(b) In addition, there are regulations concerning the use of political speech and religious imagery or statements in ads:

(i) Political speech in advertising is legal under Article 65 of the Egyptian Constitution, which provides that ‘Freedom of thought and opinion is guaranteed. Every person has the right to express his/her opinion verbally or by any means of expression and publication’. However, considering that Egypt has undergone two revolutions since 2011, the political situation in Egypt is polarized to some extent.

(ii) There are no special provisions banning the use of religious imagery or statement in ads. However, such use is considered a sensitive subject and has very strict requirements that should not be breached. The main legislative provisions that regulate the censorship of religious material in artworks are contained in the sub-

clauses of Article 2 of Decree 220 of 1976, which prohibits some religious acts to be performed in advertising.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

N/A

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Advertising must not violate Article 2.11 of Decree 220, which stipulates that it should not contain ‘use of phrases, gestures, or meanings that are obscene, in poor taste, or vulgar, or failure to maintain good taste and judgment when using phrases intimately related to sexual life or illicit sexual relations’.

Overall, the use of swear words or profanity in Egyptian media is subject to absolute censorship.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

No, it is not required that the advertising identify who is the advertiser/sponsor.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

N/A

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

N/A

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no laws, regulations or self-regulatory rules specifically related to advertising via social media in Egypt. However:

- (a) Article 163 of the Egyptian Civil Code provides that ‘A person committing any fault causing harm to another is obliged to compensate for the damages suffered’. Thus, 3 elements must be present for Tort liability to arise:
 - (i) fault or error;
 - (ii) damage to another; and
 - (iii) casual connection between the fault and the damage.
- (b) Article 66 of the Egyptian Commercial Law provides that:

- (i) 'All act contravening the customs and norms observed in commercial dealing shall be considered an illegal competition. In that shall be included in particular, the encroachment on a third party's trademarks, his commercial name, the letters patent, or his industrial secrets which he possesses the right to invest, and instigating the workers in his trading to store or divulge his secrets, or quit working for him, and also all act or claim that results in causing confusion to the trading store or his products, or in weakening the confidence in its owner or those in charge of its management, or in his products.
- (ii) All illegal competition shall force its perpetrator to compensate the harm ensuing therefrom. The court shall, in addition to the compensation, have the power to pronounce a ruling ordering the removal of the harm and the publication of a summary of the sentence at the expense of the judgment debtor in a daily newspaper.'

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

Until now, there have been no specific rules of regulations that govern this matter.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

N/A

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

It is prohibited to use an individual's name, picture, trademark, etc, without the owner's approval of such usage.

9.2 Are there situations when permission is not required?

No, permission is always required when using any individual's name, picture, likeness, voice, trademark, etc.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There is a requirement for there to be a physical and legal presence of the company in Egypt in order to directly promote/advertise or host a contest/draw (not a lottery) through Egyptian platforms. Moreover, the draw or contest itself cannot take place in Egypt under any circumstances unless it is conducted through the company's legal entity in Egypt and subject to approval from the Ministry of Social Solidarity.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Yes—it is permissible, but it is not common practice, as advertisers do not want to waste their air time by advertising products/services of another company.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Egypt which affect advertising (eg Swedish gender equality law)?

N/A

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

(a) The use of religious imagery or statement in ads is a sensitive subject matter in Egypt. There are no specific provisions banning the use of religious imagery or statements; however its use is subject to very strict requirements that should not be breached under any circumstances due to the sensitivity surrounding religion in Egypt. Article 5 of the Civil Code will apply if the advertisement is promoting religion in a negative light.

(b) However, the main provisions of legislation that regulate the censorship of religious material in artwork are the following sub clauses of Article 2 of Decree 220 of 1976 which stipulates:

‘No license may be given for the exhibition, production, or promotion of any work that includes any of the following:

- (1) Advocacy of atheism, the disparagement of the Heavenly religions and religious beliefs, or the approval of sorcery.
- (2) Depictions of the image or voice of Prophet Mohamed, whether symbolic or explicit, or images of one of the first four Caliphs, Prophet Mohamed’s Family, or the Ten People Promised Paradise, or images of Jesus Christ or any of the Prophets; in all cases, the competent religious bodies should be consulted.
- (3) The improper recitation of Quran verses, Prophetic Hadith (Speech) of Prophet Mohamed, and the content of revealed sacred text or the improper or inaccurate presentation of religious rites.
- (4) Depictions of funeral or burial ceremonies that do not comport with the solemnity of death.’

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Egypt?

In general, we recommend that any advertisement must be legally reviewed by a local professional before being published so that the advertiser/sponsor avoid any penalties, claims, bans, etc.

FINLAND

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Finland?

Advertising and marketing are primarily regulated by statute.

The core statutory framework consists of consumer protection laws, including the Consumer Protection Act (38/1978), which regulates marketing to consumers. Business to business marketing is governed by unfair business practices legislation, such as the Unfair Business Practices Act (1061/1978).

Data protection legislation, both domestic as well as EU level regulation, is becoming increasingly important, especially in relation to direct marketing, marketing to minors, and marketing through electronic channels. Sector specific laws regarding the advertising of certain goods or services (such as tobacco, alcohol, gambling, and pharmaceutical products) and media specific laws (such as radio and television legislation) complement the general framework.

In addition to the statutory framework, intellectual property laws such as the Copyright Act (404/1961) and the Trademarks Act (7/1964), which is, as of 2018, being amended, must also be taken into account in advertising containing copyrightable works and trademarks.

In addition to the statutory framework, advertising is regulated by self-regulatory codes (see question 2).

1.2 What types of communications are considered to be 'advertising'? How is this determined?

'Advertising' has not been defined in Finnish legislation but the EU Comparative Advertising Directive defines it as 'the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations'.

In practice, advertising is understood to be a subcategory of marketing.

'Marketing' is generally interpreted to cover any attempt to influence a consumer or other recipient in a commercial manner.

1.3 What is the basic regulatory framework for advertising regulation?

The general principles regarding marketing to consumers are regulated in the Consumer Protection Act. The Unfair Business Practices Act sets out the legal framework for Business to Business marketing.

Certain laws complement the general framework. The Personal Data Act regulates, inter alia, handling of personal data in direct marketing in general. The Act on Electronic Communication Services 917/2014 (AECS) regulates direct marketing through electronic channels as well as marketing on television and radio.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

According to Chapter 24 of the AECS, direct electronic marketing (ie marketing messages sent by means of automated calling systems, facsimile machines, or e-mail, text, voice, sound, or image messages) may only be directed at persons who have given their prior consent (opted-in). However, direct electronic marketing may be sent to existing customers without their prior consent where the service provider or seller has obtained the contact information for e-mail, text, voice, sound, or image messages in the context of the sale of a product or service, and the same contact information is used for marketing the service provider or seller's own products of the same product group or other similar products or services. In such cases, the service provider or seller must offer the customer a possibility, at no charge, to opt-out of their contact information being used for direct marketing purposes at the time of collecting the contact information and in connection with every such marketing message. The possibility to opt-out must be notified clearly to consumers.

Direct electronic marketing may be sent to companies, unless a company has prohibited such marketing (opted-out).

The AECS contains also provisions regarding marketing on television and radio. There are specific requirements for the content, placement, and duration of commercials as well as sponsorship and product placement.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Certain industries, such as the alcohol, tobacco, pharmaceutical, medical devices, and gambling industries have sector-specific statutory regulation:

- (a) **Alcohol:** The advertising of strong alcoholic beverages (ie with an alcohol content of more than 22 per cent) is prohibited. Strict restrictions apply to the direct and indirect advertising of mild alcoholic beverages.
- (b) **Tobacco:** The advertising of tobacco products is prohibited.
- (c) **Pharmaceuticals:** The advertising of pharmaceutical products is highly regulated. For example, advertising must encourage appropriate use of pharmaceutical products and the marketing of pharmaceutical products must not induce people to use the products unnecessarily, give a misleading or exaggerated picture of the composition, origin, or medicinal importance of a product, or be improper in any other similar manner. Those products which may be marketed as 'pharmaceutical products' have been specifically defined in the Medicines Act (395/1987). The marketing of pharmaceutical products in Finland always requires registration of the product or marketing authorization, which is granted by the Finnish Medicines Agency.
- (d) **Medical devices:** The advertising of medical devices is also regulated. For example, marketing of medical devices may not be inappropriate or give an exaggerated or false impression of the device or its effectiveness or use.
- (e) **Gambling:** The advertising of gambling services is prohibited in Finland from all entities other than those authorized under the Lotteries Act (1047/2001).

1.6 Are any government pre-approvals required?

There is no general requirement to pre-clear advertising. However, a company may request an advance statement from a self-regulatory body, the Board of Business Practice on whether a planned marketing campaign or other marketing activities are considered to be in line with good business practices. Also, sector-specific pre-clearing frameworks exist. In the pharmaceutical industry for example, a company may voluntarily request the supervisory body acting under Pharma Industry Finland (PIF) to inspect an advertisement in advance in accordance with the provisions of the PIF Code. The supervisory body may then approve or reject the advertisement. In addition, pre-clearing is required for television and radio advertisements of pharmaceutical products.

1.7 Does the media pre-clear advertising?

No, the media does not generally pre-clear advertising, as there is no formal pre-clearance system in place.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The Consumer Ombudsman monitors compliance with the Consumer Protection Act. In the case of unlawful marketing activities, the Ombudsman will first try to convince the trader in question to cease such marketing voluntarily by way of negotiations between the trader and the Ombudsman. In certain cases, if the matter is considered of minor importance and case law supports the Ombudsman's interpretation, the Ombudsman may issue a prohibition reinforced with a threat of a fine. If the trader opposes the prohibition within the given timeframe, the Consumer Ombudsman may bring the case before the Market Court. If the above criteria for a prohibition ordered by the Consumer Ombudsman are not met the Consumer Ombudsman may apply for a prohibition from the Market Court.

The potential remedies under the Consumer Protection Act and the Unfair Business Practices Act are described in more detail in questions 1.9 and 1.10 below.

Marketing offences have also been criminalized in the Criminal Code (39/1889). According to Chapter 30, section 1, a person, who in the professional marketing of goods, services, real estate, or the bonds and securities of a private limited-liability company or other commodities gives false or misleading information which is significant from the point of view of the target group, may be sentenced to a fine or imprisonment for up to a year.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor may have a right of action in situations which constitute unfair business practices. Such activities may arise where a business has conducted marketing activities which are not clearly identifiable as having a commercial purpose, or where the party on whose behalf the marketing is conducted does not clearly appear in the marketing.

There may also be a right of action if a business has used false or misleading expressions concerning its own business or the business of another, or expressions that are otherwise presented in an unsuitable manner, if it is likely to affect the sales or business of the other party. Additionally, a competitor may have a right of action if inappropriate comparative marketing - such as false comparisons, marketing that belittles a competitor or causes confusion with a competitor's products - is used.

The potential remedies include an injunction to prohibit the business from carrying on or repeating the infringing conduct. The injunction may also be imposed as an interim measure and reinforced with a threat of a fine.

Potential remedies further include a right to damages. When ordering an injunction, the court can oblige the business to rectify its conduct within a set time limit if it is considered necessary due to the evident harm caused by such conduct. Again, this obligation may be reinforced with a threat of a fine. The court can even decide at the request of the applicant that information regarding the injunction be published in one or several newspapers or journals at the defendant's cost. The most severe violations of the marketing provisions are criminalized as unfair competition offences under the Criminal Code (Chapter 30, section 2) and may result in fines or imprisonment of up to one year.

1.10 When do consumers have a right of action? What are the potential remedies?

In practice, it is the Consumer Ombudsman who supervises and takes action when a business has violated the marketing provisions of the Consumer Protection Act. These provisions include:

- (a) the prohibition of inappropriate or unfair marketing;
- (b) the obligation to clearly show the commercial purpose of the marketing and on whose behalf it is implemented;
- (c) the prohibition to convey false or misleading information in marketing;
- (d) delivering goods or services to consumers without an express order and by requiring payment, return, safekeeping or other measures in respect of them; and
- (e) unclear price markings may also result in a right of action for a consumer.

An injunction may be imposed to prohibit a business from carrying on or repeating marketing activities which violate the provisions of the Consumer Protection Act, if this is deemed necessary for consumer protection. The injunction may be reinforced by a threat of a fine if considered necessary on a case by case basis. In special circumstances, the injunction may be directed at an employee of the business for violating the marketing provisions or at another person acting on behalf of said business. The injunction may in certain cases also be imposed as an interim measure.

When imposing the injunction, the court may order the business to rectify the marketing operation within a specified time limit, if it is considered necessary due to the evident harm caused to consumers. Again, this obligation may be reinforced by a threat of a fine.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Finland have a primary advertising self-regulation system?

The main self-regulation system followed in Finland is the International Code of Advertising Practice (ICC Code) published by the International Chamber of Commerce. The ICC Code is not a legally binding instrument as such, but its principles complement the statutory framework. Self-regulatory bodies may issue statements on whether marketing activities are in compliance with the ICC Code.

Under the Finland Chamber of Commerce, the Council of Ethics in Advertising issues statements to consumers and companies on ethical aspects of specific advertisements or advertising practices.

2.2 Is there a self-regulatory advertising code? What are the key principles?

As mentioned above, the most important general self-regulatory advertising code is the ICC Code, which is based on the principles of decency, honesty, social responsibility, and truthfulness. Certain self-regulatory bodies have issued their own sector-specific codes as explained below.

The Council of Ethics in Advertising applies the ICC Code in its praxis, but it has also issued its own principles on good marketing practice. The key principles concern the use of a woman or a man as an eye-catcher or sexual object and the use of sexual insinuations or promises in advertising, as well as claims and implications that the role of one gender is lower than the other, as explained in more detail under question 11.2.

The PIF has issued its own Code of Ethics which contains rules on the targeting of pharmaceutical marketing and information at consumers and healthcare professionals. The key principles are that prescription-only medicines may only be targeted at professionals and only self-care medicines available without prescription may be marketed to consumers. A pharmaceutical company can inform consumers about diseases and their prevention, diagnosis, and treatment, and it must guide the consumer towards additional information on health promotion and the treatment of the disease. Sailab (MedTech Finland) has also its own Code of Ethics with extensive guidance geared at, *inter alia*, enabling the development of medical technology and enhancing security and impactfulness.

The Council of Mass Media in Finland follows the Guidelines of Journalism issued by the Union of Journalists. The Guidelines contain provisions on the professional status of journalists, obtaining and publishing information, rights of interviewers and interviewees, correcting mistakes and issuing opinions, as well as publicity and privacy.

The Ethical Committee for Premium Rate Services has also issued its own set of norms for providing premium electronic services. Its marketing principles concern, *inter alia*, content of advertising, protecting minors, and price announcement.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The Board of Business Practice acting under the Finland Chamber of Commerce handles marketing-related disputes between companies. A company may request a statement from the Board on whether certain activities carried out by another business violate good business practice or are otherwise inappropriate, or whether marketing activities carried out by another company violate the ICC Code. The matters are decided based on written documents, and no hearings are organized. The proceedings generally last about three months, and they may in many cases prove to be more cost-efficient for the parties than dispute resolution through other means. If the Board of Business Practice decides that good business practice has not been followed in marketing, the violating party must rectify its conduct. If a decision of the Board of Business Practice is not complied with, the statement may be published upon request.

The Board does not handle disputes regarding agreements, intellectual property rights, or violations of competition law.

2.4 Is the self-regulation system effective? Is it widely used and followed?

While the statements of the self-regulatory bodies are not legally enforceable, they are widely adhered to. Thus, the self-regulation system may be considered effective even though the jurisdiction for

dispute resolution is held by the Market Court (the court with competence to handle disputes relating to matters involving unfair business practices). The parties to a dispute may choose to bring their matter before a self-regulatory body, such as the Board of Business Practice, if, for example, they wish to avoid legal proceedings. The statement of the Board of Business Practice may also be requested in connection with a court case.

2.5 Are the self-regulatory system's decisions reported?

The Board of Business Practice publishes summaries of its decisions online in an anonymized form so that the parties may not be recognized. The proceedings of the Board of Business Practice are confidential, which is also one of the key benefits of the system. The purpose of publishing the summaries is to clarify the principles of good business practice which are formed in the praxis of the Board of Business Practice and the Market Court.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Companies should generally adhere to the principles of the Consumer Protection Act, the Unfair Business Practices Act, and other relevant legislation when carrying out their marketing activities. The purpose of the Consumer Protection Act is to protect consumers from, inter alia, inappropriate marketing, unfair marketing practices, and unreasonable agreement terms. The Unfair Business Practices Act aims to prohibit marketing practices which may be harmful for other companies by, for example, regulating comparative marketing. The Act also generally prohibits inappropriate business practices. Particular attention should also be paid to ethics, non-discrimination, gender equality, and the protection of minors.

2.7 Are there any other self-regulatory systems that govern advertising practices in Finland?

Other self-regulatory bodies include the Board of Business Practice, the Council for Mass Media, the Ethical Committee for Premium Rate Services, the Supervisory Commission of Medicinal Products (operating under PIF), Sailab (MedTech Finland) which is an industry association for producers and suppliers of health care and laboratory equipment and supplies, and the Finnish Medical Association which supervises the advertising of medical services. Furthermore, the Finnish Bar Association supervises the advertising of legal services.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Finland (eg, consumer protection laws; IP laws; unfair competition laws)?

The Consumer Protection Act sets forth the basic framework regarding advertising claims in consumer marketing. The key principles of the Act are the prohibition of inappropriate marketing and the prohibition to use such practices in marketing which are otherwise unfair from the consumers' perspective. Inappropriate marketing is defined as marketing which is in clear conflict with the generally accepted norms of society. Unfair marketing practices include giving false or misleading information in marketing and omitting disclosure of substantially relevant information.

The Consumer Protection Act also contains provisions on comparative marketing, which applies to both consumer and business to business marketing. Business to business marketing is otherwise regulated in the Unfair Business Practices Act.

IP laws, such as the Copyright Act (404/1961) and the Trademarks Act (7/1964) must also be taken into consideration in marketing.

3.2 Is substantiation required for advertising claims?

The burden of proof, with regard to the validity of information provided in marketing, is on the advertiser. For example, under the Consumer Protection Act, it is prohibited to give false or misleading information in marketing, if it is likely to result in a consumer making a purchase which he otherwise would not have made. Misleading information means information which does not correspond to measurable or verifiable facts. Research must be impartial, generally accepted, and usually made by neutral experts in the relevant field especially if the advertiser has specifically referred to research results. Similar regulations are applied to business to business marketing.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

It is generally acceptable for advertisers to present slightly exaggerated positive statements about their own products that would be generally regarded as commercial promotion (see question 3.2 above). However, caution should be exercised especially when using superlatives, as advertisers usually have a strict burden of proof for the truthfulness of such claims. Puffery is not, as a rule, considered as giving false information, as consumers are usually able to detect it as subjective exaggeration.

3.4 What are the rules governing the use of disclosures in advertising?

As a rule, marketing must clearly disclose its commercial purpose and on whose behalf the marketing is conducted.

In terms of disclosures to be given to consumers, before the consumer makes a purchase, the following information must be disclosed to the consumer:

- (a) the main characteristics of the goods;
- (b) the name and address of the seller;
- (c) the total price of the goods including taxes, or information on how the price is formed;
- (d) additional delivery costs, if necessary, or information that such costs may be incurred;
- (e) any exceptional practices concerning payment, delivery, fulfillment of the contract or customer complaints; and
- (f) how it is possible to cancel the contract.

In home or distance selling the scope of information to be provided to the consumer is wider and includes information on the right to cancel the purchase, the minimum duration of the consumer's obligations under the contract, and information on the available means of dispute resolution.

The marketing of certain products, such as financial services and instruments as well as consumer credit, is also subject to more stringent requirements.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

The general prohibition on false and misleading statements in advertising also applies to the use of endorsements and testimonials. Furthermore, pursuant to Article 14 of the ICC Code, marketing communications should not, without prior permission, depict or refer to any person's property in a way likely to convey the impression of a personal endorsement of the product or organization involved.

Under Article 13 of the ICC Code, testimonials must be genuine, verifiable and relevant. Testimonials which have become obsolete or misleading through passage of time should no longer be used.

3.6 What are the rules governing the use of product demonstrations in advertising?

The general principles of the Consumer Protection Act apply to the use of product demonstrations. Thus, information conveyed about the products through product demonstrations may not be false or misleading. The special requirements regarding comparative marketing described below, including the prohibition on causing confusion between the trademarks or products of the company and a competitor must also be complied with. Special attention should also be paid to the use of superlatives.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Under the Unfair Business Practices Act, comparative marketing is defined as marketing where a competitor, a product, or a service marketed by a competitor can be recognized. Comparative marketing is permitted, as long as certain requirements, laid out mainly in the Consumer Protection Act and in the Unfair Business Practices Act, are fulfilled. For example, in order to be permitted, comparative marketing may not be false or misleading; it must pertain to essential and verifiable characteristics of the products; must not create a risk of confusion between the trademarks, goods, or other identifiers of a trader and those of a competitor; and may not unlawfully exploit the goodwill of a competitor.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

The general rules applicable to intellectual property apply also to comparative advertising. In addition, the Unfair Business Practices Act sets out guidelines for the use of trademarks. For example, under the Unfair Business Practices Act, comparative advertising may not give rise to a danger of confusing the advertiser and the competitor; represent a product or service as a copy or reproduction of another product or service protected by a trademark; or belittle or dishonor the competitor's trademark, trade name, product or service, operations or circumstances. Also, for example, comparative advertising that takes unfair advantage of the reputation of the competitor's trademark, trade name, or of the original appellation of the product or service marketed by the competitor is prohibited.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

General rules concerning the prohibition to convey false or misleading information in marketing apply also to the use of claims relating to geographic origin. There are also some sector and/or product-specific requirements, such as relating to claims concerning certain alcohol products originating from Finland (eg, use of the terms 'Vodka of Finland', 'Finnish fruit liqueur', and 'Finnish berry liqueur').

3.10 Are there any special rules governing product packaging?

There are general provisions setting forth information that should be provided on the product packaging. In addition, there are specific rules governing product packaging in certain fields, such as in the pharmaceutical, food, and tobacco sectors, to name a few.

4 PRICE ADVERTISING

4.1 What are Finland's rules regarding price advertising?

According to section 3 of the Price Indication Decree (553/2013), if consumer goods are marketed for a certain price, the sales and unit prices must be indicated in a clear, conspicuous, and easily understandable and detectable manner.

For example, the Consumer Ombudsman has outlined that indicating price information in small print or in a color which is not distinguishable from the background may be considered as inappropriate marketing, if the consumer is not able to read the text in full. Additionally, the price information must be complete and accurate, and include the sales and unit prices of the products (including all taxes and fees collected from the consumer). Advertisers should ensure that the advertisement does not convey misleading information about the pricing.

4.2 What are Finland's rules regarding advertising 'free' products?

The Consumer Ombudsman has outlined that the products may not be described as 'free' if acquiring them incurs any costs or requires a purchase to be made. Such advertising could be considered as misleading marketing which is prohibited under the Consumer Protection Act. When a consumer receives a benefit in connection with a purchase, such benefit should be characterized as 'without additional cost' or by using another more precise phrase, rather than being advertised as free.

4.3 What are Finland's rules regarding sales and special offers?

The Consumer Ombudsman has issued guidelines and instructions on sales and special offers. With regard to sales, for example, consumers must be given the reduced selling price of the goods or services in question. Moreover, if the products have been sold at a reduced price for a long period of time, the reduced price actually becomes the normal price. Therefore, sales cannot continue for very long. As an example, the Market Court has in its practice outlined that a sale may last up to two months. If the products have in fact never been sold at the 'normal price', they cannot be advertised as being on sale.

A 'special offer' is shorter in duration, usually one month at most. Unlike sales, special offers may be used in newly-opened stores and at special sales events. When advertising special offers, the duration of the special offer or the number of products that can be purchased must be indicated.

4.4 What are Finland's rules regarding rebates?

Generally, rebates are permitted, as long as the general principles of the Consumer Protection Act are complied with, including the requirement that marketing must be identifiable as such and price information must be clear and conspicuous. Additionally, the Consumer Ombudsman has outlined that a rebate must not dominate marketing. If precise information about a rebate is given, consumers must also be informed how they may obtain and utilize such rebate.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Not applicable.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

The advertising of pharmaceuticals is restricted as explained above in question 1.5 with reference to, inter alia, encouraging appropriate use of pharmaceutical products.

The advertising of tobacco and strong alcoholic beverages is completely prohibited. Strict restrictions also apply to the advertising of mild alcoholic beverages. For example, the advertising may not be directed at minors, and the advertisements may not contain claims of certain possible positive effects of drinking. Mild alcoholic beverages may not be advertised on television between 7 am and 10 pm, or in cinemas in connection with presenting a film that has an age limit of less than 18 years.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Telemarketing by electronic messages is subject to certain restrictions as explained above in question 1.4. As a rule, such marketing requires prior consent of the consumer. Other types of direct marketing, including by marketing by phone, is allowed unless the consumer has opted out of such marketing. Both companies and individuals must be able to opt-out of any direct marketing. Also, in accordance with the general principles of the Consumer Protection Act, marketing must always be recognizable as such, and it must be clear on whose behalf the marketing is being conducted.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

According to the Consumer Protection Act (Chapter 2, sections 1 and 2), marketing may not be 'inappropriate'. Marketing is considered inappropriate if it clearly conflicts with the generally accepted values of society and in particular if:

- (a) it violates human dignity or religious or political belief;
- (b) it is discriminatory based on, inter alia, gender, age, ethnic origin or state of health; or
- (c) it conveys an approach which promotes or glamorizes endangering health, safety or the environment without a justified reason.

Where marketing is directed at minors, it is considered inappropriate especially if the lack of experience and natural credulity of minors is exploited in such marketing, and if the marketing is likely to have an adverse effect on the balanced development of a minor or if it is intended to disregard the parents' ability to educate their child.

The interpretation of this principle has been clarified in case law, statements of the Consumer Protection Ombudsman, and decisions of the relevant self-regulatory bodies.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Yes. It must be clear on whose behalf marketing is conducted. This follows from the general principles of the Consumer Protection Act (Chapter 2, section 4) and the AECS (Chapter 26). According to Chapter 26 of the AECS, the name or logo of the sponsor must be clearly presented either at the beginning or at the end of sponsored audiovisual programs or radio programs. This fulfills the requirement of transparency, which is a central principle of the Act.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

The primary rule, in accordance with the general principles explained above, is that marketing must always be recognizable as such.

Furthermore, pursuant to the AECS, product placement (ie the insertion of a product, service or trademark within an audiovisual program in return for consideration) is, as a rule, prohibited. The prohibition does not apply to cinematographic works, films, or series made for audiovisual content services, sports programs, or light entertainment programs. Providing props and product prizes for use in audiovisual programs free of charge is also considered product placement if the items are of significant value. Such placement is, however, generally permitted in programs other than children's programs.

When product placement is carried out, it must be ensured that it does not:

- (a) affect the content of the programs or their scheduling;
- (b) encourage the purchase of products or services;
- (c) make promotional or other special references to the products; or
- (d) give undue prominence to the products.

Sponsoring is also subject to certain restrictions. The AECS provides that a sponsor may not influence the content of sponsored programs or their placement in the program schedule in a way that may affect the liability or autonomy of the content provider or radio broadcaster.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

When programs contain product placement, viewers must be informed of its existence clearly either by a logo or text at the beginning and at the end of the program and again after each commercial break. This requirement does not apply if the content provider has not produced or commissioned the program, and obtaining information about product placement requires unreasonable effort (AECS, Chapter 26).

The same requirement applies to the sponsoring of audiovisual programs: the sponsor's name or logo must be presented clearly at the beginning or at the end of the sponsored program.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

The general principles applicable to all marketing also apply to advertising in social media. In addition, the Nordic Consumer Ombudsmen have issued a position paper on social media marketing. The position paper contains the Nordic Consumer Ombudsmen's interpretation as to how the general principles of marketing law should be taken into account in the social media context.

In line with the general principles applicable to marketing, one of the most important requirements is that marketing messages should be clearly identifiable as such. Advertisers should ensure that consumers are able to recognize advertisements and on whose behalf they are made. If individuals receive payment for mentioning certain products in social media, they should be careful not to create the impression that their communication does not have a commercial purpose. Pages created for companies or products in social media must contain certain information required by law, such as contact details.

The restrictions concerning electronic direct marketing must also be adhered to. In particular, this means that marketing messages may only be sent to persons who have given their prior consent (opted-in).

Where social media marketing is directed at children, more stringent requirements apply. For example, children should not be persuaded to purchase or demand that their parents purchase products. The advertising of certain products may not be directed at children at all, such as alcohol. There are also certain requirements for banner advertising. It must be ensured that banners contain correct information, the total price (including all fees and taxes) and the terms of purchase must be clearly stated.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

There is no significant case law on the subject of user generated content. Generally, advertisers are responsible for ensuring that their marketing material contains accurate information. Any false information must be corrected by sufficiently effective means. In online marketing, this obligation is interpreted especially strictly, because it is possible to update, modify, and remove data quickly and at any time.

If the advertiser has not complied with this duty of care, it may under certain circumstances be liable towards its customers for any damage resulting from such negligence. If the advertiser is able to show that the damage was caused by reasons not attributable to the advertiser or that its marketing has not been inappropriate, the advertiser is not usually liable for damages.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

There is no significant case law from courts or self-regulatory bodies yet, but the position paper of the Nordic Consumer Ombudsmen referred to above in question 8.1 and other guidelines issued by the Finnish Consumer Ombudsman contain useful information on the requirements related to social media marketing.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

The use of an individual's name, picture or characteristics has not been specifically regulated in Finland. However, the images or voices of persons appearing regularly in news or current affairs programs may not be used in commercial communications, pursuant to the general principles of the AECS (Chapter 26).

It has been generally considered in legal praxis that using a person's name or picture requires the person's consent. This obligation may be derived from the Finnish Constitution (731/1999), which guarantees a right of privacy for everyone, as well as from the data protection legislation. Finnish courts, as well as self-regulatory bodies, such as the Council of Ethics in Advertising and the Board of Business Practice have interpreted the consent requirement in their decisions.

Furthermore, Article 14 of the ICC Code contains a specific requirement concerning the portrayal or imitation of persons in marketing. It provides that marketing communications should not portray or refer to any persons, whether in a private or public capacity, unless prior permission has been obtained.

9.2 Are there situations when permission is not required?

As explained above, there are no provisions regarding the use of an individual's name, picture, or characteristics, except for the images or voices of persons appearing regularly in news or current affairs programs. However, the Finnish Supreme Court has considered that where the picture of a person is part of a marketed product, such as a picture of a famous person in a published article, the article may be used in the marketing of the said publication without specific permission. In such case the picture is only considered as a description of the content.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

While in practice other laws (such as intellectual property laws) may limit the use of pre-existing materials, there is no advertising-specific regulation concerning the types of materials that must be cleared before they may be used in advertising, such as those displaying historic places and buildings. In the case of private premises, the respect for private life regulated in the Constitution must, naturally, be observed.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

As a general rule, if the other company's products are not the focal point of the advertisement, there is usually no obstacle for such use. However, the provisions regarding inappropriate business practices as well as intellectual property legislation must be observed. For example, according to Article 15 of the ICC Code, the exploitation of another company's goodwill and the unjustifiable use of a brand's name or trademarks are prohibited. In the case of comparative marketing, the principles of fair

competition must be taken into account. According to Article 12 of the ICC Code, marketing communications should not denigrate or bring into public contempt or ridicule another firm's product. The rules regarding comparative marketing have been described in more detail in question 3.7.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Finland which affect advertising (eg, Swedish gender equality law)?

Discriminatory marketing is prohibited under the Consumer Protection Act. Advertising may not prejudice human dignity or be discriminating based upon gender, age, ethnic origin, nationality, language, state of health, handicap, sexual orientation, or other similar characteristic.

The Council of Ethics in Advertising has considered gender equality in many cases. It has outlined that an advertisement is inappropriate if a woman or a man is used as an eye-catcher or sexual object, and the gender is used in a degrading, disparaging or derogatory manner. An advertisement may also be inappropriate if it contains sexual insinuations or promises which do not relate to the advertised product in any way. In addition, an advertisement is inappropriate if it claims or clearly implies that the role of one gender is of lower value than the other socially, economically or culturally. In general, advertisements should not promote stereotypical gender roles. These principles have been codified in the Council's principles on good marketing practice.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

Marketing is considered inappropriate under the Consumer Protection Act if it conflicts with the generally accepted norms of society and if it offends religious belief. This provision has been considered by the Council of Ethics in Advertising in many decisions. The Council has in most cases found advertisements with religious references acceptable despite the fact that individual persons may be offended by the depiction of religion in such advertisements. Thus, it may be concluded that the threshold for prohibiting advertisements for religious reasons seems to be relatively high.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Finland?

In Finland the supervisory authorities are particularly concerned by advertising to minors and by advertising conducted through electronic channels. Consequently, it is advisable to have any such advertising carefully examined before the launch of the campaign.

FRANCE

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in France?

Advertising is regulated both by law and through self-regulation.

General rules apply to all advertising, irrespective of the product concerned. For example:

- (a) the Consumer Code covers deceptive and misleading advertising, as well as comparative advertising;
- (b) the Intellectual Property Code deals with the protection of trademarks and copyrights;
- (c) Article 9 of the Civil Code protects individuals' image and privacy; and
- (d) the 1994 '*loi Toubon*' imposes the use of the French language in all advertising.

The French advertising self-regulation agency *Autorité de Régulation Professionnelle de la Publicité* (ARPP) represents advertisers, agencies and the media. It details expected ethical standards, secures proper implementation of these standards through advice and pre-clearance, including providing mandatory advice before the broadcast of all TV commercials. ARPP works with an independent 'jury' which handles complaints against advertisements which violate ARPP rules. Its decisions are published on its website (this is seen as a sanction in itself).

1.2 What types of communications are considered to be 'advertising'? How is this determined?

TV advertisements are defined as messages broadcast on TV, for remuneration or other compensation, aimed either at promoting products or services, or at ensuring the commercial promotion of a public or private company.

Aside from this, there is no official definition, except that which has been developed by case law in connection with comparative advertising, ie a communication which is made public and in the interest of an advertiser.

1.3 What is the basic regulatory framework for advertising regulation?

There is both a legal and a self-regulatory system.

Generally, unfair competition and misleading advertising are prohibited, comparative advertising is regulated, and specific regulations apply to certain products (eg alcohol, tobacco and books), categories of persons (eg children in advertising, respect of the image of individuals) and also to certain media (eg TV, internet).

The ARPP has so far issued approximately 28 Recommendations which are either general, thematic, aimed at certain media or economic sectors, or miscellaneous recommendations.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Digital media advertising is principally regulated by the law dated 21 June 2004, as modified on 3 January 2008 (entitled *loi pour la confiance dans l'économie numérique*). Article 20 of this law provides that advertisements, in whatever form (pop-ups, advertisement banners etc) must be

identified as such and therefore they must be clearly distinguished from any non-commercial information. The name of the person or corporation for which the advertisement is made must be clearly stated.

E-mail advertising requires the prior consent of the addressee (Articles L34-5 al.1 of the *Code des Postes et Télécommunications* and L 223-7 of the *Code de la Consommation*) except under certain circumstances.

In all instances, the person on behalf of whom the e-mail advertising message is sent should not be disguised and the subject matter of the e-mail must not conceal any relationship with the product or service offered. The name and address where the addressee may send a request for the discontinuation of the advertising e-mail without any cost (aside from costs in relation to the discontinuation request) should be clearly stated (Article L34-5 al.5 of the *Code des Postes et Télécommunications*).

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

- (a) **Alcoholic beverages:** Direct or indirect advertising of alcoholic beverages (ie, any propaganda or advertising in favor of a corporate body, service, activity, product or item, the effect of which, whatever the goal, is to remind the consumer of an alcoholic beverage) is strictly regulated in France.
- (b) **Cars:** The content of advertising pertaining to new or used cars (in particular information on the gas consumption and carbon dioxide emission of new cars) is regulated. Additionally, direct or indirect advertising in which the car appears off-road is prohibited.
- (c) **Companies in the energy sector:** Advertising by companies in the energy sector and advertising dealing with energy and energy consumption must include the following message '*l'énergie est notre avenir, économisons la*' ('energy is our future, save it').
- (d) **Firearms, weapons, and ammunition:** Only the name of the manufacturer or distributor; the technical characteristics of the firearms; the price; and any sales conditions may be advertised, and such advertisements can only appear in specific media.
- (e) **Food:** Advertising of food products must not create confusion for the purchaser or consumer as to the characteristics of the food products. This includes the nature; identity; qualities; content; quantities; durability; origin; and manufacturing/sourcing process of the goods.
- (f) **Gambling and 'State' lotteries:** Any advertising must include a safeguard message against excessive or pathological gambling, as well as a reference to a system which provides information and assistance. Such advertising is prohibited in audiovisual programs, in the press and on internet sites aimed at under-aged persons so that minors are especially protected.

- (g) **Medical services:** Any direct or indirect advertising and in particular any arrangement/layout (*aménagement*) or sign (*signalisation*) providing a commercial look at medical premises is prohibited.
- (h) **Tobacco products** (cigarettes, cigars, snuff, pipe tobacco): Any propaganda or advertising, direct or indirect, in favor of tobacco, tobacco products or ingredients is prohibited.

1.6 Are any government pre-approvals required?

Not applicable.

1.7 Does the media pre-clear advertising?

The media does not pre-clear advertising per se but it is keen to have the relevant regulations complied with.

For instance, TV advertising requires pre-clearance to be carried out by the ARPP. French TV channels therefore ensure that the ARPP has given its approval to the advertisement in question before broadcasting the same.

Since 5 October 2010, each advertisement to be broadcast on TV has to bear its own identification number (PubID), which contains information such as: the name of the advertiser, the name of the product, the name of the advertising agency, the ARPP pre-clearance, and the music.

1.8 How does the government enforce advertising laws? What are the potential remedies?

- (a) The *Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes* (DGCCRF) has broad investigative powers in relation to all matters pertaining to the protection of consumers, including advertising practices.

DGCCRF agents are entitled to enter the professional premises of the advertiser, advertising agency and communication agency during business hours with a prior appointment in order to request an immediate review of documents; take copies of the same; and to ask questions.

Depending on the violation, a claim can be brought before civil and/or criminal courts.

Violations of the Loi Evin (which in particular places limitations on advertisements for alcoholic beverages) are sanctioned by fines of up to 75,000 euro and up to 50% of the advertising budget allocated to the promotion. In cases of repeated violation, the sanction is prohibition of the distribution of the alcoholic beverage which is the subject of the advertisement for 1 to 5 years. Courts may also order the removal or confiscation of the prohibited advertisement. Corporate entities who have committed a violation may be ordered to pay a fine of up to 375,000 euro and up to 50% of the advertising budget.

- (b) Further to EU Directive 2005/29 dated 11 May 2005 concerning unfair commercial practices, French law has been modified to cover not only misleading advertising per se but also other unfair commercial practices.

Violations of the rules governing unfair commercial practices are subject to criminal sanctions as well as civil remedies.

- (i) Criminal sanctions:

- (1) Individuals: fine of up to 300,000 euro and/or up to two years imprisonment; 50% of the advertising expenses may be levied;
 - (2) Legal entities: fine of up to 1,500,000 euro (which can be set to an amount equivalent to up to 10% of the average turnover based on the last three fiscal years, or 50% of the advertising expenses to create the litigious ad). There are also additional sanctions, such as publication of the decision (eg in a newspaper or on the website of the losing party, as determined by the judge).
- (ii) Civil remedies: Damages can be awarded to a claimant who brought his claim in the criminal court. In addition, for actions based on tort, judges can allocate damages based on an assessment of the prejudice suffered in each case.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor suffering a prejudice (ie having an interest in bringing a legal action) is entitled to bring a claim before civil and/or criminal courts. This competitor will be entitled to receive monetary damages to compensate him for the prejudice suffered (eg unfair competition).

Tort law applies in the event the action is brought on the ground on unfair competition/ parasitism.

In France, except where liability arises out of a contract, the general rule is set by Article 1240 of the French Civil Code: 'Every act of a man which causes injury to another obligates the one by whose fault it occurred to give redress'.

In addition, Article 1241 of the French Civil Code provides that 'Everyone is responsible for the injury he has caused not only by his act, but also by his neglect or imprudence'.

The wording of Article 1240 of the French Civil Code clearly shows that three elements are necessary to engage liability:

- (a) a fault;
- (b) a damage; and
- (c) a causal link between the two.

The burden of proof of all these elements falls on the claimant.

If these three criteria are fulfilled, the claimant is entitled to claim compensation for the prejudice it has suffered.

1.10 When do consumers have a right of action? What are the potential remedies?

A consumer suffering prejudice (ie having an interest in bringing a legal action) is entitled to bring a claim before civil and/or criminal courts.

This consumer will be entitled to receive monetary damages which aim to compensate the prejudice suffered (eg unfair advertising).

2 SELF-REGULATORY FRAMEWORK

2.1 Does France have a primary advertising self-regulation system?

Yes. The French advertising self-regulation agency (ARPP) has the following powers:

- (a) 'Good behavior' codes (ie the aforementioned Recommendations): The ARPP and those in the advertising sector (agencies, advertisers, advertising media, and professional bodies) collaborate to draft self-regulatory rules. These rules are a serious commitment from the industry but they do not replace French general law which remains applicable and must be complied with by advertising professionals.
- (b) Enforcement of the self regulatory rules: The ARPP ensures that the self regulatory rules are complied with by following three main steps:
 - (i) Advice (*conseil*) for each type of advertising media, before finalization of the advertisement (the ARPP's members are entitled to ask for advice on their projects).
 - (ii) Opinion (*avis*) only concerning TV advertising prior to broadcast. Each TV advertisement must be submitted to the ARPP, which then issues one of three opinions: 'favorable', 'to be modified', or 'do not broadcast'.
 - (iii) After the broadcast of the advertisement, the ARPP is entitled to require, in cases of lack of compliance with the self-regulatory rules, and depending on the gravity of the breach, that the advertising campaign is modified or withdrawn.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The ARPP has issued approximately 28 Recommendations as follows:

- (a) Recommendations addressing general issues (such as the obligations to identify advertisements as a commercial messages, the rules applicable where specific wording is used in advertisements, or the rules applicable where footnotes are included in advertisements);
- (b) Thematic Recommendations (for instance, Recommendations in relation to claims/arguments related to health, ecological arguments, children, use of an individual's image, religion, and product safety);
- (c) Recommendations relating to specific types of media (notably internet and telephone);
- (d) Recommendations relating to certain economic sectors (5 sectors):
 - (i) Food, health and beauty: Recommendations in connection with advertising for alcohol; health and beauty; food aimed at children under 3;
 - (ii) Mobility: Recommendations in connection with advertising for motor vehicles and two wheeled vehicles;
 - (iii) Real estate: Recommendations in connection with advertising for real estate, construction and residential properties;
 - (iv) Services: Recommendations in connection with advertising for services such as the offers of employment dedicated to home working, or the offer of drinking-water systems; and
 - (v) Miscellaneous: Recommendations in connection with advertising for books; promotional offers; and toys.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The ARPP acts in cooperation with an independent Jury (*Jury de la Déontologie Publicitaire* (JDP)), which is in charge of dealing with complaints against the advertisements which do not comply with the self-regulatory rules (Recommendations). These complaints can be brought either by competing advertisers; public associations; governmental authorities; or private individuals.

In order to be brought before the JDP, a claim must meet the following criteria:

- (a) a claim must be brought against an advertisement;
- (b) the advertisement in question must be identifiable and have been broadcast in France; and
- (c) the claim must be based on a violation of the self-regulatory rules.

The JDP is not permitted to sanction the violation of French advertising law, nor is it empowered to issue civil penalties or to force the discontinuation of non-compliant advertisements. However, its decisions are published on its website (which is a sanction in itself from the advertiser's point of view).

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self-regulatory system appears to be effective as it is well used and followed by people engaged in the field of advertising.

In 2017, the ARPP handled 43,612 files, which represents 191 files per day on average. Among these files, the ARPP has handled:

- (a) 19,268 pieces of advice (across all media);
- (b) 22,006 pre-cleared TV advertisements;
- (c) 2,338 claims brought before the JDP.

2.5 Are the self-regulatory system's decisions reported?

The JDP's decisions are published, and the methods of publication vary depending on the seriousness of the violations.

The first level of publication consists of an online publication of the decision on the JDP's website once the decision is handed down by the JDP.

At a second level, a press release is issued by the JDP with a reference to the trademark of the advertiser and the identification of the advertising agency.

In the case of serious breaches, the JDP may publish its decision in a relevant newspaper.

3 years after the decision has been rendered, the JDP's decision is rendered anonymous.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

On May 7, 2014, the First degree Tribunal of Paris held that the publication of a decision by the JDP was defamatory to the advertiser in question.

A students' insurance organization, broadcast 5 advertisements presenting students explaining why they chose SMEREP, as follows: 'Clara, 18, the blond girl', 'Thomas, 19, the lazy guy', 'Greg, 19, the heartthrob', 'June, 18, the angry girl', 'Jeanne, 22, the Parisian girl'.

The plaintiffs before the ARPP claimed that these advertisements presented disparaging stereotypes of young people.

The JDP concluded that the campaign violated the '*Image de la personne humaine*' Recommendation. Its decision was published on the JDP's website.

SMEREP sued the ARPP (which the JDP is part of) before the First degree Tribunal of Paris which, ordered the ARPP to pay 10,000 euro in damages to compensate SMEREP for its moral prejudice, as well as 4,000 euro for procedural costs.

2.7 Are there any other self-regulatory systems that govern advertising practices in France?

Not applicable.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in France (eg, consumer protection laws; IP laws; unfair competition laws)?

(a) Consumer protection laws

- (i) Use of the French language (*Loi Toubon*): The use of French language is mandatory in any written, spoken or audiovisual advertising.

Any wording associated with registered trademarks must be accompanied by a translation into French. This does not mean, however, that both should be of the same size, graphics or color.

- (ii) Prohibition of misleading commercial practices: Misleading advertisements are subject to sanctions. The sanction forms part of the broader infringement called 'misleading commercial practices', which is divided in two categories:

- (1) misleading commercial practice resulting from a positive action; and
- (2) misleading commercial practice resulting from an omission, for instance, not providing information which is essential for the recipient of the advertisement.

(b) Intellectual property laws

- (i) The use of a copyrighted work or registered trademark in advertising is subject to the authorization of the author/owner.
- (ii) The use of French monuments in advertisements has to be carefully considered under French copyright law. Even if a monument is in the public domain, the moral rights still remain in force as they are perpetual.

(c) Unfair competition law

- (i) Unfair competition is based on tort and requires that the suffering party proves:

- (1) a fault (disloyal behavior consisting of the intention to promote its own commercial activity through a 'free ride');
 - (2) a prejudice (to damage somebody's reputation or image, customers' misappropriation, destabilization) and
 - (3) a link between (1) and (2).
- (ii) While unfair competition implies a competing relationship between the parties at stake, the notion of 'parasitism' has been developed by French authors, and then applied by judges to reprimand disloyal behaviors towards non-competitors. This means that even if the parties at stake do not operate in the same field of activity, the use of one element of the other business' activity could lead to a sentence based on parasitism (ie free ride).

3.2 Is substantiation required for advertising claims?

Substantiation is required. The rules on misleading commercial practices apply to all advertising claims that cannot be substantiated by the advertiser.

In addition, the ARPP have issued Recommendations which oblige advertisers to substantiate claims. For instance, in a 'Sustainable Development' the following Recommendation was issued in December 2003:

- (a) Section 1-1.5 (*Veracity*) points out that the advertiser must be able to substantiate:
 - (i) any allegation or advertising representation; and
 - (ii) any use of a sign or a symbol in advertising.
- (b) Section 1-2.4 (*Objectivity*) provides that any exploitation of a claim based on figures/surveys must be substantiated by verifiable, objective and updated documents.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

The use of exaggeration in the advertising message is tolerated in France (*publicité hyperbolique*) provided that, through the visual elements of the advertisement, to the critical mind of the average consumer, it is blatant that the exaggeration cannot mislead anyone.

In addition, caricaturized advertising messages are tolerated for the same reasons.

3.4 What are the rules governing the use of disclosures in advertising?

Any disclaimer or other qualification or clarification must be expressed clearly and legibly and must not mislead consumers in any case.

There are specific rules which impose, in certain instances, the use of disclaimers in advertisements.

For instance, since February 1, 2007, health messages have been added to advertising for manufactured food and drinks products on television, cinema, radio, newspapers, and on posters and marketing flyers distributed in supermarkets. If the advertisers decide not to use these health messages, they must pay 1.5% of the cost of the promotional campaign to the national nutritional policy. In relation to TV advertisements, the health message must be included in a fixed or moving

window streamer or on a screen at the end of the advertisement. The health message is supplemented at the end of the advertisement by a reference to the website www.mangerbouger.fr.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Endorsement is possible in advertising only if the company, business, or trademark owner accepts the association with the advertisement.

The use of testimonials is also carefully monitored so as to avoid any violation of the law prohibiting misleading commercial practices.

The ARPP has also issued a Recommendation dedicated to health claims that specifically addresses the use of testimonials in advertising. In particular, a testimonial based on a component of a product can be made by a member of the medical, para-medical or scientific sector, provided that such a testimonial:

- (a) is based on objective, scientific and verifiable proofs; and
- (b) is not based solely on the personal opinion of the professional concerned.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules dedicated to product demonstrations. Therefore, the general principles prohibiting misleading advertising or forced sales/aggressive commercial practices apply.

Specific additional rules apply on all sales carried out outside stores. These rules have been recently amended by a law dated 17 March 2014 (amendments apply to agreements concluded after 13 June 2014). No payment can be made by the buyer (consumer) to benefit the seller (professional) within 7 days from the date on which the sale was concluded. In addition, the buyer benefits from a right of withdrawal of 14 days (previously 7 days) without any justification to be provided to the seller. The buyer is then required to send back the product purchased within 14 days following the day on which the seller was informed of the withdrawal.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted in France provided that the following rules are complied with:

- (a) the comparison must concern goods or services which cover the same need, or which have the same purpose;
- (b) the comparison must be objective, and exclude any reference to subjective criteria such as taste, smell, or the visual appearance;
- (c) the comparative advertisement must objectively compare one or several essential, accurate, verifiable and main defining characteristics of the goods or the services (eg the price);
- (d) the comparative advertisement must not mislead or attempt to mislead the public;
- (e) the comparative advertisement must not, without valid cause, take advantage of any goodwill in the trademark or name of the competitor;
- (f) the comparative advertisement must not disparage the trademark, trade name or other distinctive brand of the competitor; and

- (g) the comparative advertisement must not lead to confusion between the advertiser and the competitor.

3.8 Are there any special copyright or trademark rules that may impact comparative advertising (eg, whether the use of a competitor's trademark or products may be used)?

Trademark/copyright law does have an impact on comparative advertising. The use of a trademark or a copyrighted item of a competitor is permitted in connection with comparative advertising, provided that there is no confusion between the advertiser and the trademarks or commercial name/trade name of the competitor.

The ECJ held in a decision dated 12 June 2008 that, where there is no risk of confusion, a trademark owner cannot avail himself of his rights in his trademark to prohibit the use, in a comparative advertisement, of a sign identical or similar to his trademark, irrespective of whether the other conditions of legality of the comparative advertisement are met or not.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

- (a) The 'CE' marking was introduced pursuant to European technical harmonization legislation. It is mandatory for all products covered by one or more European directives which expressly provide for it, and it guarantees free movement throughout the EU for these products. To be entitled to affix 'CE' marking to their products, manufacturers must conduct, or have conducted, controls and tests ensuring that the products comply with essential requirements, particularly those concerning health and safety, as set forth in the relevant directives.

'CE' marking is not certification and it does not attest to the product's geographical origin.

Being both mandatory and regulatory, it represents a manufacturer's visible confirmation that its product complies with European legislation.

Whether a product manufactured in France or imported is subject to a 'CE' marking obligation can be verified in the technical harmonization directives or by referring to national measures transposing them. These directives specify the scope of application for the relevant products and, where applicable, the excluded products. There are currently around twenty technical harmonization directives providing for the affixing of 'CE' marking relating to a vast range of products. Only the products mentioned in these directives are obliged to have 'CE' marking.

- (b) The 'made in France' label is compulsory:
- (i) for food products when the lack of this information can lead the consumer into confusion (for instance, a product called 'Provençal spices' with a French flag featured on the packaging but which does not come from France will have to show its geographical origin) or
 - (ii) for pre-packed meat (with the information pertaining to the breeding place and the point of slaughter).

Otherwise, the 'made in France' label is not compulsory.

But when the 'made in France' label is featured on the packaging of the product, the general rule for a commercial claim to be truthful and honest applies; otherwise it will be deemed a misleading advertising.

3.10 Are there any special rules governing product packaging?

The Consumer Code sets specific information to be provided to the consumer for his/her information before purchasing the product; some of this information has to be presented on the label of the product. The use of the French language (or a French translation, if the information is presented in a foreign language) is compulsory for the proper information of the French consumer.

The information is:

- (a) the essential characteristics of the product, in particular its composition (list of ingredients), bottle volume etc.
- (b) the use-by date,
- (c) the specific information allowing the proper use of the product (ie the instructions for use), including any safety information or instructions for use.

The following information must also be presented on the packaging of a pre-packed product:

- (d) the net weight of the product expressed in kilograms or grams (there are rules as to the size of this information, depending on the weight of the product).
- (e) identification of the company which packed the product. When it is not located within the EU, the identification of the importer (located in France or within the EU) must also be presented on the packaging.
 - (i) If the importer is located in France, such identification would be done through the importer's corporate name and postal address, and identification of the town in which it is based, by means of a geographic code;
 - (ii) If the importer is located in another EU country, such identification may be made by means of a mention allowing the relevant authorities of the State concerned to identify this company (a code could be accepted); and this mention must be presented in compliance with the rules applicable in the State concerned.

These mentions must be inserted on the packaging or, at least, be presented on a labelling to be stuck on the packaging.

There is also specific information (including pictograms) to be featured on the packaging of certain products, for instance the dangerous chemical products.

4 PRICE ADVERTISING

4.1 What are France's rules regarding price advertising?

As a general rule, any service provider or seller of products must, through marking, labeling, posters or any other relevant means, inform the consumer of the price, the potential contractual limitation of liability and the specific conditions of sales, in ways set out in specific provisions issued by the Ministry of the Economy. These rules only apply to consumers.

The price must be expressed in euro (tax included).

Any product or service ordered during a period corresponding to an advertisement must be sold at the advertised price.

4.2 What are France's rules regarding advertising 'free' products?

The offer of free products is not prohibited per se under French law.

The offer (and therefore the corresponding advertisement) of certain types of products (such as alcoholic drinks or drugs) for free is, however, prohibited.

Sales with premiums are also legal per se under French law, unless a premium sale is deemed an unfair commercial practice under Directive 2005/29/EC.

4.3 What are France's rules regarding sales and special offers?

Sales operations (*soldes*) under French law must concern products sold in a store that have been purchased as stock by that store at least one month earlier. The aim is to accelerate the sale of any remaining stock.

Sales operations are authorized twice a year at dates specifically set by the French authorities (in January and in July, although the exact dates vary throughout the French territory) for a duration of five weeks.

There is also an authorized floating period of two weeks (*soldes flottantes*), or two periods of one week each, for which the store sets the dates, provided that this complementary period ends at least one month before the beginning of one of the major sales operations period of five weeks.

4.4 What are France's rules regarding rebates?

Discounts, or price reductions, are allowed in France subject to the specific regulations set out by an Act dated 11 March 2015.

According to this Act, any announcement of price reduction is legal provided that same is not an unfair commercial practice and does comply with this Act; and the announcement of price reduction made in a commercial establishment/entity must bear the price reduction but also the reference price.

But the calculation of the reference price no longer refers to any criteria, so that those used before the enactment of this Act (eg the lowest price within the last 30 days, the recommended price etc) are no longer compulsory. Thus, the calculation of the reference price turns on the free interpretation/assessment of the seller, provided that the price reduction does not constitute an unfair commercial practice as prohibited by the Directive 2005/29 and implemented in the French Consumer Code under Section L121-2. As a consequence, the sellers must be able to evidence the reality of the reference price chosen to advertise price reductions (bills, recommendation from the manufacturer, or any other document used to assess the reference price).

A commercial practice is unfair if:

- (a) it is contrary to the requirements of professional diligence and
- (b) it materially distorts, or is likely to materially distort, the economic behavior, with regard to the product, of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

Further, an advertisement which is made outside the point of sale (or inside, if visible from outside), must be expressed either as a flat amount or as a percentage of the previous price, eg 50% off.

The terms of the promotion and the categories of products or services covered must be provided eg 'up to 50% off shirts, except for those marked with ...').

As regards information supplied inside the point of sale, the previous price and the new price must be shown for each category of product.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

In France, a sale at a price below cost is prohibited.

The cost price is equivalent to the price the seller bought at, reduced by all price reductions that may have been offered by the seller and increased by the delivery costs, the VAT and any other tax which could apply to such a sale.

Violations are subject to criminal sanctions or an action before civil courts (for monetary damages) is possible.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Given the scope of this publication, this list cannot be exhaustive, but includes:

- (a) **Firearms, weapons, and ammunition:** The content of advertising for firearms is regulated. Only the name of the manufacturer or distributor, the technical specifications, the price and the sales conditions may be advertised and only in specific media.
- (b) **Tobacco products** (cigarettes, cigars, snuff, pipe tobacco): Any propaganda or advertising, direct or indirect, in favor of tobacco, tobacco products or ingredients is prohibited under Article L3511-3 al.1 of the Public Health Code.

Any form of commercial communication or advertising, ie any act, whatever the purpose or the media, the effect of which is to remind the public of tobacco products or brands is prohibited.

The prohibition of indirect advertising is defined in the broadest way possible.

Limited exceptions apply to tobacco advertising at certain motor sports events and on specific websites.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Spamming is subject to specific regulations that vary depending on the means used to send the communications.

The two applicable systems are those of:

- (a) opt-out, whereby it will be possible to send commercial communications unless the data subject has expressly stated that he/she did not want to receive such communications; and
- (b) opt-in, whereby it will only be possible to send commercial communications to data subjects who have expressed their prior consent.

This may be implemented through tick-boxes. It is strongly advisable not to pre-tick the opt-in box.

Opt-out requirements apply in the case of communications sent by postal mail.

Opt-in requirements apply to all commercial electronic communications (eg fax, e-mail and SMS).

Moreover, under the General Data Protection Regulation (GDPR), which entered into force on 25 May 2018, such consent is one lawful basis for data processing (eg for marketing purposes). The consent must meet several criteria under the GDPR; it must be: freely given, specific, informed, and unambiguous.

However, there are alternative ways to ground a data processing, for instance for marketing purposes. In particular, the data processor may be able to rely on 'legitimate interests' to justify some of its business-to-business or business-to-consumer marketing. In this case, the data processor will have to show, in particular, that the way it uses people's data is proportionate and has a minimal privacy impact.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

There are general principles which are aimed at preserving the dignity of the human being (Section 16 of the Civil Code).

In addition, all advertising and marketing communications should be decent, respect human dignity and be compliant with ARPP's Recommendations '*Image de la Personne Humaine*' and '*Races, Religions, Ethnics*'.

According to these Recommendations:

- (a) advertising should not shock or offend by way of representations or situations, explicit or implicit, that can be perceived as degrading or humiliating;
- (b) advertising should not devalue a person because of her/his gender, age, sexual orientation, disability, or social group, in particular by minimizing her/his role or responsibilities;
- (c) the use of stereotypes (sexual, racial, religious, social, etc) must be handled with an increased sense of social responsibility, and especially with respect for the dignity of the person concerned; and
- (d) advertising must not condone, incite or trivialize violence, whether moral, physical, explicit or implicit.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Under the ARPP Recommendation '*Digital advertising and marketing communication*', marketing communications and advertising should be clearly distinguishable as such, whatever their form. That identification can be achieved by any means whereby the consumer can clearly and immediately understand that the message is an advertisement:

- (a) If the commercial nature of the message is obvious, either because it uses a common advertising format or because of the content, no further identification elements are required.
- (b) If the commercial nature of the message is not obvious then a clear notice identifying the commercial nature of the message should be added.

When the message is surrounded by news or editorial content, it should be presented in a way that it is instantly recognizable as an advertisement. The notice must be readable or audible, and intelligible.

When the form of the advertisement does not allow an immediate identification of its commercial nature, it must be identified as specified in the Annex of the Recommendation.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

According to the Recommendation '*Digital advertising and marketing communication*' issued by the ARPP in December 2010, marketing communications and advertising should be clearly

distinguishable as such, whatever their form, and rules on the identification of the advertisement must be complied with (see question 7.2 below).

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

In order to ensure clear information reaches consumers, marketing communications and advertising should be clearly distinguishable as such, whatever their form.

This identification can be achieved by any means whereby the consumer can clearly and immediately understand that the message is an advertisement.

The identity of any advertiser in relation to broadcasting advertising or marketing communications must be obvious.

In relation to digital media, the identification of the advertisement/marketing communication must comply with the provisions of the Digital Advertising and Marketing Recommendation.

Regarding integration into print media, in the case of a paid for editorial advertisement or any other advertisement that has the appearance of an editorial advertisement, the advertiser, the advertising agency and the press media must display the words '*PUBLICITÉ*', '*COMMUNIQUÉ*' or a synonym, in a clear and readable way, at the top of the advertisement.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

The ARPP, in its Recommendation on Digital advertising dated December 2010, defines a social network as follows:

'A social network is a community of people or organization of direct or indirect relations, linked/connected by a common interest (hobby, profession etc)'

The ARPP also details the three main principles which apply where advertisements are broadcast through social media:

- (a) **Identification of advertising:** In light of the specificities of social networks, it is recommended to add an explicit notice if the commercial nature of the advertisement is not obvious.

Further, the advertisements appearing in spaces which are dedicated to chats or interactions (eg comments on a status, message on a wall) between users must be identified as advertising by means of a clear indication.

The use, for advertising purposes, of social network functions meant for the user (groups, events, fan pages) must be clearly identified.

In no event must an advertisement create confusion with a user's message.

- (b) **Protection of children and teenagers:** It is recommended that providers offering services that require prior identification request that the user provides his/her age or date of birth in order to protect children and teenagers against harmful advertisements.

- (c) **Fair, truthful and honest advertising:** The advertisement must not mislead the consumer regarding the service/product offered and the identification of the advertiser.

When the format does not enable the advertiser to provide information requested by law (eg a tweet), this information must be directly accessible via a link.

In addition, this information must be legible or audible and intelligible, without impairing any compulsory provisions which would be applicable.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg statements that a consumer makes on an advertiser’s Facebook page)?

As a general rule, the editor of content broadcast over the internet is deemed liable in the event a claim is brought against the content owners (copyright/trademark infringement, etc).

However, the Digital Advertising and Marketing Recommendation issued by the ARPP in December 2010 specifically provides that, where the users of online communications are invited to create content for advertising purposes (eg a contest for advertisement creations by way of uploading user generated content), the advertiser must ensure compliance with the Recommendation by, for example, monitoring the content of the contributions.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

The decisions made by French courts and the self-regulatory JDP consider that the internet is a medium (among others) to which the general rules governing advertising apply.

There is, however, a decision by French courts which concerned an advertisement broadcast over the internet which led to the modification of the law.

Advertising of alcohol is strictly restricted in France. The ‘*Loi Evin*’ (1991), which has been implemented in the Public Health Code, limits the media and content which are permitted in connection with advertisements for alcohol. In February 2008, Heineken was sanctioned by the Court of Appeal for broadcasting an advertisement over the internet, which, at that time, was not listed as an authorized media for advertising alcoholic beverages.

As a result, in 2009, a new law was introduced which added ‘online communication services’ as an authorized medium, under a specific condition: advertisements for alcohol carried out online should not be intrusive—such as pop-ups—or interstitial, and should remain, in any case, prohibited on websites which are, by their character, presentation or purpose, mainly targeted at young people.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

Civil law applies to the use of an individual’s name, picture, likeness, voice, and identity in advertising. Section 9 of the Civil Code provides that everybody is entitled to protect his/her private life/privacy. This general principle has been used by French courts to reinforce the individual’s rights to protect their name, picture, likeness, voice, and identity. As a result, any use of a person’s name,

picture, likeness, voice, and identity in advertising must be authorized by the individual concerned. This, for example, prohibits the use of 'lookalikes' in advertisements.

The use of children in advertising is also strictly regulated and, in all cases, requires authorization from the children's parent/guardian.

Criminal law also applies to penalize the recording or the transmission of someone's image/likeness, without his/her consent, where this individual is located in a private area.

Data protection law may also apply where data allowing an individual to be identified has been collected and used for advertising/marketing purposes without the consent of the data subject.

9.2 Are there situations when permission is not required?

French judges are required to reconcile and ensure the protection of two general principles under French law: the right of privacy and the right of freedom of expression.

As a result, there are court decisions based on Section 9 of the Civil Code, which held that information about public broadcast in the context of events/news (*actualités*) is not a violation of someone's private life.

However, judges do carefully analyze the way information is processed and presented to the public to ensure that the information does not exceed what is deemed 'related' to the *actualité* (for instance a press article completely dedicated to the life of a young princess aged 13 with no link to her official duties as a princess, has been deemed to violate her private life).

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Where a building or a monument is used in an advertisement, consent must be obtained from the owners of the building (to a certain extent) and the architects.

The owner of a building does not have an exclusive right in relation to use of the monument's image, but he could prohibit the use of its image by a third party if such use causes him abnormal trouble. Such trouble cannot, in principle, result from the mere use of the image.

The architect of a building protected by French copyright has patrimonial rights (ie the right to authorize the reproduction and the representation of his/her work) and moral rights (ie, the right to oppose any use which is, in his/her opinion, detrimental to the image of the building; and the right to respect of his/her name, which means that the author should be credited).

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

The use of a branded product or a visible third party's trademark has to be authorized by the trademark owner, except where co-branding agreements have been entered into by the advertiser and the trademark owner.

Otherwise, the trademark owner could begin a legal action based on parasitism/un-accepted endorsement to promote a competitor or any third party's products.

The sole exception to this general principle could occur where comparative advertising is made (provided that the general principles detailed in question 3.7 above are complied with).

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of France which affect advertising (eg, Swedish gender equality law)?

Not applicable.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

Not applicable.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in France?

French courts do not have to apply the criteria used for copyright to unfair competition. A combination of distinguishing features can be sufficient to make a case, where such combination shows either that a concept was stolen without compensation, or that such combination causes third parties to confuse the competing parties.

As a result, even if a claim could be rejected on the ground of copyright infringement, the risk of being sentenced for unfair competition/parasitism should not be disregarded. Such a risk increases substantially when the claimant is able to provide evidence that he/she was approached prior to the advertisement campaign.

It is, therefore, highly recommended that advertisers or their advertising agencies adopt a prudent approach when dealing with authors in connection with the preparation of an advertising campaign.

GERMANY

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Germany?

Advertising in Germany is governed by statutory law, administrative regulations and industry self-regulation, all as interpreted and developed by case law in a large number of court decisions. In principle, all print, billboard, radio; broadcast, TV, movie, and online advertising and promotions targeting parties in Germany (whether originating from a source located abroad or in Germany) are subject to German law. Statutory law in the advertising and marketing sector includes the laws relating to:

- (a) fair trade;
- (b) consumer protection;
- (c) general terms and conditions;
- (d) distance (electronic) contracting;
- (e) data protection;
- (f) privacy;
- (g) industrial and intellectual property;
- (h) the antitrust laws;
- (i) regulations governing audio-visual media services; and
- (j) youth protection

as well as regulations concerning particular products and services (such as food, tobacco and alcohol).

1.2 What types of communications are considered to be 'advertising'? How is this determined?

Advertising includes any statement or claim made for the purpose of promoting the sale, distribution, lease, or other use of an advertised product or service, by influencing the consumer's use or purchase behavior of the promoted product or service. The advertisement must enable the consumer to recognize, directly or indirectly, that the advertiser is promoting a product or service. This means the addressee must be in a position to identify the promoted product or service.

1.3 What is the basic regulatory framework for advertising regulation?

The primary source of advertising regulation is the Law Against Unfair Trade Practices of 3 March 2010, last modified 17 February 2016. The statute implements the Unfair Commercial Practices Directive (Directive 2005/29/EC of 11 May 2005), the Privacy and Electronic Communications Directive (Directive 2002/58/EC of 31 July 2002) and the Technical Standards and Regulations Directive (Directive 98/34/EC of 22 June 1998, now replaced by Directive 2015/1535/EU).

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Section 7 of the German Law Against Unfair Trade Practices regulates certain forms of advertising and promotion by means of electronic messages (based on the European E-Commerce Directive of 8 June 2000). It is illegal to unreasonably direct advertising to someone who does not wish to receive advertising. Marketing/advertising by telephone ('cold calls') directly to consumers is illegal, unless the consumer has given express consent. If the marketing/advertising is directed to any party other than a consumer who has not expressly consented, it is illegal unless consent can be implied. Advertising through automatic calling machines, telefax or electronic mail is illegal if the receiving party has not expressly consented to such advertising. Very narrow exceptions apply.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Health-related advertising (ie advertising relating to medicinal products (drugs), medical devices and other products where the advertising concerns the diagnosis, cure, relief or abatement of a medical condition of human beings or animals, as well as advertising relating to plastic surgery without medical indication) is regulated by the Health Advertising Law (*Heilmittelwerbegesetz*) of 19 October 1994, amended most recently on 20 December 2016.

In terms of basic rules, health advertising is considered misleading and is prohibited if:

- (a) the advertised product has not been approved for marketing;
- (b) it claims, in particular, an efficacy or effect which does not exist;
- (c) it advertises a guaranteed success or the absence of detrimental effects in case of long term use;
- (d) it conceals the intent of advertising;
- (e) it contains untrue or misleading statements regarding the composition or property of a medicinal product, medical device or other product or treatment; or
- (f) it contains incorrect information on the identity, education, ability or records of the manufacturer, inventor or related persons.

The law prescribes legible doctor and patient information.

Advertising to the public (as opposed to members or institutions of the medical or veterinarian professions, or parties permitted to trade with relevant products) is restricted and must bear special warnings. Any such advertising may not be directed to children below the age of 14 and may not be connected with promotional contests or sweepstakes promoting excessive use of medicinal products or medical devices.

The law regulates the extent to which members or institutions of the medical or veterinarian professions, or parties permitted to trade relevant products may be offered, or may accept, a benefit, gift or other promotional item.

Prescription drugs may not be advertised except to doctors, dentists, veterinarians, pharmacists and persons permitted to trade in such products.

1.6 Are any government pre-approvals required?

German law does not require government pre-approvals of advertising (except regarding certain classification requirements in the sector of youth protection concerning certain movies, video games and online media services).

On a voluntary, self-regulatory basis, the Central Association of the German Advertising Industry (*Zentralverband der Deutschen Werbewirtschaft*—<http://www.zaw.de>) offers certain pre-clearance and advisory services to its members. A membership list is available at <http://www.zaw.de/index.php?menuid=87>.

1.7 Does the media pre-clear advertising?

The media do normally pre-clear advertising (by in-house or external means) for their own protection against cease and desist claims. There is no legal or self-regulatory obligation to do so, and any such pre-clearance would extend to obviously illegal content, only. The media pre-clearance does not

normally cover clearance of third-party rights, which remains the primary responsibility of the advertiser.

1.8 How does the government enforce advertising laws? What are the potential remedies?

In Germany, advertising regulations are not normally enforced by government bodies, but rather by competitors, consumer protection agencies, or industry trade associations who request enforcement of applicable German law. These organizations include the Centre of Protection against Unfair Competition (*Wettbewerbszentrale*) in Bad Homburg, or Integritas (the self-regulatory body for pharmaceutical advertising) in Bonn. In order to qualify, the organization must meet certain statutory conditions (including a clear identification of the business purpose to prosecute fair trade and media law violations). Often, the organization represents a certain industry or professional sector and conducts targeted searches for fair trade violations. If the cease and desist demand is successful, the prosecuting association is entitled to certain cost reimbursements in accordance with Section 12 of the Law Against Unfair Trade Practices. If a third party has prompted the complaint, its name and address must be disclosed.

In certain health and safety-related sectors (such as food, drugs, youth protection, product labeling etc), and in the sector of public utilities and communication, relevant public institutions (agencies and regulatory bodies) monitor the market and enforce fair competition and fair trade rules, as well as regulations pertaining to their specific competencies.

Potential remedies in this sector are administrative orders, enforcement of such orders, and fines.

1.9 When does a competitor have a right of action? What are the potential remedies?

It is normal practice in Germany for a competitor or qualifying consumer or industry association claiming a violation of German fair trade laws to send a formal cease and desist request to the violating party, as a first step. The defendant party may either refuse to comply with the request or accept the request by issuing a formal cease and desist undertaking, including a penalty clause stating that any future violations will be subject to a penalty payment. If a cease and desist request is refused, the complaining party may ask a court to issue a cease and desist order by preliminary injunction (even without notice). A decision on such a motion is normally available in a matter of hours or days. The defendant party may contest the injunction order by a filing an 'objection'. Any resulting court judgment is subject to appeal to the appellate court.

In practice, claimants would not normally pursue claims for damages in unfair advertising cases because the required proof and quantification of damages is generally difficult to establish in court. In theory, it is possible to ask that profits gained through an illegal trade practice should be surrendered to the government. In practice, however, this sanction has little relevance in unfair trade disputes.

There are not normally criminal sanctions, except in cases of intentional, fraudulent misleading of the public. Eg, according to Section 16 of the German Law Against Unfair Trade Practices, it is forbidden to mislead the public by providing untruthful information.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers may indirectly prosecute violations of fair trade laws aiming at the protection of consumers, by asking a qualifying fair trade protection association (as to which see question 1.8 above) to take appropriate action against the advertiser. Either based on their own findings or upon notification received from a consumer, qualifying German fair trade or consumer protection organizations prosecute violations in their own name, in and out of court.

The remedies are the same as in the case of a cease and desist demand of a competitor. The consumer reporting a violation is not involved as a party and has no fair trade-related claims of their own.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Germany have a primary advertising self-regulation system?

Advertising self-regulation is becoming increasingly customary in Germany. The German Advertising Council (*Deutscher Werberat*—see <http://www.werberat.de/keyfacts>) and certain industry organizations operating on a membership basis (such as the self-regulatory institutions created by members of the pharmaceutical industry) have gained significant authority. The German Advertising Council is a founding member of the European Advertising Standards Alliance (EASA), and closely cooperates in this sector with the International Chamber of Commerce (ICC).

These bodies create ‘best practice’ rules which influence the interpretation of statutory and regulatory law by the courts.

In the case of the German Advertising Council, the aim is to provide an effective means of recourse against objectionable print or screen advertising for the public and for market competitors. The German Advertising Council provides a mechanism for dispute resolution between the public (including competitors, consumers, associations and agencies) and the advertiser. It is highly-regarded for its fast and practical complaints procedure.

Decisions of the Council are binding only upon its members on a contractual basis, pursuant to its terms of membership.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The German Advertising Council has adopted several self-regulatory advertising codes which are available in English at <https://www.werberat.de/en>, such as the Code of Conduct on Commercial Communication for Alcoholic Beverages and the Rules on Advertising and its Appraisal.

The Rules on Advertising and its Appraisal cover general principles and, in particular, sensitive issues (such as tobacco and alcohol advertising, and advertising directed to minors).

In terms of key points of these Rules, the following should be noted: Advertising must uphold prevailing notions of decency and morals, and observe the principles of fair competition and social responsibility. In particular (the following is quoted from the Code):

- (a) Consumer trust must not be abused and inexperience or lack of knowledge must not be exploited;
- (b) Children and youths must not be subjected to physical or psychological harm;
- (c) Discrimination in whatever form—on grounds of race, ethnic origin, religion, gender, age, disability or sexual preference, or by reducing an individual to a mere sexual object should be neither fostered nor silently tolerated;
- (d) Violent, aggressive or antisocial behavior should be neither fostered nor silently tolerated;
- (e) Fear should not be instilled nor unhappiness or suffering be facilitated; and
- (f) Behavior that threatens consumers’ safety and security should be neither fostered nor silently tolerated.

When evaluating advertising, the German Advertising Standards Council takes into account:

- (a) the notion of a reasonably well-informed and rational consumer who is among the audience addressed by the advertisement in question;
- (b) the tone and variety of issues covered in media editorial content as an expression of social reality;
- (c) the nature of the medium used to disseminate the advertisement; and
- (d) the situation in which the consumer is confronted with the advertisement.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

There is no direct enforcement mechanism available: the German Advertising Standards Council is neither a public agency nor a court, and advertisers are not bound by its decisions save by membership or contract. However, if an advertiser fails to modify or discontinue an advertisement that has been objected to by the German Advertising Standards Council, the Council would issue a reprimand and make the case public.

Upon receipt of a complaint, the Council will ask the advertiser to comment. If the comment is not satisfactory and if the advertisement continues, the Council will make a formal decision. If the decision confirms that the complaint was justified, the advertiser will be formally asked to refrain from continuing the advertisement. If the advertiser fails to comply, the Council will publish its decision and objection to the advertisement publicly. See ‘Complaints Procedure’ at <https://www.werberat.de/en>.

In cases of a suspected violation of German fair trade laws, the German Advertising Standards Council will forward the complaint to specialized fair trade prosecution organizations such as the Center for the Prosecution of Unfair Advertising (Zentrale zur Bekämpfung unlauteren Wettbewerbs), the Association for the Prosecution of Unfair Health Advertising (*Verein für lautere Heilmittelwerbung*) the Protection Association of the Alcohol Industry (*Schutzverband der Spirituosenindustrie*) the Federal Examination Board for Youth Threats in the Media (*Bundesprüfstelle für jugendgefährdende Medien*), the Commission for Youth Media Protection (*die Kommission für Jugendmedienschutz*) or in exceptional cases, to the Criminal Prosecutor.

If the complaint concerns editorial content, the German Advertising Standards Council would forward the complaint to the relevant self-regulatory bodies such as the German Press Council, the Voluntary Self-Regulators of Multimedia Service Providers, the Voluntary Self-Regulators of the Film Industry, or the Voluntary Self-Regulators of Television.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The various self-regulation systems available in Germany are generally effective and well accepted by members of the industry associations providing self-regulation rules, as well as by advertisers in general in respect of the self-regulation tools made available by the German Advertising Council. Since the cost of self-regulatory proceedings is normally considerably lower than the cost of litigation in court, the reason for using self-regulatory instruments is not only a greater degree of confidentiality but also a matter of saving costs.

The German Advertising Standards Council has a rate of acceptance of 94% of its decisions, which remained at a consistently high level over the past years.

2.5 Are the self-regulatory system’s decisions reported?

Yes, the effectiveness of self-regulation largely depends on the public reporting of violations.

If the German Advertising Standards Council confirms that a complaint is justified, and the advertiser fails to comply with a cease and desist request, the Council will publish its decision in its own publications and in the press. See <https://www.werberat.de/pressemitteilungen> (available in German only).

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Depending on the by-laws and self-regulation rules of a given industry association, the rulings delivered in a self-regulation procedure can be final and binding upon members. In the case of the procedures applied by the German Advertising Council, the outcome in procedures before the Council is open to recourse in the regular court system. One should be aware that the likelihood of becoming exposed to a cease and desist request of a competitor is considerably greater than the risk of being detected by an agency or other institution of public administration.

2.7 Are there any other self-regulatory systems that govern advertising practices in Germany?

The important self-regulatory efforts are as described above.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Germany (eg, consumer protection laws; IP laws; unfair competition laws)?

The basic laws governing advertising and marketing claims in Germany are:

- (a) the Act Against Unfair Trade Practices (as revised on 17 February 2016);
- (b) Regulation No 1924/2006/EC of 20 December 2006 on nutrition and health claims made on foods;
- (c) the Law Relating to the Enforcement of EU Consumer Protection of 21 December 2006;
- (d) the Price Declaration Regulation (as revised on 17 July 2017);
- (e) the Law Relating to Cease and Desist Claims regarding Consumer Law and Other Violations (as revised 17 July 2017);
- (f) the Regulation Regarding Information Obligations of Service Providers of 12 March 2010;
- (g) the Telemedia Act (as revised on 28 September 2017);

together with underlying EU Directives.

In addition, advertising is also governed by:

- (h) German Trademark Act of 25 October 1994 (as revised on 17 July 2017); and
- (i) Regulation 2017/1001/EU of 14 June 2017 on the European Union trade mark, as well as by relevant implementation and harmonization rules.

Finally, in terms of competition rules,

- (j) the Law Against Competition Restraints of 26 June 2013, and related EU law is relevant.

3.2 Is substantiation required for advertising claims?

In advertisements that contain a specific claim relating to the characteristics of the advertised product or service, the advertiser may be required, by relevant statutory or case law, to substantiate such a claim. Substantiation requirements are contained in a number of laws and case law relating to specific products and services, particularly health and environmental (green) advertising. Even if there is no specific substantiation requirement, if a competitor, or competent fair trade association, challenges the accuracy of a given claim, the advertiser must prove the accuracy of its claim by substantiation of the alleged facts. This also applies for test results the advertiser refers to.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Puffery and otherwise clearly fanciful advertising messages that are clearly obvious and understood by the average consumer as ‘pie in the sky’ can be acceptable without substantiation, providing there is no misleading element or effect. Specific claims or factual statements relating to the properties and characteristics of an advertised product or service would not be permissible without substantiation.

3.4 What are the rules governing the use of disclosures in advertising?

Specific disclosures may be required to qualify a given claim or statement regarding the properties of the advertised product or service. There are no specific rules as to the content and format of a disclosure (apart from generally applicable rules ensuring legible content in terms of font size and legible print). Disclosures must be appropriate and sufficient to correct any false impression raised, or likely to be raised, by a claim or statement in the absence of the disclosure.

In addition, disclosures which are material for the consumer in its factual context as a basis for a commercial decision are necessary. For instance, in respect of consumers, any information shall be deemed to be material which, according to EU Regulations or pursuant to legal provisions for the implementation of EU Directives for commercial communication including advertising or marketing, shall not be omitted.

Furthermore, in relation to consumers, where goods or services are offered with reference to their characteristics and price, in such manner appropriate to the communication medium used that an average consumer can conclude the transaction, the following information shall be deemed to be material if not already apparent from the context:

- (a) all main characteristics of the goods or services to an extent appropriate thereto and to the communication medium used;
- (b) the identity and the geographical address of the entrepreneur and, where applicable, the identity and geographical address of the entrepreneur on whose behalf he is acting;
- (c) the final price, or in cases where the nature of the goods or services means that such price cannot be calculated in advance, the manner in which the price is calculated as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot be calculated in advance, the fact that such additional charges may be payable;
- (d) arrangements for payment, delivery and performance, as well as complaint handling policies so far as they depart from the requirements of professional diligence; and
- (e) the existence of a right of withdrawal or cancellation.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Endorsements and testimonials must be truthful and not misleading. For instance, testimonials may be misleading if they are not qualified by information describing the relevance of the endorsement.

In German health advertising law, it is not permitted to advertise to the consumer any endorsements and testimonials of persons practicing in the health sector or as an academic, if such endorsement or testimonial is likely to increase the use of the advertised drug.

3.6 What are the rules governing the use of product demonstrations in advertising?

Product demonstrations must communicate a fair representation of the product's features and properties. Demonstrations must not mislead by, for instance, demonstrating applications and uses which are not possible based on the product's normal properties and abilities. Product demonstrations in advertising are subject to the same rules as any other form of advertising.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

The European Directive 97/55/EC dated 6 October 1997 regulating comparative advertising in Europe has been adopted into German fair trade legislation. Comparative advertising is permitted subject to certain restrictions. Comparative advertising is permissible if it:

- (a) concerns products or services serving the same purpose;
- (b) relates objectively to one or more features of a product or service which are
 - (i) essential;
 - (ii) relevant;
 - (iii) verifiable; and
 - (iv) typical for the product or service.

Comparative advertising is illegal if it diminishes, in an unfair manner, the reputation of a competitor or unfairly disparages or degrades the products or services of a competitor or its personal or business affairs. As applies to any other advertising, comparative advertising must be true and accurate.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

- (a) The use of a competitor's trademark for the purpose of comparative advertising is permissible as long as the advertising complies with the restrictions of comparative advertising mentioned at question 3.7 above.
- (b) The use of a copyrighted work of a competitor is only permissible in accordance with the stipulations of the German Copyright Act. There are no exceptions for comparative advertising. In addition, when depicting a competitor's product for the purpose of (permitted) comparative advertising, the mere fact that the comparative advertising is permissible does not automatically allow the use of a copyrighted work which is contained in the depicted product.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Claims relating to the geographic origin are addressed explicitly in the German Trademark Act, the European Union Trademark Regulation and the German Act Against Unfair Trade Practices. It is forbidden to use geographical indications as a claim for goods or services which do not originate from that geographical location (eg city, region, territory or country). Furthermore, in the case that the geographical indication stands for special properties or a special quality of a product, the geographical indication may only be used if the goods or services have these properties or this quality, notwithstanding the correctness of the geographical indication of origin.

In addition, EU Regulation No 1151/2012 of 21 November 2012 on quality schemes for agricultural products and foodstuffs provides for the protection of certain registered designations of origin and geographical indications in relation to specific agricultural products and foodstuffs.

In respect of the claim 'made in Germany', apart from the fact that the claim must not be misleading as to the product's origin, it must also be true in respect of the essential steps during the manufacturing process. For instance, if the product is designed and all its parts are manufactured in a different country and just assembled in Germany, the claim 'made in Germany' would be misleading and must be replaced, eg, by 'assembled in Germany'.

3.10 Are there any special rules governing product packaging?

There is a general duty to affix the full name and postal address (not PO Box) of the manufacturer of the product, or its importer, on the outside of the packaging. Certain exceptions apply.

Packaging which mislead the consumer as to the size, content or quality of the product is prohibited.

There are also many rules regulating certain mandatory disclosures and indications, including the language to be used, which must be affixed to the packaging, depending on the type of the product.

4 PRICE ADVERTISING

4.1 What are Germany's rules regarding price advertising?

Advertising involving the price of a product or service must comply with the Price Declaration Regulation (*Preisangabenverordnung*):

- (a) Prices advertised to consumers must include the Value Added Tax (VAT) and any other price components. Special rules apply in distance sales, eg the obligation to disclose additional packaging or mailing charges. Price change conditions are subject to restrictions.
- (b) Products shown in shops, displayed in shop windows or in catalogues must clearly state the price, either on or near the product.
- (c) Prices of products sold by weight, volume or size, must be stated with their unit price and their price by a stated standard weight, volume or size.
- (d) Special rules apply to utilities, gasoline, parking, bank loans or other financial services.
- (e) Although it is permitted to show a normal price and a lower special discounted price, such advertising is not permitted if the 'normal' price has never been demanded or has been demanded for an incommensurably short period only.

4.2 What are Germany's rules regarding advertising 'free' products?

A 'free product' or 'free gift' is a temporary offer of a product or service, free of charge and independent of any obligation to purchase. A 'premium' would be a temporary offer of a free or significantly discounted gift to be received when different goods or services are purchased. In Germany, free gifts and premiums are legal, subject to restrictions applicable in health advertising (always within the limits of general fair trade principles as outlined above). Advertisers of free gifts must comply with bribery, subsidy and anti-trust regulations.

4.3 What are Germany's rules regarding sales and special offers?

'Special Sales', 'Off Season Sales', 'Below Cost Sales', 'Clearances' or special promotional periods during which goods or services are offered on special terms for a limited period of time are permitted,

provided that any offered price reduction is a true price reduction that applies for a considerable period of time (no short-term price swinging). Announcements must not be misleading regarding the original or reduced price. Offers must comply with the Price Declaration Regulation. Conditions for special offers must be clear and unambiguous as to their scope (eg clear indication of any exceptions) and, if limited in time, state the period during which it is applicable.

4.4 What are Germany's rules regarding rebates?

A 'discount' is a price reduction offer, an additional quantity of an identical product or service purchased, or a cash value offered by means of a coupon or voucher which can be applied against the purchase price of an identical product or service. Discounts are permissible, but subject to fair trade limitations relating to advertising that is misleading, or exerts undue influence.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

- (a) **Promotions and sweepstakes:** Except in health advertising, there are no specific restrictions on promotional contests or sweepstakes. Entrants must not be required to pay a stake or incur similar costs, and prizes may not be excessively enticing.
- (b) **Nuisance and harassment:** The unsolicited promotional delivery of unordered goods or of electronically transmitted advertising may be illegal, unless it occurs within a standing business relationship and the addressee expects such promotional communication. Except where the goods are of insignificant value, even if the addressee is informed that it has no obligation to pay for the goods received, such unsolicited distribution of goods can be considered an unfair business practice.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Restrictions apply to advertising of pharmaceutical products, health-related services and medical devices, tobacco products, alcohol and sex services. Certain restrictions apply to advertising in particular media and vis-à-vis children.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

See question 1.4 above.

In addition, all advertising in cases where it is apparent that the solicited market participant does not want this advertising is prohibited. Thus, eg, a sign at the recipient's mailbox indicating that advertising is not wanted ('no advertisements') or an explicit opt-out of any advertising must be respected.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

According to the Law against Unfair Trade Practices § 7 para 1, all commercial (advertising) acts which are unconscionably pestering are considered illegal and thus prohibited. These could include indecent or obscene acts of advertising if the act itself is indecent or obscene. It has to be pointed out, however, that this stipulation does not aim at the content but only at the manner of the advertising act.

Causing a public disturbance by engaging in gross indecency is a criminal offence under § 183a of the German Criminal Code. Less severe acts of obscenity can be sanctioned as an administrative offence pursuant to § 118 of the German Act on Regulatory Offences. Advertising also needs to follow those rules.

Telemedia service providers have to comply with the German Network Enforcement Act, a more recent Act serving to improve enforcement of the law in social networks. The Act imposes certain reporting and intervention duties for telemedia service providers in cases of hate speech and other illegal acts of its users, and related complaints by others.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

The full name and address of the advertiser must be disclosed in all advertising and offers which promote the properties and price of a product or service in a manner which enables the average consumer to make a purchase decision. The mere indication of an internet address is not sufficient.

On publicly-available online advertising, an advertiser has to provide specific identifying information that is easily recognizable, directly accessible and consistently available. These criteria are met when it can be found under a clear headline such as 'contact' or 'imprint' on the homepage or not more than two clicks away from the homepage. The imprint must include:

- (a) Full (company) name, postal address (not PO Box), and contact email address of advertiser, and, if the advertiser is a legal entity, the form of organization and the full name of the legal representative (CEO, Managing Director).
- (b) Location of the commercial register in which the advertiser is registered, including its registration number.
- (c) VAT Identification number, if applicable.

Additional requirements apply in certain circumstances.

In case of email advertisements, the name of the sender must be apparent in the header of the email. For further information with regard to email advertising see question 1.4 above.

Advertising in social networks (eg posts by influencers) needs to be marked as such, if the person posting the messages receives compensation for this activity. German courts take a rather strict approach to the marking; '#ad' or '#sponsored' would not be sufficient. Recent case law requires the full term in German language such as *#werbung* (English = advertisement), and there are also restrictions on the positioning of such disclosure.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

As a rule, advertising content must be separate from editorial content. Advertising must be clearly recognizable as advertising, eg there must be a mark stating that the content is an advertisement.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Advertising in an editorial context must be marked 'advertising' (*Anzeige*), see question 7.1. See also question 6.1.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There is no distinction made between advertising through standard channels and marketing published through social media or other channels. Social media advertisements must comply with:

- (a) German Law against Unfair Trade Practices;
- (b) distance selling rules;
- (c) consumer protection rules;
- (d) labeling requirements; and
- (e) clearance of third-party rights (eg trademarks, company names, designs, etc; and data protection rules).

There are no important specific legal bodies regulating social media advertising (nor offline advertising for that matter). Since social media advertising is considered as a channel for advertising just like any other channel, the rules of the German Advertising Council also apply to advertising in social media.

Although the law does not focus on social media (but encompasses it), companies' microsites on social media platforms have to meet all the requirements set out for regular company websites as set out in question 6.1.

Advertisements for which supporters, followers, or 'likes' are bought on social media in order to artificially inflate a product's relevance or popularity can be considered unfair advertising. The same applies to fake accounts or fake comments, as this might mislead the public. 'Guerilla-marketing' or so-called 'viral marketing' (eg, where an advertiser posts a supposedly independent clip on YouTube endorsing its own product) may also be considered unfair advertising if the advertising character and/or the advertiser are hidden from the consumer.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

The liability of internet service providers offering promotions is regulated by the Telemedia Act (*Telemediengesetz*), implementing the EU Directive on E-Commerce. Service providers are not liable for the information transmitted if the provider has not initiated the transmission, selected the receiver of the transmission, or selected or modified the content contained in the transmission.

There is service provider liability in all other cases. The scope of liability is quite broad, including responsibility to take steps to avoid and prevent illegal acts.

Service providers are not generally obliged to monitor their websites, but must act if made aware of a breach on their website. See also question 5.3 with respect to providers of social networks.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

Recent decisions at the appellate court level impose strict disclosure requirements in social media networks for posts which have a promotional character. The character of promotional communication must be clear and obvious to the consumer at all times. This applies, in particular, to so-called 'influencer marketing'.

In a recent decision (C-132/17), the European Court of Justice decided that a YouTube video channel is not an audiovisual media service, so that the advertiser was not entitled to rely on certain exemptions from marking requirements in advertising. It has not yet been decided, though, whether YouTube videos qualify as a 'program' under Article 1(1)(b) of the Audiovisual Media Services Directive (Directive 2010/13/EU). If such videos were to be considered 'programs', this would give rise to the same information and marking requirements for YouTube videos as those applying to broadcasters of TV programmes.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

In principle, everyone in Germany is protected by the so-called 'right in one's own image' in accordance with the provisions of the Art Copyright Law (*Kunsturhebergesetz*) (KUG). In short, the KUG says that pictures of the image of an individual may not be published or distributed except with that person's consent.

The only exception applies to pictures that depict an event of a historic nature, past or present (§ 23 paragraph 2 No. 1 KUG). This includes pictures of 'persons who are part of contemporary or past history.'

In this context, the courts make a distinction between 'absolute' and 'relative' persons of current or past history. 'Absolute' persons of current or past history are those whose participation within public life subjects them generally to public information interest (such as actors, politicians, top sportsmen/women and also well-known persons in business and commerce). With respect to these absolute persons of current or past history, the courts assume a permanent public interest. For this reason, the publication or distribution of their likeness is not subject to their consent, provided the distribution or publication serves a particular public information interest. If that is the case, the distribution or publication may also serve a commercial interest but there must always be a substantive, topical or editorial concept and context (see BGH NJW 1979, 2203, 2204—Soccer Player Calendar). If there is no such editorial concept, and if the individual depicted becomes degraded to a mere object of commercial interest, then the individual's consent is required.

'Relative' persons of current or past history are subject to a public information interest with respect to a specific event only. Free distribution and publication is limited to coverage of that particular event.

The legal evaluation depends on the nature of use of a picture and the role an individual image plays in that context.

The regular statutory privacy protection of a person's image is limited to 10 years from the individual's death. In addition, there is a posthumous privacy claim against gross defamation and degradation. That claim exists so long as there is a justified interest (ie as long as there is active memory of the deceased, not if personal memory has faded.) Mere commercial use as such is not a gross defamation or degradation in the sense of this posthumous right.

Remedies include cease and desist claims and claims for damages.

9.2 Are there situations when permission is not required?

Yes — see question 9.1 above.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Clearance is required for all protected works and images, as well as trademarks, names and other proprietary property.

In terms of copyright works, the German Copyright Act contains a number of rules that describe the circumstances in which a work can be used freely, such incidental works (Section 57) and works in public places (Section 59, which states ‘It shall be permissible to reproduce, distribute and make available to the public works located permanently in public roads and ways or public open spaces’). In the case of buildings, this authorization only extends to the façade as seen from a publicly accessible view point. Different rules apply for works of art which are only installed for certain amount of time.

10.2 Is it permissible to use other companies’ recognizable products in advertising (eg, an actor wearing branded training shoes)?

Advertising must be recognizable as such. It is illegal to conceal the advertising nature of any commercial practice.

Special requirements apply to product placement and online advertising. Product placement is prohibited in broadcasting programs for children and certain other types of programs.

While the advertiser may rely on the principle of exhaustion of trademark (and/or other IP) rights, if the other company’s recognizable product used in advertising has been purchased in existing sales channels, exemptions to this rule exist. For example, where the use of the product carrying the third-party mark takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the third-party brand, the use of the third-party product can still be an infringement. The crucial point is whether use of the mark in the context of one’s own product exploits the reputation of the well-known mark or dilutes its characteristics in the market.

Similar rules apply with respect to third-party copyrights, design rights and/or patents.

For comparative advertising see question 3.8 above.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Germany which affect advertising (eg Swedish gender equality law)?

With the exception of rather strong protection for the personal image, the advertising environment in Germany appears to be standard and comparable to the rules in other highly commercial countries.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

There are no particular cultural norms above and beyond the ordinary statutory fair trade rules.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Germany?

Promotions such as sweepstakes and contests often involve the collection, processing, or use of personal data which is strictly regulated by data protection laws such as the General Data Protection Regulation, one important aspect of which is the information and disclosure requirement.

Wherever consent is required, the consent must be informed, ie the data subject needs to be informed about:

- (a) the purpose of the use (eg advertising);
- (b) the advertiser's name;
- (c) the range of specific products or services to be advertised; and
- (d) the means of advertising, eg email, mail, telephone.

The consent must cover all the above aspects and be given explicitly (opt-in only, no opt-out or pre-checked consent boxes) in order to be valid.

For certain forms of advertising, express consent is necessary (eg advertising via telephone, fax and email).

Where the data subject has informed the advertiser that he/she no longer wishes to receive advertisements, this must be respected, as otherwise the advertising is illegal and can trigger heavy fines and civil lawsuits.

GREECE

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Greece?

Advertising in Greece is regulated by both public law and industry self regulation.

The main statutes on advertising law are the following:

- (a) Law No 2251/1994 on Consumer Protection, as amended in order to comply with Directive 2005/29/EU and as recently amended by Law 4512/2018;
- (b) Law No 146/1914 on Unfair Competition, protecting competitors from illegal advertising;
- (c) Presidential Decree No 109/2010, regulating advertising through audiovisual media which implements Directive 2010/13/EU;
- (d) Laws on protection of personal data (including e-privacy law);
- (e) IP Laws that impact upon comparative advertising (Law No 2121/1993 on Copyright, Law No 4072/2012 on Trademarks etc).

These primary statutes are supplemented by a great number of special provisions which regulate advertising of specific products and services (tobacco, alcohol, credit products, gambling etc).

Advertising self regulation has gained much importance in recent years. The main Self Regulation Organization (SRO) in Greece is the Advertising Self-Regulation Council (SEE).

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

A definition of ‘advertising’ is provided in the Greek Consumer Protection Law (article 9(1)), by which advertising means ‘the making of a communication in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations’.

1.3 What is the basic regulatory framework for advertising regulation?

The main regulatory tool for advertising self regulation is the Hellenic Code of Advertising and Communication Practice (HCACP), the structure and content of which is almost identical to the ICC Consolidated Code of Advertising and Communication Practice. HCACP covers both non-broadcast and broadcast advertising, including online advertising and social media and it is enforced by the SEE.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Presidential Decree No 109/2010 sets out specific rules with regard to certain advertising practices such as telemarketing, sponsorship and product placement when offered in audiovisual media.

Direct marketing communications (through text messages, emails etc) are heavily regulated and may only be allowed in respect of consumers who have given their express prior consent (article 11 of Law No 3471/2006 which implemented into Greek Law the Directive 2002/58/EU (e-Privacy Directive)). When such communications use harassment or involve persistent and undesirable communications with customers, they qualify as aggressive commercial practices and fall within the provisions of articles 9g and 9h of Law No 2251/1994 on Consumer Protection.

The advertising tool of promotional contests, which is excessively used in Greece, is subject to specific rules aiming to prevent misleading practices.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

- (a) **Alcohol:** Advertising of alcoholic beverages in audiovisual media and radio (including teleshopping) must not:
- (i) be aimed specifically at minors;
 - (ii) depict minors consuming alcohol;
 - (iii) link the consumption of alcohol to enhanced physical performance or to driving;
 - (iv) create the impression that alcohol consumption contributes towards social or sexual success.
 - (v) imply that alcoholic beverages have therapeutic properties or that they act as stimulants, tranquilizers or sedatives,
 - (vi) encourage immoderate consumption of alcoholic beverages or show negatively the abstinence from their consumption or their moderate consumption,
 - (vii) highlight the high alcohol content as a positive attribute of beverages.

In the field of self-regulation, the Hellenic Association of Drinks Distributors (ENEAP) has voluntarily adopted similar restrictions which apply across all media and can be found in Annex VI of the HCACP, as well as in Annex IV (regarding, more particularly, beer).

- (b) **Tobacco:** All forms of tobacco advertising are prohibited, except from advertisements inside tobacco stores.
- (c) **Medicines:** It is illegal to advertise medicines which are available on medical prescription only. Advertising of over-the-counter medicines is in principle permitted but certain restrictions apply, eg said advertisements must disseminate particular minimum information, along with the warning message: 'The Ministry of Health and the National Organization for Medicines advise you to read carefully the instructions and consult your doctor or pharmacist'.
- (d) **Foodstuff/Food supplements:** Greek and EU legislation 'on nutrition and health claims made on foods' introduce specific restrictions on advertising, presentation and labeling of food and beverages. Advertisements insinuating directly or indirectly that a food product has therapeutic qualities are prohibited as misleading. Furthermore, Annex V of the HCACP sets out detailed guidelines on food advertising which apply across all media (eg that the advertisements concerned should not induce excessive consumption of food etc). Finally, certain restrictions are also imposed on advertising nutritional supplements and food products intended for use in energy-restricted diets for weight reduction.
- (e) **Gambling:** Greek law sets out the general principle of responsible advertising along with a number of specific restrictions safeguarding a high level of consumer protection. Only the licensed gambling providers may be advertised.
- (f) **Plant Protection Products:** EC Regulation 1107/2009 concerning the placing of plant protection products on the market imposes certain rules and restrictions on advertising of authorized plant protection products. For example, all such advertisements should include the warning notice 'Use plant protection products safely. Always read the label and product information before use'.
- (g) **Cosmetics:** In the framework of self-regulation, Annex VII of the HCACP incorporates the Guiding Principles on Responsible Advertising and Marketing Communication of Cosmetics,

which have been adopted by Cosmetics Europe in light of the provisions of article 20 of EC Regulation 1223/2009, which prohibits misleading advertising claims specifically regarding Cosmetic Products.

Professional Codes of Conduct, such as those of attorneys, doctors etc, also impose restrictions on advertising of the services of the respected professionals.

1.6 Are any government pre-approvals required?

Pre-clearance of advertisements by the government or sector-specific government agencies is not obligatory in Greece, with some exceptions:

- (a) Firstly, advertising of over-the-counter medicines must be submitted to the Hellenic Organization for Medicines for monitoring before publication or broadcast.
- (b) Under a recent legislative amendment, television advertisements for plant protection products must also be submitted to the competent Directorate of the Ministry of Agricultural Development and Food prior to their broadcasting.
- (c) Furthermore, every commercial communication for gambling services must be submitted for prior approval to the Hellenic Gaming Commission.

In addition, advertising of specific products or services (eg over the counter medicines, credit or financial products, investments etc) must contain pre-approved warning messages and/or particular information. For example, any advertisement of a credit agreement that indicates an interest rate must include information such as the total amount of credit, the annual percentage rate of charge etc.

1.7 Does the media pre-clear advertising?

The Greek media do not have a mechanism of pre-clearing advertisements. Advertisers/ advertising agencies, before publication/broadcast of any advertisement may voluntarily seek the advice of the SEE, but this is not common practice in the Greek advertising market. The SEE only has an advisory function and its pre-clearing opinions are not binding for the applicants or for the SEE itself. As a result, the SEE committee may later examine and even uphold a complaint filed by a third party (competitor/consumer) against the advertisement.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The main government agencies which enforce advertising laws in Greece are as follows:

- (a) The Ministry of Economy and Development through the General Secretariat for Consumers is the state authority which imposes the administrative sanctions to those who infringe the consumer protection legislation. If the state authority intervenes, either ex officio or following a complaint, it may address a recommendation or impose a monetary fine varying from €1,500–1,000,000. Sanctions may get stricter for repetitive infringers.
- (b) The Greek National Council for Radio and Television (NCRTV) is an independent administrative authority which monitors compliance with the specific regulations of TV and Radio advertising and is empowered to impose sanctions for infringement, such as addressing a recommendation or imposing a monetary fine on the infringing TV channel, varying from €14,673.50–146,735 (for radio stations the range of fine is from €2,935–29,350).

- (c) The Hellenic Organization for Medicines is the state authority which has jurisdiction over advertising of medicines/medical devices/nutritional supplements. It may penalize any illegal advertisement of medicines with a monetary fine up to €22,000.
- (d) The Ministry of Agricultural Development and Food through the Hellenic Food Authority may impose a monetary fine varying from €500–30,000 for any violation of the legislation regarding advertising of food products.
- (e) The Hellenic Capital Market Commission intervenes if the marketing communications of investment firms disseminate misleading information to clients/ potential clients. It has the authority to impose a fine up to €5 million.
- (f) The Hellenic Gaming Commission has the authority to impose monetary fines varying from €5,000–120,000 for infringements of the legislation regarding the commercial communication of gambling services.
- (g) The Municipal and Regional Health Services, the Municipal Police and the Coast Guard can impose fines varying from €500–10,000 for any infringement of the legislation regarding advertising of tobacco products.

In all abovementioned cases, the entity on which a sanction was imposed may file a petition to the body which has issued the decision or to the administrative courts asking for the annulment of the imposed sanction.

1.9 When does a competitor have a right of action? What are the potential remedies?

Competitors may challenge advertising by commencing court proceedings on the basis of Unfair Competition Law (Law No 146/1914 as amended), namely article 1 which prohibits any unfair act among competitors (including unfair advertising) and article 3 which prohibits misleading statements in the course of competition.

With regard to the remedies available:

- (a) the courts may issue a cease and desist order; or
- (b) award indemnity in case that monetary or moral damage have been caused (For the payment of indemnity, the plaintiff must prove that the infringement occurred by intention or negligence of the infringer; or
- (c) order the publication of the court decision and the publication of a corrective advertisement or corrective declaration.

The main disadvantage of court proceedings is that they may last for a long period of time and usually entail significant costs. In cases of imminent danger, though, the plaintiff may apply for an injunction asking for preliminary measures.

As an alternative to the judicial route, competitors may file a complaint to the SEE.

1.10 When do consumers have a right of action? What are the potential remedies?

In the case of unfair commercial practices, Greek consumer protection law permits any consumer and/or any consumer association to request a court to issue a cease and desist order, to award damages suffered by reason of that practice and to order the publication of the court decision.

In addition, consumer associations that have more than 500 members and have been registered in the consumer associations' registry for more than a year are entitled to file a class action for the protection of collective interests of consumers. With regard to class actions, the remedies include the prohibition of the illegal marketing practice (even if it has not taken place yet), the reparation of moral damages and the publication of the court decision etc.

Consumers and/or consumer associations may also file a complaint to the SEE challenging an advertisement for violating HCACP. The filing of a complaint to the SEE does not exclude the possibility of also taking legal action before court.

Finally, in cases of illegal commercial practices, consumers may address a complaint to the Hellenic Consumers' Ombudsman which is an independent authority of extrajudicial dispute resolution in the area of consumer disputes.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Greece have a primary advertising self-regulation system?

The national system of advertising self regulation is mainly handled by the SEE. The SEE is an independent non-profit association which was created in 2003 by the Hellenic Association of Advertising and Communication Agencies (EDEE) and the Hellenic Advertisers Association (SDE), which means that the major advertising agencies and advertisers are part of the self-regulatory system. SEE is a member of the European Advertising Standards Alliance (EASA).

SEE may be activated either after an ex officio monitoring or after submission of a written complaint. Both consumers and competitors are entitled to file complaints claiming that a marketing communication (printed or broadcasted) breaches the HCACP.

Charges are imposed on competitors (not to consumers) for the examination of both their complaints (filed before the SEE committee of first instance) and their appeals (filed before the SEE committee of second instance).

SEE closely collaborates with government agencies that enforce advertising laws (eg General Secretariat for Consumers and the Greek National Council for Radio and Television etc).

2.2 Is there a self-regulatory advertising code? What are the key principles?

The Hellenic Code of Advertising and Communication Practice (HCACP) consists of the following parts:

- (a) The general principles of advertising practice which apply to all marketing communications. The core principle of the code is that marketing communication should be legal, decent, honest, truthful and socially responsible. Other key principles is that marketing communication should be clearly distinguishable; advertising claims relating to verifiable facts should be substantiated and marketing communication should not make unjustifiable use of the name, initials, logo and/or trademarks of another company.
- (b) Five detailed chapters, which mainly refer to certain advertising methods. More specifically, the code covers:
 - (i) sales promotion (Chapter A),

- (ii) sponsorship (Chapter B),
 - (iii) direct marketing (Chapter C),
 - (iv) marketing communication using electronic media and the telephone (Chapter D) and
 - (v) environmental claims in marketing communication (Chapter E).
- (c) Seven Annexes, five of which serve to regulate advertising of specific products (food, beer, alcoholic drinks, tobacco and cosmetics) and the other two relate to advertising directed to minors and green advertising.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The SEE has introduced specific rules relating to the enforcement of the decisions issued by its committees. The decisions of SEE committee of first instance are immediately binding for the parties and enforceable, although there is a right to an appeal before the committee of second instance.

If a complaint is upheld, SEE committees may address a recommendation for the cease or modification of the advertisement. If the infringer fails or unjustifiably delays to comply with the recommendation, SEE can enforce the adjudication by requesting in writing that all media sources immediately interrupt the broadcasting or publication of the advertisement in question. If the infringer remains uncooperative, SEE may issue an ‘ad-alert’, warning the whole advertising market of the infringer’s activities.

Adjudications of SEE are reported to the competent government agencies (eg General Secretariat for Consumers etc); therefore, in cases where both the HCACP and the advertising statutes are violated, the statutory authorities may intervene to enforce the law.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The Greek advertising self regulation system is widely used nowadays, since the advertising agencies and advertisers have understood that the self regulatory, out of court route may offer the swift resolution of the dispute by persons having knowledge of advertising business at a relatively low cost.

The main disadvantages of the system are that the complainant may not seek damages and that the decisions of SEE are not legally binding, although they are usually respected by the involved parties.

2.5 Are the self-regulatory system’s decisions reported?

The self regulatory system’s decisions are rendered in writing and are reported to the SEE website (www.see.gr), but only in the Greek language. In addition, SEE actively promotes industry and consumer awareness of the HCACP by making it available to the public in printed copies and through its website.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

The issues currently creating concern to Greek SRO are the poor substantiation of claims used in foodstuff and food supplement advertising and the fact that a lot of superiority claims (mainly used in advertising of mobile and internet service providers) are found to be misleading.

Companies should take into consideration that the awareness about online behavioral (targeted) advertising is increasing amongst the public. In addition, the Hellenic Personal Data Authority has recently made efforts to educate consumers with respect to risks posed by this marketing strategy.

2.7 Are there any other self-regulatory systems that govern advertising practices in Greece?

The Hellenic Bank Association (HBA) is active in the self regulation of the banking sector. Among other self regulation codes, HBA has issued the Code of practice on advertising of financial products and services offered by banks. However, the code does not provide any consequences for non-compliance and it lacks enforcement mechanisms.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Greece (eg, consumer protection laws; IP laws; unfair competition laws)?

The statutes that mainly regulate advertising claims in Greece are the following:

- (a) Law No 2251/1994 on Consumer Protection (articles 9a–9i). This law prohibits unfair business-to-consumer commercial practices (such as misleading and aggressive advertising) and is the main legislative tool for the control of advertising claims.
- (b) Law No 146/1914 on Unfair Competition (articles 1, 3). Article 1 introduces a general clause which prohibits all unfair commercial acts, including unfair advertising. Article 3 of this Law is a specific provision, according to which any advertisement which misleadingly gives the impression of an especially favorable offer, is prohibited. This provision mainly aims to protect competitors from misleading advertising claims.

Apart from the above general provisions, a great number of special provisions serve to regulate advertising claims in specific media (audiovisual media/radio etc) or introduce restrictions to advertising claims of specific products and services (alcohol, foodstuff, gambling etc).

Finally, in case of advertising claims of a comparative nature, IP laws must be taken into account and in particular Law No 2121/1993 on Copyright protection and Law No 4072/2012 on Trademarks.

3.2 Is substantiation required for advertising claims?

Substantiation is always required for objective advertising claims. According to the Best Practice Recommendation on claims substantiation (the Recommendation) issued by the SEE, the advertiser has the burden to prove the truth/accuracy of the advertising claim. Therefore, before publishing/broadcasting an advertisement, the advertiser must have proof supporting evidence available in order to substantiate the objective (verifiable) advertising claims. According to article 8 of HCACP, such substantiation should be available without delay and upon request of the SEE Committee which will examine any complaint challenging the advertisement.

The type of proof required depends on the type of the advertising claim and the characteristics of the advertised product. The Recommendation of the SEE indicatively stipulates the following means of proof:

- (a) statistical surveys;
- (b) market shares;
- (c) sales data;

- (d) certificates/ accreditations issued from the competent public authorities; and
- (e) scientific studies and testimonials.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Under Greek Consumer Law, the common advertising practice of making statements which obviously exaggerate (puffery) cannot be considered as a misleading commercial practice. Nevertheless, Greek Law does not define the criteria under which puffery is distinguished from the advertising claims that require substantiation.

Some guidance on this issue can be found in the Recommendation issued by SEE. According to the Recommendation, advertising claims which can be verified and which the average consumer is likely to regard as objective require substantiation. On the contrary, puffery is a claim that the average consumer cannot treat seriously. An example of this difference is provided in the Recommendation: the claim that a glass cleaning liquid 'is the most economic in its category' is verifiable and requires substantiation, while the claim that 'it makes glass invisible' is obvious puffery.

3.4 What are the rules governing the use of disclosures in advertising?

Specific industries are obliged by law to include warning messages and other disclosures to their marketing communications (eg advertisements of over-the-counter medicines, food supplements, credit products etc).

Disclosures voluntarily used by advertisers (such as disclaimers, footnotes etc) are permitted to the extent that they do not mislead the average consumer. They are used to clarify the advertising claim and must not contradict or alter the general impression created by the main body of the advertisement.

With regard to television commercials, the SEE has provided that the superimposed text (Supers) should occupy 5% of the screen size and should be timed (the minimum is 2 words per second) to ensure that the television commercial is legible.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

According to article 9F of Law No 2251/1994 on Consumer Protection, any claim that a trader or a product has been approved, endorsed or authorized by a public authority or private body, when actually he/it has not, is forbidden as this is considered misleading advertising practice. Endorsements and testimonials in respect of over the counter medicines are prohibited.

According to HCACP guidelines, marketing communication should not contain or refer to any testimonial or endorsement unless it is genuine, verifiable and authorized by the person making the endorsement. Testimonials or endorsements which have become obsolete or misleading through passage of time should not be used.

Finally, according to the Recommendation of the SEE, testimonials themselves are not considered substantiation, and impartial evidence is required.

3.6 What are the rules governing the use of product demonstrations in advertising?

No special statutory rules apply to demonstrations of product performance. In the framework of the general principle of truthfulness, any such demonstration must present the actual qualities of the advertised product without exaggerating its performance. In light of this, it is advisable that the demonstration is performed with samples of the product already available to consumers (or prototypes that perform no differently than the actual product) and no mock-ups, modifications or alterations should be employed.

With regard to demonstrations of cosmetics' performance, specific guidance is provided by the Guiding principles on responsible advertising and marketing communication of cosmetics issued by Cosmetics Europe.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Under article 9(2) of Law on Consumer Protection, comparative advertising is permitted, provided that the following conditions are met:

- (a) it is not misleading
- (b) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
- (c) it compares goods or services meeting the same needs or intended for the same purpose; and
- (d) for products with designation of origin, it relates in each case to products with the same designation.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

According to Law on Consumer Protection (article 9(2)) identifying a competitor by its name or by its trademark in the course of comparative advertising is permitted, provided that any such advertisement:

- (a) does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;
- (b) does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
- (c) 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
- (d) does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Advertising that includes misleading information regarding the geographic origin of a product is specifically prohibited both by the Law on Consumer Protection (article 9d of Law 2251/1994) and by the legislation on Unfair Competition (articles 3-4 of Law 146/1914).

In addition, provisions on the protection of geographical indications and designations of origin for agricultural products and foodstuffs are provided in EU Regulation 1151/2012 (and relevant delegated regulations), which is directly implemented in Greece, as well as in Ministerial Decision 261611/2007, as amended.

As regards geographical indications of alcoholic beverages, EC Regulation 110/2008 is in force, along with Ministerial Decision published in Gov Gazette B/1946/2011.

3.10 Are there any special rules governing product packaging?

Specific provisions regarding packaging of various categories of products are included in the Rules for the Handling and Marketing of Products and Services (codified in Ministerial Decision No 91354/2017). In addition, special rules and restrictions for certain categories of products are in force in other legislative texts, such as Article 11 of the Code of Food and Beverages (prepackaged foodstuffs) and Law 4419/2016 (packaging and presentation of tobacco and related products etc).

The use of the term 'ecologic' or 'eco' in the packaging and advertising of products is permitted only if such products are granted the EU Ecolabel (according to EC Regulation No 66/2010).

4 PRICE ADVERTISING

4.1 What are Greece's rules regarding price advertising?

According to the Rules for the Handling and Marketing of Products and Services (codified in Ministerial Decision No 91354/2017), communications which include the price of goods are required to indicate both the selling price and the unit price. All price indications must be inclusive of VAT and other taxes (total price) and must be displayed in an unambiguous, easily identifiable and clearly legible way. If additional charges apply (eg for postage, packaging or delivery of goods), the trader is obliged to inform consumers of these before they commit themselves to buy (this rule is of particular significance in the field of distance sales).

4.2 What are Greece's rules regarding advertising 'free' products?

The claim that something is offered for free/without charge (or similar expressions), is permissible only if the consumer does not have to pay anything other than the unavoidable cost of responding to the commercial practice and of collecting or paying for delivery of the item (article 9f of the Consumer Protection Law). Advertising a product as offered for free if another one is purchased ('buy one, get one free') is accepted only if the consumer will pay nothing for the one item and no more than the regular price for the other.

4.3 What are Greece's rules regarding sales and special offers?

According to Law No 4177/2013 (article 15), 'official' sales are made upon seasonal clearance and, in particular, four times a year. Special offers on specific products, or a specific category of products, can be made throughout the year, excluding the sales periods. According to the Code of Conduct for Consumer Protection during sales and special offers (Ministerial Decision No 56885/2014 as amended), in any case of sales, discounts or special offers, all commercial communications should include both the previous price and new, discounted, price, and may also indicate the percentage of the discount. All such communications should be simple, clear, truthful and be made in Greek, and optionally in any other additional language.

The Law on Consumer Protection (article 9(3)) provides that any comparative advertising referring to a special offer must indicate, in a clear and unequivocal way, the date on which the offer ends or, where appropriate, that the special offer is subject to the availability of the goods and services. Where the special offer has not yet begun, the advertisement must indicate the date of the start of the period during which the special price or other specific conditions shall apply.

4.4 What are Greece’s rules regarding rebates?

No special rules apply to this advertising practice. In view of the general principle of truthful and non-deceptive advertising, rebate promotions must clearly disclose all the information that is likely to affect a consumer’s purchasing decision, such as the before-rebate cost of the product, the amount of the rebate and any additional terms and conditions (including purchase requirements, additional charges or fees etc) so that consumer is informed of the actual out-of-pocket cost.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

The following retail marketing practices are prohibited under all circumstances:

- (a) inviting consumers to purchase a product at a fixed (usually attractive) price without making them aware that there is limited stock/availability (bait advertising).
- (b) inviting consumers to purchase a product at a fixed price, but then refusing to show that product to them or showing a defective sample of the product with the deliberate intention of promoting a different product (bait and switch advertising).

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

- (a) It is illegal to advertise products and services that are themselves illegal (eg narcotics) or acts that are forbidden by the law (acts of terrorism, racist acts).
- (b) The following should not be advertised on audiovisual media and radio:
 - (i) any form of tobacco and relevant products;
 - (ii) prescription drugs and medical treatments;
 - (iii) services of sexual nature between 06.00 and 01.00 hrs;
 - (iv) services of astrologers, fortune tellers etc between 07:00 and 21:00 hrs;
 - (v) alcohol aimed at minors;
 - (vi) toys between 07.00 to 22.00 hrs;
 - (vii) war toys;
 - (viii) online games/bets conducted by non-licensed entities;
 - (ix) advertisements linked to religion; and
 - (x) firearms and weapons, with the exception of hunting guns.
- (c) The following should not be advertised on the internet, print media and outdoor:
 - (i) any form of tobacco and relevant products;
 - (ii) prescription drugs;

- (iii) online games/bets conducted by non-licensed entities.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

According to the general rule provided in article 9c of the Consumer Protection Law, unfair advertising practices (eg misleading, aggressive etc) are prohibited. This principle is supplemented by a black-list of 31 commercial practices that are considered misleading or aggressive under all circumstances (articles 9f and 9h), some of which are based on particular advertising practices.

Under Greek legal theory, subliminal messages, shock tactics, dangerous sounds or visual effects qualify as unfair commercial practices. In addition, subliminal advertising in audiovisual media and radio is expressly forbidden by law (article 10(1)(b) of Presidential Decree No 109/2010 and article 3(3) of the NCRTV Code of TV/radio advertising).

Finally, the following practices of broadcast advertising are also banned:

- (a) telemarketing that incites minors to buy or rent the advertised products and services;
- (b) advertising which encourages children to buy products by phone order or mail;
- (c) advertising that encourages minors to convince their parents or other persons to buy products or services or that exploits the trust of minors towards their parents, teachers or other persons; and
- (d) advertising that may be harmful, mentally or physically, to minors.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Advertisements must not offend public morals. The Greek Supreme Administrative Court (Conseil d'Etat) in a landmark Decision (No 1319/2004) has ruled that a nude outdoor advertisement was unfair because it offended the standards of decency prevailing in Greece.

The issue of decency in advertisements offered by audiovisual media and radio is mainly regulated by article 10 of Presidential Decree No 109/2010 and article 4 of the NCRTV Code of TV/radio advertising. More specifically, broadcast advertisements must respect human dignity and must not include discriminations based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. In addition, advertisements should not play on consumers' superstitions or fear.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Under article 9f of the Greek Consumer Protection Law, the use of editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable is forbidden. Apart from the above general provision, which covers all media, hidden commercial communication is prohibited in audiovisual media, according to the specific provision of article 10(1)(a) of Presidential Decree No 109/2010. The same ban is valid for radio advertising.

A similar rule is set out in article 9 of HCACP, according to which all marketing communications should be clearly distinguishable as such, whatever their form and whatever the medium used. When an advertisement appears in a medium containing news or editorial matter, it should be so presented that it is readily recognizable as an advertisement and the identity of the advertiser should be apparent.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Articles 11 and 12 of Presidential Decree No 109/2010 set out a number of restrictions with regard to commercial sponsorship and product placement in audiovisual media:

- (a) The basic principle is that the autonomy of the media service provider must be respected. Sponsored/Product placed programs must not directly encourage the purchase or rental of goods or services.
- (b) Sponsorship/product placement of cigarettes (or other tobacco products) and medicines that are available only on medical prescription is prohibited. Nevertheless, sponsorship of programs by undertakings whose activities include the manufacture or sale of medicines is permitted but it may promote only the name or the image of the undertaking (not specific medicinal products).
- (c) Certain types of programming may not be sponsored/product placed (eg news). Product placement is permitted in cinematographic works, films and series made for audiovisual media services, sports programs and light entertainment programs, with the exception of programs directed to children.

In the field of industry self regulation, HCACP includes an entire chapter on best practices in Sponsorships (Chapter B).

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Under current legislation on audiovisual media, viewers must be clearly informed of the sponsorship agreement or the existence of product placement.

Sponsored programs must be clearly identified as such by the name, logo and/or any other symbol of the sponsor at the beginning, during and/or the end of the programs. Nevertheless, the appearance of a sponsorship logo during children's programs, documentaries and religious programs is prohibited.

Programs containing product placement must be appropriately identified at the start and the end of the program, and when a program resumes after an advertising break, in order to avoid any confusion on the part of the viewer. According to the Guidelines of the NCRTV, in case of product placement, TV channels must show for ten seconds a specific disclosure 'the program which follows contains product placement' and a special logo. Similar disclosure must be shown at the end of the program.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

With regard to online commercial communications, the rule that advertisements should be clearly identifiable as such is stipulated in article 5 of Presidential Decree No 131/2003, which implemented into Greek Law EU Directive 2000/31 (e-Commerce Directive). Apart from this provision, there is no specific legislation governing marketing communications via social media; these being ruled by the provisions of the Law on Consumer Protection and the general principles of legal, decent, honest, truthful and socially responsible advertising.

In addition, in December 2017, the SEE published the Digital Marketing Communications Best Practice. This Best Practice makes clear that marketing communications via social media:

- (a) fall into the scope of self-regulation,
- (b) should respect the principles and general provisions of the Hellenic Code of Advertising—Communication Practice and
- (c) are subject to the control of SEE.

However, other forms of communication, such as editorial content, independent review websites, and User Generated Content which has not been distributed or approved by the advertiser, are not considered marketing communications and are outside the remit of self-regulation.

Under Article 1.6 of the Digital Marketing Communications Best Practice, the distinction in social media between marketing communications and editorial content should be clear. It should be obvious to the consumer that a message constitutes a marketing communication and such communication must not falsely claim or give the misleading impression that the advertiser is a consumer. The identification of an advertisement as such can result from different elements, such as the lay-out or the content of the webpage, the use of identifiers etc. According to Article 1.8 of Digital Marketing Communications Best Practice, the rule of lawful collection of users' personal data is also applicable in digital marketing communications.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

User Generated Content which has not been distributed or approved by the advertiser is not considered to be marketing communication. Of course, it is illegal for the advertiser to post favorable reviews for its products/services pretending to be a consumer (misleading marketing practice).

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

Advertising through social media is a relatively new tool in Greek advertising industry. This probably explains the fact that, to our knowledge, neither court judgments nor decisions of the SEE have so far been issued in relation to the field of advertising via social media. It is worth noting however that, since 2016, each decision of the SEE ends with the note that the SEE's rulings are valid and applicable to all media where each disputed advertising is present, regardless of whether they are explicitly mentioned in the decision, including digital media and social media channels.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

Under Greek legal theory and jurisprudence, the right of an individual to control any commercial use of his/her name, image, voice and other aspects of identity (publicity right) is considered to be an integral part of the general right of personality; therefore publicity right is protected as per the provisions of articles 57–59 of the Civil Code, which also serve to protect the personality right.

Publicity right involves two aspects: a positive one, permitting the person to commercially exploit (eg license) aspects of its identity and a negative one, entitling the person to forbid any unauthorized commercial use of its name/image/voice/likeness etc.

Advertisers must be aware that the content of publicity right is very broad in Greece, eg a Greek Court held that the rights of a famous Greek composer were violated because his well-known lyrics were adapted and used in an advertisement of a car without his authorization.

It is noted that publicity right is recognized to everyone (not only to famous people). In light of this, the Greek courts have repeatedly held that the use of images of residents of rural Greece (farmers etc) in advertising without their permission constitutes an infringement of their publicity right.

Moreover, Article 7 of Presidential Decree No 109/2010 specifically provides that any broadcast advertising should be respectful to the personality, honor, reputation, personal and family life, professional, social, scientific, artistic, political or other legal activity of any identifiable person.

9.2 Are there situations when permission is not required?

Express permission is always required for the use of an individual's picture etc in advertising, even when a famous person is depicted.

According to Greek legal theory and jurisprudence, such permission must be specific (ie a general permission given by a famous person for the publication of its images in the media is not enough). In addition, if permission is given for the use of an image in a specific advertisement, it is not valid for any future use in other advertisements.

Finally, it is noted that obtaining permission from the person depicted in the photograph only prevents a claim for violation of the right of publicity. For any advertising use of a photo it is necessary in addition to obtain copyright permission from the person who took the photograph (or whoever owns the relevant copyright in the photo).

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Under Greek Law, the State has a special right on photos, slides and depictions etc of Greek antiquities, that is similar to copyright. As a result, any use of, for example, a photo of a Greek antiquity for advertising purposes, is subject to prior license by the Greek Ministry of Culture and payment of the relevant fees.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

This advertising practice is lawful only when the affected company, in its capacity as the legitimate right holder of trademarks, logos etc, has given its permission (article 9f of the Consumer Law).

According to the similar provision of HCACP (article 15), marketing communication should not make unjustifiable use of the name, initials, logo and/or trademarks of another firm, company or institution. Marketing communication should not in any way take undue advantage of another firms, individual's or institution's goodwill in its name, brands or other intellectual property, or take advantage of the goodwill earned by other marketing campaigns without prior consent.

Additionally, if the affected company has registered the logo, the design or the image as trademark, the unauthorized use of said distinctive marks in the advertisement would probably consist also a trademark infringement.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Greece which affect advertising (eg Swedish gender equality law)?

According to the Greek Constitution and Penal Code, any representation made in public (including advertisements) must not offend:

- (a) the symbols of the Greek State or International Organizations;
- (b) the person of the President of the Greek Republic;
- (c) the Greek Orthodox religion or any other known religion.

In addition, according to a very little-known law, the national flag must not be used for advertising and commercial purposes (article 6(11)(d) of Law No 851/1978 on the National Flag). Nevertheless, no advertisement has been banned nor have any criminal charges been pressed against any person for infringing this provision. In fact, the use of the flag is commonplace in advertisements associated with the participation of the Greek national team in significant football competitions, such as the FIFA World Cup/FIFA Euro Cup etc.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Advertisers should consider that advertising content which involves discrimination against women is not appreciated by Greek society (eg advertisements which provide in direct or indirect way stereotypical ideas for the role of woman in society, by either focusing on the traditional role of woman as a mother and housewife or by displaying woman as an object of man's desire).

Religion is another 'sensitive' issue for a significant part of the Greek audience. The Greek Orthodox Church has a strong presence that might affect the appropriateness of certain advertising messages; therefore, religious advertising is not common, while it is expressly prohibited in TV and Radio (article 8(1) of the NCRTV Code of TV/radio advertising).

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Greece?

It is advisable for advertisers/advertising agencies coming from abroad to seek local legal advice, due to the fact that Greece lacks a systematic legal framework for advertising.

GUATEMALA

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Guatemala?

Advertising in Guatemala is not regulated in a single legal body and there is no specific law or regulation that can be applied to this topic. On the contrary, provisions on advertising are included in a series of legislative instruments (Decrees or Laws) which address specific areas of law, and take advertising as an additional or circumstantial element of the matters covered under such instruments. Likewise, there are lower-level regulations, of an administrative type, whose purpose is to develop the procedures and the implementation of the Decrees (Governmental Agreements and Ministerial Agreements).

There are also marketing and advertisement guild agreements that seek harmonization and regulation of groups, users and people or companies dedicated to advertising.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

According to the provisions established in the Consumer and Users Protection Act (Decree 6-2003), all 'communication that the supplier addresses to the public by any means, to inform and motivate him/her to acquire or hire goods and services' is considered to be advertising.

1.3 What is the basic regulatory framework for advertising regulation?

Due to the absence of a specific law in the matter, the legal regulation on advertising in Guatemala is directly or indirectly included in several laws, regulations and agreements. The main ones are:

- (a) Health and Safety Code, Decree 90-97;
- (b) Law for the Dignification and Integral Promotion of Women, Decree 7-99;
- (c) Radio Communications Law, Law-Decree 433;
- (d) Law of Expression of Thought, Decree 9;
- (e) Electoral and Political Parties Law, Decree 1-85;
- (f) Commercial Code, Decree 2-70;
- (g) Law on Sporting Events, Decree 136-96;
- (h) Industrial Property Law, Decree 57-2000;
- (i) Consumers and Users Protection Act, Decree 6-2003;
- (j) Alcoholic Beverages, Wines, Beers and Fermented Beverages Consumption and Advertisement Regulation, Government Agreement 127-2002; and
- (k) By-laws of Health Regulations for the Authorization and Surveillance of Advertising of Products derived from Tobacco, Government Agreement 338-2013.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Text message advertising or social media advertising is not specifically regulated. General provisions on advertisements will apply to this means of advertising. There are, however, certain specific regulations to be observed, eg:

- (a) comparative advertising is prohibited (Commercial Code, Decree 2-70);

- (b) advertisement through billboards and advertisements in public spaces and radio and television advertisements are regulated by specific norms (Advertising Law in Urban Roads, Extra-urban Roads and similar, Decree 34-2003; and Radio Communication Law).

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Yes, there are regulations in relation to products that are subject to certain level of state control, such as those made or derived from tobacco, alcoholic beverages and pharmaceutical products.

1.6 Are any government pre-approvals required?

Yes—the Ministry of Public Health and Social Welfare must approve all advertising that is connected with products made or derived from tobacco, alcoholic beverages and pharmaceutical products. Likewise, it must do so for the promotional campaigns of alimentary products that reach the consumer through advertising campaigns.

The advertising of games of chance is permitted, as long as the respective contests, raffles and drawing of lots have the authorization of the corresponding authority; in this case, the Departmental Governance or the Ministry of Interior.

1.7 Does the media pre-clear advertising?

There is no mandatory legal regulation in this regard. However, the advertising sector applies a Code of Ethics issued by the National Advertising Council (as to which see answer 2.1 below) under which there may be some supervision prior to an advertising campaign or announcements being launched to the mass media.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The Ministry of Public Health and Social Welfare has dependencies in charge of monitoring the advertising of restricted products, which have the authority to demand that the advertiser complies with the law. If this is not done, the Ministry can impose a fine and even proceed to withdraw the commercial or publicity in question. A similar situation applies to the municipalities in the case of advertising on public roads within their jurisdiction.

1.9 When does a competitor have a right of action? What are the potential remedies?

The three main cases where a competitor has a right of action are:

- (a) When the advertising constitutes unfair competition under the Commercial Code and the Industrial Property Law, the affected party may bring a claim via civil action to request the suspension of the act and the payment of damages and/or compensation for losses suffered from the activities of the competitor.
- (b) Where advertising amounts to a criminal offense under the Criminal Code, such as the violation of Industrial Property rights or crimes against honor, the affected competitor may file a complaint before the public's prosecutor office, to proceed with a criminal proceeding that results in the imposition of a prison sentence and/or a fine.

- (c) Another case refers to regulated sectors (eg products made or derived from tobacco, alcoholic beverages and pharmaceutical products), in which there is a possibility that any competitor may denounce the non-compliance with the rules of a specific advertisement, following the procedure established in the Health Code. Remedies for non-compliance include withdrawal of the advertisement and sanctions against the person responsible.

1.10 When do consumers have a right of action? What are the potential remedies?

A consumer (or ‘user’) has a right of action in respect of misleading advertising under the provisions of the Consumer and Users Protection Act. The infraction can be reported to the Department of Attention and Assistance to the Consumer (DIACO). ‘Misleading advertising’ is defined by said regulation as advertising that ‘induces the consumer or user to error by means of trickery or deceit to defraud him in his assets to his own detriment or of a third party’. This is a special case of infringement, which can be subject to a fine of US\$16,000–30,000.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Guatemala have a primary advertising self-regulation system?

In Guatemala, there is no binding system of self-regulation. Regardless of this, several associations or guilds have formed the denominated, National Advertising Council (NAC):

- (a) the Advertisers Association of Guatemala (AAG);
- (b) the Guatemalan Association of Advertising Agencies;
- (c) the Guatemala Media Chamber; and
- (d) the Independent Media.

The NAC has created a Code of Ethics, aiming at better interaction amongst its members and establishing certain guidelines that such members are called upon to observe, in particular, the adoption of standards of business acts and quality standards that can be adjusted to the reality of the Guatemalan market.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Yes, there is a Code of Ethics issued by the NAC, which is a guide for the development of the activities of its members within the field of advertising, internally as well as relating to behavior before the public and users. The principles that are relevant to this Code are: truthfulness, loyalty, morality, decency, honesty, legality and trustworthiness.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

No—the Code of Ethics issued by the NAC, does not include a dispute resolution system.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The NAC, in various publications, has stated that the voluntary system has proved to be effective and is generally accepted by its members. It is qualified as ‘voluntary’ because it does not have a mandatory and binding nature, not having been issued by the Congress of the Republic or another authority empowered by law to do so.

2.5 Are the self-regulatory system’s decisions reported?

The system does not provide for the publication of decisions. Decisions and/or agreements are discussed among the members of the Guild, and, seeking for harmonization in the field of advertising, agreements have been reached in which the advertising trade associations have been involved, such as those that make up the NAC.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Since the Code of Ethics sets the guidelines and the endorsed practices from the perspective of advertising, this tends to set principles for all those involved in with the NAC. This Code is mainly divided into general principles, special conduct guidelines addressed to the treatment of social groups (children, youth and sick persons), and guidelines relating to product sectors (food, alcohol and moderate cigarettes and tobacco, loans, insurances and investments, teaching courses, etc). This is because these are the most important points to be considered by companies at the time of launching advertising campaigns and the areas most requiring professional consultation.

2.7 Are there any other self-regulatory systems that govern advertising practices in Guatemala?

No, there is no other system of self-regulation regarding advertising practices; though there are, certainly, companies (particularly multinationals) which have developed their own internal advertising codes.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Guatemala (eg, consumer protection laws; IP laws; unfair competition laws)

The description of products in advertising is regulated in a general way in the Consumer and Users Protection Law, by means of two standards:

- (a) The expression ‘guaranteed’ or ‘warranty’ or any equivalent phrase, caption or word, can only be stated in advertising when there is indication as to what it means, who is the person obliged and the conditions attached. This applies to any statement that is made regarding the qualities of the product or service.
- (b) To avoid misleading advertising, which is defined as that which induces the consumer or users to error by means of trickery or deceit, to defraud him in his own assets to the detriment of himself or a third party.

The Commercial Code states that is an act of unfair competition to deceive or mislead the public in general, or a specific person, through the use of false guidelines about the origin or quality of the product or services, or the false reference of credits, awards or distinctness obtained by the same.

The Industrial Property Law states that the use, promotion, publication of false or inaccurate indications or facts, that may mislead as to the origin of the products or services, their nature, manufacturing method, use, quantity or other characteristics, is an act of unfair competition. A provision in the Industrial Property Law clearly states that, in case of contradiction between the Commercial Code and/or other laws containing provisions related to unfair competition and the Industrial Property Law, the Industrial Property Law shall prevail.

The Health Code prohibits advertising that attributes therapeutic properties to food or that misleads or deceives the public as to the nature, ingredients, qualities, properties or origin thereof.

3.2 Is substantiation required for advertising claims?

The Guatemalan legal system does not expressly state that evidence must be provided on the properties of the products or the claims within the advertisements. However, any consumer can request that the truthfulness of these properties is verified, in which event substantiation of the claims must be made available.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

The Guatemalan law does not expressly consider the case of whether there are any types of advertising messages that do not require substantiation. The question of whether advertisements that ‘presumably’ no reasonable person would assume to be literally true and are not intended to be an express warranty or guarantee for the consumer are lawful will be a matter of discussion before a competent authority, if challenged. The authority will decide based on the message being challenged, in the context of the product or service.

3.4 What are the rules governing the use of disclosures in advertising?

The regulations on misleading advertising, contained in the Consumer and Users Protection Law (as to which see question 3.1), state that the information contained in the packages or advertising of products must be truthful, accurate, clear and visible, written in Spanish or in symbols that are internationally known, with the purpose to inform the consumer or users about the warnings or how to use the product.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

There are no guidelines governing the use of testimonials and endorsements. Therefore, the general regulations on misleading advertising would apply.

Testimonials or endorsements should be truthful.

As to the inclusion of individuals in advertising, the Health Code bans the use of public figures (endorsement by individuals) in advertising for tobacco and alcoholic beverages.

3.6 What are the rules governing the use of product demonstrations in advertising?

The Health Code prohibits any activity that comprises the free distribution, for consumption, of tobacco and alcoholic beverages. Comparative advertisement is banned.

There are no specific provisions as regards other product sectors, and so the general regulations on misleading advertising will apply.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

No—comparative advertising is forbidden and is described as an act of unfair competition, according to the Commercial Code of Guatemala.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

As indicated above, comparative advertising is expressly considered an act of unfair competition under the Commercial Code.

In addition, there are provisions related to unfair competition contained in the Industrial Property Law, that will impact comparative advertising, which gives the following as examples of unfair competition:

- ‘Any act or omission capable of causing ... weakening of the distinctive character of a sign, regarding the products, services, company or establishment of others;
- the use, promotion or disclosure of false or inaccurate indications or facts capable of denigrating or discrediting the products, goods, services, company or establishment of others or that may mislead with respect to the origin, the nature, the mode of manufacture, the aptitude for its use, use or consumption, the quantity or other characteristics of the own or foreign products or services;
- the improper use or omission of truthful information, when they are liable to mislead as to the origin, nature, manner of manufacture, suitability for use, use or consumption, quantity or other characteristics of the own or foreign products or services.’

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

Yes—the Industrial Property Law provides for the protection of geographical indications and denominations of origin. The Law prohibits the registration as a trademark of a sign that could cause confusion with regards to the true geographical origin of a product. It also requires that all products sold in Guatemala clearly indicate in Spanish the place of production or manufacture. The use of geographical indications in a way that will mislead the public as to the origin and or characteristics of the product constitutes infringement of the law.

3.10 Are there any special rules governing product packaging?

In Guatemala the main regulations in relation to this matter are the following:

- (a) **Foods:**
 - (i) General food labeling (prepackaged): Central American Technical Regulation (RTCA) 67.01.07:10;
 - (ii) Nutritional labeling of pre-spilled food products for human consumption for the population from 3 years of age: RTCA 67.01.60:10;
 - (iii) Labelling of fermented alcoholic beverages: RTCA 67.01.05:11;
 - (iv) Labeling of distilled alcoholic beverages: RTCA 67.01.06:11.
- (b) **Medicines, Cosmetics and Hygienics:**
 - (i) Labeling of pharmaceutical products: RTCA 11.01.02.04;
 - (ii) Labeling of Cosmetics: RTCA 71.01.36.06;
 - (iii) Labeling Hygienic Products: RTCA 71.01.38.06;
 - (iv) Labeling of natural pharmaceutical products for human use: RTCA 11.04.41.06.
- (c) **Others:**

- (i) Labeling of Pesticides: RTCA 65.03.57:10;
- (ii) Labeling of Textiles: RTCA 59.01.08:12;
- (iii) Labeling of Footwear: RTCA 59.01.08:12.

(d) **General**

Protection to the Consumer and Users Act, Decree 006-2003.

4 PRICE ADVERTISING

4.1 What are the Guatemala’s rules regarding price advertising?

Price advertising is regulated by the Consumer and Users Protection Law, which establishes the basic right of consumers and users to know the characteristics of products and services, including their price. The price advertised must be maintained, so that the charging of higher prices is prohibited, unless the changes have been made in good time and publicly known. The merchants must make their prices available to the public, which must include all applicable taxes, and must be marked in local currency.

4.2 What are the Guatemala’s rules regarding advertising ‘free’ products?

The Health Code bans any activity that includes the free distribution, for consumption, of tobacco and alcoholic beverages. There are no specific provisions as regards other product sectors, and so the general regulations on misleading advertising will apply. Therefore advertising ‘free’ products is not prohibited as long as all the activities addressed to advertise the products that are delivered free to the consumer, do not induce a deception or error in the consumer when the products are sought in the domestic market.

4.3 What are the Guatemala’s rules regarding sales and special offers?

The Civil Code of Guatemala states that a person who offers to the public objects at a certain price is obliged to honor his offer. On the other hand, the Consumer and User Protection Law defines an ‘offer’ (special price) as ‘the commercial practice of offering the public, on a temporary basis, lower prices than the usual ones’. In both cases, the supplier is obliged to supply the consumer with what is offered through the advertising used to reach the general public.

The Consumer and Users Protection Law (see question 4.1), establishes that in advertising ‘on sale’ or ‘discounts’ the term or unit numbers to be promoted, as well as the business conditions offered, should be stated. If the term is not stated, it will be understood that the offer will have a term of no less than a month from the date of the last announcement.

4.4 What are the Guatemala’s rules regarding rebates?

The Consumer and Users Protection Law also regulates the return of products. In case of any breach of the product specifications, the supplier must repair it or return the price paid to the consumer or users who claims it.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Product bundling has been interpreted by DIACO as ‘offers’, which may result in restricting the practice unless it complies with the ‘offer’ regulations.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

As regards prohibited practices, the basic principles about respect for privacy and morality should be taken into consideration; insults to people should be avoided, especially if these involve incitement to hatred or violence, as well as discrimination based on gender, religion, political tendency or ethnic group. Provisions in this regard are included in the Political Constitution of the Republic and in the Criminal Code of Guatemala.

On the other hand, although the law does not expressly state it, it is understood that it is prohibited to advertise products that are not legally tradable, such as drugs or certain types of weapons.

There is an express prohibition on the advertisement of pharmaceutical products whose sale requires a medical prescription, under the Code of Health.

Likewise, in the same Code, there is a prohibition on the advertising of tobacco products and alcoholic beverages on television and radio within the time period that is considered as children’s programming, as well as prohibition on placing advertising on the perimeter of educational or sports centers.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

The Radiocommunication Law prohibits:

- (a) the dissemination of propaganda contrary to the security of the State, or to public order,
- (b) denigrating or offensive treatment to civic and patriotic symbols,
- (c) offence to religious beliefs
- (d) encouragement of racial discrimination,
- (e) vulgar comedy or offensive sounds;
- (f) anything contrary to moral or decorum;
- (g) anything harmful to children or youth; and
- (h) exaltation of crime.

The Health Code establishes that the advertising of promotions, pharmaceutical products that are sold without a prescription, tobacco products and alcoholic beverages, must be authorized prior to broadcasting.

The Advertising Act on Urban Roads, Extra-Urban Roads and Similar prohibits the placing of advertising that can obviously affect the physical or mental health of people, as well as advertising containing written or drawn expressions that damage, injure or denigrate other rights or interests, directly or indirectly, as well as cause any injury to the principles of unfair competition.

The Law for the Protection of the Cultural Heritage of the Nation, Decree 26-97 of the Congress of the Republic, prohibits and sanctions the illicit positioning of any type of commercial advertising in archaeological areas or historical monuments. Likewise, it is prohibited to place advertising on property which has been declared to be cultural heritage of the Nation.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

There are several general regulations on the subject of indecency or obscenity, but specifically the Radiocommunication Law states that it is not permitted to broadcast material that is indecent or contrary to morality. The penalty is a fine equivalent to approximately US\$130.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

There is no regulation expressly requiring identification of the specific entity responsible for an advertisement. Generally, an advertising or media agency will submit the materials and will appear as the responsible entity for the content or campaign. When applying for authorization to advertise regulated products, the applicant's data is placed in the approval request file.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

The sole specific regulation governing the integration of advertising content and entertainment/editorial content refers to the advertising of tobacco products and alcoholic beverages. The Health Code prohibits advertising to show the user the consumption of these products, as well as the use of cartoons or depiction of public figures using or consuming them.

For everything else, the general regulations in relation to intellectual property, moral standards and good manners apply, as well as the rule that an advertisement's content does not imply the commission of a crime.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There is no express regulation regarding integrating advertising content with other content, although it is always advisable to consider the limitations that the regulated products (tobacco and alcoholic beverages) have, and to find a way to avoid integrating it with advertising addressed to groups that can consider it as an attack against moral principles.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There is no specific law generally regulating advertising for social media. However, principles and norms that apply to traditional advertisement should be observed when it comes to social media advertisement and marketing. The Consumers' Protection Act (and its bylaw) refers to certain characteristics and data to be considered when communicating information to consumers (such as truthfulness, clarity etc). This Act also expressly prohibits deceptive advertising.

Another law that contains provisions applicable to advertising and marketing via social media is the Commercial Code, which expressly prohibits comparative advertisement and refers to other conduct that is considered unfair competition in advertising and marketing.

For certain regulated products, such as tobacco, alcoholic beverages and pharmaceutical products, advertising and marketing is regulated under the Health Code and its bylaws.

Even though there is not yet a specific law regulating personal data protection in social media, the Courts have issued decisions that should be followed, particularly those setting out considerations as to data privacy and rights of intimacy and informed consent.

Finally, it is important to bear in mind that the intellectual property laws are to be observed when advertising and marketing via social media.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

Guatemalan legislation does specifically consider responsibility for advertising claims made in user generated content, although there have been cases that, when users make claims by these means (eg on a Facebook page or similar ones), the Directorate for Consumer Care and Assistance has paid special attention to whether the advertiser’s products or services could face possible claims from users for misleading advertising and situations for which consumers or users feel deceived.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

In Guatemala, except in very specific cases, the common law has no binding effect, which is why there are no specific cases that could be the subject of discussion.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

The Law of the National Registry of the People, Decree 90-2005 of the Congress of the Republic assesses as ‘public information’ the name and surname, identification number, birth or death dates, gender, profession or job, nationality and civil state of individuals. All other information relating to individuals will be considered as ‘not public’ and therefore of a private nature.

However, the fact that this data is considered public, does not mean that it can be shared or used for an economic purpose. Although there is no specific regulation that controls the use of personal data in advertising, the general criteria are that they cannot be used without the direct authorization of the owner. For example, in the announcement of winners of promotions, sweepstakes, skill contests and similar activities, it is customary that the people concerned sign an authorization for the use of their image.

9.2 Are there situations when permission is not required?

There is no specific regulation that foresees that situation, although (as explained in question 9.1 above), when there has been no consent or authorization from the owner of the data, the owner could legally act against those who have used the data without their consent.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

The Law for the Protection of the Cultural Heritage of the Nation establishes that if a project of any kind is planned to be developed on Government land, public buildings or historical places (whether urban or rural) or in archaeological, paleontological or historical zone or sites, prior approval from the General Directorate of Cultural and Natural Heritage must be obtained. A license, for which a fee may apply, shall be requested.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Under the Industrial Property Law, the use of another company's recognizable products in advertising could be considered unfair competition, risk of association and/or trademark infringement.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Guatemala which affect advertising (eg Swedish gender equality law)?

There is no specific provision on the use of cultural elements in advertising. However, the Political Constitution of the Republic and the Law for the Protection of the Cultural Heritage of the Nation generally establish a prohibition on acts that weaken the national culture, especially the traditional culture of the indigenous communities, by preventing, or acting in any way against, the ways of life, folkways, traditions, indigenous costumes, languages, dialects, or celebration of their periodic feasts and native rituals.

Likewise, regulations in relation to moral and ethical principles prevent the carrying out of acts that denigrate the national symbols or values of the population. In particular, the Industrial Property Law prevents the registration of trademarks that are contrary to the moral or public order, or that include elements that insult or ridicule people, religions or national symbols.

It is important to take into consideration the discrimination crime, contained in the Criminal Code of Guatemala. Advertising campaigns, or publicity in general, that may generate discomfort in groups and sectors that are considered discriminated against, could lead to actions against the advertiser. An example of this is the case of *Maria Chula* in 2017, in which a virtual store with this name, which was dedicated to the manufacture, sale and export of clothing and articles using the typical fabric of Guatemala, was the subject of a complaint by the Presidential Commission against Discrimination and Racism against Indigenous People in Guatemala (CODISRA). CODISRA considered that the combination of the products advertised and the name of the store was pejorative and discriminatory

against the indigenous women's sector in Guatemala. The owner of the virtual store had to give a public apology and explanation about the meaning of the name to dismiss the case.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

No.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in the Guatemala?

Advertising projects should bear in mind that Guatemala is a conservative country and its citizens are religious (Catholic/Christian).

HOLLAND

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Holland?

In the Netherlands, four main sources of advertising regulation exist:

- (a) Firstly, there are consumer protection laws.
- (b) Secondly, there are sector specific laws that cover advertising rules, for example regarding food, or medicinal products.
- (c) Thirdly, intellectual property laws, (eg, copyright and trade mark law), may regulate advertising content. Competitors are able to start legal proceedings when they feel advertising is breaching the law and the competitor is suffering damages. In the civil courts, the principle is followed that the parties delimit the subject matter of the proceedings. The Government can also enforce some of the laws and impose warnings and/or penalties. Labelling is also considered to be advertising in the Netherlands.
- (d) Finally, the Netherlands has a strong self-regulatory system. Consumers and competitors may file complaints about advertising with the Advertising Code Committee (RCC). Several sector specific regulatory bodies are also active, such as the Inspection Board for the Public Promotion of Medicines and Health Products, the Medicines Advertising Code Foundation and the Foundation for Responsible Alcohol Consumption (a collaboration of Dutch producers and importers of beer, wine and spirits).

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

The Dutch Advertising Code (Advertising Code) defines advertising as any form of public and/or systematic direct or indirect commendation of goods, services and/or ideas by an advertiser or, on its behalf, with or without the help of a third party. Virtually all communication instigated by an advertiser recommending its products or services (or even ideas) is considered to be advertising. Examples include editorials, packaging and defamatory articles. Only purely informational communications fall outside the scope of the definition.

1.3 What is the basic regulatory framework for advertising regulation?

The regulatory framework for advertising comprises the civil law and system of self-regulation. The Dutch Civil Code regulates three types of commercial practices: business-to-business, business-to-consumer and comparative advertising. The self-regulatory system provides for a ‘general’ advertising code that is applicable to all and numerous specific codes relating, for example, to advertising for alcohol or travel offers. These specific codes are aimed at specific types of advertising.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Besides the general Advertising Code, several other specific self-regulatory codes exist. Some of these codes are aimed at specific types of advertising, eg:

- (a) Letter box advertising, door-to-door sampling and direct response advertising code;
- (b) Advertising code for the use of the postal filter (persons that can subscribe to this filter are the deceased and persons that don’t want to receive any direct mail. Advertisers are obliged to consult this register before sending direct mail);
- (c) Code for the distribution of unaddressed printed advertisements;

- (d) Code for distribution of advertisements by e-mail 2012;
- (e) Advertising code for telephone information services;
- (f) Advertising code for SMS services;
- (g) Advertising code for social media;
- (h) Advertising code for Fieldmarketing; and
- (i) Telemarketing code 2012.

The law also contains several provisions that are aimed at specific types of advertising, such as the Media Act, which covers advertising related to the media. Another example is the recently implemented provisions regarding distance buying (such as webshops), based on the Directive on Consumer Rights (2011/83/EC).

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There are several industries that are subject to specific laws which govern their advertising. Some sectors also have their own specific, self-regulatory advertising codes. When the specific self-regulatory codes apply, the Advertising Code shall remain fully in force.

Other rules regarding advertising for specific products such as tobacco, medicinal products, health products, drugs and geographical indications can be found scattered across different laws, regulations and directives. The list of advertising provisions for specific products is extensive.

In particular, the following have industry-specific regulation:

- (a) **Alcohol:** The Licensing and Catering Act and the Advertising code for alcoholic beverages 2014 apply. Examples from the self-regulatory code are that TV commercials may not feature models or persons that look like they are younger than 25 years old. It is also not allowed to advertise excessive alcohol consumption, such as using pitchers or a large bottle of alcohol with only few 'drinkers'.
- (b) **Tobacco:** The Tobacco Act and the Advertising code for tobacco products apply. Tobacco may not be advertised in the Netherlands, except for several strict exceptions. It is also not allowed to give tobacco products for free to consumers. The Dutch government actively follows European developments and discussions regarding tobacco. In 2016, the EU Tobacco Directive 2014/40 was implemented into Dutch law in the Dutch Tobacco Act, which has resulted in stricter rules for advertising e-cigarettes and refill containers.
- (c) **Medicines:** The law makes a distinction between non-prescription and prescription-only medicinal products. The Medicines Act, Code of conduct for pharmaceutical advertising and Code for the advertising of medicinal products to the general public, and/or Code for the public advertisement of medical (self-care) devices may apply to advertising of any medicinal product.
- (d) **Food and drink:** Several European regulations (such as the Nutritional and Health Claims Regulations and Food Information for Consumers Regulations), the Commodities Act and the Advertising code for food products apply. The advertising code for food products also gives specific rules on food advertising aimed at children (up to 12 years old).
- (e) **Automotive:** Regulation includes the Environmental advertising and passenger cars Codes. The vehicle labelling directive has been implemented in national law by the Energy Consumption Passenger Cars Labelling Decree. Advertising for cars may, for example, not give

rise to aggressive, dangerous or environment unfriendly behavior. Furthermore, several strict provisions exist regarding the display of CO2 burden and fuel consumption;

- (f) **Gambling:** The Betting and Gaming Act, the Advertising code for games of chance offered by licensees, by virtue of the Betting and Gaming Act, and the Code of Conduct for Promotional Games of Chance apply. Promotional games of chance are permitted in the Netherlands, although bound by rules. A distinction is made between promotions in which the prize value is below or above 4,500 euro. If the value of the prize exceeds this amount, special rules apply such as obligatory general gaming conditions and limitations on the total number of promotional games of chance per year.
- (g) **Travel:** The Advertising code for travel offers 2014 (based on regulation 261/2004/EC) applies. The Authority for Consumers and Markets (ACM) prioritizes the monitoring of the travel industry. The ACM is able to impose high fines. Travel offers may not be used as a carrot: the consumer should be able to book the offer for the advertised prize.

1.6 Are any government pre-approvals required?

No statutory pre-approvals are required. However, advertising for certain products such as financial services/products (lending operations) should contain specific warnings/disclaimers, which can be found in the law. However, in some self-regulatory industries pre-approval may be needed (eg, advertising of alcohol, medical devices, medicinal and health products). Strictly speaking, only organizations which participate in the self-regulation system are bound by the system of pre-approval. However, it is recommended to follow the self-regulatory system. For example, the Dutch Food and Consumer Product Safety Authority (NVWA) (the government regulator) will usually follow the stance taken by the industry regulator. Furthermore, in a complaint before the Advertising Code Committee, prior approval from a self-regulatory institution regarding a type of advertising (such as the packaging) will assist in achieving a positive outcome.

1.7 Does the media pre-clear advertising?

There is no pre-clearance by the media. However, individual media usually apply general conditions, based on which they may refuse to broadcast an advertisement. Furthermore, the Advertising Code Authority offers clearance advice (for a fee) on advertisements, though this advice offers no guarantees. Members of the Foundation for Responsible Alcohol Consumption (STIVA), the self-regulatory system for alcohol advertising, are obliged to clear all advertisements on radio, television and cinema with STIVA before publication.

1.8 How does the government enforce advertising laws? What are the potential remedies?

There are some government institutions that enforce advertising laws or laws that contain advertising provisions:

- (a) the Dutch Media Authority enforces the Media Act (surreptitious advertising, sponsorship);
- (b) the ACM enforces the Telecommunications Act (which prohibits spamming);
- (c) the Dutch Data Protection Authority enforces the General Data Protection Regulation (GDPR);
- (d) the NVWA enforces all cases that concern human and animal health, based on, for example, the Claims Regulation, the FIC Regulation, the Commodities Act and the Tobacco Act;
- (e) the Dutch Health and Youth Care Inspectorate (IGJ) is the body responsible for enforcing laws and other regulations regarding medicinal products and medical devices;
- (f) the Games of Chance Authority enforces the Betting and Gaming Act; and

- (g) the Dutch Authority for Consumers & Markets monitors the market regarding all sorts of (unfair) commercial practices.

Some of the government institutions are dealing with recent reorganizations and budget cuts; therefore, these institutions focus on major violations of the law. However, if these authorities decide to enforce the law, they are authorized to impose high fines. It is wise to seek advice, especially as some violations may also breach criminal laws. Therefore, the Public Prosecution Service could play a role in some cases.

However, the majority of minor advertising issues are handled by the self-regulatory institutions or by the competent Dutch courts.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor may, at any time, file a complaint to the Advertising Code Committee if it thinks that an advertisement violates the Advertising Code. Please see question 2.1 for further information regarding the proceedings at the Advertising Code Committee.

Furthermore, a competitor may decide to take legal action. It is common, mainly in cases of allegedly misleading (comparative) advertising, for the competitor to bring proceedings. There used to be a debate as to whether the provisions aimed at business-to-consumer relations are also applicable in business-to-business relations. It is now the common view that the provisions in the Dutch Civil Code implementing the Unfair Commercial Practices Directive can also be relied on between competitors.

The provisions on commercial communication follow from the Unfair Commercial Practices Directive and are implemented in the Dutch Civil Code. The competent court might:

- (a) impose a prohibition (ie prevent an advertisement from being run);
- (b) impose a penalty;
- (c) make an order for rectification ('we made misleading comparative advertising'); and
- (d) order a recall (for example, products with labels that contain misleading advertising).

These types of cases are normally handled in interim injunction proceedings. However, damages can only be awarded in a distinct proceeding on the merits (which can easily take a year or more). Therefore, this procedure is not commonly used in advertising. However, in cases that do go to trial, the awarded damages can be high. For example, in a case between Philips and Tefal regarding a new product—Actifyr—the damage was assessed at over 1 million euro.

Some self-regulatory or government institutions (KOAG-KAG, IGJ, NVWA) enable companies to notify the authority or file a complaint if the company feels that a competitor is acting in breach of the applicable rules. In certain cases where criminal law is applicable, the competitor can even report the incident to the police (although this is rare).

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers may, at any time, file a complaint with the Advertising Code Committee. This procedure is very easy, free to consumers and therefore commonly used. For potential remedies, please see question 2.1. A consumer can also start legal proceedings through the courts. For the potential remedies, please see question 1.9.

Consumers can also notify the Dutch Authority for Consumers & Markets, Dutch Food and Consumer Product Safety Authority, Dutch Health and Youth Care Inspectorate or the Dutch Foundation for the

Code for Pharmaceutical Advertising about unlawful trade activities. Sometimes, consumers take joint action supported by consumer associations.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Holland have a primary advertising self-regulation system?

The self-regulatory advertising system is well-known and widely used among consumers and businesses in the Netherlands. Any consumer or competitor can file a complaint to the Advertising Code Committee. If the Advertising Code Committee considers the claim well-founded, the Advertising Code Committee will make a 'recommendation'. A recommendation means that the Advertising Code Committee recommends this manner of advertising be discontinued. Furthermore, if the circumstances warrant it, the Advertising Code Committee may ask the secretariat to publish a decision as an ALERT (which means that the secretariat will take care that the decision is brought to the attention of the public by means of a press release in associated media, to interested individuals or organizations and via placement on www.reclamecode.nl). The Advertising Code Committee may not impose financial penalties. For radio and television commercials, the advice of the Advertising Code Committee is followed by all Dutch broadcasting institutions as a matter of contract. As a result, any advertisements that do not comply with the advice will not be broadcasted.

2.2 Is there a self-regulatory advertising code? What are the key principles?

There is a general self-regulatory code (the Advertising Code) and numerous special advertising codes, aimed at specific industries or types of advertising. The key principles are that advertisements should be recognisable as such, in accordance with the law and principles of good taste and decency. Other key principles are that the form and content of an advertisement must not undermine confidence in advertising and that an advertisement may not arouse feelings of fear or superstition.

The Advertising Code contains also provisions regarding comparative advertising, guarantees and aggressive advertising. Advertising should not be dishonest. Misleading and/or aggressive advertising is by any means considered to be dishonest. Both the general and special (specific) advertising codes are applied in spirit as well as the letter. The burden of proof regarding the content of the advertisement is with the advertiser. If the specific codes that are aimed at specific industries or types of advertising apply, for example, when alcohol is being advertised, the general advertising code shall remain fully in force.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The findings of the Advertising Code Committee are not binding. However, the decision of the Advertising Code Committee is followed by nearly all Dutch media. The losing advertiser may appeal the decision. The Board of Appeal handles the case in higher instance. The complainant needs to file his appeal within 14 days to the Board of Appeal. The Board of Appeal will only handle the case if the complaint filing fee is being paid.

The president of the Advertising Code Committee can also reject a complaint by itself. The president of the Advertising Code Committee will reject a complaint without the full Advertising Code Committee when he finds that the Advertising Code Committee will reject the complaint. If the complainant does not agree to this rejection, he may object to the plenary Advertising Code Committee within 14 days after the decision.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The system is highly effective and widely used. The Netherlands is known for its self-regulatory system. Companies are likely to follow the recommendations of the Advertising Code Committee, not least because it applies a system of naming and shaming on the website for companies that do not comply. According to the most recent annual report of the Dutch Advertising Code Authority, the compliance rate is 97%.

The Compliance Department is an independent department within the Advertising Code Authority. This department checks whether decisions of the Advertising Code Committee or the Board of Appeal are being followed. If not, they request the advertiser does so. If the advertiser refuses to comply, this will be published on the website of the Advertising Code Authority. In this way, non-compliant advertisers will be brought to the attention of third parties, such as government regulators.

2.5 Are the self-regulatory system's decisions reported?

The decisions of the Advertising Code Committee and the Board of Appeal are published on the website of the Advertising Code Authority: www.reclamecode.nl. All of the final decisions can be found via a search engine on the website. Since 2016, the website of the Advertising Code Authority also discloses whether the advertiser complied with the decision. Some important decisions are also placed in the newsletter of the Dutch Advertising Code Authority.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

The first key area of focus is the recognisability of advertisements (for example, in relation to native advertising), and advertising on social media and other online channels.

Importantly, the self-regulatory system applies a very broad definition of advertising. Editorials, advertorials, or other 'grey area communication' that initially looks like information, are generally also considered to be advertising. Another example is non-commercial advertising which propagates concepts, for example, fundraising for bodies such as Greenpeace. In cases that concern the latter form of advertising, the Advertising Code Committee gives 'non-committal advice' instead of a recommendation.

The regulator is free to decide on all the different types of communication. Comparative advertising is common in the Netherlands.

Finally, it is possible to organize a promotional game of chance in the Netherlands, provided that the requirements for promotional games of chance are met.

2.7 Are there any other self-regulatory systems that govern advertising practices in Holland?

There are some sector-specific self-regulatory institutions, such as:

- (a) the KOAG-KAG (medical devices, non-prescription medicinal products and health products),
- (b) the Foundation for the Code for pharmaceutical advertising (CGR) (prescription only medicines),
- (c) STIVA for alcohol (although essentially only for members) and
- (d) the Committee for the Promotion of Veterinary Products.

Both consumers and competitors may file complaints to the KOAG-KAG, CGR and the Committee for the Promotion of Veterinary Products.

The KOAG-KAG monitors the market and reviews all types of advertising for medical products, health products and medical devices (ie, clearance). The CGR also monitors the market (of prescription only medicines) to issue advice at its own volition. Furthermore, the CGR has a close collaboration with the governmental IGJ (Netherlands Health and Youth Care Inspectorate).

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Holland (eg, consumer protection laws; IP laws; unfair competition laws)?

Firstly, there are consumer protection laws, particularly the Unfair Commercial Practices Act, which is based on the Unfair Commercial Practices Directive and incorporated in the Dutch Civil Code. Other consumer protection laws are the General Data Protection Regulation (GDPR), the Commodities Act, the Telecommunications Act (ban on spam) and the Media Act (surreptitious advertising and sponsorship).

Secondly, as referred to in question 1.1, there are sector-specific laws that cover advertising rules. For example, the Claims Regulation contains provisions regarding advertising. Another example is tobacco: the Tobacco Act has several specific provisions dedicated to advertising tobacco and tobacco-related products, including e-cigarettes and refill containers.

Thirdly, the Copyright Act and the Benelux Convention on Intellectual Property are important intellectual property laws that may influence the content of advertising.

However, one of the most important sources of rules that cover advertising are the self-regulatory provisions. These provisions follow from the Advertising Code, special advertising codes and other self-regulatory institutions as mentioned in question 2.7.

3.2 Is substantiation required for advertising claims?

Substantiation is extremely important for advertising claims. The burden of proof is on the advertiser to show that the claim is true. The advertiser should be able to substantiate the claim(s) within a short period of time. It is important to note that, if a request is made by a competitor, the court may require substantiation evidence to be provided within a short period of time. The need for substantiation may even require advertisers to reveal trade secrets in certain cases. A solution to this problem is a non-disclosure agreement between the parties. Trade secrets currently have 'European attention'. In 2016 an EU Directive (2016/943) came into force on the protection of undisclosed know-how and business information (trade secrets) against unlawful acquisition, use and disclosure. The Directive had to be implemented in the Netherlands in the Dutch Trade Secrets Act by 9 June 2018, although this has not yet been completed.

If a claim cannot be (sufficiently) substantiated, it is presumed to be misleading.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

The law states that the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally does not make an advertisement misleading. Therefore, these types of claims do not need to be substantiated. Typical examples of 'puffery' in the Netherlands are advertising claims that are made in the cosmetics industry. What is 'common' will be decided based on the perception of the average consumer. The average consumer is the consumer who is reasonably well-informed and reasonably observant and circumspect. The courts or the Advertising Code Committee will decide if a claim needs to be substantiated on a case-by-case basis. The consumer or competitor can decide if he wants to file a complaint at the Advertising Code Committee or want to

start legal proceedings at the courts. As a rule of thumb, the more the claim relates to characteristics that are essential for consumers, the more likely substantiation will be required.

3.4 What are the rules governing the use of disclosures in advertising?

No specific self-regulatory rules exist regarding disclosures. However, the general rule that advertising should not be misleading also affects the use of disclosures. This implies that essential information must be made clear to consumers. Disclaimers should be placed on the same page where the claim is made. Disclaimers can refer to another source (eg, a website) for further information. However, limitations of fundamental importance need to be set out prominently in the advertisement itself. The requirements for setting out significant terms depend on the type of media that is used and the type of claims that are made. For example, the basis for claims that are made in comparative advertising should feature in the advertisement itself. A clear reference to a website where all further information regarding the comparison in the advertising can be found will generally suffice.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

No specific rules exist regarding testimonials and endorsements. However, testimonials and endorsements are considered advertising. Therefore, they fall under the scope of the general advertising rules. Testimonials, commendations or statements by experts used in advertisements need to be based on the truth and tally with the latest accepted scientific views. Testimonials or endorsements that are communicated through social media are generally assessed in the light of the specific self-regulatory Social Media Code. Advertisers should ensure that advertisements are identifiable as such. If reviews or other communications are moderated (for example, on a website) the advertiser is obliged to mention this. The ACM and the Dutch DPA published a joint 'legal opinion' concerning 'tell-a-friend' marketing (ie, viral marketing). In summary, tell-a-friend systems are permitted, provided certain requirements (such as a lack of an incentive being provided when using the tell-a-friend system) are being met.

3.6 What are the rules governing the use of product demonstrations in advertising?

No rules exist regarding product demonstrations in general. All product demonstrations in advertising fall within the general definition of advertising. Therefore, the product demonstrations should comply with the advertising provisions, pursuant to the Advertising Code. The basic principle is that the advertising should not be misleading. Additionally, certain industry-specific advertising provisions contain their own rules. For example, with alcohol marketing, no sampling may be directed at children.

Product placement is subject to various rules designed to counter surreptitious advertising. Letterbox advertising, door-to-door sampling and direct response advertising codes require that the goods and/or services that are offered are depicted and/or described clearly and truthfully and samples of goods must be safely packaged when delivered to the recipient.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted, although subject to certain strict rules. Comparative advertising for medicinal products is bound by more specific rules. The rules for comparative advertising follow from the law (unfair commercial practices) and self-regulatory provisions.

Comparative advertising must:

- (a) not be misleading;
- (b) compare products or services that meet the same demands or are intended for the same purpose;

- (c) compare objectively one or more essential, relevant, checkable and representative characteristics of these goods or services; and
- (d) not lead to confusion with a competitor.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Pursuant to European court rulings, trade marks may be used in comparative advertising if all the requirements for comparative advertising are met. Therefore, if an advertisement does not meet all the requirements (unauthorized comparative advertising), the use of the trade mark is likely to be unlawful, based on Dutch case law. Unauthorized comparative advertising that uses a competitor's trade mark is considered to be a trade mark infringement. It is risky to use copyright-protected works of competitors in (unauthorized) comparative advertising. It is important to note that in the event of trade mark or copyright infringement or infringement of other intellectual property rights, the losing party can be ordered to pay costs (including the legal costs!). This may influence the use of trade marks in comparative advertising, as the potentially high costs have a chilling effect on the advertisers. The Dutch courts may allow a cross-border injunction in the event of trade mark infringement. The courts generally feel free to do so.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

There are no specific Dutch rules on claims relating to a geographic origin of a product. To protect certain names of local products and their geographic origin, the European Regulation (1151/2012/EC) on quality schemes for agricultural products and foodstuffs applies. According to this regulation there are three different types of protection through quality labels: the protected designation of origin (PDO), the protected geographical indication (PGI) and the traditional specialities guaranteed (TSG). A producer of a product can only seek protection for names which are registered in the Database of Origin and Registration (DOOR) of the European Commission. If a name is registered, the product has to comply with the product dossier, which can also be found in the DOOR database.

Furthermore, Country of Origin Labelling (COOL) is a hot topic in Europe at the moment. There are currently no European rules on COOL, but many European countries use it as a way to market their products. It is not, however, customary in the Netherlands.

In 2018, the European Commission released a draft regarding rules for indicating the country of origin or place of provenance of the primary ingredient of a food where different to that given for that food. It is unclear whether this draft will be amended or not and when it will be adopted.

3.10 Are there any special rules governing product packaging?

A general rule for product packaging is that it must not be misleading. There are some special rules for the labelling of certain products. The Dutch Food and Consumer Product Safety Authority (NVWA) checks whether the information on the label is correct. Special rules apply for certain types of products such as food stuffs, tobacco products and e-cigarettes, clothing and textiles, cosmetics and household chemicals. The most important rules in this regard are for food stuffs and tobacco products and e-cigarettes. For more information please see question 1.5.

4 PRICE ADVERTISING

4.1 What are Holland's rules regarding price advertising?

The general, and most important, rule is that price advertising may not be misleading. Advertising to consumers must always include prices inclusive of VAT, as should advertisements aimed at both consumers and businesses. Furthermore, some sectors have their own specific rules. For example, the Code for Travel Offers requires that the travel industry publish their prices including fixed, unavoidable costs (ie, additional and inseparable from the service) known at the time of publication that must be paid for the service offered, eg, booking fees.

If an advertisement can qualify as an 'invitation to purchase', specific information must be supplied, such as the main characteristics of the product and the identity of the advertiser. If an advertisement specifies the price of a product, it falls within the definition of an 'invitation to purchase'. These rules follow from the law and the Advertising Code. The provisions regarding the type of information that needs to be supplied have changed, with regard to distance selling, following the introduction of the new Directive. The provisions now make a distinction between 'traditional selling' and 'distance selling', such as webshops.

4.2 What are Holland's rules regarding advertising 'free' products?

Products may be advertised for free. However, a product shall not be advertised as being 'free of charge', 'for nothing' or 'available at no cost' if the consumer has to pay something else above the inevitable costs in order to respond to the offer and collect the product or have it delivered. It is not permitted to hand out samples of medicines free of charge. Alcohol advertising in which alcoholic beverages are supplied to consumers free of charge or for less than half of the regular (actual) sales price is prohibited.

4.3 What are Holland's rules regarding sales and special offers?

The basic principle is that sales and special offers shall be transparent and therefore not misleading. Advertisements may not suggest limited availability if this is not true, eg, 'offer ending soon' type deals. The Authority for Consumers & Markets is currently actively enforcing the rules concerning travel offers. All travel offers should comply with the rules regarding transparent pricing, including providing a clear statement of the unavoidable costs (for example, booking costs).

4.4 What are Holland's rules regarding rebates?

Besides the general rules concerning advertising, no specific provisions are dedicated to rebates. Rebates should, therefore, comply with all general rules regarding advertising. Rebates (for example the amount of the refund) shall not be misleading, untrue or contrary to provisions regarding good taste and decency. As an example, it is not allowed to mislead the consumer regarding the period in which the rebate is valid, or regarding any (extra) obligations for the consumer. The advertisement announcing the rebate needs to be clear about all conditions under which the rebate is valid, including the period.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Some sectors in the retail industry have their own rules, such as advertising for travel offers, alcohol and vehicles. The key requirement is to maintain transparency.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Guns may not be advertised. There are also strict requirements for the advertising of drugs, tobacco and medicinal products. Moreover, no advertising for alcohol may be aimed at children. Alcohol may not be advertised on radio or TV before 9pm. Alcohol advertising may not reach an audience comprised of more than 25% minors. Therefore, alcohol advertising is not allowed in media aimed at children, such as magazines for teenagers, events or websites targeted at minors. Furthermore, it is not allowed to advertise alcoholic beverages on radio or television immediately prior to, during or immediately after programs that are heard or viewed by more than 25% minors.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

There are some restrictions related to the ban on spamming. Consumers may subscribe to the '*Bel me niet*' ('Do not call me') register. These consumers may not be approached by telemarketers. Similar rules apply to consumers that subscribe to the postal filter and consumers that have a sticker placed in the immediate vicinity of their letterbox stating that they do not want to receive any unaddressed, printed advertising material and/or free local papers.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The Advertising Code states that advertising must not be gratuitously offensive or contrary to the principles of good taste and decency. Advertising that allegedly violates the principles of good taste and decency is brought before the Advertising Code Committee on a regular basis. However, the Advertising Code Committee adopts a reticent attitude when giving an opinion on such advertisements. In some rare cases, advertising might be considered an unlawful act. Very rarely, criminal law might be applicable.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Rule number one of advertising is recognizability.

It should be clear to consumers when the communication they are confronted with is advertising. Just as importantly, strict unfair commercial practices rules require that advertising must not be misleading as regards its source, commercial purpose or the characteristics of the advertiser.

In invitations to purchase, the identity of the advertiser/trader and its address should be made clear. In the case of distance selling (eg, internet shopping) the consumer needs to be provided with even more detailed information regarding the characteristics of the advertiser/trader, such as the phone and fax number (if applicable) and e-mail address of the advertiser. These provisions were changed from 13 June 2014.

The Media Act includes specific provisions regarding sponsorship. All sponsored programs must make clear at the beginning or end of the program that they are, in fact, sponsored, and must state the sponsor's name. Program offerings that are composed of news, current affairs or political information

may not be sponsored. The Media Act contains more specific provisions that are aimed at sponsored program offerings.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

The Media Act contains some provisions based on EU Directive 2010/13, such as the length and content of advertising on television (commercials). The Advertising Code states that advertising on radio and TV must be clearly separated from the rest of the programs by visual and/or acoustical means. Product placement is allowed for commercial media services. However, it is bound by several specific rules, as laid down in the Media Act. For example, one provision states that extreme attention may not be paid to the product involved. If programs or products in programs are sponsored, specific rules regarding the sponsorship apply.

Furthermore, an advertisement (including an 'advertorial') in a youth magazine or in other printed matter with an audience of over 25% of children must be headed by the word 'advertisement' in font size 12. This is based on the Code for Advertising Directed at Children and Young People (the Children's Advertising Code).

The Children's Advertising Code states that game and in-game advertising must be clearly recognizable by visual, virtual and/or acoustic means (appropriate for the children's relevant level of understanding) and must distinguish itself from the game. In the game and before the game can be started, it should be made clear to children that the game or parts of it contain advertising.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

The general rule is that advertising should be recognizable. Therefore, it is common to distinguish advertising from other content by using 'advertisement' or 'editorial' as a headline. The content of the advertisement should comply with all rules for advertising. If a large part of a magazine contains advertising of only one advertiser, in some cases the total magazine may be considered to be advertising. As referred to in question 7.1, the Children's Advertising Code pays attention to in-game advertising. In-game advertising must be clearly recognizable and distinguished from the game itself. Furthermore, in the game and before the game can be started, it should be made clear to children that the game or parts of it contain advertising.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

The self-regulatory Code for Social Media elaborates on advertising on social media, focusing mainly on the recognizability of advertising in social media. Sponsored content (on blogs, in forums, or status updates on social media) can be made recognizable by adding #spon, #adv, #sample, or #prom to the message. By doing this, the relevant relationship between the advertiser and the distributor of the message becomes clear.

It is not permitted to manipulate messages or other content on social media in a way that the consumer can be misled. This ban on manipulation supplements the prohibition on systematically creating and/or using false or non-existent identities in bulk to communicate about a product and/or service through social media. Advertisers are prohibited from directly encouraging children aged 12 or under to advertise products or services on social media. It is the duty of the advertiser to make sure that

content on its own website or related websites, that does not comply with the Advertising Code, is deleted. This is an onerous requirement and requires advertisers to moderate content.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

An advertiser is responsible for all of the content on its website. Therefore, if statements on the website contain misleading or otherwise unauthorized information that can qualify as advertising, the advertiser is responsible. The advertiser is also responsible for content on its social media accounts, such as Facebook or Twitter. Unmoderated social media pages still exist. However, the advertiser is responsible for its content, including when consumers make claims that are untrue. This area of law is still very much under development.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

This area of law is developing rapidly. There are no key court or self-regulatory decisions worthy of mentioning at present. However, self-regulatory decisions tend towards a situation in which the advertiser has the obligation to moderate user-generated content, for example, on its website and even social media.

Testimonials on, for example, a website are also allowed, although bound by rules. Testimonials should be true. If the content of testimonials is untrue, the advertiser is responsible. For example, if a product is presented in the testimonial as a medicine (‘my headache completely disappeared’), when it is not a medicine, the advertiser is held responsible. Therefore, as an advertiser it is very important to moderate the user-generated content on websites or even on (own) social media sites such as Facebook. However, it is not permitted to delete negative reviews and only mention or use positive testimonials. If this type of editing is taking place, the advertiser should make this very clear.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

Any individual can challenge the use of his picture and identity (known as a ‘portrait right’). Furthermore, case law shows that a person can even object to the use of look-a-likes or the use of a name, based on an unlawful act. Also, ‘sound-a-likes’ may be challengeable based on an unlawful act. However, this is still a point of discussion. The key issue is whether the consumer will think that the person portrayed is connected to the advertiser or that he/she has given consent. Cases are handled on a case-by-case basis by the Dutch courts.

9.2 Are there situations when permission is not required?

In cases concerning the use of portraits, the courts always balance the privacy aspects against freedom of speech. In some cases, this results in a judgment that states that the advertiser may use the portrait without consent, eg, politicians. According to Dutch case law, in some situations it is allowed to use politicians in advertising. For example, when the advertisement refers to a recent development and the consumer will not think that the politician co-operated in the specific advertisement.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Use of copyright-protected work and trade marks must be cleared (for example, by obtaining permission from the rights holder) before they can be used (legally) in advertising. Buildings can generally be featured in advertising, especially those located in public areas. However, some exceptions exist. For example, buildings may only be used if they are displayed in their present condition. As a result of this, pictures of buildings may not be modified as regards the environment or specific characteristics of the building.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

In general, other companies' recognizable products may not be used without consent, as this may infringe trade marks or copyrights of other companies. However, the Government does not enforce these rights; enforcement is up to the rights holders involved.

There is one exception on copyright-protected works. This *de-minimis* provision states that minor use of copyright-protected work is allowed. However, the self-regulatory authorities and the courts exercise restraint in applying this exception, as the general rule is that 'everything used in advertising is used on purpose'.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Holland which affect advertising (eg, Swedish gender equality law)?

One example of a rule particular to the culture of Holland is the Equal Treatment Act. This Act prohibits any discrimination, inter alia, in the advertisement of job offers. Another example is the Termination of Life of Request and Assisted Suicide Act. Such laws may influence the content of advertising. Furthermore, in the Netherlands, possession of weapons is not allowed. Therefore, weapons in advertising are also prohibited. On the other hand, homosexuality is accepted in the Netherlands. Therefore, if this 'theme' is used in advertising, it will be generally accepted.

The courts and the Advertising Code Committee are bound by the law and also follow generally accepted standards. These standards influence the values that determine good taste and decency. Thus, when the Advertising Code Committee reviews advertisements, it will be led and influenced by generally accepted Dutch norms in relation to good taste and decency.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

There is still some sensitivity towards the Dutch holiday, *Sinterklaas*. As this is mainly a holiday for children, during this period all eyes are on advertising aimed at children, which must not be misleading. In the *Sinterklaas* tradition, '*Zwarte Piet*' (Black Pete), plays an important role. There is an ongoing discussion which fires up every year around 5 December regarding the role of *Zwarte Piet* in this Dutch tradition. Some people consider *Zwarte Piet* to symbolize racism and slavery.

The Netherlands is a multi-cultural country. Therefore, the cultures and religions of others are, to a certain extent, respected. Advertisements aimed at specific cultures are accepted. Most people in the Netherlands are very accepting towards other cultures or beliefs. There are, however, specific groups

in society that may be offended by some types of advertising. For example, not everyone was amused when a well-known clothing brand advertised with a kissing gay couple. The ad resulted in several complaints to the Advertising Code Committee. The chairman of the Committee rejected the complaints because the portrayal of people in a way which shows their (homo-)sexual preference must be considered socially acceptable in Dutch society, and discrimination based on sexual orientation is forbidden.

11.3 Is there any other general advice or cautions you would give to advertisers operating in Holland?

Be transparent! It is relatively easy to start (interim injunction) proceedings at relatively low costs (between €10,000-25,000). Competitors are, therefore, inclined to bring a case before the court. Moreover, self-regulatory procedures are even easier to start (by both competitors and consumers) and are the order of the day. Although it is quite possible to test the limits of grey areas, it is wise to seek advice from a Dutch professional.

 HONDURAS 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Honduras?

There is no general advertising Law in Honduras. However, several laws contain different regulations addressing advertising. The most important of these laws is the Consumer Protection Law and its regulations. Other regulations addressing advertising are contained in several other Laws, such as the Commercial Code, Criminal Code, the Transit Law, and several product regulations.

Other laws, although aimed at other purposes, apply to advertising as well, such as the Laws protecting Copyright and Intellectual Property rights.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

The Consumer Protection Law defines advertising as all types of communications that the provider aims to the public, by itself or through third parties, by any mean to inform or motivate the public to acquire or contract goods or services.

1.3 What is the basic regulatory framework for advertising regulation?

The most important law that regulates advertising is the Consumer Protection Law and its regulations, which concerns issues such as the prohibition of misleading and abusive advertising, as well as regulating promotions, comparative advertising, and others.

In addition, different laws regulate other issues related to advertising, such as intellectual property rights and copyright.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The advertising laws and regulations apply to all media and to all forms of advertising.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

The following products have specific advertising regulations:

- (a) Alcoholic beverages;
- (b) Tobacco products;
- (c) Prescription drugs;
- (d) Food;
- (e) Dietary supplements;
- (f) Milk and dairy products;
- (g) Baby formulas;
- (h) Natural products with medical properties; and
- (i) Financial products and services

1.6 Are any government pre-approvals required?

Advertising for the following products require government pre-approvals:

- (a) Alcoholic beverages;
- (b) Tobacco products; and
- (c) Other licit drugs.

1.7 Does the media pre-clear advertising?

No, the media does not pre-clear advertising in Honduras.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The Consumer Protection Directorate is in charge of enforcing the advertising laws. Potential remedies to any infringing advertising are:

- (a) suspension of the advertising; and
- (b) precautionary measures determined by the Consumer Protection Directorate.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor has a right of action in two possible scenarios:

- (a) when an advertisement violates applicable regulations protecting consumers and/or other rules of public order, in which case the remedies available do not contemplate monetary damages; and
- (b) if an advertisement amounts to unfair competition and/or a violation of any right of the competitor (such as intellectual property), in which case, in addition to any other applicable remedies, the competitor may seek compensation for the damages caused.

1.10 When do consumers have a right of action? What are the potential remedies?

Any person has legal standing to file a complaint against any advertising violating the laws.

Also, if the consumer shows damages or specific harm, he/she may seek compensation in the Courts of Law.

2 SELF-REGULATORY FRAMEWORK

2.1 Does the Honduras have a primary advertising self-regulation system?

No, Honduras does not have a primary advertising self-regulation system.

2.2 Is there a self-regulatory advertising code? What are the key principles?

No, in Honduras there is no self-regulatory advertising code.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Yes, the Consumer Protection Law establishes that disputes that arise among consumers and users with relation to their rights and obligations that emerge from the Customer Protection Law can be resolved through arbitration.

The arbitral award is binding between parties and is not appealable.

2.4 Is the self-regulation system effective? Is it widely used and followed?

N/A

2.5 Are the self-regulatory system's decisions reported?

N/A

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Yes, misleading advertising and comparative advertising is forbidden in Honduras. Comparative advertising is only allowed when the advertising party obtains the approval of the company that owns the brand to be used in comparative advertising.

2.7 Are there any other self-regulatory systems that govern advertising practices in Honduras?

No, there are no other self-regulatory systems that govern advertising practices in Honduras.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Honduras (eg, consumer protection laws; IP laws; unfair competition laws)?

Advertising claims are governed by:

- (a) the Consumer Protection Law and its regulations,
- (b) the Copyright and Related Rights Law;
- (c) the Intellectual Property Law; and
- (d) the Commercial Code.

3.2 Is substantiation required for advertising claims?

Yes, substantiation is required for all advertising claims.

The burden of proof is on the advertiser to prove the truthfulness of all that is said in the advertising.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

The regulations do not expressly mention this issue. However, the legal standard is whether an advertisement is likely to generate confusion, so consumer perception is always evaluated. It is important to note that misleading advertising is regulated in Honduras.

3.4 What are the rules governing the use of disclosures in advertising?

The Consumer Protection Law states that all information provided to consumers must be in Spanish, timely, clear, true, adequate and sufficient regarding the essential characteristics of the goods and services offered and the condition for its commercialization.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Endorsements and testimonials have to be true and made by real professionals. Avoid using testimonials that may be the subject of a complaint.

3.6 What are the rules governing the use of product demonstrations in advertising?

The data must be real; the image should not exaggerate the product or the service.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is not permitted unless expressly approved by the competitor.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

There are no special copyright or trade mark rules that may impact comparative advertising; only that it requires approval from the competitor.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

According to the Intellectual Property Law, geographic origin must not be used in relation to a product or a service if false or misleading with regards to the origin of the product or service, or when its use could be confusing or create expectations in relation to the origin, provenance, characteristics or qualities of the product or service.

3.10 Are there any special rules governing product packaging?

Yes. There is some mandatory information that must be included in packaging generally; as well as specific regulations for certain products (such as food, pharmaceuticals, alcohol, cosmetics, chemical products, etc).

4 PRICE ADVERTISING

4.1 What are the Honduras rules regarding price advertising?

The main rule is that all advertised prices must be final, including all charges, taxes, and any other amount that must be paid and cannot be changed.

4.2 What are the Honduras rules regarding advertising 'free' products?

If the offer is for a 'free' gift, it must be completely free of any purchase or any obligation. If the gift is conditional upon purchasing a product, this must be clearly stated in the advertising, and not via disclaimer.

4.3 What are the Honduran rules regarding sales and special offers?

Special offers must specifically establish their commencement and ending date; also, its conditions, limitations or restrictions. The withdrawal of a special offer is only valid when advertised through the media in which it was originally advertised. Furthermore, the previous price and conditions and the new price and conditions must be stated in the withdrawal.

4.4 What are the Honduran rules regarding rebates?

Same as above.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

No, there are no other key restrictions.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Tobacco products may not be advertised at all.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

There are no advertising practices that are completely prohibited, although certain forms of advertising are regulated, and others are forbidden for specific products.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Yes, indecency and/or obscenity are prohibited.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Yes, the advertiser and/or sponsor must be identified.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are no special rules on this issue (except for the ethical rules of journalism when applicable).

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no special rules on this issue (except for the ethical rules of journalism when applicable).

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

No, it is a very unregulated area.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

There are no specific rules addressing this situation. However, through the application of general rules, it may be construed that the administrator of the page has an obligation to exercise due care and avoid legal violations made in any media controlled by it.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

There are no relevant decisions directly dealing with this issue.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

The general rule is that prior consent is needed in order to use a person’s portrait, name, likeness, etc.

The key parameter in determining whether consent is required is whether the individual can be recognized or not.

9.2 Are there situations when permission is not required?

Yes, permission is not required when the data used is simply the person’s complete name and identity number.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

No, there are no specific rules governing the types of materials that must be cleared before they may be used in advertising.

10.2 Is it permissible to use other companies’ recognizable products in advertising (eg, an actor wearing branded training shoes)?

It is not permissible to use other companies’ recognizable products in advertising.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Honduras which affect advertising (eg Swedish gender equality law)?

Legally, all information conveyed to consumers must be in Spanish language. Other languages may be used concurrently, but, in case of contradiction, the Spanish version prevails.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

It is always good to adapt advertisements to local idiosyncrasies, but there is no major diversion from what applies in most Latin American countries.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Honduras?

No, nothing additional.

 HONG KONG 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Hong Kong?

Hong Kong values and protects freedom of expression effectively by permissive openness, subject only to certain specified parameters which are found in restrictions placed by the Communications Authority upon advertisements carried on the radio and television broadcasting media by the carrier licensees (the Broadcast Codes) and in certain purpose-specific content such as:

- (a) the Obscene Publications Ordinance,
- (b) the Medical Registration Ordinance,
- (c) the Control of Obscene and Indecent Articles Ordinance,
- (d) the Smoking (Public Health) Ordinance,
- (e) the Undesirable Medical Advertisements Ordinance,
- (f) the Public Health and Municipal Services Ordinance,
- (g) the Trade Descriptions Ordinance, and
- (h) the Dutiable Commodities Ordinance.

The advertising industry in Hong Kong operates under a self-governing code of practice (4As Code) which all members of the Association of Accredited Advertising Agencies (the 4As) are required to adopt and implement.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

- (a) In the Radio Code of Practice on Advertising Standards (Radio Code) published by the Communications Authority, ‘advertisement’ is defined to mean ‘any material included in a licensed service which is designed to advance the sale of any particular product or service or promote the interests of any organization, commercial concern or individual in any way’.

There are certain exceptions, such as:

- (i) promotion of the station and program services of the licensee, or
- (ii) free charity-related advertisements approved by the Communications Authority, or
- (iii) free references to title of an event sponsored by a person other than the licensee,
- (iv) provided that the licensee receives no consideration and the references do not obtrude on program interest or entertainment.

- (b) The Generic Code of Practice on Television Advertising Standards (Television Code) defines ‘advertisement’ or ‘advertising material’ to mean ‘any material included in a television program service which is designed to advance the sale of any particular product or service or to promote the interest of any organization, commercial concern or individual in any way, including sound effects and/or visual presentation’.

However, this Code provides for exceptions, such as:

- (i) identification of the licensee station, the channel or program service,
- (ii) public interest announcements,
- (iii) sponsor identifications permitted under the Program Sponsorship of the Code, and
- (iv) charitable free advertised material approved by the Communications Authority.

- (c) Under Section 50(3)(b) of the Public Health and Municipal Services Ordinance no person shall ‘advertise for sale any drug injuriously affected in its quality, constitution or potency by the addition of any substance to, or abstraction of any constituent from, a drug’ and, under Section 51(4), no person shall ‘advertise under the designation of milk any liquid in the making of which any separated milk, or any dried or condensed milk has been used’.
- (d) ‘Advertisement’ (廣告) is defined in the Undesirable Medical Advertisements Ordinance as ‘including any notice, poster, circular, label, wrapper or document, and any announcement made orally or by any means of producing or transmitting light or sound’.
- (e) Section 23 of the Control of Obscene and Indecent Articles Ordinance provides that if any indecent matter is publicly displayed, the person making the display or causing or permitting the display commits an offence with substantial penalties, but always excluding any matter included in a television program service provided by a licensee under the Broadcasting Ordinance or included in the display of an article in a bona fide art gallery or museum and visible only from within that gallery or museum.
- (f) Under the Securities and Futures Ordinance, the Securities and Futures Commission is charged with authorization of certain advertisement schemes, and issues guidelines requiring advertisements to contain warning statements or notes relative to the involvement of risk and prohibiting indications of future performance by reference to past performance.
- (g) The Code of Advertising Practice for members of the Travel Industry Council of Hong Kong defines ‘advertisement’ as ‘either paid or unpaid for communication, whether in cash or in kind, addressed to the public or a section of the public, the purpose of which is to influence the opinions or behavior of those to whom it is addressed with a view to advancing the sale of a particular product or service of any member, and which includes information accessed via electronic means by the public or a section of it (including internet users)’.
- (h) The 4As Code requires advertisements:
 - (i) to be truthful and not liable to misinterpretation,
 - (ii) not to contain statements or visual presentations offensive to accept its standards of public decency and good taste,
 - (iii) to be compliant with the laws of Hong Kong, and
 - (iv) to clearly identify themselves as advertisements and with detailed specific restrictions upon product and/or service descriptions and claims.
- (i) The Trade Descriptions Ordinance prohibits false trade descriptions generally provided in the course of trade by suppliers of goods or services as included in advertisements. ‘Advertisement’ (廣告) is defined to include ‘a catalogue, a circular and a price list’ and a ‘trade description’ is defined as meaning ‘an indication, direct or indirect and by whatever means given, with respect to goods or services indicating any of the matters specifically set out in the definition’.

1.3 What is the basic regulatory framework for advertising regulation?

Given the prevailing protection of freedom of expression in Hong Kong there is no basic regulatory framework for advertising regulation. For discussion of inhibiting laws and codes see question 1.2 above.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Under the Television Code and the Generic Code of Practice on Television Program Standards (Television Program Standard Code) issued by the Communications Authority pursuant to Section 3 of the Broadcasting Ordinance all licensees carrying television program services must ensure compliance with both of these Codes or face sanctions by the Communications Authority.

Under Section 23(1) of the Broadcasting Ordinance, a licensee holder of a television program services license shall be responsible at all times for ensuring that its licensed service does not include a subliminal message. Under Section 23(5) ‘subliminal message’ (潛意識訊息) means ‘the transmission of material the duration of which is so brief that it does not enable a person to obtain a conscious picture of the material’.

Under the Unsolicited Electronic Messages Ordinance (UEMO), which is Hong Kong’s anti-spam law, professional spamming activities such as the use of unscrupulous practices to reach out to more recipients and fraudulent activities in relation to sending commercial electronic messages are controlled. This ordinance sets out the rules for sending commercial electronic messages, such as the requirement to:

- provide full sender information and, particularly,
 - include and to honor an unsubscribe facility and requests,
- as well as providing for the do-not-call registers which must all be kept for at least three years after receipt.

It should be noted that the UEMO regulates the sending of ‘commercial electronic messages’ with a ‘Hong Kong link’. In general, a commercial electronic message has a ‘Hong Kong link’ if the message:

- originates in Hong Kong;
- is sent to Hong Kong; or
- is sent to a Hong Kong telephone or fax number.

However, in a careful legislative avoidance of controls upon direct marketing to consumers, the following messages are exempt from the application of the UEMO:

- person-to-person telemarketing calls;
- sound broadcasting; and
- a partial commercial electronic message exemption exists if an electronic message is sent in response to a request by the recipient and the primary purpose is related to a commercial transaction with which the recipient is currently involved.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Advertising practices are specifically regulated under the separate ordinances of:

- (a) the Dangerous Drugs Ordinance,
- (b) the Pharmacy and Poisons Ordinance,
- (c) the Smoking (Public Health) Ordinance,
- (d) the Undesirable Medical Advertisements Ordinance, and

(e) the Public Health and Municipal Services Ordinance.

1.6 Are any government pre-approvals required?

There is no mechanism for pre-approval or pre-censorship by government departments or in the case of radio broadcasting by the Communications Authority. All restrictions in the relevant applicable laws must be followed.

1.7 Does the media pre-clear advertising?

Media advertising agencies are obliged to ensure that advertising conforms to the 4As Code which effectively operates as an industry self-regulating mechanism.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Infringement of ordinance-prohibited restrictions will attract prosecution, usually with financial penalties and imprisonment.

In terms of advertisements carried by licensed television or radio broadcasters, there are the two Television Codes and the Radio Code, all of which require adherence by the licensed broadcast carriers. Sanctions are available, including withdrawal of the license concerned, although this has not actually happened with any broadcast carrier due to the difficulty of obtaining a license and the clear intention of all licensees to keep their licenses in good order.

1.9 When does a competitor have a right of action? What are the potential remedies?

The basic right of action for competitors in respect of a television or radio broadcast is in regard to the restriction in the two Television Codes, whereby an advertisement must not contain any claim intended to disparage competitors, competing products or other industries, professions or institutions. The available right of action is information and complaint to the Communications Authority about the carriage of such offensive material on the television or radio broadcast concerned.

In respect of any civil wrong such as defamation, the injured party can commence civil proceedings for damages or injunction.

1.10 When do consumers have a right of action? What are the potential remedies?

The rights of consumers are distinguishable from the rights of competitors. The rights of consumers are addressed in question 2.3 below.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Hong Kong have a primary advertising self-regulation system?

Hong Kong does not have any legislated overall primary advertising self-regulation system.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The 4As Code, requiring mandatory observance by all advertising agency members, sets out the following key principles:

- (a) The 4As Code's purpose is to ensure that each member of the 4As will carry on its profession and business in such a manner as to protect the public interest and uphold the dignity and interests of the profession, the 4As and its members generally, and to force competition between advertising agencies into the area of upgrading the quality and extending the scope of their various services. (Membership of the 4As requires each individual member or partnership to acknowledge acceptance of the 4As Code either under the company seal or under personal signature.)
- (b) Members are required to have a clear understanding with advertisers about the service fees and government duties and taxes to be charged, setting out clear accounts to be rendered, specifically identifying the amount and nature of the service fee charged and any government duties, levies and taxes levied.
- (c) The 4As Code prohibits direct or indirect rebate to advertisers. This includes a prohibition on a member paying for third party placement in the service of an advertiser, paying or making any allowance, fee or remuneration or granting any benefit or consideration to any person connected directly or indirectly with an advertiser or charging for work done or materials supplied at less than the gross cost of them to the member. Full disclosure of any third party paying commission or remuneration at a higher rate than normal in the trade full disclosure to the client concerned must be made.
- (d) The 4As Code requires each member to carry on its profession and business in such a manner as to protect the public interest and to uphold the dignity and interests of the profession, the 4As itself and its members generally. Members are prohibited from holding or obtaining business by offering an extension of credit as an inducement.
- (e) The 4As Code requires its members involved in Direct Mail and Direct Marketing to be familiar with and to follow the rules and Codes of Practice of the Hong Kong Direct Marketing Association.
- (f) The 4As Code sets provision to govern the nature and amount and rates of charges made by members for their services.
- (g) The 4As Code provides that the basic principle to govern all advertising is that advertising shall be legal, decent, honest and truthful and in case of any contravention or failure to comply with the Code the member concerned will be penalized in accordance with the rules of the 4As.
- (h) The 4As Code requires that no advertisement shall contain any descriptions, claims or illustrations which mislead about the product or services advertised and with particular reference to a series of matters specifically identified in the 4As Code. All descriptions, claims and comparisons should be capable of substantiation.
- (i) The 4As Code expressly allows product comparison whereby one product is compared to a group of products, but otherwise members are not permitted to indulge in disparaging advertising, which is defined as advertising which seeks to compare a product or service to similar or other products or services in a way which is misleading, derogatory, false in implication or in fact. Advertising which implies that a competitive product is not fit for its purpose is not allowable.
- (j) Advertisements containing a specific claim for the nutritional value of food or dietary supplements must be substantiated by sound scientific evidence. All cigarette advertisements must bear the appropriate health warning and tar designation of the cigarette being advertised. There are further provisions restricting:

- (i) alcohol advertising,
- (ii) financial advertising,
- (iii) real property advertising,
- (iv) prize claims,
- (v) advertisements to children,
- (vi) 'free' gifts, and
- (vii) switch and bait advertising.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Any third party, including a consumer, finding that a member of the 4As has transgressed any provision of the 4As Code is entitled to make representation to the 4As itself or also to the Consumer Council of Hong Kong. The Consumer Council reference can cause negative publicity, but the Council is not empowered to sanction the transgression.

2.4 Is the self-regulation system effective? Is it widely used and followed?

On the whole, self-regulation applied through enforcement of the 4As Code is effective.

2.5 Are the self-regulatory system's decisions reported?

There is no provision for decisions of the 4As under the 4As Code to be reported.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Please see under the respective separate provisions above.

2.7 Are there any other self-regulatory systems that govern advertising practices in Hong Kong?

Apart from the 4As Code there is no other self-regulatory system governing advertising practices in Hong Kong except for the self regulatory rules and regulations of professional bodies such as the medical profession, the legal profession, accountants and architects.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Hong Kong (eg, consumer protection laws; IP laws; unfair competition laws)?

The following are the basic laws governing advertising claims in Hong Kong:

- (a) the Trade Descriptions Ordinance imposes discipline on false or extravagant or misleading quality claims;
- (b) the Competition Ordinance provides for controls on practices which prevent, restrict or distort competition; and
- (c) the Broadcast Codes provide for controls on television and radio licensees in matters of disparagement, and on broadcast content with particular reference to tobacco, alcohol and children.

3.2 Is substantiation required for advertising claims?

Yes, substantiation of claims is required under the 4As Code, the Trade Descriptions Ordinance and the Broadcast Codes.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Controls under the Trade Descriptions Ordinance expressly exclude the legitimate use of puffery which avoids misrepresentation.

3.4 What are the rules governing the use of disclosures in advertising?

The Broadcast Codes and the 4As Code require honesty in full disclosure in advertisements carried.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

(a) Under the 4As Code, testimonials used in advertisements shall be the testimony of competent, impartial persons containing no misstatement of facts or misleading implications and should reflect the current opinion of the authors. The 4As Code expressly prohibits the use of fictitious testimonials, and those which the advertiser knows to be incorrect.

Therefore, advertising agency members of the 4As should ask the advertiser to supply a copy of the supporting evidence for any testimonial claim and where an identifiable picture of a person is used in conjunction with a quotation commending an advertised produce, the person shown should be the person whose works are quoted.

(b) The Broadcast Codes:

(i) provide for integrity of all advertisements,

(ii) prohibit indirect publicity of the unacceptable products or services set out in the Codes and

(iii) require adherence by licensees with all provisions relating to tobacco advertisements under the Smoking (Public Health) Ordinance and alcoholic liquor as defined in the Dutiable Commodities Ordinance which are extensive.

(c) The Television Code provides for specific identification of sponsored television programs and sponsors are required to be clearly distinguishable from advertisements and should not contain extravagant claims or direct advice to buy the products or services of the sponsor.

3.6 What are the rules governing the use of product demonstrations in advertising?

The Television Code expressly prohibits a group of products or services which are unacceptable for advertising and this Code sets out in detail provisions regulating specific categories of television advertisement for which licensees must ensure compliance.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

The Broadcast Codes prohibit inclusion in advertising matter of claims that have the effect of disparagement of competitors, of competing products or of services or other industries, professions or institutions.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

- (a) The 4As Code permits comparative advertising, provided that it is made clear exactly what is being compared with what, and that the differences shown are true and can be proved.

The comparative subject matter should not be presented in such a way as to suggest a better bargain than is truly the case, and all comparisons should be substantiated and supportable by research and/or other statistical evidence.

Members of the 4As are not permitted to indulge in ‘disparaging advertising’ which is defined as advertising which seeks to compare a product or service to similar or other products or services in a way which is misleading, derogatory, false in implication or in fact, and advertising which implies that a competitive product is not fit for purpose is not allowable.

- (b) The rules impacting comparative advertising are found in the Broadcast Codes and the 4As Code which address the issues specifically.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

- (a) The 4As Code expressly states that ‘no advertisement shall contain any descriptions, claims or illustrations which directly or by implication mislead about the product or service being advertised’ and sets out particular matters to be observed, including the place or date of manufacture, production, processing or re-conditioning.
- (b) The Trade Descriptions Ordinance states that a false trade description is liable to prosecution and certainly extends to falsity in stating geographical origin.
- (c) The Television Code prohibits advertisements which contain any descriptions, claims or illustrations which expressly or by implication depart from the truth or mislead about the products or services advertised.
- (d) The Public Health and Municipal Services Ordinance expressly provides for offences of false labelling and advertisement of food or drugs. It prohibits a description of a food or drug which is false or is calculated to mislead as to the nature, substance or quality of any food or drug.
- (e) The Hong Kong Trade Marks Ordinance prohibits false attribution of a trade-marked good or service to a geographical origin.

3.10 Are there any special rules governing product packaging?

- (a) Under the Public Health and Municipal Services Ordinance, false labelling, whether falsely describing food or calculated to mislead as to the nature, substance or quality of the food, is an offence.
- (b) The Smoking (Public Health) Ordinance prohibits sale or offer for sale or possession for purposes of sale any cigarettes unless the packet thereof and, if the packet is within a retail container, the container also, bears a health warning and sets out the tar and nicotine yields in the prescribed form and manner.

With effect from 21 October 2017, the Chinese or English version of the health warning and indication of tar and nicotine yields is required to be of a size that covers at least 85% of the area of the surface on which that version of the health warning appears.

- (c) Under the Pharmacy and Poisons Ordinance, no person who is authorised to sell any poison may do so unless the container of the poison is labelled in accordance with regulations and displays the name of the poison, the particulars of the ingredients of any preparation containing a poison and including the word ‘Poison’ and the name of the seller of the poison and the address of the premises in which it is sold. All medicines are required to be labelled with the name and address of the party by whom it is supplied or dispensed.

4 PRICE ADVERTISING

4.1 What are the Hong Kong’s rules regarding price advertising?

- (a) Under the Radio Code, a licensee must ensure that any description, demonstration or claim of a specific nature with regard to advertisement of real property has been adequately substantiated by the advertiser. In particular,
 - (i) the lowest selling price of a real property should be stated as such and should not give an impression that it is the average price; and
 - (ii) a price being given only to local purchasers should be stated as such and the impression should not be given that it is also being offered to overseas purchasers if there is a significant difference in the prices; and
 - (iii) advertisements must not offer any furniture, home appliances or any other goods as ‘free gifts’ unless such items are supplied at no cost or no extra cost to the recipient. The licensee needs to obtain a statement to this effect from the advertiser.
- (b) The Television Code require that a licensee must ascertain whether any descriptions, demonstrations and claims of a specific nature with regard to real property advertisements have been adequately substantiated by the advertisers. In particular:
 - (i) no claims may expressly or by implication misrepresent the location, size and value of the real property and the available transport facility;
 - (ii) the lowest selling price of a real property should be stated as such and should not give an impression that it is the average price;
 - (iii) a price being offered to local purchasers only should be stated as such and should not give an impression that it is also being offered to overseas purchasers if there is a significant difference in the prices; and
 - (iv) advertisements must not offer any furniture, home appliances or any other goods as ‘free gifts’ unless such items are supplied at no cost or no extra cost to the recipient. The licensee needs to obtain a statement to this effect from the advertiser.
- (c) The 4As Code requires that advertisements shall not contain exaggerated, fictitious price comparisons, non-existent discounts or savings, or employ list prices known to be false or not current. All prices quoted should be accurate and incapable of misleading by distortion or undue emphasis.

Except where the law prohibits the use of the word ‘free’ in advertising, goods or services offered without cost or obligation to the recipient may be unqualifiedly described as ‘FREE’. The term ‘free’ can also be used conditionally where the offer requires the recipient to

purchase some other items—provided that all terms and conditions are accurately and conspicuously disclosed in immediate conjunction with the use of the term ‘FREE’ and further provided that the article or service required to be purchased is not increased in price or decreased in quality or quantity. However, if the so-called ‘free’ item is not an accessory, extra or duplicate, but an essential component part of an article normally sold as a complete unit, then the item shall not be described as ‘FREE’ in the advertisement.

- (d) The Trade Descriptions Ordinance defines ‘trade description’ to mean ‘an indication, direct or indirect, and by whatever means and in whatever form’, and defines ‘false trade description’ as ‘a trade description which, is false to a material degree or which, though not false, is misleading’. Thus, apart from trivial errors or discrepancies, the falsity must be to ‘a material degree’ which will vary with the facts and, given that price is one of the most important pieces of information in relation to a product or service which can influence the purchasing decision of the consumer, traders should note that any typographical or inadvertent errors in pricing may not necessarily be trivial and whether such errors constitute an offence of applying a false trade description to the goods or services concerned would depend on whether the falsity involved is to a material degree.

It is not uncommon for traders to make price comparisons as a commercial practice. If traders choose to make price comparisons, they should be able to show clearly what prices are being compared and to show that any claims so made are accurate and in particular are set out.

There are further provisions in relation to prices terms such as ‘sale’, ‘original price’ or ‘reduced price’ which should all be used with caution to avoid misleading consumers. Traders should avoid making ‘lowest price’ claims if they are not backed up by evidence. If an offer is limited to a price matching promise, the trader should make this clear. General notices of ‘half price sale for all items’ should be avoided if in fact the sale is not applicable to certain products in the shop.

4.2 What are the Hong Kong’s rules regarding advertising ‘free’ products?

Please see question 4.1 above.

4.3 What are the Hong Kong’s rules regarding sales and special offers?

Please see question 4.1 above.

4.4 What are the Hong Kong’s rules regarding rebates?

Please see question 2.2(c) above on rebates prohibition under the 4As Code.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

The basic key restrictions are as set out above.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

- (a) Under the Control of Obscene and Indecent Articles Ordinance:
- (i) Any person who publishes or possesses for purposes of publication, or imports for purposes of publication, any obscene article commits an offence and is liable to a fine of HK\$1,000,000.00 and to imprisonment for 3 years.
 - (ii) Any person who publishes any indecent article to a person who is a juvenile commits an offence and is liable to a fine of HK\$400,000.00 and to imprisonment for 12 months on first conviction and increasing fines and conviction for second and subsequent offences.
- (b) Under the Smoking (Public Health) Ordinance no person may:
- (i) sell, offer for sale or possess for purposes of sale any cigar, pipe tobacco or cigarette tobacco unless it is in a retail container that bears a health warning in the prescribed form and manner;
 - (ii) sell, offer for sale or possess for the purposes of sale any cigarettes unless they are in a packet of at least 20 sticks and the packet thereof and, if the packet is within a retail container, the container also, bears a health warning in the prescribed manner and form and details of the tar and nicotine yields;
 - (iii) print, publish or cause to be published a tobacco advertisement in a printed publication in any local newspaper or any printed document printed, published or distributed in Hong Kong except a tobacco advertisement in a printed publication that is published for the tobacco trade or as the 'in-house magazine' of any company engaged in that trade;
 - (iv) display or cause to be displayed or publish or distribute for the purpose of display or cause to be published or distributed for the purposes of display any tobacco advertisement in writing or other permanent or semi-permanent form (There are very minor exceptions to this restriction);
 - (v) broadcast a tobacco advertisement by transmission of sound by means of radio waves or by the transmission of visual images or sound by wireless or in any other way intended for general reception by members of the public;
 - (vi) exhibit a tobacco advertisement by film; or
 - (vii) place or cause to be placed tobacco advertisements on the internet.
- (c) Under the Undesirable Medical Advertisements Ordinance no person may:
- (i) publish or cause to be published any advertisement likely to lead to the use of any medicine, surgical appliance or treatment for any disease or condition specified in the Schedule 1 to the Ordinance; or
 - (ii) publish or cause to be published an advertisement for an orally consumed product which makes for the product any of the claims specified in Schedule 4 to the Ordinance.
- (d) The Public Health and Municipal Services Ordinance:

- (i) prohibits advertisement for sale of any drug injuriously affected in its quality, constitutional potency; and
- (ii) no person shall advertise under the designation of ‘milk’ any liquid in the making of which any separated milk, or any dried or condensed milk has been used.

Any person who publishes or is party to the publication of an advertisement which falsely describes any food or drug or is likely to mislead as to the nature, substance or quality of any food or drug shall be guilty of an offence.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Under the Unsolicited Electronic Messages Ordinance (UEMO) and the Unsolicited Electronic Messages Regulation (UEMR) a code of practice has been issued by the Communications Authority (CA) and the effect of these three apply to regulate the sending of ‘commercial electronic messages’ with a ‘Hong Kong link’.

A ‘commercial electronic message’ is defined as ‘an electronic message the purpose, or one of the purposes, of which is, inter alia, to offer or supply goods, services, facilities, land, a business opportunity or to advertise or promote a supplier of goods, services, facilities, land, business opportunity etc in the course of or in the furtherance of any business’.

Whether the message is of a promotional nature has to be determined on a case-by-case basis, taking into account matters including the purpose and content of the message concerned.

In general, a commercial electronic message has a ‘Hong Kong link’ if the message:

- (a) originates in Hong Kong;
- (b) is sent to Hong Kong; or
- (c) is sent to a Hong Kong telephone or fax number

BUT specifically the following messages are exempted from application of the entire UEMO:

- (a) person-to-person telemarketing call; and
- (b) sound broadcasting or television program services.

Moreover, in order to exempt a substantial body of established telemarketing practice, the following are exempted from application of Part 2 of the UEMO (which sets out rules about sending of commercial electronic messages only):

- (a) electronic messages sent and is passed to in response to the recipient’s request;
- (b) electronic messages, the purpose of which is to:
 - (i) facilitate, compete or confirm a commercial transaction previously agreed;
 - (ii) provide warranty information, product recall information or safety or security information with respect to a commercial product previously purchased or used by the recipient;
 - (iii) deliver goods or services, including product updates and upgrades, that the recipient is entitled to receive under the terms of the transaction previously agreed;
 - (iv) provide notification or updates in relation to a subscription, membership, account, loan etc; and

- (v) provide information directly related to an employment relationship or a related benefit plan in which the recipient is currently involved, participating or enrolled.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Please see question 1.2(e) above.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

The Television Code imposes the core principle that program integrity must be preserved and not distorted for commercial purposes.

All sponsored programs must be clearly identified, and sponsor identification must be distinguishable from advertisements and should not contain superlative claims, price information and direct exhortations to the viewing public to purchase or rent the sponsor's products or services and viewers should not be subject to hidden editorial influence.

The Television Code requires a distinction to be drawn between advertising and front or end sponsor credits in order to ensure that credits are not used as a means to extend allowable advertising time? Credits may include the sponsor's name and/or his house/trade/brand/product/service name and/or trade mark/logo and may show the sponsor's product or service and contact details. Front sponsor credits must precede and not be integrated within any part of the program. End sponsor credits may be integrated with but must not precede the rolling end credits of a program.

Apart from front or end sponsor credits, the licensee may incorporate a sponsor's name, his house/trade/brand/product/service name, trade mark/logo, advertising slogan and attribute of the sponsor into the title of a program/program segments/program feature.

Other detailed requirements apply.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

The Broadcast Codes make specific and detailed requirements governing the integration of advertising/sponsorship content and the strictly-segregated entertainment content.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Specific disclosure and positioning of integrated advertising content with other content must be observed under requirements in the broadcast codes.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no special rules governing the use of social media for advertising purposes. All provisions of the 4As Code and individual specific ordinance enacted provisions apply.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

Under the current clear exemption of the internet from definition as a broadcast medium there is no responsibility on advertisers on social media or in relation to user generated content.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

No.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

The Personal Data (Privacy) Ordinance (PDPO) governs the collection of personal data by a data user in relation to any human being defined as the 'data subject'.

Six data collection principles apply in respect of 'personal data' which is defined as 'any data which enables identification of a living human being' and this would accordingly extend to the name, picture, likeness, voice and identity in advertisement of a living human being.

- (a) The data collection principle is set out in the schedule to the PDPO and relates to purpose and manner of collection of personal data being a lawful purpose directly related to a functional activity of the data user who is to use the data and that the collection of the data is necessary for or directly related to that purpose.
- (b) The data user must take care to ensure that the personal data collected is accurate having regard to the purpose for which it is collected and will not be retained for longer than meets that express purpose.
- (c) Principle 3 governs the use of the personal data for a new purpose without the prescribed consent of the data subject which means any purpose other than the purpose for which the data was to be used at the time of original collection.
- (d) Principle 4 governs the requirements for security of the personal data being retained by the data user: if the data user engages a data processor to process the data whether within or outside Hong Kong the data user must oblige the data processor to adopt contractual or other means to prevent infringement of the data protection principles under the PDPO.
- (e) The data user must take all practical steps to ensure that a person can ascertain the policies and practices of the data user in relation to personal user.

- (f) A data subject is entitled under Principle 6 to ascertain whether the data user holds personal data and to request access to it within a reasonable time and at a fee (if any) that is not excessive and be given reasons if a request is refused.

9.2 Are there situations when permission is not required?

The PDPO does not provide for or require the consent of the data subject at the time of collection of the personal data by the data user but each of the principles set out above applies to the use of the personal data after collection and any change in the express stated use of the personal data at the time of collection must have a prior consent of the data subject.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

The Copyright Ordinance vests copyright in the author of an original artistic work (alternatively in the owner of an authored work) provided that it is within the copyright period extending from the date of creation of the original work and for the period of 50 years from the death of the creator of the original work.

A photograph is an original work and protected by copyright. However, a photograph of a famous building does not give copyright entitlement to any aspect of ownership of the building.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

The rights of the original author may be infringed in copyright through the use of a recognizable original work in an advertisement.

Use by an advertiser of the registered trade mark or the recognizable registered right of another company is likely to be an infringement of the registered rights of the other company under the Trade Marks Ordinance.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Hong Kong which affect advertising (eg Swedish gender equality law)?

Equality law in Hong Kong

There are four major anti-discrimination laws in Hong Kong which are:

- (a) the Sex Discrimination Ordinance,
- (b) the Disability Discrimination Ordinance,
- (c) the Family Status Discrimination Ordinance and
- (d) the Race Discrimination Ordinance.

These ordinances were enacted between 1996 and 2009 and they are administered by the Equal Opportunities Commission which has issued guidelines under each of the four ordinances with the

intention of overall reinforcement of the philosophy of equal opportunity and the elimination of discrimination for the disadvantaged.

The Equal Opportunities Commission is established as a watchdog for social conscience and consists of a chair person and 15 members appointed by the Chief Executive of Hong Kong. Below the EOC is the Legal and Complaints Committee, which provides advice on applications to the EOC under the specific ordinance concerned for legal assistance to take action in the district court for monetary compensation.

Under Article 22 of the Basic Law for Hong Kong 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

The Hong Kong Bill of Rights provides for the right under the anti-discrimination ordinances to include damages, apologies and orders for employment.

Discrimination can be direct or indirect, and indirect discrimination can be justified only on the basis that the requirement or condition affecting the complainant has a legitimate aim, and that the means used to fulfil the aim are proportionate. This means a balancing exercise is required between the needs of the defendant and the discriminatory effect.

The Sex Discrimination Ordinance identifies an offence occurs where a reasonable person would anticipate that the person affected would be offended, humiliated or intimidated. Examples of prohibited conduct under the Disability Discrimination Ordinance are vilification such as incitement of hatred, serious contempt and severe ridicule against disabled or racial groups by public activity.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Consistent with the freedom of expression so very much a part of Hong Kong society as indicated in question 1.1 above there is total freedom of religious worship and even the Fa Lun Gong religious movement is openly practiced in Hong Kong, although completely banned in China.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in the Hong Kong?

Freedom of expression is treasured in the highest value for the Hong Kong community under the law, the only restrictions upon this being stated in question 1.1 above, there is no general advice or caution other than what is set out above.

 HUNGARY 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Hungary?

Advertising is regulated in Hungary by way of statutory rules and self-regulation. The statutory rules (mainly acts of Parliament, but also decrees of the Government and of ministers) that govern advertisements cover advertising law, consumer protection law, competition law, data protection law and intellectual property law. There are also special rules for certain sectors, such as pharmaceuticals and food.

The main self-regulatory bodies are the Hungarian Advertising Association (MRSZ) and the Self-Regulatory Advertising Board (ÖRT). The ÖRT is the Hungarian member of the European Advertising Standards Alliance (EASA).

1.2 What types of communications are considered to be 'advertising'? How is this determined?

Advertising means any form of communication which has the aim or has the effect of promoting the sale of goods and services. It is not the type of communication, but the content and/or purpose of that communication that determines whether it qualifies as advertising.

1.3 What is the basic regulatory framework for advertising regulation?

The main acts are:

- (a) Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities (the Advertising Act),
- (b) Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices (the UCP Act) and
- (c) Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (the Competition Act).

Additional rules are included in:

- (d) Act CLXXXV of 2010 on Media Services and on the Mass Media (the Media Act) and
- (e) Act CVIII of 2001 on Certain Aspects of Information Society Services and Electronic Commercial Services (the E-Commerce Act).

The Hungarian Code of Advertising Ethics (the Code) is also worth noting. Also, there are a number of EU Regulations regarding the advertisement of certain product types/industries (eg food, cosmetics) which are directly applicable in Hungary, as a Member State of the EU.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The E-Commerce Act contains special provisions on digital advertisements. Digital advertisements must clearly identify that the communication in question is an advertisement. Furthermore, digital advertisements must clearly show or communicate the advertiser's identity. In case of promotional offers, such as discounts or gifts, the details and conditions of such promotions must be clearly

communicated. In the case of promotional games, the terms and conditions of the game must be easily accessible.

The Code also includes rules in relation to advertising published on the internet and mobile devices.

Direct marketing may only be sent to natural persons (consumers) when there is express prior consent (electronic or written), with the exception of so-called direct mail. According to the Advertising Act, 'direct mail' means 'a communication consisting solely of advertising, marketing or publicity material which is sent to at least five hundred addressees by way of post'.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Advertising practices are subject to specific regulations in several industries, the most significant being:

- (a) **Gambling:** The Advertising Act allows the advertisement of gambling. However, there are several restrictions. Advertisements must not invite children or juveniles to participate in gambling. According to the Code, an advertisement must not suggest that gambling is a solution to personal or professional problems or imply that gambling may solve financial problems.
- (b) **Alcohol:** Alcoholic products may be advertised. However, several restrictions apply:
 - (i) The advertising of alcohol must not be addressed to children or juveniles.
 - (ii) Advertisements must not urge excessive alcohol consumption, must not connect alcohol consumption with better physical or sexual performance, driving, therapeutic effects or suggest that alcohol can solve personal conflicts.
 - (iii) Alcohol advertisements must not appear on the outer cover page of the advertising medium or on the home page of a website.
 - (iv) Alcohol advertisements must also not be shown in theatres or cinemas before 8pm, or in the case of television programs, such advertisements must not be broadcast just before, during or just after program targeted at children or juveniles.
- (c) **Pharmaceuticals:** The legal regulation differentiates between marketing aimed at the general public (advertisements) and marketing aimed at healthcare professionals (detailing). Advertisements must always be based on summaries of product characteristics and the patient information leaflet of the specific pharmaceutical, as approved by the regulatory authority. Advertisements for pharmaceuticals must include mandatory warnings with the exact wording prescribed by the law. Prescription-only pharmaceuticals must not be advertised.
- (d) **Financial services:** Hungarian legislation contains several rules on the advertisement of financial products or services. Detailed rules may be found in particular in Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises (the Bank Act), and in Act CLXII of 2009 on Consumer Loans (the Act on Consumer Loans).
- (e) **Food:** Consumers may not be misled:

- (i) with regards to the characteristics of the foodstuff (eg, its nature, identity or properties);
- (ii) by attributing to the foodstuff effects or properties which it does not possess; or
- (iii) by stating or suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics.

Nutrition and health claims made regarding of food are strictly regulated on an EU level.

- (f) **Tobacco:** Advertising tobacco products is completely forbidden, even indirectly. The prohibition does not apply to professional advertisements addressed exclusively to distributors of tobacco products.
- (g) **Cosmetics:** On an EU level, common criteria have been established for the justification of claims used in relation to cosmetic products in order to assess whether or not the use of a claim is justified.

1.6 Are any government pre-approvals required?

Government pre-approvals are not required.

1.7 Does the media pre-clear advertising?

The media does not pre-clear advertising.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The main bodies are:

- (a) the Ministry for Innovation and Technology
- (b) the local consumer protection authorities acting as consumer protection authorities with general competence (Consumer Protection Authority), and
- (c) the Hungarian Competition Authority (HCA).

The HCA has jurisdiction if the commercial practice is capable of affecting competition. As a general rule, this is the case if the commercial practice is carried out via:

- (a) a media service provider providing national media services;
- (b) a periodical distributed nationwide;
- (c) a daily newspaper distributed in at least three counties;
- (a) direct marketing targeted at consumers in at least three counties; or
- (b) sales promotions is out in at least three counties.

The maximum fine that the Consumer Protection Authority may impose is 5% of the annual net turnover of the company but at most HUF 2 billion (approx US\$ 18 million and €16 million).

The maximum fine that the HCA may impose is 10% of the annual net turnover of the company group.

The Hungarian National Bank has jurisdiction in relation to the specific rules regarding financial services advertising.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor may bring an action against an advertiser in the civil courts claiming unfair competition based on the Competition Act or trade mark infringement.

As a general rule, in the statement of claim, the plaintiff (the competitor whose interests were violated) may demand:

- (a) the establishment of the infringement;
- (b) the termination of the infringement and the prohibition of further infringement by the party infringing the law;
- (c) that the party infringing the law make amends—through an announcement or in any other appropriate manner—and, if necessary, that sufficient publicity be given to such amends by or at the expense of the party infringing the law; and
- (d) damages in accordance with the rules of civil law.

Furthermore, if a competitor believes that an advertiser has published an unlawful comparative advertisement or if there is a misleading B2B commercial practice, it may also file a complaint with the HCA. In practice, before filing a complaint with the HCA, the parties will try to settle the issue before the ÖRT. The ÖRT may prohibit the unlawful advertisement and oblige the party infringing the Code to amend same and to obtain the ÖRT’s prior approval before publishing same. The ÖRT’s decision is binding on its members only, and it is not enforceable, but advertisers generally follow its decisions.

Should the HCA initiate a procedure based on a complaint, this procedure is *ex officio*, which means that the competitor who filed the complaint will not be a party to such procedure and will not have the right to stop the procedure even if in the meantime the parties have settled the case among each other.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers may complain about an alleged infringement by requesting the initiation of the procedure of an authority (the HCA or the Consumer Protection Authority). Consumers do not need to worry about which is the competent authority, as an authority without jurisdiction will forward the request to the relevant authority.

The sanctions available to the HCA and the Consumer Protection Authority are detailed under question 1.8. However, these are typically not remedies for consumers but rather sanctions (such as fine) against the advertiser.

In addition, consumers are entitled to initiate litigation proceedings to claim damages suffered. Therefore, if a consumer suffers actual damage or loss due to the unlawful advertisement, these damages may be claimed before the court.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Hungary have a primary advertising self-regulation system?

Hungary does not have a primary advertising self-regulatory system. The significance of the self-regulatory framework is growing, but it only supplements and elaborates on the statutory regulations relating to advertising law.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The Code is approved and used by a number of self-regulatory bodies, including the MRSZ and the ÖRT. The Code was published by the MRSZ in 1981 and is based on the Code of the International Chamber of Commerce. Amendments to the Code are carried out jointly by ÖRT and MRSZ.

The signatories to the Code are Hungarian producer and advertising organizations from a number of sectors (food, soft drinks, alcohol, pharmaceuticals, FMCG, automotive industry, financial products, etc).

The key principles of the Code are very similar to the key principles appearing in the statutory rules. Such key principles include the following:

- (a) all advertisements must be legal, decent, honest and truthful;
- (b) an advertisement must be prepared with a due sense of professional care and on the basis of social responsibility;
- (c) an advertisement must meet legal requirements in all aspects; it cannot encourage a breach of law;
- (d) an advertisement is fair if it meets the legal and ethical norms of fair competition and good business practice;
- (e) an advertisement must be true; it shall not mislead the consumer with its statement or visual elements, or its overall effect;
- (f) the moral-ethical standards generally accepted by society and approved by the general public must be kept in mind; and
- (g) no advertisement may harm the reputation of the advertising profession or undermine public confidence in advertising.

The Code includes special rules that apply to specific industry sectors (eg, food, alcohol) and certain types of advertising (eg, advertisements on the internet and on mobile devices, advertisements targeted at children and juveniles).

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Complaints in respect of advertising may be filed with both the MRSZ and the ÖRT by consumers and competitors. Sanctions applied by the bodies include the request for the removal and amendment of the unethical advertising. However, sanctions imposed by the bodies bind the parties concerned in the complaint procedure only if they are members of the respective body. Non-compliance with decisions of the bodies may result in the termination of their membership, but, otherwise,

compliance is not enforceable. Nevertheless, as set out above, market players tend to comply with the decisions of such self-regulatory bodies.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Yes, the self-regulation system appears to be effective in Hungary. A number of advertisers tend to use this as the first forum to settle their disputes rather than to turn to the Consumer Protection Authority, the HCA or the courts.

In addition, the ÖRT provides copy advice (as to whether or not an advertisement complies with the advertising ethical rules) in written form upon the request of advertisers, agencies or the media. This service is also frequently used by advertisers.

2.5 Are the self-regulatory system's decisions reported?

Decisions passed in individual cases and copy advice (see question 2.4) of the self-regulatory system are not published.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Please see question 2.2.

2.7 Are there any other self-regulatory systems that govern advertising practices in Hungary?

In certain sectors, there are additional and special statutory rules in relation to advertising, which may be, supplemented by codes of ethics approved by the self-regulatory body active in that sector. As an example, for pharmaceuticals, the Code of Ethics for Pharmaceutical Communication has been approved by the competent self-regulatory bodies.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Hungary (eg, consumer protection laws; IP laws; unfair competition laws)?

Statutory rules relating to advertising are included in the UCP Act, the Advertising Act and the Competition Act. These acts implement EU directives that relate to advertising.

There are rules and requirements specific to products or media. The most important rules among these are the Medical Product Act (Act XCVIII of 2006 on the General Provisions Relating to the Reliable and Economically Feasible Supply of Medicinal Products and Medical Aids and on the Distribution of Medicinal Products) and the Media Act.

Advertisers must also take into consideration the statutory intellectual property rules in order to avoid unlawful use or infringement of third parties' intellectual property rights. Such rules are set out in the Copyright Act (Act LXXVI of 1999 on Copyrights) and in the Trademark Act (Act XI of 1997 on Trademarks).

In addition to the above, there are rules specific for certain product types/industries set forth at EU level which are directly applicable in Hungary (eg food, cosmetics).

Beyond the legal rules, the significance of self-regulation is also growing; and, as far as the ethical rules are concerned, the Code, which is a non-legally binding code created by MRSZ, should be taken into consideration. The ethical rules basically mirror the statutory rules relating to advertising.

3.2 Is substantiation required for advertising claims?

Yes, substantiation is required. At the request of the competent authority, the advertiser must provide proof to verify the authenticity of any commercial communication. In the event of the advertiser's failure to comply, the fact in question shall be considered as untrue.

The overarching principle of substantiation is that the stronger and more sweeping a factual statement, the stricter rules apply to substantiation (eg, in the case of superlative statements, such statements must be substantiated against all competitors and competing products available on the relevant market).

The substantiation must be prepared and be available at the time when the advertisement is published.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

The basic principle of the UCP Act is that all statements in the advertisements must be true, cannot contain false or untrue information, must not mislead the consumers and the advertiser must be able to substantiate the factual statements.

However, according to the UCP Act, the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally (hyperbole) shall not be treated as a commercial practice likely to materially distort economic behavior. Therefore, obviously subjective attributes (eg, "The best movies on our channel!"), or creative slogans (eg, "Red Bull gives you wings") do not need substantiation.

3.4 What are the rules governing the use of disclosures in advertising?

There are no specific statutory rules in respect of disclosures and disclaimers in advertisements. However, the HCA has some guidelines which must be taken into consideration by the advertisers.

The most important principle is that the disclosure must be noticeable for the consumers (ie, it must be of a proper size and legible). The disclosure, under no circumstances, can significantly modify the main message of the advertisement.

Whether such requirements are met shall be decided on a case-by-case basis and will largely depend on the type of advertising medium.

As a general rule, the advertisement (and its unfair nature) must be assessed in itself; however, according to the UCP Act, where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the advertiser to make the information available to consumers by other means will be taken into account in deciding whether information has been omitted and whether it constitutes a misleading omission.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Testimonials are evaluated as being part of the advertisement and as claims of the advertiser, which means that factual statements made in these testimonials must be true and verifiable. However, the Code provides that the verification of claims made in an advertisement may not be based solely on testimonials, even if they are true.

3.6 What are the rules governing the use of product demonstrations in advertising?

No specific statutory restrictions apply to product demonstrations in advertising. The basic principle of the UCP Act shall apply, according to which the advertising must not mislead consumers. Consumers must not be misled in respect of the main characteristics of the advertised product (such as its fitness for purpose, the results to be expected from its use, its benefits, or its price).

In addition, the HCA has set guidelines upon which the advertiser can rely when making product demonstrations. One of the most important guidelines which must be taken into consideration is that the factual statements of the advertising must be absolutely in line with test and survey results and also with the circumstances under which the test or the survey was carried out.

Practically, this means that, where advertisements contain a product demonstration, then such demonstration must be displayed under the same circumstances as under which the test was carried out and under which the average consumer would use the advertised product.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted by the Competition Act, subject to certain positive and negative conditions in line with the relevant EU Directive.

According to the positive conditions, comparative advertisements:

- (a) are allowed to compare only goods which are similar in terms of purpose and function;
- (b) must objectively compare one or more features of the goods in question which are definitive and typical, and which can be confirmed;
- (c) must objectively exhibit the prices, when applicable; and
- (d) shall pertain to products of the same origin where it pertains exclusively to products with designation of origin.

The negative conditions of comparative advertising are detailed under question 3.8.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

According to the Competition Act, comparative advertisements shall not:

- (a) injure the reputation of another company or the name, merchandise, brand name or other marking of such a company;
- (b) lead to any confusion between the advertiser and another company or the name, merchandise, brand name and other marking of such a company;

- (c) result in any unfair advantage derived from the reputation of another company or the name, merchandise, brand name and other marking of such a company; or
- (d) violate the provision of the Competition Act regarding the prohibition on imitating the merchandise of another company or the characteristics of such merchandise.

If the comparative advertisement contains a competitor's trade mark, and the comparative advertisement is not in compliance with the above requirements, the trade mark holder may bring trade mark infringement proceedings if the advertisement violates the functions of the trade mark. Claims on the basis of unfair market practice are almost identical to those of trade mark infringement.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Both the UCP Act and the Competition Act consider it to be an unfair commercial practice/misleading of business partners if untruthful information is provided regarding the geographic origin of a product.

Special rules may exist in relation to certain product types. For example, as regards food, the provisions of EU Regulation No 1169/2011 related to the indication of the country of origin have to be applied directly, as Hungary is the member of the European Union. According to the Regulation, indication of the country of origin must not be misleading. Also, the indication of the country of origin is mandatory where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food.

Also, it is worth noting that geographical signs and designations of origin used to indicate the geographical origin of products on the market may be granted protection as geographical indications according to specific regulations. If such protection exists, the proprietors shall enjoy the exclusive right to use the geographical indication.

3.10 Are there any special rules governing product packaging?

According to Act CLV of 1997 on Consumer Protection, as a general rule, products must be packaged in such a way that the packaging protects the product, facilitates delivery and does not adversely affect the quality or quantity of the product. In addition to this, a number of legal norms, mainly at EU level, include rules relating to packaging and labelling of specific product groups (such as food, cosmetics, pharmaceuticals, biocide products, etc).

4 PRICE ADVERTISING

4.1 What are Hungary's rules regarding price advertising?

Beyond general rules relating to advertising (eg, the advertising must be fair, must not be aggressive and must not be misleading) there are some special considerations developed by HCA case law that apply to the communication of price.

Price must be considered as a basic feature of a product and service which is significant from the point of view of consumers and their decision-making. Price communication must include the full price of the product or the service (including tax additional costs, if any).

Furthermore, the communication of discounts/rebates (including the communication of gratis products (one product for free if another product is purchased)) to consumers by wholesalers (eg, in case of labeling products with 'gratis' or '20% off') may be problematic. Wholesalers are not in a position to ensure that such discounts/rebates are in fact granted to consumers in retail stores. Therefore, such communications may be regarded as misleading by the HCA.

4.2 What are Hungary's rules regarding advertising 'free' products?

Advertisement of 'free' products is, as a general rule, allowed under Hungarian law and, if the product is in fact free, the communication should be acceptable. According to HCA case law, 'free' means that no costs other than that of transportation should be paid for the product.

As an exception, certain restrictions apply to the provision of 'free' products in pharmacies.

4.3 What are Hungary's rules regarding sales and special offers?

Based on the applicable general rules, there is significant HCA case law in respect of sales and special offers. Case law confirms that such offers must be in fact 'special' and cannot mislead consumers in terms of the availability, conditions, magnitude or any other feature of the sales offer.

In addition, the Code includes special rules in relation to information to be provided to consumers on sales promotions.

4.4 What are Hungary's rules regarding rebates?

In respect of rebates, the general statutory rules apply. In addition, HCA case law confirms that, in the case of rebates, there must be a genuine reduction of the price in comparison to the price of the product prior to the period of such a rebate. Consequently, the rebate cannot be regarded as genuine, if prior to the rebate the product/service had the same price or, although there was a higher price prior to the application of the rebate, it was applied only exceptionally or for a temporary period of time.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Not applicable.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

As a general principle, according to the Advertising Act, advertising is prohibited for all goods, the production and marketing of which is against the law (such as drugs and other psychotropic materials). In addition, there are specific products and services the advertising of which is specifically prohibited, such as sexual services, dangerous dogs, animal fights, human organs or human tissues, abortion and institutions carrying out abortion services.

The Advertising Act allows the advertisement of gambling. However, it is prohibited to invite children or juveniles to participate in gambling.

Alcoholic beverages may be advertised. However, advertising of alcohol must not be targeted at children or juveniles, and they must not participate in such advertising.

Advertisement of tobacco products is completely forbidden, even indirectly. The prohibition does not apply to professional advertisements addressed exclusively to distributors of tobacco products.

The advertisement of prescription pharmaceuticals for consumers is prohibited, while that of over-the-counter pharmaceuticals is regulated by specific legal regulations.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

The overarching principles of the advertising legislation are that advertisement practices should be fair, should comply with the requirements of professional diligence and should not distort the economic behavior of consumers.

The Advertising Act specifically prohibits subliminal advertising, which is defined as advertising that, when published, due to time constraints or any other reason, influences the consumer in a psychological sense with stimuli from images, sounds, or other effects of intensity below the threshold required for conscious perception.

As a general rule, direct marketing requires the prior express consent of consumers (which cannot be obtained by electronic means).

The UCP Act also contains a black list of market practices which should be considered as unfair by their very nature, such as making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media or equivalent means of communication, except in circumstances and to the extent justified to enforce a contractual obligation.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Pursuant to the Advertising Act, no advertisement may be disseminated if it displays sexuality in a grossly indecent manner, meaning in particular the open display of sexual intercourse or genitals. The above restrictions do not apply to advertisements on sex products or to advertisements displayed in sex shops.

According to the Advertising Act, all advertisements targeted at children and young people that have the capacity to impair their physical, intellectual, or moral development are prohibited. The prohibition applies in particular to gratuitously violent and sexual content, especially if it features children or young persons in such situations.

In addition, pursuant to the Advertising Act, advertisements must not encourage violence or such conduct that is likely to jeopardize personal or public safety, or the natural or man-made environment. Advertisements must not display gratuitous violence and must not be frightening.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

No, as a general rule the advertiser has no such obligation. However, according to the Advertising Act, an advertisement may be published only if the advertiser has provided its name and address to the advertising service provider.

All outdoor advertising media must explicitly indicate the name and address of the publisher of the advertising. According to the Code, an advertisement should be clearly identifiable irrespective of its location and medium or the technical solution of transmission.

In the case of sponsorship, the Code prescribes that the sponsor's name, brand name, trade mark or logo must be published in a way that the audience should be aware of the sponsorship.

Further detailed rules may be found in the Media Act.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Under the UCP Act, advertising content must be clearly identifiable, since it is considered to be an unfair commercial practice to use editorial content in the printed or electronic media to promote the sale or use of a product where a business entity has paid for its promotion without making it clear (through images or sounds) that the content is advertising.

According to the Code, an advertisement should be clearly identifiable, irrespective of its location, medium or manner of transmission. In media containing news and editorial materials, the promotional nature of an advertisement should be indicated in a manner that is easily and clearly identifiable. The advertiser or its brand should also be identifiable. Advertisements should not be misleading and, therefore, may not create the impression of a study, analysis or market research.

The Media Act contains detailed rules regarding sponsoring of programs. In the case of a sponsored media service or program the sponsor should be identified (eg, by reference to the name or trade mark of the sponsor). This may take place simultaneously with the program, prior to or after the end of the program, so that it is not harmful to the nature and content of the sponsored program.

Product placement is prohibited as a general rule except for:

- (a) in cinematographic works intended for showing in movie theaters; cinematographic works, films and series made for media services; sports programs and entertainment programs; and
- (b) in programs other than the ones mentioned in (a), provided that the manufacturer or distributor of the product in question, or the supplier or agent of the service, does not provide the producer of the given program with any financial reward either directly or indirectly with the exception of making available a product or service free of charge for the purpose of placement.

As for influencer generated content, it should be indicated in the post whether it is paid, sponsored content, in a clear, noticeable, easily understandable and emphasized way.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Yes, as detailed above, the advertising character of an integrated advertisement shall be indicated in a manner that is easily and clearly identifiable, and the advertiser or its brand shall also be identifiable. This is applicable to editorial content, sponsored content and product placement. Viewers must be clearly informed of the existence of product placement. Programs containing product placement must be appropriately identified—using optical or acoustical means—at the start and the end of the program, and when a program resumes after an advertisement break.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no special statutory rules governing the use of social media for advertising purposes. Therefore, the general rule on the prohibition of unfair commercial practices, including aggressive and misleading advertising, applies, together with the rules on electronic commerce and information society services and the relevant terms and conditions of the social media service providers.

The Code, however, does contain special rules for advertising on the internet and on mobile devices, some of which could be relevant when using social media for advertising purposes:

- (a) Advertisements on the internet or on mobile devices may not limit users in their navigation possibilities. Visitors must be provided with an option to close the advertisement or the website containing it, to minimize its size or to navigate from the site if they wish.
- (b) In advertising a product or a service via the internet or mobile device where advertising is directly linked with a purchase opportunity and/or the opportunity of using the service, the advertiser should take special care to provide exact and authentic information. Therefore, application of internet and mobile technology that might mislead or in any other manner harm the consumer must be avoided.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

According to the E-Commerce Act, service providers shall be liable for any unlawful information they have made available, with certain exceptions as set out in the E-Commerce Act.

According to the HCA, if an opinion of a consumer is placed in the advertisement, it will be regarded as information provided by the advertiser itself.

On the basis of the above, it could be argued that the user generated content is not placed by the advertiser but the user and, therefore, the advertiser shall not be liable for such content from a legal perspective. We are not aware of any decision which would unequivocally determine liability for in such a case.

Irrespective of the above (for the reason as set out in question 8.3 below), we would advise advertisers to monitor and filter content generated by users in order to prevent any possible liability.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

According to a decision of the Court of Constitution, the operator of a website shall be liable for unlawful user generated content published on the website (eg, an unlawful comment submitted by a user) irrespective of the fact of whether the comments were moderated or not, or that the operator—after having noticed the unlawful content—removed such content. This decision was much debated and was criticized for excessively extending the liability of website operators. The decision was based on comments which violated the goodwill of a third person. Therefore, the decision did not refer specifically to advertising claims.

The decision, however, also highlighted that there is a difference between a website, which is edited and operated by a content provider, and social media (eg, Facebook or blogs) where there is no editor or moderator. Due to this distinction, the above is not applicable to such social media websites.

However, it should be noted that a Facebook page of an advertiser is generally an edited media and, therefore, it could be argued that the liability expressed in the decision of the Constitutional Court would apply to such Facebook pages. For this reason, we would advise advertisers to monitor and filter the content generated by users in order to prevent any possible liability.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

According to the Hungarian Civil Code, the consent of the person affected is required for producing or using his/her likeness or recorded voice. The notion of ‘use’ is interpreted widely. Every type of use of a likeness or voice shall be deemed as ‘use’ if such voice or likeness becomes accessible to third persons. The scope of the consent is also to be interpreted, taking into consideration the circumstances in which it was given. For example, as a general rule, if someone consents to a recording made by a television or radio, then the consent to the broadcast of the same could be assumed as well.

The scope of the consent could be determined on the basis of the relationship between the parties or the aim of the recording. On the basis of the above, where an individual’s name, picture, likeness, voice or identity is used in an advertisement, it is necessary to inform the person that the recording is made for advertising purposes and to request the person’s consent for such use. The person must also be told the channels where such advertising will be published.

9.2 Are there situations when permission is not required?

The consent of the relevant person is not required for recording his/her likeness or voice or for the use of such recording if it was made as part of a crowd or captured during a public performance. In order to apply the above exemption, it is necessary that the recording is made at a place or event where it can be expected that a recording would be made (eg, a sports event) or, if it was made at a place or event where it is not usually expected (eg, on the street), the person may not be displayed prominently or in a recognizable manner.

It should also be noted that even a recording of a crowd can only be used for a purpose that is linked with the event (eg, information regarding the event). Therefore, this exemption does not mean that such recordings could be automatically used for advertising purposes.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

According to the relevant legislation, the Hungarian flag and the coat of arms may not be used for advertising purposes. The use of such symbols is restricted to specific purposes (such as international fairs, or expressing national identity).

The places and buildings which have to be considered national monuments (eg the Hungarian Parliament, Buda Castle, National Museum etc) cannot be used for advertising activities without prior approval from the competent authority(ies). In case of positive decision, a license agreement must be concluded on the terms and conditions of the use of the given national monument.

In the case of buildings which are not considered national monuments or cultural heritage, provisions on copyright must be taken into consideration, since architectural works are regarded as intellectual property and protected by copyright based on the individual, original nature of the work arising from the author's intellectual activity. Thus, the use of any architectural work requires the author's approval and a license agreement on the terms and conditions of use during the advertising activity.

Copyright is protected during the author's lifetime and for seventy years after his/her death. The seventy-year term of protection shall be calculated from the first day of the year following the author's death, or, in the case of a work of joint authorship, from the first day of the year following the death of the last surviving author.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

The consent of the rights holder is necessary to use its recognizable products in advertising.

In the case of comparative advertising, (advertising that directly or indirectly identifies a competitor, or its goods manufactured, sold or introduced by such other business entity for the same or similar purpose as those featured in the advertising), as a general rule, the indication of the other product/service which is subject to the comparison is permissible. However, comparative advertising is prohibited if:

- (a) this may result in any unfair advantage derived from the reputation of the competitor or the name, merchandise, brand name and other marking of such competitor;
- (b) this may harm the reputation of the competitor or the name, merchandise, brand name and other marking of such competitor;
- (c) it presents goods as imitations or replicas of goods bearing a protected trade mark or trade name; or

- (d) it creates confusion among market participants between the business entity and a competitor, or between the business entity's trade name, goods, trademarks or other distinguishing marks and those of a competitor.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Hungary which affect advertising (eg, Swedish gender equality law)?

According to the Code, the text of advertisements should not impair the rules or the clarity of the Hungarian language.

All radio, television and outdoor advertising and advertising placed in printed press product must be in Hungarian and even the slogan must be displayed in Hungarian.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

Advertisements should not harm the generally accepted moral and ethical standards of society and should comply with general requirements (eg, they should not be discriminatory in any way, and should not encourage aggressive, violent or unlawful behavior).

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Hungary?

The Hungarian authorities are usually stricter and apply a stricter approach to advertisements compared to other competent authorities in the European Union. This often results in serious modifications of advertising materials which were approved in other (EU) jurisdictions. Therefore, advertisers should be aware that it may be difficult to publish foreign advertisements in Hungary without first making some adaptations.

INDIA

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in India?

In India, there is no single statute or statutory body which regulates the advertising industry. There are some general laws which regulate advertising as a whole. However, the advertising of a particular product is also regulated by special statutes in this regard.

In general law, the Consumer Protection Act 1986 is one piece of legislation which regulates unfair trade practices in advertising. Different IPR laws, such as the Indian Trademarks Act 1999 and the Copyright Act 1957, also deal with the use or creation of third-party materials in advertisements.

The advertising code as contained in the Cable Television Network Rules 1994 regulates advertising on satellite channels in India. The Code of Commercial Advertising on Doordarshan and All Indian Radio regulates advertising on national broadcasters in India. The Press Council Act 1978 deals with advertising in press.

There are specific laws which deals with advertising of particular products, such as the Infant Milk Substitutes, Feeding Bottle and Infant Foods (Regulation of Production, Supply and Distribution) Act 1992 which forbids the advertising of Infant Milk formula and the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act 2003 (Tobacco Prohibition Act) which prohibits all direct and indirect advertising of tobacco products in all media.

In the absence of any single governmental authority regulating advertising in India, the role of the self-regulatory body assumes greater significance in this respect. The Indian advertising market as a whole is regulated and controlled by a self-regulatory organization called the Advertising Standards Council of India (ASCI).

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

The ASCI Code defines advertising ‘as a paid-for communication, addressed to the Public or a section of it, the purpose of which is to influence the opinions or behavior of those to whom it is addressed. Any communication which in the normal course would be recognized as an advertisement by the general public would be included in this definition even if it is carried free-of-charge for any reason’.

As regards the determination of advertising communication, the advertising code of the Cable Television Network Rule 1994 provides that ‘all advertisements should be clearly distinguishable from the program and should not in any manner interfere with the program viz, use of lower part of screen to carry captions, static or moving alongside the program’. However, in view of advertising in the form of branded content, it has become difficult to distinguish the program from the advertisement.

In view of this, the determination of the advertising communication should be done as per the definition of ‘advertising’ as given above in the ASCI Code.

1.3 What is the basic regulatory framework for advertising regulation?

The basic regulatory framework to regulate advertising in India comprises the regulation of advertising by various statutory bodies or government departments under different laws, as well as enforcement through the courts of different laws. Further, there is also a self-regulating mechanism in the form of ASCI which consists of the Consumer Complaints Council (CCC) appointed by the Board of Governors. The CCC receives, deliberates and decides on complaints received from consumers and competitors and its decisions are binding on ASCI. The CCC provides decisions for advertisements against which complaints have been upheld. ASCI further reports on non-compliant upheld advertisements (ie upheld advertisements which reappear) to regulatory authorities such as the Ministry of Information & Broadcasting (MIB), the Drug Controller General of India (DCGI), the Medical Council of India (MCI), the Ministry of Health and Family Welfare, and the Food Safety & Standards Authority of India (FSSAI) for taking action as per the law of the land.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Advertising through unsolicited calls and messages is regulated by the Telecom Regulatory Authority of India (TRAI). TRAI has issued the Telecom Commercial Communication Customer Preference Regulations 2010 to curb a growing menace and effectively regulate unsolicited commercial calls and messages. It has issued a notification prohibiting unsolicited commercial communications (UCC) through SMS. TRAI has stipulated that all mobile operators have to prefix an identification tag before all application-to-peer (A2P) SMS texts sent from their SMS centers (SMSC). TRAI has used multiple means to deter SMS spam and unsolicited telemarketing, including mandatory registration for telemarketing and SMS marketing, which includes provisions requiring marketers to respect a nationwide 'Do Not Call' list, the Telecom Commercial Communications Customer Preference Portal (NCCP). TRAI additionally approaches this from a pricing perspective, levying higher termination charges for 'transactional SMS texts' to raise the costs of bulk SMS and make it uneconomical to send unsolicited SMS campaigns. The NCCP is a database containing a variety of information prescribed in the Telecom Commercial Communications Customer Preference Regulations, 2010.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

In India, there are specific provisions or regulations for the advertising of certain industries such as pharmaceuticals, tobacco product, alcohol, food, automotive vehicles, etc:

- (a) **Pharmaceuticals:** Prescription-only drugs are those medicines that are listed in Schedules H and X of the Drug and Cosmetics Rules 1945. The phrase 'over-the-counter' (OTC) has no legal recognition in India. All the drugs not included in the list of 'prescription-only drugs' are considered to be non-prescription drugs (or OTC drugs). The Drugs and Cosmetics Act 1940 prohibits advertisements for any drug or cosmetic from using reports of tests or analysis of the Central Drugs Laboratory or by a government analyst. This Act also requires the advertising of certain medicines to be made in a prescribed manner.
- (b) **Infant milk formula:** The Infant Milk Substitutes, Feeding Bottle and Infant Foods (Regulation of Production, Supply and Distribution) Act 1992 forbids the advertising of infant milk formula.
- (c) **Tobacco products:** The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and

Distribution) Act 2003 (Tobacco Prohibition Act) prohibits all direct and indirect advertising of tobacco products in all media.

- (d) **Alcohol:** The Cable Television Network Rules 1994, the Advertising Codes of Doordarshan and the All India Radio, and the Norms for Journalist Conduct issued by the Press Council of India prohibit any advertisement directly or indirectly promoting the production, sale, or consumption of cigarettes, tobacco products, wine, liquor, or other intoxicants.

However, some states allow advertising through billboards, signboards, and such media, but subject to many restrictions. Also, the ASCI Code prohibits the use of minors for advertising alcohol products.

- (e) **Food:** As per the Food Safety & Standards Act 2006, no advertisement relating to the standard, quality, quantity or grade-composition, and no representation concerning the need for, or the usefulness of, any food can be made which is misleading or deceiving or which contravenes the provisions of this law or rules and regulations made thereunder.
- (f) **Automotives:** The Self-Regulation Guidelines on Advertisements for Automotive vehicles state that advertisements should not, specifically:
- (i) portray violation of the Traffic Rules;
 - (ii) show speed maneuverability in a manner which encourages unsafe or reckless driving, which could harm the driver, passengers and/or general public; or
 - (iii) show stunts or actions, which require professional driving skills, in normal traffic conditions which in any case should carry a readable cautionary message drawing viewer attention to the depiction of stunts.

1.6 Are any government pre-approvals required?

Different legislation and regulations dealing with advertising and marketing do not require pre-approval or notification of an advertisement to any governmental authority nor does any mechanism exist for taking such pre-approval on a voluntary basis.

However, advertisers must obtain permission from the local municipal corporation if they want to publicize their products through billboards or through posters.

Further, it has been provided in the Cable Television Network Rule 1994 that a product that uses a brand name or logo, which is also used for cigarettes, tobacco products, wine, alcohol, liquor or other intoxicants, may be advertised on a cable service subject to some conditions. All such advertisements found to be genuine brand extensions by the Ministry of Information and Broadcasting shall be previewed and certified by the Central Board of Film Certification as suitable for unrestricted public exhibition prior to their telecast or transmission or retransmission.

1.7 Does the media pre-clear advertising?

In India, no formal mechanism exists through which media pre-clears advertising. There is no pre-clearance agency for an advertisement. There may exist an in-house mechanism in a media house to take the decision whether to print or broadcast a particular advertisement in view of its possible breach of the relevant legislation or the self-regulatory code of ASCI, but nothing on an institutional basis.

1.8 How does the government enforce advertising laws? What are the potential remedies?

There is no single governmental body to enforce advertising laws. Generally, the enforcement of advertising is, laws to a large extent, done through the self-regulatory mechanism of ASCI, as well as through courts, such as is done in the case of comparative advertising. However, different advertising laws are also enforced through various governmental regulatory bodies, statutory bodies, governmental departments, etc.

For example, the Press Council of India, constituted under the Press Council of India Act 1978, regulates advertising in print media in case of a complaint. It adjudicates a complaint against or by the press for violation of ethics or freedom of the press. The Press Council of India has issued the Norms for Journalist Conduct, a reference guide for the press. These norms include advertising norms similar to provisions in the ASCI Code and prohibit, inter alia:

- (a) advertisements that are vulgar;
- (b) advertisements promoting cigarettes, tobacco products, wine, liquor, and other intoxicants;
- (c) advertisements hurting religious or communal sentiments; or
- (d) any advertisement prohibited by any other law.

Bureaucracy at the local level, such as the District Magistrate and the Commissioner of Police, are responsible, within their jurisdiction, for enforcement of the Advertising Code as contained in the Cable Television Network Rules 1994. The Director General of All India Radio & Doordarshan is responsible for the enforcement of the Code of Commercial Advertising on Doordarshan and All India Radio, which are national broadcasters in India.

Under the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act 2003 (Tobacco Prohibition Act), any police officer, not below the rank of a sub-inspector or any officer of State Food or Drug Administration, may take actions for violation of any provision of this Act.

The potential remedies against prohibited advertising range from discontinuance of the advertisement to criminal prosecution of the offenders.

The potential remedies for advertisers or advertising agencies lies in approaching the court and challenging decisions or actions of the governmental authorities.

1.9 When does a competitor have a right of action? What are the potential remedies?

In general, a competitor has a right of action in the case of comparative advertising, which disseminates untruthful or disparaging material through various media. In such actions by competitors, common law remedies which the court in India can provide include injunctive relief or monetary damages to manufacturers and sellers. A competitor can also approach the court for a remedy against the infringement of its trade mark in the case of unauthorized use of its trade mark in an advertisement. If successful, the competitor will get damages, in addition to injunctive relief.

Further, ASCI can also be approached with a complaint, since the ASCI Code also provides for regulation of advertisements which mislead consumers and is unfair to competitors. In the case of comparative advertising, ASCI may order changes in the advertisement or ban the advertisement altogether.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers have a right of action against an advertisement under the Consumer Protection Act 1986 for certain practices of advertisers termed as ‘unfair trade practices’, which are defined as ‘practices which for the purpose of promoting sale, use, etc of products adopt unfair methods or unfair or deceptive practices, including false representations about the quality, quantity, sponsorship, approval of the product; providing materially misleading information about the warranty or guarantee of product or price of the product; giving false or misleading facts that disparage the goods or services or trade of another person; advertising of false offer of bargain price, etc’.

The remedy under the Consumer Protection Act 1986 against such advertising practices is to approach the consumer forum for discontinuation of such advertisement.

Further, consumers can also approach ASCI with their complaints against the advertisement. ASCI may, after investigation and inquiry into the matter, order the modification or stopping of the advertisement.

Furthermore, consumers also have rights to approach various governmental authorities, such as the Press Council of India, Director General of All India Radio & Doordarshan, TRAI, etc with their grievance, which may take appropriate action in this regard.

2 SELF-REGULATORY FRAMEWORK

2.1 Does India have a primary advertising self-regulation system?

Yes, India has a self-regulatory organization for advertising content—the Advertising Standards Council of India (ASCI) founded in 1985. The three main constituents of the advertising industry viz the advertisers, the advertising agencies and the media came together to form this independent non-governmental organization. The aim of ASCI is to maintain and enhance the public’s confidence in advertising. Their mandate is that all advertising material must be truthful, legal and honest, decent and not objectify women, safe for consumers—especially children—and, last but not least, fair to their competitors. ASCI’s role has been acclaimed by various agencies including the Government.

There is no other non-governmental body in India which regulates advertising content that is released in India. If an advertisement which is released in India seems objectionable, a person can write to ASCI with his/her complaint. This complaint will be deliberated on by the CCC after providing due process to the advertiser to defend the advertisement against the complaint, and depending on whether the advertisement is in alignment with the ASCI Code and law of the land. The complaint is either upheld or not upheld and, if upheld, the advertisement is voluntarily either withdrawn or modified.

ASCI’s team consists of the Board of Governors, the Consumer Complaints Council (CCC) and its Secretariat. ASCI’s Board of Governors has 12 members, four representing each of the key sectors such as advertisers, advertising agencies, media and allied professions such as market research, consulting, business education, etc. The CCC currently has about 21 members: 9 are from within the industry and 12 are from the civil society like well-known doctors, lawyers, journalists, academics, consumer activists, etc. The CCC’s decision on complaints against any advertisement is final. ASCI also has its own independent Secretariat of 5 members which is headed by the Secretary-General.

2.2 Is there a self-regulatory advertising code? What are the key principles?

ASCI has adopted a Code for Self-Regulation in Advertising. It is a commitment to honest advertising and to fair competition in the market-place. It stands for the protection of the legitimate interests of consumers and all those concerned with advertising—advertisers, media, advertising agencies and others who help in the creation or placement of advertisements.

ASCI has one overarching goal—to maintain and enhance the public's confidence in advertising. ASCI seeks to ensure that advertisements conform to its Code for Self-Regulation and follows these four basic principles:

- (a) to ensure the truthfulness and honesty of representations and claims made by advertisements and to safeguard against misleading advertisements;
- (b) to ensure that advertisements are not offensive to generally accepted standards of public decency;
- (c) to safeguard against the indiscriminate use of advertising for the promotion of products which are regarded as hazardous to society or to individuals to a degree or of a type which is unacceptable to society at large; and
- (d) to ensure that advertisements observe fairness in competition so that the consumer's needs to be informed on choices in the market-place and the canons of generally accepted competitive behavior in business are both served.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

ASCI has a dispute resolution mechanism in the form of the Consumer Complaint's Council (CCC) appointed by the Board of Governors. CCC receives, deliberates and decides on complaints received from consumers and competitors, and its decisions are binding on ASCI. The CCC gives decisions for advertisements against which complaints have been upheld. ASCI further reports non-compliant upheld advertisements (ie upheld advertisements which reappear) to regulatory authorities such as the Ministry of Information and Broadcasting (MIB), the Drug Controller General of India (DCGI), the Medical Council of India (MCI), the Ministry of Health and Family Welfare, and the Food Safety & Standards Authority of India (FSSAI) for taking action as per the law of the land.

ASCI, under its National Advertising Monitoring Service (NAMS), tracks in print and on TV all advertisements against which complaints have been upheld. Further, results show that over 90% of such advertisements with 'upheld complaints' do not reappear or are appropriately modified.

A complaint to the CCC regarding a print advertisement should include:

- (a) full particulars of the print advertisement,
- (b) the name and date of publication, and
- (c) a clipping or copy of the print advertisement.

In the case of a TV commercial (TVC) airing, the CCC require:

- (d) the channel,
- (e) date and time of the TVC,

- (f) reasonable description of an audio visual, specific claims or visual depictions which are considered to be false, misleading or objectionable and the reasons for the same.

It usually takes 4–6 weeks for the CCC to decide on a complaint from the date a ‘complete’ complaint is received.

2.4 Is the self-regulation system effective? Is it widely used and followed?

ASCI's role has been acclaimed by various agencies including the Government. However, in the initial years of its existence, it lacked the force of legal recognition, which was gained via a notification in The Gazette of India, ensuring that as far as TV commercials go, they will abide by the ASCI Code. Thereafter, ASCI's effectiveness and credibility as an advertising self-regulatory organization has increased several-fold, with speedier redress of complaints and high compliance of the CCC's decisions by advertisers. Regulatory bodies like MIB, DCGI, FSSAI and FDA now recognize and support self-regulation work, with the inclusion of the ASCI in the Inter-Ministerial Monitoring Committee formed to review misleading advertising content.

2.5 Are the self-regulatory system's decisions reported?

Yes, a summary of complaints which have been decided on by the CCC are published in the Quarterly Compilation reports (normally sent to members of ASCI members, regulators and NGOs) and in its Annual Report. ASCI also releases to the media every month a summary of decision on complaints taken by the CCC.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

The current focus areas of which companies should be aware include religious, cultural and moral concerns with regard to advertising. Advertisements should not offend the sensitivity of the public.

Further, comparative advertising should not lead to disparagement of the product or brand of competitors and should not result in dilution of the trade mark of competitors.

Finally, advertisements should not provide misleading information and should not make unsubstantiated claims.

2.7 Are there any other self-regulatory systems that govern advertising practices in India?

The News Broadcasters Association (NBA) represents the private television news and current affairs broadcasters in India. NBA presently has 20 leading news and current affairs broadcasters (comprising 45 news and current affairs channels) as its members. According to the News Broadcasting Standards Regulations issued by NBA (NBA Regulations), any broadcast (which includes an advertisement) should be in compliance with NBA's code of conduct. The code has a procedure for complaints against a broadcaster who is in breach inter alia of the following:

- (a) depiction of violence or intimidation against women and children;
- (b) sex and nudity;
- (c) endangering national security;
- (d) refraining from advocating or encouraging superstition and occultism.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in India (eg, consumer protection laws; IP laws; unfair competition laws)?

There are several laws in India that relate to advertising. The important ones include:

- (a) **Consumer Protection Act 1986:** The Act has been legislated with a view to provide for the protection of the interests of consumers. One of its prime objects is to promote and protect the rights of consumers, such as the right to seek redress against unfair trade practices. Section 6 of the Act grants consumers the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be, so as to protect the consumer against unfair trade practices. Section 2(1)(r) of the Act, under the definition of the term ‘unfair trade practice’, covers the gamut of false advertisements including misrepresentations or false allurements. Redress against such unfair trade practices pertaining to false advertisements may be sought.
- (b) **Laws relating to Intellectual Property such Indian Trademarks Act 1999 and the Copyright Act 1957 and relevant provision of the ASCI Code:** It is stated in Chapter IV, Section 2 of the ASCI Code that ‘Advertisements shall not make unjustifiable use of the name or initials of any other firm, company or institution, nor take unfair advantage of the goodwill attached to the trade mark or symbol of another firm or its product or goodwill acquired by its advertising campaign’.

Section 3 of Chapter IV further states that ‘Advertisements shall not be similar to any other advertisers earlier than advertisements in general layout, copy, slogans, visual presentation, music or sound effects, so as to suggest plagiarism’. Under the provisions of these Acts, advertisements should not contain material that violates or infringes another’s rights, including, but not limited to, privacy, publicity or any other intellectual property rights. Also, advertisements should not contain any names, trade marks or other intellectual property.
- (c) **Emblems and Names (Prevention of improper use) Act 1950:** This piece of legislation prohibits the use of any trade mark or design, any name or emblem specified in the Schedule of the Act or any colorable imitation thereof for the purpose of any trade, business, calling or profession without the previous permission of the Central Government.
- (d) **Indecent Representation of Women (Prohibition) Act 1986:** This Act is aimed at prohibiting indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto (Sections 3 and 4).
- (e) **Young Persons (Harmful Publications) Act 1956:** Section 3 of the Act, inter alia, imposes a penalty for advertising or making known by any means whatsoever that any harmful publication (as defined in the Act) can be procured from or through any person;
- (f) **Indian Penal Code 1806:** The IPC, via an array of provisions, prohibits obscene, defamatory publication, publication of a lottery and/or statements creating or promoting disharmony/enmity in society.

3.2 Is substantiation required for advertising claims?

Yes, substantiation is required for certain advertising claims as per the ASCI Code. Section 1 Chapter I of the ASCI Code states that:

‘Advertisements must be truthful. All descriptions claims and comparisons which relates to matters of objectively ascertainable fact should be capable of substantiation. Advertisers and advertising agencies are required to produce such substantiation as and when called upon to do so by the ASCI.’

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Section 6 of Chapter I of the ASCI Code states that ‘Obvious untruths or exaggerations intended to amuse or to catch the eye of the consumer are permissible provided that they are clearly to be seen as humorous or hyperbolic and not likely to be understood as making literal or misleading claims for the advertised product.’ Therefore, it is the judgment of a reasonable person which is the determining factor whether a claim is puffery or a misleading claim. In case of such an advertisement, there is no need of substantiation.

3.4 What are the rules governing the use of disclosures in advertising?

The ASCI guidelines on communicating Discloser, Disclaimers, or Supers provides that Disclosers, Disclaimers, or Supers should be clearly legible and, on TV advertisements, should be held long enough for the full message to be read by the average viewer on a standard domestic TV set. Therefore, following minimum size of lettering of ‘Supers’ and its holding time on the screen for TV advertisements is required:

- (a) for print advertisements, the font size of the ‘Supers’ shall be a minimum of 6 pts for 100 column centimeters or less and and 7pts for more than 100 cc or equivalent size advertisements;
- (b) for TV advertisements, the size of the ‘Supers’ shall be of minimum 12 pixel height and stay not less than 4 seconds duration on the screen for up to 2 lines of ‘Supers’. For every additional line of ‘Super’, an additional 2 seconds of hold time is required. The script of the ‘Supers’ should be in the same language as the audio of the advertisement.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

All testimonials and endorsements must be true, failing which action may be taken against such advertisement under the Consumer Protection Act 1986, since such false testimonials and endorsements are an unfair trade practice and amount to false and misleading representation that said products have sponsorship, approval or affiliation which they may not have. Further, action can also be taken by ASCI against such advertisement under the Consumer Protection Act 1986.

3.6 What are the rules governing the use of product demonstrations in advertising?

There is no restriction on product demonstration in advertising, provided such demonstration is not vulgar, or offensive to generally accepted standards of public decency.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Indian law, although interpreted to allow comparative advertisement, does not address the issue in a direct or comprehensive manner in any legislation. In India, comparative advertising is permitted to an extent but this should not amount to disparagement.

Section 2(1)(r)(1)(x) of the Consumer Protection Act states that something that ‘gives false or misleading facts disparaging the goods, services or trade of another person’ constitutes unfair trade practice.

However, a business entity cannot claim relief against unfair comparative advertising under the Consumer Protection Act, as a business entity is not a consumer. This can be taken up only by consumer associations, the central government, or state governments, and it does not provide protection to the business entity. Thus, under the existing law, a manufacturer whose goods are disparaged has no standing to seek a remedy. Presently, in the absence of any specific legislation regulating comparative advertising, disputes are decided by various courts on the basis of the facts in each case.

However, Section 1 of Chapter IV of the ASCI Code permits advertisements containing comparisons including those where a competitor is named in the interests of vigorous competition and public enlightenment, provided:

- (a) it is clear what aspects of the advertiser’s product are being compared with what aspects of the competitor’s product;
- (b) the subject matter of the comparison is not chosen in such a way as to confer an artificial advantage upon the advertiser, or so as to suggest that a better bargain is offered than is truly the case;
- (c) the comparisons are factual, accurate and capable of substantiation;
- (d) there is no likelihood of the consumer being misled as a result of the comparison, whether about the product advertised or that with which it is compared;
- (e) the advertisement does not unfairly denigrate, attack or discredit other products, advertisers or advertisements directly or by implication; and
- (f) advertisements shall not make unjustifiable use of the name or initials of any other firm, company or institution, nor take unfair advantage of the goodwill attached to the trade mark or symbol of another firm or its product or the goodwill acquired by its advertising campaign.

Further, the Indian judiciary has also evolved the following principles for the protection of competitor interests with regard to comparative advertising:

- (a) a tradesman is entitled to declare his goods to be best in the world, even though the declaration is untrue;
- (b) he can also say that his goods are better than his competitors’, even though such statement is untrue;
- (c) for the purpose of saying that his goods are the best in the world or his goods are better than his competitors’ he can even compare the advantages of his goods over the goods of others;

- (d) however, he cannot, while saying his goods are better than his competitors, say that his competitors' goods are bad. If he does so, he defames his competitors and their goods, which is not permissible;
- (e) if there is no defamation to the goods or to the manufacturer of such goods, no action lies, but, if there is such defamation, an action lies and, if an action lies for recovery of damages for defamation, then the court is also competent to grant an order of injunction restraining the repetition of such defamation.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

The Indian Trademark Act 1999 contains provision which relates to comparative advertising. Sections 29(8) and 30(1) are the specific provisions to address issues related to trade mark infringement, made in the garb of comparative advertising. Comparative advertising is permitted under Section 30(1) which reads as:

'Nothing in section 29 shall be preventing the use of registered trademark by any person with the purposes of identifying goods or services as those of the proprietor provided the use:

- (i) is in accordance with the honest practices in industrial or commercial matters, and
- (ii) is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trade mark.'

But with certain limitations which are provided under Section 29(8) which reads as:

'A registered trademark is infringed by any advertising of that trademark if such advertising:

- (i) takes unfair advantage and is contrary to honest practices in industrial or commercial matters; or
- (ii) is detrimental to its distinctive character; or
- (iii) is against the reputation of the trademark.'

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

There are general provisions in the Indian Customs law, Trade Mark law and Geographical Indications law which deal with origin of articles.

Under Section 11 of the Customs Act, the Central Government is empowered to issue Notifications imposing conditions on the importation of goods specified in the Notification. The purposes of imposing such conditions are also listed in the Act, such as:

- (a) the prevention of deceptive practices;
- (b) the implementation of any treaty, agreement or convention with any country;
- (c) the protection of patents, trade marks and copyrights;
- (d) the prevention of smuggling etc.

Under Section 5 of the Customs Tariff Act 1975, the Central Government is given the power to issue notifications regarding rules for determining whether any article has originated from any foreign country with which India has entered into a trade agreement imposing a lower customs duty rate.

Further, Section 139 of the Trademark Act 1999 empowers the Central Government to issue notifications requiring certain goods to indicate the country or place in which they were made or produced, or of the name and address of the manufacturer or the person for whom the goods were manufactured.

The Geographical Indications of Goods (Registration and Protection) Act 1999 prohibits falsifying and falsely applying Geographical Indications. The Act imposes a penalty for applying false geographical indications, for selling goods to which false geographical indication is applied and for falsely representing a geographical indication as registered. Therefore, false indications of origin or source, in the advertisement is prohibited. Further, use of geographical indications for advertising is not allowed if such use is likely to mislead the public as to the true origin of the products.

3.10 Are there any special rules governing product packaging?

The ASCI Code provides that any written or graphic matter on packaging, whether unitary or bulk, or contained in it, is subject to the Code in the same manner as any advertisement in any other medium. Further, claims in advertisements should not be inconsistent with the information on the label or packaging of the food or beverage. Placement of disclaimers of a claim on packaging should be in a prominent and visible space and, ideally, should be on the same panel of the packaging as the claim made.

In case of informal resolution of a complaint by ASCI regarding pack claims, the compliance period for packaging material to be modified or replaced in the market place is a maximum of four months. No product with a manufacturing/packing date should be available in the market with old packaging material beyond four months after the date of the CCC recommendations being conveyed. In advertisements, however, the modified or replaced pack visual should be complied with within ten business days.

Specifically, by a Notification issued by the Ministry of Commerce on 24 November 2000, all pre-packaged commodities (intended for direct retail sale only) imported into India must carry the following declarations on the label:

- (a) name and address of the importer;
- (b) generic or common name of the commodity packed;
- (c) net quantity in terms of standard unit of weights and measurement. All units of weight or measurements must be metric. If the net quantity of the imported package is given in any other unit, its equivalent of standard units must be declared by the importer; and
- (d) month and year of packing in which the commodity is manufactured, packed or imported, and the maximum retail sales price (MRP) at which the commodity in packaged form may be sold to the end consumer. The MRP includes all taxes, freight transport charges, commission payable to dealers, and all charges towards advertising, delivery, packing, forwarding and the like.

Further, under Prevention of Food Adulteration Rules 1955 (PFA), and the Standards of Weights and Measures (Packaged Commodities) Rules of 1977, labels on packaged food products should contain following information:

- (e) name, trade name or description;

- (f) name of ingredients used in the product in descending order of their composition by weight or volume;
- (g) name and complete address of manufacturer/packer, importer, country of origin of the imported food (if the food article is manufactured outside India, but packed in India);
- (h) net weight, number or volume of contents;
- (i) distinctive batch, lot or code number;
- (j) month and year of manufacture and packaging;
- (k) month and year by which the product is best consumed;
- (l) maximum retail price.

In addition, wherever applicable, the product label also has to contain the following:

- (m) the purpose of irradiation and license number in case of irradiated food,
- (n) extraneous addition of coloring material.
- (o) a symbol indicating whether food is vegetarian or not:
 - (i) non-vegetarian food—ie any food which contains whole or part of any animal including birds, fresh water or marine animals, eggs or product of any animal origin as an ingredient, not including milk or milk products—must have a symbol of a brown color-filled circle inside a brown square outline prominently displayed on the package, contrasting against the background on the display label in close proximity to the name or brand name of the food.
 - (ii) vegetarian food must have a similar symbol of green color-filled circle inside a square with a green outline prominently displayed.

4 PRICE ADVERTISING

4.1 What are India's rules regarding price advertising?

The Consumer Protection Act 1986 contains specific provisions with regard to price advertising. Section 2(1)(r)(1)(ix) states that something will be an unfair trade practice if it:

‘materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made’.

Further, please also see the Consumer Protection Act 1986, Section 2(1)(r)(2) for additional rules with regard to price advertising in question 4.3 below.

4.2 What are India's rules regarding advertising ‘free’ products?

Chapter 1 Section 5 of the ASCI Code provides that ‘Advertisements shall not be so framed 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:

- (a) 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.
- (b) Where a claim is made that if one product is purchased another product will be provided 'free', the advertiser is required to show, as and when called upon by the Advertising Standards Council of India, that the price paid by the consumer for the product which is offered for purchase with the advertised incentive is no more than the prevalent price of the product without the advertised incentive.

Further, the Consumer Protection Act 1986, Section 2(1)(r)(3)(a) states that 'the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole' constitutes unfair trade practice.

4.3 What are India's rules regarding sales and special offers?

The Consumer Protection Act 1986 contains provisions regarding sales in Section 2(1)(r)(2) of the Act. Section 2(1)(r)(2) states that something will be an unfair trade practice if it:

'permits the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

For these purposes, 'bargain price' means:

- (a) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or
- (b) a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold'.

Further as regards special offers, please see the Consumer Protection Act 1986, Section 2(1)(r)(3)(a) in question 4.2 above.

4.4 What are India's rules regarding rebates?

There are no particular rules regarding rebates in India. Further, there is no restriction on advertising rebates on a product. However, Chapter 1 Section 5 of the ASCI Code and Section 2(1)(r) of Consumer Protection Act 1986 are also applicable in the sense that advertising a rebate offer in the advertisement should not materially mislead as to the price of product or it should not be a false offer of bargain price ie it should not be bait advertising.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

In retail advertising practices, it should be kept in mind that the cost of a product or offer price to sell as quoted in the advertisement should not be misleading so as to attract an allegation of unfair trade practice as discussed above.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Chapter III of the ASCI Code restricts advertising for the promotion of products which are hazardous, harmful or unacceptable to society at large. Also certain provisions of various other Indian statutes deal with rules which prohibit advertising certain products or services. The following products and services are banned from being advertised:

- (a) **Tobacco:** The Tobacco Prohibition Act 2003 prohibits all direct and indirect advertising of tobacco products in all media.
- (b) **Human Organs:** The Transplantation of Human Organs Act 1994 prohibits any advertising inviting persons to supply, or offering to supply, any human organ for payment.
- (c) **Magical Remedies:** The Drugs and Magical Remedies (Objectionable Advertisements) Act 1954 prohibits the advertisement of magical remedies of diseases and disorders.
- (d) **Services for Pre-Natal Determination of Sex:** The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 prohibits advertisements relating to pre-natal determination of sex.
- (e) **Prize Chits and Money Circulation Schemes:** The Prize Chits and Money Circulation Schemes (Banning) Act 1978 prohibits advertisements relating to prize chit and money circulation schemes.
- (f) **Physicians:** Under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, issued under the Indian Medical Council Act 1956, physicians are not allowed to advertise their services in any form or manner of advertising through any mode, as soliciting of patients directly or indirectly, by a physician, by a group of physicians, or by institutions or organizations is unethical.
- (g) **Legal Services:** The Bar Council of India Rules formulated under the Advocates Act 1961 strictly enforce the advertising ban and publicity rules governing law firms' websites.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

The practice of advertising through SMS spam and unsolicited telemarketing has been prohibited by the TRAI through notification of the Telecom Commercial Communication Customer Preference Regulations, 2010.

Further, according to the ASCI Code, advertisements addressed to minors shall not contain anything, whether in illustration or otherwise, which might result in their physical, mental, or moral harm or which exploits their vulnerability.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

There are various Indian statutes which, along with the ASCI Code, deal with indecency or obscenity in an advertisement. Chapter II of the ASCI Code states that an advertisement should ‘contain nothing indecent, vulgar, especially in the depiction of women, or nothing repulsive which is likely, in the light of generally prevailing standards of decency and propriety, to cause grave or widespread offence’. Other laws governing the issue include:

- (a) The Indian Penal Code: Section 292 and 293 of IPC deal with indecency and obscenity. It prescribes punishments for exhibition or sale or distribution of obscene material to any other persons, especially to minors, as they are defined as offences.
- (b) The Information Technology Act: Section 67 of the Information Technology Act 2000 provides that there should be no obscene publications on the Internet.
- (c) The Indecent Representation of Women (Prohibition) Act 1986: This Act punishes indecent representation of women, which means the depiction in any manner of the figure of a woman, her form or body or any part thereof, in such a way as to have the effect of being indecent, or derogatory to or denigrating women, or is likely to deprave, corrupt or injure the public morality or morals.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Unlike the United States of America, where rules regarding advertiser/sponsor identification have been coded in the Federal Communications Commission (FCC) sponsorship identification rules, there are no specific rules pertaining to advertiser/sponsor identification in India.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Branded content is developed or curated by a brand to provide added consumer value such as entertainment or education. It is designed to build brand consideration and affinity, not sell a product or service. Rules regarding branded content are available in various countries; however, no such coded rules are present in India.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Since no coded rules regarding branded content are present in India, there is no specific requirement for special disclosures or other obligations when integrating advertising content with other content.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Advertising through social media exists in India and the social media sites popularly used in India are Facebook, LinkedIn, YouTube, Blogger.com and Twitter.

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 and other applicable laws. However, there are no special rules governing the use of social media for advertising purposes in India.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

In general, advertisers incorporating user generated content into their advertising on social media should ensure that the content being posted is responsible, and not misleading, harmful or offensive. They should further ensure that the content is accurate, with the evidence to prove the same when required.

However, India does not support any specific rules/legislation pertaining to social media or user generated content in particular.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

There are no key court or self-regulatory decisions reported as of now.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

A person has proprietary rights over his name, picture, likeness, voice, and identity and other personal attributes, and no one is entitled to use the name and likeness of a person without the consent of that person. Further, celebrities have the right to publicity in their name, likeness, voice, and identity and other personal attributes, and the right to control the use of their name, image, likeness or other identifying characteristics.

In this connection, the ASCI Code in Chapter I Section 3 provides that ‘Advertisements shall not, without permission from the person, firm or institution under reference, contain any reference to such person, firm or institution which 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 Advertising Standards Council of India, the advertiser and the advertising agency shall produce explicit permission from the person, firm or institution to which reference is made in the advertisement’.

Further, under common law, a person has proprietary rights over his/her personal attributes and can take action to prevent misappropriation of his personal attributes by any other person.

Advertisers should seek permission from all individuals, organizations or any such entity that appears in an advertisement to use an individual's name, picture, likeness, voice, and identity and to grant the rights set forth therein.

9.2 Are there situations when permission is not required?

The relevant laws such as Trademarks Act 1999, Copyright Act 1957, and the Information Technology Act 2000 do not make any exception where personal attributes of a person can be used without having requisite permission from that person. The Copyright Act 1957 provides a fair dealing clause, for various situations where copyright-protected subject matter can be used by a third person without infringing copyright in that subject matter. However, the fair dealing provisions under the Copyright Act 1957 do not provide for use of copyrighted subject matter in an advertisement.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

No advertisement should be in violation of the Emblems and Names (Prevention of Improper Use) Act 1950, which prohibits the improper use of official emblems, names or pictorial representation of certain famous persons for commercial use. Accordingly, names or images of Mahatma Gandhi, Jawaharlal Nehru, Indira Gandhi, Shivaji Maharaj or the Prime Minister of India or the words 'Gandhi,' 'Nehru' or 'Shivaji' may not be used in advertisements.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

To use other companies' recognizable products in advertising is permissible under Indian law to a certain extent. However, no direct reference to a company's name is permissible without express permission of the company concerned. Giving false or misleading advertisements disparaging the goods, services or trade of a company is not allowable in India. Even statements which disparage indirectly in a subtle way are not permitted. The courts have been taking serious note of such misleading advertisements. There have been a number of cases where cease and desist orders have been passed by the courts in the case of such practices. For example, the recent controversy and the subsequent filing of a suit by the manufacturers of squash drink 'Roohafza' against certain objectionable dialogues regarding their product in a Bollywood movie were against the company's products.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of India which affect advertising (eg Swedish gender equality law)?

Unlike other countries, in India caste is a very sensitive subject. Therefore, any derogatory remark in any form of public communication with regard to a particular caste, creed or sect is likely to create problems for the sponsor of the advertisement and advertising agency and media, etc. Further, Under the Cable Television Network Rules 1994, no advertisement shall be permitted through cable services

which exploits social evils like dowry or child marriage. Furthermore, the Indecent Representation of Women (Prohibition) Act 1986 prohibits indecent representations of women.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Under the Cable Television Networks Rules 1994, the Advertising Codes of Doordarshan & All India Radio and the Norms for Journalist Conduct issued by the Press Council of India, advertisements based on religion or to hurt religious sentiments are not allowed. Further, such advertisement may be punishable under the Indian Penal Code 1860.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in India?

For advertisements likely to feature celebrities, there is a need to evaluate the proposed advertisement in view of Indian law and regulations before signing the celebrity to endorse a product. The reason for such prior evaluation is that celebrity advertisements cost a substantial amount to the company and, in such a situation, if for some reason the advertisement featuring the celebrity runs into problems in view of Indian law and regulation, huge amounts of resources of the company go down the drain. Therefore, there is a need to exercise caution in case of advertisements involving celebrities.

IRELAND

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Ireland?

Advertising is regulated in Ireland by a mixture of legislation, case law and self regulatory codes. Much of the legislation is influenced by the requirement to implement European Union directives. There are a variety of consumer protection laws (such as the Consumer Protection Act 2007 and the distance selling regulations), as well as industry specific legislation and the Advertising Standards Authority of Ireland (ASAI) Code of Standards for Advertising and Marketing Communications in Ireland (ASAI Code) which will be discussed in further detail below. Certain industries also have their own regulatory codes relating to advertising in that specific industry.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

There is no fixed definition of 'advertising' in Irish law. The Consumer Protection Act 2007 interprets an advertisement as 'any form of advertising or marketing'. The ASAI Code defines advertising as including, but not limited to 'a form of marketing communication carried by the media, usually in return for payment or other valuable consideration'. Further detail is then provided in the Code on what is considered a marketing communication.

1.3 What is the basic regulatory framework for advertising regulation?

The two main regulatory bodies are the ASAI and the Broadcasting Authority of Ireland (BAI) which publishes its own Code of Practice on broadcast advertising on Irish terrestrial TV and radio stations. The ASAI Code is voluntary and has limited statutory basis, but the vast majority of advertisers and media in Ireland are members of the ASAI and must, therefore, abide by its Code. ~~The Consumer Protection Agency was established by the Consumer Protection Act 2007~~ established the Consumer Protection Agency, which has since been replaced by the Competition and Consumer Protection Commission (CCPC), but most complaints regarding advertising go through the ASAI.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Types of advertising practices that are specifically regulated include:

- (a) Prohibited commercial practices: Section 55 of the Consumer Protection Act 2007 contains a list of prohibited commercial practices (based on the EU Unfair Commercial Practices Directive).
- (b) Sales promotions: Sales promotions and other advertising practices involving prize competitions often fall within the definition of a 'lottery' and are therefore regulated by the Gaming and Lotteries Acts, 1956–1986.
- (c) Phone lines: Advertising practices involving the use of premium rate phone lines or SMS numbers are regulated by the Communications Regulator (ComReg) which has its own Code of Practice on the use of such numbers.
- (d) Social Media: The ASAI Code was updated in 2013 and includes social media within its own remit.
- (e) Broadcast Advertising: The BAI Code contains prohibitions on certain types of advertising in broadcasts (such as subliminal advertising or undisclosed product placement).

- (f) Text Messaging or other direct marketing: Data protection laws can apply, and the Irish Direct Marketing Association also has a Code of Practice on Direct Marketing.
- (g) Advertising to Children: The BAI has a Code of Practice on advertising to children.

The above list is non-exhaustive.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There are industry-specific regulations (aside from the ASAI Code which also includes industry-specific rules) which are briefly summarized as follows:

- (a) alcohol: governed by various Codes of Practice agreed between the alcoholic drinks industry bodies, various health interest bodies and the Irish Government. Compliance is monitored by CopyClear (a body established in 2003 to monitor alcoholic drinks advertisements). The Public Health (Alcohol) Bill 2015 is due to be enacted in the future, although the date of commencement remains uncertain. That legislation will cover and advertising of alcohol and alcohol related products as well as sponsorship by alcohol brands;
- (b) financial services: regulated by the Central Bank of Ireland Consumer Protection Code 2012;
- (c) medicinal products: regulated by the Medicinal Products (Control of Advertising) Regulations, 2007 and also by the Irish Pharmaceutical Healthcare Association Codes of Practice;
- (d) tobacco: there is a blanket ban on tobacco advertising;
- (e) gambling: governed by the Gaming and Lotteries Acts 1956-1986; and
- (f) food: there are certain regulations in place regarding disclosures on advertising of different types of food products particularly foods which are high in fat, sugar and salt (HFSS).

Again, the above list is non-exhaustive.

1.6 Are any government pre-approvals required?

There are no government pre-approvals required for individual advertisements, but there are requirements that certain specific types of advertising must contain pre-approved warnings or disclaimers in order to be permissible. These include:

- (a) financial services advertising,
- (b) food advertising and
- (c) alcoholic drinks advertising.

Advertisements for alcoholic drinks must, for example, contain a link to a specified alcohol awareness website. Although it is not a specific Government body, Copy Clear pre-approves all alcoholic drinks advertisements regardless of the media. Media outlets will not accept an alcoholic drinks advertisement without the Copy Clear reference number.

In financial services, advertisements for mortgages must contain certain specified information on interest rates as well as warnings that the consumer's property may be at risk if they do not make the required repayments.

1.7 Does the media pre-clear advertising?

The national broadcaster RTE pre-clears all advertisements broadcast on its TV and radio stations through its internal copy clearance committee. The other main Irish TV station, TV3, also pre-clears advertisements through its own internal copy clearance system.

All alcoholic drinks advertisements must be pre-cleared with Copy Clear before media outlets will accept the advertisements.

The ASAI offers a pre-clearance service for interested advertisers, but this is a voluntary service and there is no obligation on advertisers to use it.

Aside from the above, media outlets do not generally offer any form of pre-clearance service for advertisements.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The main agency that, in practice, deals with complaints regarding advertising is the ASAI, which is not actually a Government body. Most consumers will make their complaint to the ASAI (or the BAI for broadcast advertisements) and only look to a Government agency in more extreme situations.

The CCPC has the power under the Consumer Protection Act 2007 to investigate and deal with complaints regarding issues such as misleading commercial practices or aggressive commercial practices (the definitions for which include advertising). It can initiate court proceedings against an offending advertiser or trader in relation to breaches of consumer protection legislation. Interestingly, section 69 of the Consumer Protection Act 2007 provides an indemnity for the publisher of the advertisement if they were unaware it was in breach of the Act. The Act also permits a Judge to have regard to any relevant provisions of the self-regulatory Codes (such as the ASAI Code) when considering if a commercial practice was, for example, misleading; so a limited statutory basis is also provided for the self-regulatory codes.

The Act also permits the CCPC to bring either criminal or civil proceedings and grant remedies including:

- (a) prohibition orders restricting future commercial practices of that nature;
- (b) fines; or
- (c) imprisonment in extreme situations.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor can bring a complaint to the ASAI under its intra-industry complaint system. Usually such complaints revolve around issues such as substantiation. The complaining competitor will be asked to substantiate its own complaint before it is investigated, which is a change from the general practice where a consumer may complain and the burden of proof falls on the advertiser.

A competitor is also free to use the Irish courts should it feel its legal rights have been breached by an advertisement. This is particularly common if there are intellectual property rights being disputed or the advertisement complained of is utilizing comparative advertising with the complaining competitor's product. The competitor can raise a complaint either through common law actions, such

as passing off, or based on the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007.

Some competitors will favor the courts, as this permits injunctive proceedings which can be important from a time perspective if an offending advertisement is running at the time. The ASAI intra-industry system can take some weeks to process complaints.

The only remedy available through the ASAI is either amendment or withdrawal of the offending advertisement, and the ASAI may then set requirements on future advertisements by that offending advertiser.

The courts offer various remedies depending on the legislation on which the claim is based. An award of damages and payment of legal costs would be the most common remedy. The risk for a complaining advertiser is that the costs of injunctive proceedings are significant and if its complaint is ultimately unsuccessful it may be ordered to pay the other party's costs.

1.10 When do consumers have a right of action? What are the potential remedies?

The Consumer Protection Act 2007 allows consumers to challenge advertising and advertising practices in the Irish courts. Section 74 of the 2007 Act provides that a consumer shall have a right of action for damages (including exemplary damages) against a trader accused of prohibited, aggressive or misleading commercial practices. Those proceedings can be brought in the District Court, Circuit Court or High Court, so there is no limit to the amount of damages that can be awarded.

It is, however, more common for a consumer to bring their complaint to the ASAI. Although it offers no provision for damages, it does offer a free, zero risk, complaints service to consumers who can bring their complaint without the accompanying risk and cost of court proceedings.

Similarly, complaints are frequently brought to the BAI regarding broadcast advertising for the same reason—it offers a free and zero risk service.

In terms of remedies under the self-regulatory system, there are no direct compensatory remedies offered to the complaining consumer. Instructions to amend or withdraw the advertisement are the usual sanctions, and the ASAI can also instruct an advertiser to engage in the future in compulsory copy advice for its advertisements. The ASAI Board can also fine members who refuse to accept its decisions.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Ireland have a primary advertising self-regulation system?

Yes, the ASAI Code. The ASAI represents the primary advertising self-regulatory system. It is a body set up and financed by the advertising industry. The ASAI is also a member of the European Advertising Standards Alliance, and cross-border complaints can be processed through them.

The majority of advertisers, media outlets and agencies in Ireland are members of the ASAI and one of the conditions of membership is an agreement to abide by its Code. The Code applies to commercial marketing communications and to sales promotions that promote the sales of goods or services. The Code is set up in various sections which deal with general principles and then more specifically with industry specific regulations.

Complaints are firstly evaluated to ensure they come within the ambit of the Code and then considered by its Complaints Committee.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Yes, the ASAI Code. It was most recently revised in 2016.

The general principles are that:

- (a) marketing communications should be legal, decent, honest and truthful;
- (b) marketing communications should be prepared with a sense of responsibility to consumers and to society;
- (c) marketing communications should respect the principles of fair competition generally accepted in business;
- (d) a marketing communication should not bring advertising into disrepute; and
- (e) primary responsibility for observing the Code rests with advertisers.

In general terms, the purpose of the Code is to ensure that marketing communications do not mislead or cause general offence. The general principles are supplemented by rules regarding specific industries and types of advertising as well as various other areas, such as substantiation.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

There is a complaints procedure which deals with complaints from consumers and from competitors. Complaints made by consumers can be made either in writing or via the online complaints form published on the ASAI website. The complaint is then considered by the ASAI Secretariat to confirm it falls within the remit of the Code. If it falls within the remit, then the details of the complaint will be sent to the advertiser who will be asked to provide a response within a set time frame.

Once the response is received, the Secretariat will summarize the case and prepare a report (including a recommendation) for the Complaints Committee, who will consider it at their next meeting and issue their decision (and any sanctions). Prior to that meeting, the complainant and responding advertiser will also be given a copy of the Secretariat's report and recommendation and can provide their own further submissions for the Complaints Committee to consider.

The same process can be followed by a competitor seeking to make an intra-industry complaint. The difference is that a competitor will be asked to substantiate its claim, and when the decision is published the name of the competitor will be published (unlike consumer complaints where the consumer's name is not disclosed).

2.4 Is the self-regulation system effective? Is it widely used and followed?

Generally, the system works well and is effective. Most advertisers are members of the ASAI and are, therefore, bound to comply with any decision regarding the Code and a complaint based on one of its advertisements.

There are two general difficulties that arise. Firstly, if the advertiser is not a member they have no obligation to comply with the Code or a decision of the Complaints Committee. This happens

infrequently and such advertisers can publish marketing communications which are often the cause of a significant level of complaints. Media outlets may refuse to run the advertisements concerned, but the internet and social media may lead to widespread publication regardless.

A second difficulty that arises is the speed at which complaints can be processed. There is a fast track procedure, which can be used if an advertisement is the subject of a lot of complaints, but generally it can take weeks for a complaint to be processed and a decision made.

2.5 Are the self-regulatory system's decisions reported?

Yes, the ASAI publishes its decisions on its website on a quarterly basis and the decisions are also published via press release. Decisions will disclose the details of the advertiser (but not the complainant's private details unless it is a competitor complaint), details of the complaint made, the response from the advertiser and the decision from the Complaints Committee. An archive of all recent decisions is also available on the ASAI website.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Adherence to the first of the general principles detailed above (that marketing communications should be legal, decent, honest and truthful) is advisable. Most complaints that arise relate to either:

- (a) advertisements that cause offence or
- (b) advertisements that a consumer may feel are misleading.

The ASAI Complaints Committee will look at how the advertisement complies with general principles and will also consider the response from the advertiser to the complaint. Advertisers who fail to reply or engage very little with the process are likely to find the complaint upheld. Areas of focus (without picking out specific industries) should be to ensure compliance with the general principles and to ensure that a detailed and valid response is made to any complaint through the ASAI.

2.7 Are there any other self-regulatory systems that govern advertising practices in Ireland?

Yes, the BAI has its own self regulatory Codes for broadcast advertisements. Since 2004, there has been a separate Code of Practice regulating children's broadcast advertisements.

There are also industry specific regulatory codes in areas such as pharmaceutical products, financial services and direct marketing.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Ireland (eg, consumer protection laws; IP laws; unfair competition laws)?

The chief legislation as set out above is the Consumer Protection Act 2007. That legislation replaced a multitude of historic legislation concerning consumer information, pricing and advertising. The legislation also implements the EU Unfair Commercial Practices Directive into Irish law. The various sections of the Act are discussed in more detail throughout this chapter.

Advertisers who use broadcast media need to be aware of the Broadcasting Act 2009 (which established the BAI) and which provides a basis for application of the Broadcasting Codes.

Advertisers seeking to run prize competitions will need to be aware of the Gaming and Lotteries Acts 1956–1986 which affect nearly all prize competitions run on an ‘instant win’ format and will often need to adjust the mechanic of the promotion to avoid the competition being deemed an illegal lottery.

The various pieces of intellectual property legislation are the Trade Marks Act 1996, the Patents Act 1992 and the Copyright and Related Rights Act 2000. All of these Acts form part of the laws governing advertising in Ireland.

The list of laws that can apply is too lengthy for full inclusion here—the ASAI in the Appendix to its Code lists over 60 different pieces of legislation which were taken into account when the Code was being prepared.

3.2 Is substantiation required for advertising claims?

The ASAI Code 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’. Generally, any claim made in advertising may require substantiation. If a complaint is made about a claim made in an advertisement the ASAI Secretariat will normally seek independent, documentary evidence.

Additionally, the Consumer Protection Act 2007 provides some level of protection for consumers and obligations on producers/advertisers. It includes a list of 25 prohibited commercial practices and also a more general prohibition on misleading advertising. A claim made in an advertisement which is subsequently disclosed as being incapable of substantiation will be deemed misleading under the Act.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

There is no specific law on puffery and no rules that distinguish it from claims that do require substantiation. The ASAI Code (while stating that all claims should be capable of substantiation) does allow for ‘obvious untruths or deliberate hyperbole’ that are permissible although they cannot alter any material facts.

3.4 What are the rules governing the use of disclosures in advertising?

The rules governing the use of disclosures are industry specific. For example, under the Central Bank of Ireland Consumer Protection Code, certain financial advertisements must disclose that the value of investments can go up as well as down, or that you may lose your home if repayments are not met (depending on the type of financial product being sold). There are requirements under the BAI Communications Code regarding broadcast advertisements for certain food types and separate requirements under the various alcohol advertising codes for disclosures on alcohol advertising regarding responsible drinking.

Generally, it is advisable to refer to the Consumer Protection Act 2007 or the ASAI Code, both of which will generally seek to protect consumers from misleading advertising. If a consumer is likely to be misled by a lack of disclosure, then the advertiser may be in breach of the Act or the Code.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

The ASAI Code includes a specific section on the use of testimonials and/or endorsements. An advertiser seeking to refer to a testimonial needs to have that testimonial in signed and dated

documentary form. The testimonial should be available on request and, even then, the testimonial can only be used with the permission of the person providing the testimonial. If that person is being paid, then the advertisement should disclose that they have received a gratuity for their part in the advertisement.

The Consumer Protection Act 2007 places a prohibition on claims of endorsement by traders if those claims are not accurate.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific laws on product demonstrations. Clauses in the Consumer Protection Act 2007 relating to misleading advertising can equally be applied to product demonstrations without the need for any specific reference to a product demonstration.

The BAI Commercial Communications Code of Practice contains specific rules on broadcast items, such as interactive advertising or ‘teleshopping’, which would generally be perceived as product performance. Such forms of advertising need to be clearly distinguished from program content so that it is clear they are a form of advertising.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted. Chiefly, it is governed by the European Communities (Misleading and Comparative Marketing Communications) Regulations 2007. Additionally, the Consumer Protection Act 2007 places a prohibition on advertisements that may seek (whether deliberately or by accident) to cause confusion between the advertised product and a competitor’s product. Comparative advertising is permitted, provided it does not mislead and is not likely to confuse consumers. An advertiser can identify its competitor by name, or use its trade mark, provided that in doing so he does not seek to discredit the competitor or denigrate its trade mark. Advertisements need to be ‘like for like’ in terms of the comparison.

The ASAI Code also specifically permits comparative advertising subject to compliance with the Code.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

A trade mark or name of a competitor can be used, provided the advertisement does not denigrate or discredit the rival trademark or competitor name. The Trade Marks Act 1996 can be used to enforce the rights of a trade mark holder if its trade mark is being illegally used as part of an advertisement. Additionally, the common law of ‘passing off’ has been used in the courts in the past in circumstances where a rival brand owner may feel its name, trade mark or product is being used in a comparative advertisement designed to cause confusion between the products.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

Yes, the Consumer Protection Act 2007 specifically states that a claim about geographical origin which is not correct will be seen as misleading within the terms of the Act. The ASAI Code would also put such claims under their definition of ‘misleading advertising’, although it does not have a specific section for geographical claims.

EU Regulation 1169/2011 applies to all foods, and it places an obligation on food business operators to indicate the country of origin or the place of provenance of a food whenever its absence is likely to mislead consumers as to the true country of origin or place of provenance of that product. EU law also has mandatory origin information provisions for certain products under product-specific rules (eg beef and beef products, fish, fresh fruit and vegetables, honey and olive oil). The European Union (Origin Labelling of Meat) Regulations 2015 also set out specific requirements regarding geographical origin of meat products.

3.10 Are there any special rules governing product packaging?

Yes, although it depends on the nature of the product in question. The European Union (Provision of Food Information to Consumers) Regulations 2014–2016 regulate the information that must be displayed on food packaging. The Regulations apply to operators at all stages in the food chain and to all foods intended for consumption by consumers, regardless of whether they are sold in bulk quantities first and subsequently repackaged. There are also separate standards in place for items marked ‘organic’ or ‘fairtrade’.

Additionally, there are rules for textile labelling set out in the European Union (Textile Fibre Names and Related Labelling and Marking of the Fibre Composition of Textile Products) Regulations 2012 and footwear in the European Communities (Labelling of Footwear) Regulations 1996. Both of these Regulations set out specific rules for disclosing product materials and the content of those materials.

4 PRICE ADVERTISING

4.1 What are Ireland’s rules regarding price advertising?

Section 43 of the Consumer Protection Act 2007 states that an advertisement will be deemed misleading if incorrect information is provided to consumers concerning the ‘price of the product, the manner in which that price is calculated or the existence or nature of a specific price advantage’. An advertisement which is misleading in terms of pricing is therefore in breach of the Act and the brand owner will face the risk of penalties. The CCPC has published guidelines on price advertising to assist retailers with this.

The ASAI can investigate complaints on price advertising on the basis that the advertisement was misleading. Its quarterly case reports constantly contain details of complaints regarding pricing.

4.2 What are Ireland’s rules regarding advertising ‘free’ products?

The Consumer Protection Act 2007 details unwarranted claims for ‘free’ products in its list of prohibited commercial practices. Section 51 of the Act prohibits the use of the word ‘free’ in an advertisement unless the consumer only pays the cost of responding to the promotion and reasonable delivery charges. ComReg, in its Code of Practice for premium rate numbers, prohibits the use of ‘free’ products in promotions if the consumer must then pay premium rate tariffs to receive their ‘free’ product.

Additionally, the ASAI Code contains provisions regulating the use of ‘free’ products. Again, it specifies that the offer can only be described as ‘free’ if the consumer pays no more than reasonable delivery costs. If consumers must make numerous purchases to get their ‘free product’ then this needs to be highlighted.

4.3 What are Ireland's rules regarding sales and special offers?

Section 43 of the Consumer Protection Act 2007 states that providing information on previous prices (which may give an impression of greater reductions to the current offered price) can be misleading and therefore a breach of the Act. The Act states that if a complaint is made, consideration will be given as to whether the product was previously offered in good faith at the higher price and at the same place of business and for a reasonable time.

The general provisions of the ASAI Code will also apply—that the advertisement for the sale or special offer should be legal, honest, decent, truthful and should not mislead.

4.4 What are Ireland's rules regarding rebates?

There are no specific rules regarding rebates save the general rules on misleading advertising contained in the Consumer Protection Act 2007 and the ASAI Code.

The only exception to the above would relate to financial services products. Some financial products will offer rebates as part of the contract with a consumer. The Central Bank of Ireland Consumer Protection Code states that rebates must be paid within 5 business days of falling due (if the rebate is valued above 10 euros).

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

There are no key restrictions. Any retailer would be advised to consider the guidelines published by the CCPC to avoid any issues arising.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Under the Public Health (Tobacco) Act 2002 and the Public Health (Tobacco) Amendment Act 2004 there is a blanket ban on tobacco advertising.

Alcohol may not be advertised unless it carries the CopyClear reference number to show it has been approved by that agency.

The Medicinal Products (Control of Advertising) Regulations 2007 restricts and prohibits advertising of medicinal products and particularly prescription medicines.

There are various prohibitions on political or religious advertising under the Broadcasting Act 2009.

The BAI Communications Code places certain prohibitions on advertisement of HFSS (High fat, salt, sugar) foods and under the European Communities (Infant Formulae and Follow on Formulae) Regulations 2007 there is a prohibition on the advertisement of infant formula.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

The BAI Communications Code prohibits certain advertising practices in broadcast advertisements. These include surreptitious and subliminal advertising. Product placement is only permitted in limited circumstances and with disclosures in place.

The Consumer Protection Act 2007 refers to and lists prohibited commercial practices, which could be taken to include particular advertising practices.

Electronic communication is commonly used for advertising, but there are prohibitions in place on the use of marketing emails under the e-Privacy Regulations 2011 and the Data Protection Acts 1988-2003.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

There are no specific laws for advertising relating to indecency or obscenity. The ASAI Code is generally relied on for complaints regarding advertisements that cause offence. It contains a specific section on decency and propriety and states that a 'marketing communication should contain nothing that is likely to cause grave or widespread offence'.

The BAI Communications Code contains similar provisions regarding decency and propriety.

In theory, an advertisement that causes widespread offence could fall foul of public decency laws such as the Public Order Act 1994.

Additionally, for an advertisement causing offence on religious grounds, the Defamation Act 2009 somewhat controversially extended its remit to blasphemy, whereby someone publishes or utters blasphemy if 'he or she publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, and ... he or she intends, by the publication or utterance of the matter concerned, to cause such outrage'.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

In certain circumstances, advertisers may be asked to clearly identify the advertising as such or identify the sponsor. For social media posting or the use of 'influencers' the content needs to be recognizable as advertising and needs to carry suitable disclosures. Editorial content is discussed below.

Sponsorship is permitted on broadcast advertising under the BAI Communications Code, and is specifically differentiated from advertising as defined in the Code. There are, however, specific restrictions on sponsorship in the Code and obligations placed on the sponsor/advertiser.

There is also a specific code of practice relating to alcohol marketing and sponsorship. This focuses on the sponsorship of events (such as concerts or sporting events) by alcoholic drinks companies and places restrictions on what is permissible and in what circumstances such sponsorship can occur (for

example, based on the age profile of the likely attendees). As above, the Public Health (Alcohol) Bill 2015 will regulate sponsorship by alcohol brands once enacted.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are specific rules regarding the use of editorial content or 'advertorials', and it is particularly important that there is disclosure of the fact that it is an advertisement rather than a genuine broadcast or article. The Consumer Protection Act 2007 states (at section 44(1)(b)) that an advertisement will be deemed misleading if it causes or could cause an average consumer to make a transactional decision that they would not otherwise make. Advertising content hidden as entertainment or as an editorial could easily be construed as breaching that legislation. Additionally, section 55 of the Act contains amongst its list of prohibited practices a prohibition on editorial content being used without disclosure that it is a paid promotion.

The ASAI Code also specifically states that advertising and promotions need to be designed in such a way that they can be clearly differentiated from normal, non-advertising editorial content. Any advertising content integrated with entertainment or editorial materials would also need to comply with all other provisions of the ASAI Code.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Product placement is permitted under the BAI Communications Code, but the broadcaster is required to display a 'PP' sign signifying product placement before and during the show, and then to notify viewers in the end credits of the details of the companies who have paid for product placement in the programming.

Product placement is, however, only permitted in certain programming and is specifically prohibited in children's programming and in certain light entertainment or chat shows.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Although there is no specific legislation in place governing the use of social media in advertising, the ASAI Code was extended in 2013 to cover all elements of social media. The general provisions of the Code of Standards now extend equally to any form of social media advertising. The method used to include social media in the Code was to extend the remit of the Code to 'marketing communications in non-paid for space online, under the control of the advertiser or their agent, including but not limited to advertisers' own websites'.

Additionally, the obligation on alcoholic drinks advertisers to have their advertisements cleared by Copy Clear has extended to social media advertising since 2013. Copy Clear applies the same definition as the ASAI in considering whether a social media advertisement falls within its remit.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

The ASAI issued guidelines on this when it brought social media within the remit of its Code. If the answer to one or both of the following two questions is yes and the content is deemed to be a marketing communication, then the user generated content (UGC) will fall within the remit of the Code:

- (a) Did the advertiser originally solicit the submission of UGC from individuals, then adopt and incorporate it within their own marketing communications? or
- (b) Did an individual provide the advertiser, on an unsolicited basis, with material which the advertiser subsequently adopted and incorporated within their own marketing communications?

As the ASAI remit was only extended to social media in 2013, and there was an initial grace period given to advertisers for compliance, the issue of UGC and advertisements remains largely untested before the ASAI Complaints Committee.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

The laws surrounding social media (and particularly advertising on social media) remain largely untested before the Irish courts.

The law of defamation is also being used as a method of controlling use of social media and that can impact on advertisers. The Defamation Act 2009 does not specifically deal with user-generated sites such as Twitter, Facebook or YouTube. However, a defamed party has one cause of action for multiple publications and this is important in respect of a defamatory statement which is published on the internet. Where a defamed party is unable to identify the author of a defamatory statement on the internet, the internet service provider or the social media service provider may be held liable rather than the author. Advertisers need to be aware of this, particularly if they allow publication of user generated content on their own websites or on social media pages such as a brand Facebook page.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

Data protection laws will apply, depending on how the information is collected from an individual and whether the proper consents are sought and obtained.

Use of an individual is permissible in advertising, but only with the necessary consents in place. Advertisers running conventional advertisements will generally put agreements in place with any individual featured in their advertisement.

The ASAI Code also deals with this issue relating to publicity for prize winners in competitions. It states that the privacy and safety of the individual should be borne in mind, and only their name, county of residence and photograph can be published. For prize competitions, the consent of individuals is generally obtained by their acceptance of the terms and conditions, which will include a clause confirming their agreement to use of their photograph.

9.2 Are there situations when permission is not required?

As a general rule, permission should always be obtained. It may be that an individual featured in an advertisement may already have some form of contract in place with an agency permitting use of their photograph, in which case further consent would not be required.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

This depends on the nature of the material or place in question. For example, the Irish Government has published guidelines on the use of the Irish flag at various events, and while it does not specifically deal with advertising, it does state that the flag should not be shown covered in slogans and should not be portrayed as dirty or tattered or lying on the ground. The ASAI Code can equally be applied to any such advertisement.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Advertisers should exercise caution in the use of another company's branded product in their advertisement, as it is a breach of the Trade Marks Act 1996 to use a third party trade mark without consent (or, in the case of a piece of work, a breach of the Copyright and Related Rights Act 2000). If the branded product is being used to indicate the purpose of a product or service, particularly as accessories or spare parts, then that is generally permissible under the Trade Marks Act 1996.

It will, therefore, depend on the content of the advertisement and how the branded product is used (in many cases the third party would be happy to have their product featured without any cost) but, generally, it would be advisable to seek consent to use of the product.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Ireland which affect advertising (eg, Swedish gender equality law)?

There are no special rules, but advertisers should be aware of the general principle that an advertisement should not be likely to cause offence.

The compulsory clearance for alcohol advertising is somewhat particular to Irish culture in that it is designed to combat what the Irish Government and health bodies in Ireland felt was an unhealthy level of alcohol consumption.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

Religion can sometimes be a factor, with campaigns that have run successfully in other countries being the subject of complaints in Ireland. Ireland would traditionally be seen as a conservative, Catholic country, and regulators such as the ASAI will bear that in mind when adjudicating on a decision. Advertisers need to consider whether an advertisement is likely to cause offence on that basis.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Ireland?

Advertisers should start by seeking to adhere to the general principles of the ASAI Code by keeping the advertisement or promotion 'legal, honest, decent and truthful'. Additionally, the Consumer Protection Act 2007 provides widespread protection for consumers, so advertisers should be aware of the need to avoid anything that could be construed as 'misleading'.

 ISRAEL 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Israel?

Advertising is regulated by various laws (in the form of primary legislation), enacted by the Israeli parliament, the Knesset. These laws usually provide government Ministers with regulatory powers. For example, the Consumer Protection Law 1981 (CPL) empowers the Minister of Industry and Commerce to make regulations related to consumer protection.

Pursuant to the CPL, the Minister has enacted numerous regulations, such as the Consumer Protection Regulations (Advertisements Targeted at Minors) 1991.

While legislation such as the CPL empowers the relevant Ministers to make advertising and marketing regulations, on a practical level it should be noted that government Ministers are not primarily concerned with advertising and the enforcement of advertising laws and regulations. In practice, it is the courts which are the primary bodies which enforce and interpret the various advertising laws and regulations.

Commercial television and radio are regulated by a non-governmental body, the Second Authority for Television and Radio (Second Authority). This body will be discussed in the sections below.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

The term 'advertisement' is defined as 'a message which may promote, directly or indirectly, a product, service, business or any other commercial interest, either in exchange for consideration or without consideration'. An advertisement may include announcements and sponsorship.

The contents of the 'message' are the determining factor, not the method by which the message is transmitted/conveyed.

1.3 What is the basic regulatory framework for advertising regulation?

There is no general 'Advertising Law' in Israel. The CPL and its Regulations principally govern advertising.

Additionally, there are certain types of goods and services (such as alcohol, tobacco and banking services) which are specifically covered by *ad hoc* laws and regulations.

There are also specific advertising rules housed in the legislation governing commercial television and radio broadcasts.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Unsolicited marketing communications such as spam have become common in Israel.

The Israel Communications Law (Bezeq and Broadcasting) 2008 (2008 Law) addresses unsolicited marketing communications sent via electronic means, such as email, fax machines, automatic dialing systems and short written messages, such as SMS messages.

The law in this area is technical and complex. In short (and subject to qualifications), Israel has adopted the 'opt in' model whereby a message sender must receive clear informed consent from a recipient before sending a directing marketing communication. Consent must be given in writing or within a

recorded conversation. A recipient, who has consented to the receipt of such communications, reserves the right to withdraw his or her consent at any time.

All marketing communications falling within the ambit of the 2008 Law must clearly show the word 'Advertisement' at the beginning of the message. Additionally, the advertiser's identity must be made clear in the communication and include the advertiser's address and the option to unsubscribe from future communications.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

The laws and regulations relating to the promotion, sale and advertising of tobacco and alcohol are relatively stringent and detailed.

Pursuant to the Limitation of Tobacco Advertisement Act 1983, it is prohibited to market tobacco products with accompanying free prizes, gifts or the right to participate in a sweepstake or competition. Tobacco product packages must include a warning sticker which states: 'Warning—the Ministry of Health determines that smoking causes serious diseases'.

The Consumer Protection Regulations (Advertisements and Marketing Methods Targeted at Minors) 1991 prohibit advertisements and marketing methods which encourage minors to consume alcoholic beverages and the use of cigarettes or other tobacco products.

The Second Television and Radio Authority Rules (Television Advertising Ethics) 1994 (Second Authority Ethics Rules) prohibit the advertising of tobacco products on private/commercial television. Though these Rules do not prohibit advertising alcoholic beverages, they prohibit broadcasting advertisements that portray the consumption of alcohol as beneficial to quality of life, health, success, mental or physical capabilities or sexual performance.

Naturally, due to the nature of pharmaceuticals, their marketing and promotion is subject to stringent laws and regulations.

The laws and regulations relating to the sale and promotion of non-prescription medicines are more lenient when compared to the sale and promotion of prescription medicines.

The Ministry of Health's Procedure No 24 prohibits the advertisement of prescription medicines other than in exceptional circumstances.

When advertising non-prescription medicines, advertisers should not target children.

1.6 Are any government pre-approvals required?

Generally, advertisements do not require government pre-approval. That being said, there are some restricted industries which do require pre-approval.

Pursuant to the Pharmacists Regulations (Preparations) 1986, it is prohibited to advertise pharmaceutical products in the media or non-scientific journals without authorization from the General Director of the Ministry of Health. Advertisements in this category must be submitted using a template form to the Ministry of Health. The Ministry may approve/reject and/or amend the request within 21 days of its receipt. Approval is valid for one year subject to renewal.

In relation to advertising on commercial television, the General Manager of the Second Authority may determine advertising categories which require prior approval before being broadcasted. Using these

powers, the Second Authority pre-approves advertisements targeted at minors, advertisements with sexual content or sexual innuendo and other sensitive topics.

1.7 Does the media pre-clear advertising?

Though there are exceptions, advertisements on private/commercial television stations (in contrast to public/state television stations), require pre-clearance.

State run television, for the most part, does not broadcast advertisements. Private television channels regularly and extensively broadcast television advertisements. The Second Authority, the body which governs broadcasting on Israel's private television, pre-approves advertisements in certain sectors, such as those relating to health, advertisements targeted at minors and other sensitive areas.

Advertisers and advertising agencies which adhere to a pre-signed Advertisement ethical code—the Second Authority Ethics Rules (as to which see question 2.2) are not required to pre-clear advertising with the Second Authority.

1.8 How does the government enforce advertising laws? What are the potential remedies?

As mentioned above, advertising is regulated on the national level. Israel's Parliament enacts laws which provide regulatory powers to the governmental Ministries and Ministers which enforce the laws.

Additionally, the Consumer Protection Commissioner, empowered by the CPL, enforces the CPL and its regulations. The Commissioner has the right to request that an infringer of the CPL submit a written undertaking to cease any breach or amend the breach of the CPL by publishing a statement. The Commissioner may further request that a court issue an injunction against a breach of the CPL. Additionally, the Commissioner may request that a court issue a mandatory injunction, which may include a corrective statement.

The main enforcers of advertising laws in Israel are the courts. The courts will often determine whether the relevant laws are being respected or breached while reviewing legal conflicts. Government bodies will often enforce advertising laws by taking action against infringers within the court system.

1.9 When does a competitor have a right of action? What are the potential remedies?

The laws relating to 'standing', the right to approach the courts, are very liberal in Israel. If a company or individual considers that it is being wronged by a competitor due to an advertisement, legal remedies via the courts are generally available to these parties.

For example, a competitor may sue an advertiser if it is alleged that an advertisement infringes the competitor's intellectual property rights or misleads the public in relation to the competitor's goods or services. If there is a finding in the competitor's favor, remedies will usually include injunctions and monetary relief.

Additionally, competitors and individuals may petition the High Court of Justice in Administrative law matters. High Court petitions usually involve companies that challenge the Second Authority's regulatory powers in relation to commercial/private television advertisements. For example, if a competitor feels that the Second Authority erroneously cleared an advertisement, it may petition the High Court of Justice and request that it order the Second Authority to act or refrain from acting in a certain manner.

1.10 When do consumers have a right of action? What are the potential remedies?

The right of action and remedies discussed in question 1.9 above are available to both consumers and competitors. Additionally, consumers, under certain circumstances, may form part of a class action.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Israel have a primary advertising self-regulation system?

Advertising, in its entirety, is not governed by a single self-regulatory body.

However, as mentioned above, there is a regulatory body connected to advertising on private/commercial television and radio. This body, the Second Authority, regulates commercial broadcasting in radio and television. The Second Authority is involved in monitoring program content and also advertisements broadcast on commercial television.

Commercial television and radio, in contrast to public television, is primarily financed by advertisements. Thus, the number of advertisements broadcast on both commercial television and radio is considerable and the Second Authority's role has a huge impact on viewers.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Due to its regulatory powers, the Second Authority set the Second Authority Ethics Rules (Ethics Rules) in 1994. These Rules are extensive and precisely set out what is prohibited and allowed in television and radio advertising.

The Ethics Rules' main principles state that it is prohibited to broadcast advertisements that harm human dignity, good taste or are offensive to the public. Moreover, advertisements may not be negligent, must be truthful and may not mislead the average viewer.

Additionally, advertisements may not be racist, encourage discrimination, infringe privacy rights, or contain violence, criminal activity or drug use.

In general, with few exceptions, the Ethics Rules prohibit product placement. The issue of product placement is discussed in question 7.1 and 7.2 below.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The Second Authority does not have a dispute resolution mechanism similar to the court system. It does, however, monitor broadcast advertisements and examines complaints lodged by the viewers (which may of course include competitors). When the Second Authority reveals an alleged breach of the relevant rules and regulations, it commences with an investigation in relation to the broadcaster. Thereafter the Violations Committee holds an internal deliberation, determining if a breach has been committed. If a breach of the relevant rules has been committed, the Second Authority has a number of sanctions and actions it may take, including forfeiture and deprivation of advertising space. The broadcaster can appeal the matter before the Second Authority's Director General and the Second Authority Counsel.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The effectiveness of the Second Authority's self-regulation system is a matter of debate in Israel.

On the one hand, advertisements on commercial television are regularly monitored and dealt with if they breach the relevant laws, regulations and codes.

On the other hand, the system is far from perfect. For example, it is clear that the Second Authority has not managed to effectively enforce the relevant rules relating to product placement on commercial television.

2.5 Are the self-regulatory system's decisions reported?

The Second Authority's decisions relating to advertising are reported on its official website. High profile cases, which draw public attention, are reported in the press and media.

If the matter/dispute reaches the Israeli courts, the judgment must be published, as all judgments (not just advertising-related), must be published in accordance with the law.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

When a company advertises its goods or services in comparison to goods or services offered by its competitors, the advertiser must be particularly mindful of advertising rules and regulations.

Unsurprisingly, such comparative advertising increases the risk of competitor complaints or legal action against an advertiser if the competitor feels it is being wronged by the relevant advertisement.

Advertisers should take care when making statements as to the quality, price and various attributes of their goods/services. Misleading consumers and making false statements, draws attention and action from competitors and dissatisfied consumers.

There are some areas which draw 'extra attention' and are challenged on regular basis. Health-related advertisements are regularly challenged, as are 'sexy', revealing advertisements displaying goods such as lingerie and bathing suits.

2.7 Are there any other self-regulatory systems that govern advertising practices in Israel?

Not applicable.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Israel (eg, consumer protection laws; IP laws; unfair competition laws)?

As mentioned above, the CPL and its associated Regulations govern advertising in Israel. The CPL plays a dominant role in consumer protection and advertising law (including claims made within advertisements). The overarching principle of the CPL is that claims made within advertising must be accurate and not misleading

Intellectual property laws, such as the Trademark Ordinance and the Commercial Tort Law may be useful in advertisement actions. This is due to advertisers infringing their competitors' trade mark and/or committing the tort of passing off.

Additionally, under certain circumstances, the unjust enrichment law can be influential in an advertising context. This law is designed to prevent defendants from gaining profit due to their wrongful acts, which can often provide a cause of action where the circumstances do not easily lend themselves to a straightforward intellectual property infringement claim.

3.2 Is substantiation required for advertising claims?

The CPL prohibits the misleading of consumers. Accordingly, advertisers should take note when making claims and statements.

In accordance with the CPL, if an advertisement contains facts relating to goods or services, or statements relating to test results and/or expected results due to the use of a product, the Consumer Protection Commissioner may demand substantiating evidence. If the Commissioner demands such evidence, and the evidence is not provided (or the evidence provided is not sufficient) it will be presumed that the advertisement was misleading.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Mere 'puffery' is common within Israeli advertisements and is usually accepted. However, advertisers must be careful to ensure that statements and claims do not exceed 'puffery' and amount to false and misleading statements. Advertisements containing puffery which border on false statements are likely to be challenged by competitors.

The courts and other relevant bodies will be less forgiving when examining 'puffery' targeted at minors, who naturally find it more difficult to distinguish between puffery and fact.

Although the CPL does not define 'puffery', the Second Authority Ethics Rules explicitly prohibits advertisements which contain 'exaggerations that exceed vague praises'. Therefore, it can be concluded that mere exaggerations that do not exceed vague praises are acceptable in this context.

3.4 What are the rules governing the use of disclosures in advertising?

According to the CPL, companies must disclose all defects and material traits which substantially decrease the value of the goods or services they advertise.

There are a few areas in advertising which require specific disclosures. Pharmaceutical advertisements must include statements as to the active ingredients of the advertised goods.

The Israeli legislature recently enacted a law that governs the use of fashion models in the advertising industry. The law, titled 'Weight Limitation in the Modeling Industry Act 2012', is also referred to as the 'Model Act' or the 'Photoshop Act'. In accordance with the Photoshop Act, if an advertiser alters the appearance of the model by digital means, the advertisement must contain a notice which clarifies that the model's body features were graphically altered.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

According to Second Authority Ethics Rules, the Second Authority's Director General may demand documents signed by a testifier, testifying that statements made in an advertisement are truthful. Under the CPL, the Consumer Protection Commissioner has similar powers.

3.6 What are the rules governing the use of product demonstrations in advertising?

In accordance with its general principles, the CPL dictates that all the major advertising laws and regulations prohibit misleading consumers. Thus, any demonstration must be conducted in an accurate manner.

The Second Authority Ethics Rules explicitly prohibit the use of technical means (such as photography 'tricks') to an extent which will confuse or mislead the average consumer.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertisements are permitted, provided they adhere to the relevant laws and regulations. As mentioned above, pursuant to the CPL, if an advertisement contains facts relating to goods or services, or statements relating to test results and/or expected results due to use of a product, the Consumer Protection Commissioner may demand substantiating evidence (section 7 of the CPL). Obviously, this section is particularly relevant to comparative advertising.

The Second Authority Ethics Rules allow comparative advertising, provided the compared products are similar and the bases of comparison are identical. The points of comparison must refer to facts which can be substantiated, and cannot be presented in a manner which creates an artificial advantage. It is prohibited to claim that a product is generally superior based on limited comparison.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Advertisers often use competitors' trade marks within advertisements. This is legitimate, provided that use of a trade mark is required for identifying the goods and is executed in a reasonable and fair manner. Additionally, use of another's trade mark may not mislead as to the identity of the trade mark owner.

According to the Israel Supreme Court ruling in *Ariel McDonald v McDonald's Ltd*, an advertiser may use the trade mark of a competitor in a comparative advertisement. However, an advertiser may not use a competitor's trade mark merely to diminish its competitor's reputation without comparison.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

The CPL generally prohibits misleading consumers. Obviously, this includes misleading consumers as to geographical origin. Moreover, Section 2(a)(8) of the CPL prohibits misleading consumers in relation to the 'place of production'. Thus, if an advertisement or a product misleadingly claims that a product is manufactured in a certain country, this would constitute a clear breach of the CPL.

3.10 Are there any special rules governing product packaging?

Generally, per the Consumer Protection Ordinance (the marking of goods)-1983, all packaging must, *inter alia*, include the name of the product, the trademark, country of manufacture and quantity/weight measurements. Additionally, there are countless rules and regulations relating to the technicalities of packaging various types of products. Different product types, such as food products, fashion, pharmaceuticals, have specific applicable laws. It should be mentioned, that alcoholic beverages and tobacco products must contain health warnings.

4 PRICE ADVERTISING

4.1 What are Israel's rules regarding price advertising?

The CPL generally prohibits misleading consumers. Without prejudice to the general concept of 'misleading' practices, section 2 of the CPL lists fundamental issues that form the core of fair trade. Section 2 specifically prohibits misleading consumers as to the price of the goods or services. It should be noted that section 2 relates both to marketing and advertising.

Section 17D of the CPL explicitly states that advertisers must not advertise the price of the goods or services, unless the advertised price is the overall price in local Israeli currency.

4.2 What are Israel's rules regarding advertising 'free' products?

Free goods and premiums are generally permissible, provided they adhere to the CPL's disclosure obligations and do not mislead or confuse consumers.

The Second Authority Ethics Rules prohibit offering 'free' gifts, unless they are completely free, excluding the postal fee. Goods or services offered in exchange for the purchase of additional goods and services must be clearly described as such and cannot be described as 'free gifts'.

4.3 What are Israel's rules regarding sales and special offers?

According to section 2 of the CPL, an advertiser may not mislead consumers as to 'sales' and 'special offers'. Pursuant to section 15 of the CPL, when a vendor offers goods in a 'special offer', it must clearly state what goods are included in the special offer and disclose the 'ordinary price' and the terms of the 'special offer'.

A vendor that publicly advertises the fact that it is holding a special offer must state the amount of goods in stock within the offer.

If there are specific circumstances or characteristics that apply to goods that are offered within a sale or special offer (such as low quality, short expiration period, etc), the special circumstances or characteristics must be disclosed.

4.4 What are Israel's rules regarding rebates?

There are no specific rebate rules and regulations. However, the general principle of the CPL prohibits the misleading of consumers. Accordingly, if an advertiser offers a rebate, but in reality refrains from doing so, the courts would have no difficulty in upholding the law against the advertiser.

The Second Authority Ethics Rules, which govern advertising on commercial television, specifically state that an advertisement that offers a free gift, conditional on the purchase of an additional product, must clearly state the condition. Obviously, this could apply to 'rebates'.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Not applicable.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Due to the nature of pharmaceuticals, their marketing and promotion is subject to stringent primary laws and regulations.

The laws and regulations relating to the sale and promotion of non-prescription medicines are lenient in comparison to the sale and promotion of prescription medicines. Though companies may advertise non-prescription medicines, they cannot be targeted at children, distributed within sweepstakes, distributed as free samples, or distributed within a promotion of non-medicinal products. Pursuant to the Ministry of Health's Procedure No 24, it is prohibited to advertise prescription medicines other than in certain exceptional circumstances.

The laws and regulations relating to the promotion, sale and advertising of tobacco and alcohol are stringent and detailed. Tobacco may not be advertised on radio or television, in the cinema or other public screenings, or in publications targeted at minors. Alcohol may not be advertised on billboards or publications targeted at minors.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Advertisers and promoters will often use draws and games to promote their goods and services. This should be done with caution in Israel. The Israel Penal Law 1977 carries criminal sanctions for unauthorized games and draws.

An unauthorized game is defined as a 'game in which one may win money, its equivalent or a benefit due to the results of a game, and the results are more dependent on luck than on understanding or capability'. Therefore, a promotional game which is more dependent on skill than on luck will be legal. There are no clearly defined 'skill thresholds'.

A draw is defined as 'any arrangement whereby the draw of fate or other means, one can win money, its equivalent or a benefit, and the winning is more dependent on fate than on understanding or capability'.

Advertisers and promoters should take care prior to launching games and draws, making sure they do not breach the relevant laws.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The law in Israel attempts to safeguard against advertisements which are not decent and are offensive to the viewing public. The courts and regulatory bodies have the task of maintaining a balance between freedom of speech and the protection of the viewing/consuming public.

According to the Israeli constitution (and as prescribed in the Basic Law: Human Dignity and Liberty) it is prohibited to violate the 'life, body or dignity of any person'. Thus, in extreme cases, viewers that consider advertisements offensive in the extreme may claim that their dignity has been violated.

The Second Authority Ethics Rules explicitly prohibit advertisements which violate 'human dignity, good taste or public feeling'.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

The Second Television and Radio Authority Rules (Broadcasting Sponsorship and Service Broadcasts) 1990 sets clear and very detailed rules relating to sponsorship. The sponsor and identifying data relating to the sponsor must be screened and announced on television and announced on radio. Identifying data includes the name of the sponsor and may include the screening of the sponsor's trade mark/logo. The sponsorship announcement may also mention the sponsor's products, but may not mention the product's qualities.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

According to the CPL, an advertisement which causes the average consumer not to recognize the fact that he or she is viewing (or hearing) an advertisement, will be considered a 'misleading' advertisement.

Generally, save in exceptional circumstances, the Second Authority Ethics Rules, which relate to commercial television, prohibit 'incidental', 'masked' and 'unconscious' advertisement. Section 9 of the Ethics Rules clearly states that advertisements may only be broadcast within an 'advertisement broadcast' as defined by the law. There are exceptions when broadcasting sports events or fund-raising charitable events.

Similarly, the Second Television and Radio Authority Rules (Advertisement Placement and Commercial Credit within Radio Broadcasting) 1999, which relate to commercial radio, prohibit the blurring of editorial content with advertising content.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

As stated above, generally, integrating advertisements with other content is prohibited. On television, advertisement intervals are clear and easily separated from the editorial content.

On radio, the boundary between editorial and advertising content is not as clear. Therefore, the relevant law makes it obligatory to announce radio broadcasted advertisements to distinguish such advertising from editorial content. The radio announcer must identify the commencement and end of broadcast advertisements.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There is no single 'Social Media Law'. The main legal controls on advertising and marketing via social media in Israel are those prescribed in the CPL and its associated regulations. These provide prohibitions, instructions and guidelines on the manner in which companies can market and advertise goods.

The CPL governs all methods of advertising and marketing, inclusive of advertising via social media. Other laws which are often relevant to advertising and marketing via social media include the Trademark Ordinance, the Commercial Torts Law, the Privacy Protection Law and the Prohibition of Defamation Law.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

As a general principle, an advertiser is responsible for content on its Facebook page, its website or any other site it controls.

If infringing user generated content is posted on an advertiser's site, the court will primarily examine the degree of control the advertiser has over the relevant digital channel. Additionally, the court will examine the manner in which the advertiser acted once it became aware of the alleged infringement.

Usually an immediate or prompt removal of content will suffice to negate the risk of damages/monetary relief.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

Not applicable.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

The Privacy Protection Law 1981 prohibits the infringement of an individual's privacy. Specifically, it prohibits the publication of embarrassing photos of an individual, using an individual's name, photo or voice for profit or publishing private information on an individual's private personal life. In some cases, such publications may also amount to defamation as prescribed in the Law Against Defamation 1965.

There is no single 'Rights of Publicity Law' in Israel (ie the right to profit from one's image/name/fame). However, in recognizing principles drawn from US statutes and case law, the Israeli courts have recognized that a person cannot unlawfully profit from unauthorized use of another person's image.

9.2 Are there situations when permission is not required?

According to obiter dictum made by the Israeli District Court (Jerusalem), in Civil Case No 6157/04, *David Dvash v Chomski & Vershevski*, it appears that permission to use an individual's image in advertising is not required after the death of that individual. Therefore, it is arguable that the 'right of publicity' ceases upon death and there is no need to seek permission from the deceased's estate for such use of the deceased's image.

Additionally, the civil law defenses, such estoppel, undue delay and the Statute of Limitations may negate the need for permission in this respect.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Pursuant to the Second Authority Ethics Rules, as a general rule, it is prohibited to broadcast advertisements in which the actors are dressed in formal uniforms used by governmental bodies (such as the police and armed forces).

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

An actor may wear another company's branded goods when appearing in advertisements. However, the 'other company's' goods may not be the primary subject-matter or focus of the advertisement. As such, rules prohibiting misleading of consumers and 'incidental' advertisements (discussed in question 7.1 above) apply.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Israel which affect advertising (eg, Swedish gender equality law)?

Minority groups are protected by the 'Basic Law: Human Dignity and Liberty' and general prohibition clauses relating to 'good taste, dignity and public feeling'. Moreover, television and radio-related Acts/Regulations contain provisions which unequivocally outlaw advertisements which harm minority groups or any group of people.

Advertisements which negatively stereotype (including on gender grounds) or are offensive are also prohibited by laws and regulations mentioned in the preceding paragraph. However, unsurprisingly, the courts have a difficult task in determining which advertisements stereotype or are offensive to a degree that justifies judicial intervention.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

It should be noted that television advertisements containing religious messages are prohibited by the Second Authority Ethics Rules.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Israel?

It is safe to assume that in the future, advertisements via social media will increasingly be subject to review/challenge before the courts. While there is currently no specific law relating to social media, consumer protection laws certainly apply to these media channels. In light of this, companies should refrain from any prohibited acts referenced above, irrespective of the platform in which the advertisement is conveyed.

ITALLY

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Italy?

The Consumer Code (Legislative Decree No 206 of 2005) and Legislative Decree No 145 of 2007 lay down general provisions on unfair commercial practices, misleading advertising and comparative advertising, in connection with business-to-consumer relations (the Consumer Code) and business-to-business relations.

Further, commercial communications are also regulated by provisions specific to certain products or services, relating to certain media or applying to a particular target audience; therefore, such provisions are scattered across a multitude of statutes, regulations and industry rules. Ethical codes or voluntary guidelines will also come into play.

A self-regulation system is in place, administered by the Institute for Self-Regulation in Advertising (IAP).

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

‘Advertising’ is defined by EU Directives as

‘any message diffused—in any form and any way—in the course of a trade, business, craft or profession with the aim of promoting the transfer of immovable property or real estate, the supply of goods or services and the constitution or transfer of rights and obligations relating to them’.

The Self-Regulation Code (SR Code) states that:

‘the term ‘marketing communication’ shall refer to advertising and all other forms of communication including corporate and institutional messages whose aim is to promote the sale of goods or services regardless of the modalities used, as well as forms of communication regulated by Title VI’.

1.3 What is the basic regulatory framework for advertising regulation?

Primary sources of law which should be considered by advertisers are:

- (a) the Italian Civil Code (unfair competition);
- (b) the Consumer Code (unfair commercial practices);
- (c) Legislative Decree No 145 of 2007 (misleading and incorrect comparative advertising);
- (d) the Audio-Visual Media Service Code (governing radio, TV and audio-visual media services); and
- (e) the SR Code, administered by IAP, the Italian SRO.

Sector, product or service and media-specific provisions may provide additional restrictions or set special requirements for advertising.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The general principles and criteria governing commercial communication usually apply, irrespective of the media used for diffusing the advertising messages.

There are provisions in place to regulate advertising on radio, TV or audio-visual media services, but they mostly refer to the general principles related to such means of communication. In some cases, such provisions set bans or restrictions for specific products and services or outline rules relating to specific audiences (eg, references to violent, sexually explicit or improper content in content targeted at vulnerable audiences, such as children and minors).

Local supervisory authorities (such as the Italian Data Protection Authority) may issue specific guidelines, which advertisers must take into account for their commercial communications. Such guidelines refer to monitoring and profiling practices, to online behavioral advertising, geo-location targeting, advertising on social media, and use of cookies and apps.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Several restrictive provisions are sector specific (eg, for tobacco manufacturers) or product specific (eg, for alcoholic drinks or pharmaceuticals). Other provisions make reference to the target audience (eg, children or minors).

Some examples include, but are not limited to:

- (a) **Alcohol:** Commercial communications for alcoholic products are subject to a range of restrictions.
 - (i) Aside from compliance with provisions governing the promotion and the selling of food and beverages, and with the regulations on labeling and advertising of food products, additional prescriptions—set in the Consumer code for potentially harmful products—must be fulfilled.
 - (ii) Law No 125 of 2001 addresses the advertising of alcoholic beverages and provides for specific restrictions (also in connection with the advertising of super-alcoholic beverages).
 - (iii) The Audio-Visual Media Service Code contains further restrictions for such commercial communications, especially when targeted towards minors.
 - (iv) Article 22 of the SR Code also states that advertising of alcoholic drinks shall not be targeted, directly or indirectly, to minors and calls for compliance with principles and criteria identical to those mentioned above.
- (b) **Tobacco:** There is a strict ban with regards to the advertising of tobacco products. This was introduced by Law No 165 of 1962 and was confirmed in Law No 52 of 1983. Legislative Decree No 300 of 2003, which implemented the EU Directive 2003/33, provides only one exception for the advertising of tobacco products in publications intended exclusively for professionals in the tobacco trade. Further bans are provided for by the Audio-Visual Media Service Code (eg, in connection with sponsorship and teleshopping).
- (c) **Medicines:** Stringent provisions contained in Legislative Decree No 219 of 2006 govern advertising of pharmaceuticals, covering both prescription-only (POMs) and over-the-counter products (OTCs). They consider ‘advertising’ as ‘any informative action, aimed at reaching out to prospective clients and with the purpose of promoting the prescription, supply, sale or consumption of pharmaceuticals’. The definition includes:
 - (i) the soliciting of agents to health care professionals,
 - (ii) the supply of free samples,
 - (iii) offers of benefits of any kind resulting in favor towards the prescription, and

- (iv) the sponsoring of meetings, events or scientific conferences attended by health care professionals.

A total advertising ban applies to pharmaceuticals not authorized for commercial distribution. POMs may not be advertised to the general public, who can be addressed only with advertising for products that are conceived and manufactured for use without the intervention of a physician for diagnosis, prescription and surveillance during their consumption. The ban also covers all medical devices to be sold only on medical prescription (or to be used only with the assistance/supervision of a doctor or a health professional), pursuant to Legislative Decree No 46 of 1997. Advertising for a pharmaceutical, when allowed, must comply with certain requirements. Limitations also apply to the advertising of OTCs.

- (d) **Food and drinks:** Specific prescriptions on labeling and information requirements apply (with regards to the characteristics, components and storage requirements of the product).
- (e) **Automotives:** Presidential Decree No 84 of 2003 requires all promotional material to comply with the prescriptions contained in a standard form as well as to give indications on fuel consumption and CO2 emissions for all car models advertised. All advertising performed at the point of sale must fulfill specific requirements. Car dealers must provide a clear label regarding fuel consumption and CO2 emissions in respect of each vehicle offered for sale or lease (such labels must also to be presented in a standard format, prescribing the use of a particular text font).
- (f) **Gambling:** Games of chance are state run and may be operated only after having obtained a license. Only duly licensed operators are allowed to advertise games of chances (advertisement by not-licensed operators is punished pursuant to criminal law) in accordance with the restrictions provided for by the Customs Agency (*Agenzia delle Dogane e dei Monopoli*). Recently, local lawmakers have been confronted with increasing concerns about the booming popularity of gaming (especially online gaming) and about the harmful impact on vulnerable persons, such as elderly people and minors, and have responded as follows:
 - (i) Law No 189 of 2012 addresses such concerns and allows advertising—irrespective of the media used—only under the condition that it:
 - (1) does not excessively incentivize gaming,
 - (2) does not feature minors,
 - (3) contains specific alerts about the risks of addictiveness and
 - (4) offers clear and easily accessible indications on winning chances.
 Additional restrictions apply (again for all media) to advertising capable of reaching an audience of minors. Infringement is sanctioned with fines (from 100,000 euro up to 500,000 euro) which can be served on both the advertiser as well as the media company. Corrective advertising will also be awarded.
 - (ii) Law No 208 of 2015 has further tightened restrictions by providing that advertising of games of chance are banned completely in generalist TV and radio broadcasts from 7 am to 10 pm.
 - (iii) Finally, Legislative Decree No 87 of 2018 prohibits all forms of advertising, even indirect, concerning games of chance and gambling; a transitional period of one year applies before such ban enters into force, during which time operators are allowed to carry out advertisement provided for by contracts already executed at the date the Decree entered into force.

- (g) **Toys:** The SR Code sets specific criteria for marketing games, toys and educational products for children. The Ethics Code, adopted on 29 November 2002 by Italian TV and broadcasting companies, provides guidelines for advertising toys.
- (h) **Consumer credit:** Pursuant to Legislative Decree No 385 of 1993, any advertising containing the interest rate or any other value relating to the cost of credit (ie, the financial offer) shall contain some minimum elements to be clearly displayed, such as:
 - (i) the interest rate—ie, the TAN—whether fixed or variable;
 - (ii) the total amount of the credit and the expenses included therein;
 - (iii) the TAEG value;
 - (iv) the total amount due by the consumer and
 - (v) the amount of each payment.

1.6 Are any government pre-approvals required?

The local legal framework does not require any government pre-approvals.

1.7 Does the media pre-clear advertising?

The local legal framework provides no obligation to seek pre-clearance. All major media companies usually perform some advance clearance in-house in order to avoid legal issues and fines, both for their clients and themselves.

On request of an advertiser or of an agency, the local SRO offers copy clearance with respect to planned campaigns or commercials. Such advance evaluation precludes action from the IAP's Review Board, but not also petitions filed with the Jury by a competitor or intervention from other authorities (eg, the Competition Authority, AGCM) or a claim filed with a court.

Compliance with the provisions of the SR Code does not prevent media companies from applying stricter standards.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Responsibility for supervision and enforcement is assigned to a number of different authorities:

- (a) ordinary civil courts: which deal with these issues in the context of claims (stemming from competitors) dealing with matters relating to unfair competition;
- (b) the Competition Authority (AGCM): this is in charge of controlling misleading and unfair comparative advertising;
- (c) the Communication Authority (AGCOM): this controls radio, TV and audiovisual media services advertising; and
- (d) an efficient self-regulation system is in place, administered by the IAP—a private organization—which the entire advertising industry, inclusive all major media companies, adheres to. The system is based on the provisions of the SR Code, enforced through standard clauses contained in all contract forms used by the advertising industry.

The local legal framework provides for 'parallel competence', meaning that filing a complaint with the SRO does not preclude access to regulatory authorities or to a civil court.

1.9 When does a competitor have a right of action? What are the potential remedies?

(a) Statute

Pursuant to Article 2598 of the Italian Civil Code, competitors alleging to have been damaged by misleading or illicitly comparative advertising may bring an action for unfair competition before the Ordinary Court. Other civil actions are available under the provisions of the Intellectual Property Code.

(b) Regulatory authority

Pursuant to Italian law, any competitor is entitled to bring misleading advertising before the Competition Authority (AGCM) to rule on the complaint. AGCM may also institute the proceedings *ex officio* and it also has the power to obtain relevant information, to conduct investigations and to negotiate commitments with advertisers.

AGCM may order:

- (i) the withdrawal of misleading advertising or
- (ii) prohibit misleading advertising whose publication is imminent (in case of urgency, AGCM may order an interim suspension of the unlawful advertising).

In addition, AGCM may order

- (iii) the publication of the decision to withdraw the misleading advertising or
- (iv) the publication of a notice of amendment.

When the unfair or misleading commercial practice has been or shall be broadcast, AGCM shall consult the Communication Authority (AGCOM) before taking any action against the advertiser.

Infringement of the general prohibition of misleading, surreptitious and illicitly comparative advertising is sanctioned by AGCM with a fine from EUR5,000.00 up to EUR5,000,000.00 (minimum fine is EUR50,000.00 if advertising encourages behaviour prejudicial to health or safety or it is likely to be viewed by minors).

In case of an interim suspension of the unfair practice, should the advertiser fail to fulfil the order of AGCM, the latter may issue a further penalty ranging from EUR2,000.00 up to EUR20,000.00.

(c) Self-regulatory proceedings

A competitor can file a petition with the IAP's dispute resolution body (Jury). Petitioners are to submit their requests through a written memorandum, containing a description of the questioned commercial communication as well as the grounds of the challenge.

Upon a finding of non-compliance with the SR Code's provisions, the Jury will:

- (i) order an advertiser to halt the infringing campaign within a given deadline (seven or five working days); or
- (ii) publish its decision with the IAP's Secretariat.

All media used for broadcasting the infringing commercial communication and adhering to the SR Code are to comply with the decisions issued by the Jury.

Temporary desist orders can be issued by the IAP's Review Board (a separate body to the Jury) at any time, when a questioned commercial communication appears to be patently in violation of the SR Code's rules.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers (or their associations) have a right of action for misleading advertising as well as unfair commercial practices.

They may benefit from remedies identical to those available to competitors, except for court action relating to unfair competition.

The self-regulatory system may be accessed by ‘anyone who believes he or she has suffered prejudice from marketing communication activities contrary to the Code’.

In addition, ‘individual consumers and consumer rights associations may submit complaints free of charge to the Review Board regarding marketing communication allegedly breaching the rules of the Code that safeguard the general interests of the public’.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Italy have a primary advertising self-regulation system?

Italy has had an efficient self-regulatory system in place since 1966. It is administered by IAP, a private industry organization, which also governs public TV. The system works for the entire sector of commercial communications and members are advertisers (through their associations), professionals performing services in-house (agencies, technicians, providers, practitioners, generally through their associations), and all of the media (press, TV, radio, directly as well as through their associations).

The self-regulatory system can be activated:

- (a) ex officio by the Review Board or the IAP’s Secretariat;
- (b) by a consumer (individually as well as through a consumer protection association) by way of a petition submitted to the Review Board, which, after a preliminary investigation, may:
 - (i) ask for amendments to be made of the advertising and issue a desist order (in cases of patent violations of the SR Code) or
 - (ii) decide to approach the Jury and to proceed with a formal proceeding; or
- (c) by a complaint directly filed with the Jury (the IAP’s dispute resolution body), where stakeholders feel that their interests have suffered prejudice by the campaign in question—in violation of the SR Code—by a subject bound (through personal membership, adherence to an association member of the IAP, or by acceptance of the standard clause) to comply with the SR Code’s provisions.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The system is based on the provisions of a specific code—recently rebranded as ‘Codice di Autodisciplina della Comunicazione Commerciale’ (the SR Code), which applies through contractual agreements obliging all members of the IAP to include a compliance clause in their standard contracts.

The SR Code contains:

- (a) rules of behavior;
- (b) special rules governing sales systems as well as certain product categories;
- (c) a complaint system (procedure, organs and sanctions);
- (d) protection of advertising ideas/creative concepts; and

- (e) specific guidelines for social advertising (which includes fund-raising for social, humanitarian and health-care initiatives).

The rules of behavior as well as the special provisions focusing on certain sales systems reflect the general principles laid down in the ICC Consolidated Code of Advertising and Marketing.

Special sales systems relate to: distance selling, unsolicited supply of goods, special sales, and prize promotions.

Product/service specific provisions include: alcoholic beverages, cosmetics and personal hygiene products, food supplements and health foods, physical and aesthetic treatments, medicines and curative treatments, educational courses, financial and real estate transactions, travel packages, games, toys and educational products for children as well as gaming and gambling.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The Jury is not entitled to impose fines for advertising that infringes the SR Code. At the end of the conclusive hearing, the Jury submits its decision, announcing its findings and judgment to the parties involved in the dispute.

In the case of non-compliance with the SR Code’s provisions, the Jury will:

- (a) order the offending party to cease the infringing campaign within a given deadline (usually seven working days, five in certain cases); and
- (b) publish its decision as soon as possible with the IAP’s Secretariat (responsible for providing a copy to the parties involved and to any other interested organization).

The decisions of the Jury are final and there is no right of appeal.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Notwithstanding the fact that the IAP is not entitled to impose fines or to award damages, compliance with the Jury’s decisions is widely supported by the fact that all the relevant stakeholders in the advertising sector are active members within the system. Compliance is certainly driven by the fact that the decisions of the Jury and the freezing injunctions of the Review Board have an obvious impact on the offender’s professional image and business reputation. Moreover, although the SR Code is binding on a voluntary basis, according to case law at Supreme Court of Cassation, breach of the SR Code (also by companies which did not adhere to it) may be deemed to be unfair competition (prevented by Article 2598 of Italian Civil Code), as a behaviour which does not meet market standards of professional ethics.

In 2017, the Review Board handled 949 cases, blocking 58 campaigns. Notably, 711 cases were resolved in a short amount of time on an amicable basis. During the same period, the Jury has issued 37 decisions.

Proceedings are generally resolved:

- (a) by the Review Board, when a cease injunction is issued, in 1 to 10 days in 83% of the cases; or
- (b) by the Jury within a time frame of 8–12 business days.

2.5 Are the self-regulatory system’s decisions reported?

An excerpt of the decision is posted on the IAP website and the whole decision is stored in a database. The effects of such disclosure are similar to those of corrective advertising, but the parties involved in the dispute are not allowed to use the Jury’s decision for marketing purposes.

All media used for broadcasting the infringing advertising are held to comply with the decisions (and to stop further broadcasting of the offending campaign).

In case of non-compliance with a decision, a desist order is reiterated and the notice of such behavior is published by the IAP in the media channels deemed appropriate.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

According to recent statistics released by the IAP, the interventions of the Review Board primarily refer to the following business sectors:

- (a) health-care (65.4%);
- (b) food and beverages (9.7%);
- (c) other (transportation, gaming, apparel, telecommunication services) 24.9%

The Jury’s decisions refer to:

- (d) telecommunication services (36.4%),
- (e) health-care (27.3%) and
- (f) other sectors (21.2%).

2.7 Are there any other self-regulatory systems that govern advertising practices in Italy?

There are no other self-regulatory systems in place equal to that administered by the IAP.

The Audio-Visual Media Service Code urges providers to stipulate codes of conduct that regulate access to improper content when present in programs for children or minors. Such codes should address food and beverages, especially if they are high in salt, fat, sugar or sodium.

On 29 November 2002, Italian TV and broadcasting companies adopted—in co-operation with the Department of Telecommunication—a Code of Ethics set out to grant minors physical and moral integrity (reserving special attention to audiences aged between 0 and 14 years). The code establishes a set of requirements and limitations for all commercial communications broadcast on air during a ‘protected period’ (ie, from 4pm to 7pm).

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Italy (eg, consumer protection laws; IP laws; unfair competition laws)?

The local set of basic laws that govern commercial communication are:

- (a) the Italian Civil Code (Section on Unfair Competition);
- (b) the Consumer Code (Legislative Decree No 206 of 2005);
- (c) Legislative Decree No 145 of 2007 for the prevention of misleading and incorrect comparative advertising;

- (d) the Audio-Visual Media Service Code (Legislative Decree No 177 of 2005), governing radio, TV and audio-visual services; and
- (e) the SR Code, administered by IAP, the Italian SRO.

Furthermore, a broad range of sector, product, service and media specific provisions set additional bans or restrictions, eg:

- (a) Legislative Decree No 219 of 2006 (medicines);
- (b) Legislative Decree No 46 of 1997 (medical devices);
- (c) Legislative Decree No 231 of 2017 (food);
- (d) Legislative Decree No 300 of 2004 (the sponsoring of tobacco products);
- (e) Law No 125 of 2001 (alcoholic beverages);
- (f) Law No 189 of 2012, Law No 208 of 2015 and Legislative Decree No 87 of 2018 (gaming activities).

3.2 Is substantiation required for advertising claims?

The SR Code stipulates that messages and content used for commercial communication ‘must be capable of substantiation to prove the truthfulness of the data, descriptions, statements, illustrations used’.

An identical principle applies to quotations and references to scientific and technical tests.

The SR Code also contains special provisions on claims relating to warranties.

Statute law does not set a specific substantiation requirement, but the latter will come into play for the following reasons:

- (a) According to the Italian Civil Code, whoever initiates a court action in order to assert a right, has to prove the facts upon which such right is based. Whoever contests such action, or claims that the claimant’s right no longer exists, must prove the facts underlying the defense arguments. Any agreement intending to reverse or modify the burden of proof is void.
- (b) The Consumer Code considers as unfair commercial practice any advertising claim containing untruthful information or presentations capable, even if factually correct, of deceiving an average consumer. The same effect will occur with respect to misleading omissions.

Therefore, an advertiser, whose campaign is questioned before the Commissioner for Market and Fair Competition, will need to prove both the correctness of all claims made and respond with documentary evidence providing specific substantiation.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

The SR Code bans all marketing communications containing misleading statements, representations or omissions. However, claims that are ‘patently hyperbolic’ are exempt from this ban (eg, ‘drink/use product X and you will look 25 years younger’). The obvious assumption is that in such cases excessively exaggerated statements will not induce consumers into error.

There is no identical provision in statute, but the argument is still valid, as misleading conduct is not proven easily.

Advertisers need to consider that such exemption does not cover all superiority claims. Such statements require great attention as they may easily result in misleading or incorrect comparative advertising.

3.4 What are the rules governing the use of disclosures in advertising?

In accordance with EU Directive 114/2006, implementing Legislative Decree No 145 of 2007 defines as 'misleading advertising' any commercial communication 'which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behavior'.

The wording of all claims made by advertisers will, therefore, have to comply with the above principle and must be clear, easy to understand and transparent with respect to elements such as:

- (a) the characteristics of goods or services;
- (b) their actual availability;
- (c) their nature, execution, and composition;
- (d) their method and date of manufacture or provision;
- (e) their fitness for purpose;
- (f) their specification;
- (g) their geographical or commercial origin;
- (h) the results that are to be reasonably expected from their use;
- (i) the price (and the manner of its calculation); and
- (j) the conditions on which the goods are supplied or the services provided.

Small print in traditional advertisements or alerts presented with excessive speed in commercials must consider the 'transparency principle'. Failure may easily transform them into an unfair and misleading commercial practice.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

The SR Code requires testimonials to be 'authentic, responsible and verifiable'.

Testimonial statements must avoid being misleading as to the product's or service's characteristics and effects. Attention has to be paid to the person who is giving the testimonial: there is a specific ban on health professionals advertising pharmaceuticals, but on several occasions the Jury of the SRO has also considered the endorsement of cosmetic products given by such professionals (especially when conveying the impression of therapeutic effects deriving from the use of such products) as a misleading and questionable practice.

Local regulation allows consumers to be quoted as a part of a testimonial, but requires testimonials to be authentic, responsible and verifiable. Therefore, advertisers should be prepared to give proper evidence on who was actually interviewed, how and when interviews took place and what interviewees actually said.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific provisions to regulate product demonstrations. Clearly, the general bans and restrictions will apply. In addition, statements made and presentations performed will need to:

- (a) avoid being misleading; and
- (b) be backed by adequate substantiation on request of a regulatory authority.

Excessive purchase pressure on consumers (eg, by conveying the impression that a certain product will be available—or be on sale at particularly advantageous conditions—only for a very short time period), will be considered as an unfair commercial practice.

Product demonstrations, performed in the context of TV programs offering products for sale, must restrain from overly aggressive practices, especially when likely to be viewed by minors.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Italy has implemented EU Directive No 55 of 1997. As a result, comparative advertising was entrenched under the general principles and criteria set by the Directive. The wording of the local implementing provisions did not significantly differ from that used in the Directive.

Comparative advertising is now regulated in the Consumer Code with respect to business-to consumer relations and must, therefore, avoid any misleading or unfair commercial practice.

For business-to-business relations, Legislative Decree No 145 of 2007 requires that comparative advertising must:

- (a) not be misleading;
- (b) compare goods or services meeting the same needs or be intended for the same purpose;
- (c) objectively compare material;
- (d) have verifiable and representative features (including price);
- (e) avoid confusion with products or services of a competitor; and
- (f) avoid discrediting or denigrating their trade marks, and infringing trade names or other distinguishing signs of a competitor.

Companies engaging in comparative advertising must also consider the Civil Code's provisions on acts of unfair competition.

According to Article 15 of the SR Code, 'Comparative advertising is permitted when it helps to explain the technical or financial features and benefits of promoted products and services, objectively comparing the relevant basic, technically verifiable and representative features of competitive goods and services that meet the same needs or are intended for the same purpose. Comparisons should be fair and not be misleading, nor generate the risk of confusion, or discredit or denigrate others. Comparisons should not draw unfair advantage from the notoriety of others'.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Competitors' trademarks may be included in comparative advertising, provided that such use is performed in a fair way and without denigration (this is necessary to meet also all the other requirements set for comparative advertising).

Among the specific criteria to be met, Legislative Decree No 145 of 2007 requires that comparative advertising:

- (a) does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name and

- (b) does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products.

The SR Code demands (in Article 13/2) that ‘any exploitation of the name, trade mark, notoriety and corporate image of other marketers should be avoided, if it is intended to generate an undue advantage’.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

The SR Code (Article 2) requires claims to avoid any statement that could mislead consumers on the geographic origin of products.

Moreover, the Consumer Code (Article 21) considers as misleading all commercial practices containing false information on the geographic origin of the products which are capable of causing consumers error.

Furthermore, other rules on the import, sale and counterfeiting of goods bearing the ‘made in’ indication exist, for instance:

- (a) Regulation No 952/2013, laying down the Union Customs Code;
- (b) Law No 55 of 2010 providing special rules concerning the ‘Made in Italy’ indication for certain industries such as textile, leather and footwear; and
- (c) Article 29 of Legislative Decree No 30 of 2005 (laying down the Industrial Property Code) that provides protection for geographical indications and designations of origin against any unduly use which is able to mislead the public.

3.10 Are there any special rules governing product packaging?

Product packaging is subject to general advertising-law principles, including

- (a) Article 2 of the SR Code, which provides that claims must avoid any statement or representation that is able to mislead consumers and
- (b) Article 21 of the Consumer Code that considers as misleading all commercial practices containing false information capable of causing consumers error.

In addition:

- (c) Article 6 of Consumer Code lists certain minimum information that must be indicated on the packaging of products that are addressed to consumers and are marketed in Italy (such as the legal name or the classified name of the product and the name, business name or trade name and the registered office of the producer or that of an importer established in the European Union); and
- (d) the provisions laid down in the Consumer Code must be viewed together with regulations providing for more specific rules in particular sectors, such as Regulation No 1924 of 2006 on nutrition and health claims made on foods or Regulation No 1223 of 2009 on cosmetic products.

Furthermore, regulations governing other aspects of product packaging exist (eg, Legislative Decree No 152 of 2006 providing for environmental regulations).

4 PRICE ADVERTISING

4.1 What are Italy's rules regarding price advertising?

Statements about prices (or about their method of calculation) are one of the elements subject to special attention when the SRO, regulatory authorities or courts scrutinize advertising claims as to their misleading potential.

Legislative Decree No 114 of 1998 sets out that all products offered at the point of sale must show the actual price charged to consumers in a clear and easily readable way.

For purposes of adequate consumer information, the Consumer Code requires all advertising to report the price per unit, if different from the prices of the product put on sale (Article 20).

The SR Code specifies price indications to be among the elements to be taken into account for evaluating promotional messages as to their misleading effects (Article 2).

4.2 What are Italy's rules regarding advertising 'free' products?

As explained more in detail in question 4.4 below, products awarded for free, in addition to those purchased by consumers (or additional quantities of such product, eg, typically 'Buy three for the price of two') are not subject to limitations. Should different products be offered, the special regulation on sales promotions (Presidential Decree No 430 of 2001) may become relevant.

All promotional messages for 'free' products will need to be considered in light of the requirements set in the Consumer Code with respect to misleading information or omissions.

4.3 What are Italy's rules regarding sales and special offers?

'Special sales' (ie end-of-season and below cost sales) are subject to the provisions laid down in Legislative Decree No 114 of 1998 (Article 15).

They may only be performed during specific periods (end of season) or in special circumstances (eg, business discontinuance or transfer or restructuring of point of sale). Clear and exact indications are required as to normal sales prices as well as to the discounts/rebates applied. Local administrations (such as the regions and the municipalities) have additional competence as to advertising, consumer information and duration of special sales.

Presidential Decree No 218 of 2001 governs below cost sales, sets special administrative requirements and limitations as to their duration (maximum ten days), number (maximum three times per annum) and products put on sale (not the entire stock of goods offered), imposes correct consumer information and transparent advertising, and also prevents businesses that have achieved a dominant position in a certain market from performing such sales.

Article 20 of the SR Code holds that 'marketing communication relating to special sales of any kind, in particular promotional sales, should clearly specify the additional benefit deriving from the purchase, as well as the duration of the offer. The duration of the offer does not need to appear on the packaging'.

4.4 What are Italy's rules regarding rebates?

Rebates or discounts on sales prices may be freely awarded to consumers as long as they are applied on a specific product contextual to the moment of its purchase. They may also result in an additional, free quantity of the purchased product. Should discounts concern a product different from that

purchased, they have to avoid any instrumental promotional intent with respect to the different product in order to remain exempt from the provisions governing sales promotions.

Advertising for rebates or discounts will need to consider the Consumer Code's provisions on exact and correct information about a product's price and its calculation; demonstrating such consideration is a key element for assessing whether unfair commercial practices—through misleading information—are in play.

When such advertising originates (and rebates are announced) directly from the manufacturing company, it must be borne in mind that producers cannot impose sales prices on retailers (Law No 287 of 1990 granting fair competition in the market).

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

In 2012, AGCM issued a memorandum dedicated to commercial communication promoting cosmetic products. The memorandum sets guidelines for evaluating both the effectiveness of claims made as well as the methods and results of clinical and scientific tests performed on such products.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Strict advertising bans are in place for specific products or services. Such bans refer to certain medicines and medical devices as well as to tobacco products, irrespective of the media used. Additional (sometimes media-specific) advertising restrictions apply when the promotional messages are targeted (or likely to reach out) to an audience of minors (eg alcoholic beverages, certain food products and gaming services). A ban for any form of advertising of games of chance and gambling has been introduced recently; a transitional period of one year will apply before such ban enters into force, during which time operators are allowed to carry out advertisement provided for by contracts already executed at the date Legislative Decree No 87 of 2018 entered into force.

While sales and purchases of weapons and ammunition are heavily restricted and regulated, there is no specific provision governing the promotion (and advertising) of such products. The general principles on dangerous products and safety will, therefore, come into play.

According to the SR Code, 'marketing communication involving products that may potentially endanger health, safety or the environment, especially when such dangers are not immediately recognizable, should indicate such dangers clearly. In any case, marketing communication should not contain descriptions or representations that may lead consumers to be less cautious than usual or less watchful and responsible towards their own health and safety, and that of others'.

Article 6 of Legislative Decree No 145 of 2007 considers as misleading any advertising for products potentially harmful to the targeted public's health or safety, when omitting to provide adequate notice on such critical aspects and, therefore, capable of inducing users to not adopt proper caution and attention.

The Italian branches of all major online platforms or service providers will obviously apply locally the policies and limitations they have established in their domestic terms of service. Usually, they will not allow their users to promote or advertise firearms and ammunitions. These restrictions generally cover also the sponsoring of (and sometimes even generic reference to) such products.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

According to the Consumer Code, commercial practices resulting in repeated and unsolicited purchase invitations, directed to consumers via phone, fax, e-mail or any other distance communication, will be considered as ‘aggressive in any case’ (Article 26/1/c). Advertisers will need to take into account that, according to the privacy regulations, for promotional messages the aforementioned methods are strictly ‘opt-in’, and thus require prior notice and consent.

Presidential Decree No 178 of 2010 set up a public register (the Public Objections Register) introducing the opt-out mechanism. Accordingly, any person or entity which does not want to receive any more marketing communications on its phone may register its contact details, free of charge; otherwise, the general principle ‘silence means assent’ applies.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Aside from promotional messages that may result in a criminal offence (ie, that are capable of receiving attention from a public prosecutor), the SR Code provides (in Article 9) that a ‘marketing communication should not contain statements, audio or visual treatments depicting physical or moral violence or, that may be considered indecent, vulgar or repugnant to prevailing standards’.

The Audio-Visual Media Service Code sets—as a general principle—that commercial communication must avoid determining prejudice to human dignity.

The 2002 Code of Ethics requires that minors appearing in programs must not be confronted with vulgar topics or situations. In addition, all companies adhering to the Code of Ethics are called to monitor in advance advertising, trailers or promos for content that could potentially be harmful to minors.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

According to the Audio-Visual Media Service Code, sponsored audio-visual media services or TV programs must report the sponsor’s name or logo (both at the beginning as well as at the end of the program). Sponsoring is subject to all bans, restrictions and limitations that apply to advertising. TV sponsorship is regulated in detail under a relevant regulation.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

In the local legal framework, for print materials the topic is governed by a general principle set out both by statute and the SR Code. This principle imposes an obligation on all advertising to comply with a transparency requirement. As for TV programs: (i) the provisions on product placement contained in Article 40-bis of the Audio-Visual Media Service Code apply and (ii) some TV broadcasters have adopted *ad hoc* self-regulatory guidelines specifically concerning branded content, shared also with the Communication Authority.

Legislative Decree No 145 of 2007 holds that:

- (a) all advertising must be immediately identifiable as such; and

- (b) press advertisements are to be distinguished from other editorial content through easily perceivable graphic means.

Article 7 of the SR Code states that ‘Marketing communication must be clearly distinguishable as such. When a medium presents news and other editorial matter to the public together with marketing communication, it should be ensured that the marketing communication is readily distinguishable as such’.

Such a general transparency requirement, governing all advertising, irrespective of the form and broadcast means needs to be duly considered any time promotional messages are integrated with entertainment or editorial content. Non-compliance exposes advertising to be considered as an unfair commercial practice.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Both statute as well as the SR Code set a general principle, according to which advertising has to be ‘clearly and immediately recognizable as such’. In addition, the SR Code requires that ‘when a medium presents news and other editorial matter to the public simultaneously with marketing communication, it should be ensured that the marketing communication is readily distinguishable as such’.

In Italy, companies frequently sponsor TV programs. The Audio-Visual Media Service Code requires such programs to immediately highlight the show as ‘sponsored’ and to offer specific indication about the sponsor (or its logo) at the program’s beginning and end.

The Audio-Visual Media Service Code also requires that where a TV program containing product placement has been produced or commissioned by the provider/an affiliated company, such program shall be identified as containing product placement by an announcement at the start and end of the program and after advertising breaks.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

In Italy there is no specific law or regulation designed to regulate advertising via social media as such. Accordingly, these activities are subject to general rules applying to consumer protection and commercial communication, as well as those provisions that may come into play with respect to online platforms.

The SR Code sets forth two key provisions:

- (a) Article 4 provides that testimonials and other forms of endorsement of a product, having a promotional nature, should be recognizable as such.
- (b) Article 7 generally requires that marketing communication is clearly recognizable as such, including when is carried out through means or forms of communication where other types of content are circulated.

In addition, in 2016 the SRO adopted the so-called ‘Digital Chart’. This document specifically addresses the key legal aspects raised by the use of online media for marketing and advertising purposes. The objective of the Digital Chart is to conduct a survey of the most commonly-used forms of marketing communication online and in the digital context in general. The Chart is divided into several chapters, focusing respectively on: endorsement; native advertising; social networks and content; sharing in-app; advertising; advergames.

Within the section on endorsement, the Digital Chart specifically addresses the role of influencer marketing. Influencers are defined as figures ‘who are able to influence consumers in choosing a product and express opinions about a brand’. The Digital Chart provides that ‘when comments or opinions expressed by a celebrity, influencer or blogger about a product or brand have the characteristics of a marketing communication, they are subject to Self-Regulatory Code application’.

Also, the Chart states that, if not made clear by the context, the promotional purpose of the comment or opinion must be disclosed to the user in an appropriate manner in accordance with Article 7 of the Code. Although there is no specific or compulsory way for making such disclaimer to users, the promotional nature of content posted on social media can be disclosed through the use of wording such as ‘Advertising’, ‘Promoted by’, ‘Sponsored by’, ‘in partnership with’, to be placed at the top of the relevant post followed by the name of the brand. Additionally, these words must be included among the first three hashtags: #Advertising, #Sponsored by or #ad followed by the name of the #brand.

However, in cases where the relationship between the influencer and the advertiser is limited to the advertiser occasionally sending products free or in exchange for a limited amount, and the influencer names these products, uses them or displays them on social media, this disclosure-notice is not required and can be replaced by the simple wording: ‘product sent by’ followed by the name of the brand.

Furthermore, in connection with influencer marketing, in July 2017 AGCM sent to some of the most popular Italian influencers a moral suasion letter, inviting them to comply with the provisions of the Consumer Code on transparency in advertising. In particular, AGCM gave some instructions to reveal the real nature of the message whenever there is a commercial purpose, requiring influencers to use wordings/hashtags (partially coinciding with those provided for by SRO’s Digital Chart) whenever there is a business relationship between them and the branded product (eg, ‘#advertising’, ‘#promoted by’, ‘#in partnership with’ followed by the name of the brand). Other moral suasion letters have been sent by AGCM in August 2018.

In addition to the above, specific bodies of rules may be adopted by the various authorities whose regulatory powers may affect social media, including the Italian Competition Commission, the Italian Data Protection Authority and the Italian Communication Authority (AGCOM).

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

Such potential liability will depend on the advertiser’s role. The problem will usually occur in relation to user generated content, uploaded to—and presented on—online platforms.

If there is a relationship between the advertiser and the user posting the content, the advertiser would be regarded as liable for the content posted; otherwise, in case of content freely and autonomously posted by the user without any input by the advertiser (eg, payment of a sum in exchange for the upload of the post or supply of the product which the post relates to), then the advertiser would not be regarded as liable.

Generally speaking, in connection with the liability of hosting providers, under Articles 16 and 17 of the E-Commerce Decree (Legislative Decree No 70 of 2003), a hosting provider is not required to proactively monitor the contents uploaded on its services and it is not required to remove access to infringing content unless it receives an order from a competent administrative or judicial authority to remove the content. Nonetheless, hosting providers are obliged to promptly inform the competent public authority if they are aware of the presence of unlawful information or content, and to provide public authorities with the information that allows the identification of the user, in order to prevent and locate unlawful activities on their services.

Thus, in contrast to the E-Commerce Directive (Directive 2000/31/EC), the E-Commerce Decree expressly requires a court or administrative order to consider hosting providers bound to remove illicit contents on their services. This difference between the Italian and the European provisions has been subject to intense scrutiny in Italian case law. Recent decisions have held that the receipt of a specific order is not a prerequisite to finding hosting providers liable in cases of non-fulfillment of the duty to remove contents hosted. Rather, a detailed notice from an interested third party would be sufficient. Thus, it is possible to argue that hosting providers have actual knowledge of the unlawfulness of the content they host when they receive a detailed notice from an interested third party. In other words, it is not necessary to wait for the issuance of a specific court or administrative order to deem the hosting provider aware and thus obliged to remove access from the relevant contents.

To reach the above conclusion, such case law trend distinguishes between passive and active hosting providers. Case law considers 'passive' hosting providers to be providers of a 'merely technical, automatic and passive' service. In other words, only the providers of storage spaces on the internet are deemed to be passive hosting providers and as such granted by section 16 of the E-Commerce Decree. In contrast, 'active' hosting providers are considered by case law as providers that, in some ways, manage the information and contents provided by their users.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

Local Courts will consider—and usually follow—recent case-law affirmed by the Court of Justice of the European Union in this respect (see the CJEU decisions of *Google v Louis Vuitton* (23 March 2010) and *L'Oreal v eBay* (12 July 2011)).

There is no significant case-law on the liability of advertisers in connection with the use of social media and user generated content. Local courts have substantially ruled on the topic of the liability of hosting providers.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

The basic principle to bear in mind is that the use of a person's name or image without consent is prohibited, as they both pertain to an individual's 'personality rights'. Such rights are governed by provisions set both by the Civil Code and by the Copyright Act (Law No 633 of 1941).

According to the Civil Code:

- (a) 'Every person has a right to the name given' (Article 6) and is entitled to protection against prejudicial use performed by others (Article 7); and
- (b) the image of a person, or of his/her parent, spouse, or child can be exhibited or published only if such use is explicitly permitted by law and provided that the use is not prejudicial to the dignity or reputation of the person represented (Article 10).

Should abuse occur, a Civil Court, upon request of the interested party, can order termination and decide on the damages.

The Copyright Act provides that a person's picture may not be exhibited, reproduced and put on sale without his/her consent (Article 96). Local courts take the view that the law assigns an economic value to a person's name and image (especially if the person is famous). Therefore, unauthorized use of a

person's image/picture for marketing purposes results in prejudice and damaging effects, because the represented person is deprived (at least) of the remuneration obtainable by giving consent to the use.

Also, a person's image/picture may not be exhibited or put on sale, if such use causes prejudice to the represented person's honor, dignity or reputation (Article 97).

The following are some of the ancillary issues that advertisers are well advised to bear in mind:

- (a) consent is valid and effective between parties, but is not automatically transferable to third-party subjects (an aspect that may easily become relevant when the advertising campaign or the marketing material is handed over to client's affiliates);
- (b) in local jurisprudence and literature differing opinions may be found on whether consent is revocable or not; and
- (c) consent would not cover demeaning or deceptive uses eventually performed with respect to individuals' names or images, if not explicitly authorized (in addition, in such cases consent would easily be considered as revocable).

From a privacy law perspective, consolidated Italian case-law deems that, according to Legislative Decree No 196 of 2003 (the Data Protection Code) an individual's details, including his/her image, constitutes personal data and their commercial use has to be considered as a 'processing of personal data'. Accordingly, the processing needs to be grounded on (at least) one of the legal bases laid down in the applicable privacy law (for the list of the valid legal basis, see Article 6 of the General Data Protection Regulation (Regulation No 679 of 2016).

9.2 Are there situations when permission is not required?

Exceptions to the consent requirement apply when the reproduction of a person's image is justified by his/her notoriety (Article 97 of the Copyright Act) or by public interest (eg, for purposes of information to the general public—according to consolidated case law of the Italian courts, consent is not required any time an interest exists to deliver information to the general public. However, according to local courts, such an interest does not occur when the use is performed for marketing purposes).

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Historical buildings, monuments and artwork are considered to be cultural heritage, and are, therefore, subject to the special provisions laid down in the Constitution and in the Code for the Arts and Landscape (Legislative Decree No 42 of 2004).

The use of cultural heritage has to be in line with its natural destination (a church or a museum are obviously inappropriate for certain uses). Central or local authorities are in charge of supervising that no improper use occurs. Individual (private) use of cultural heritage is possible, but subject to prior authorization (which is given on payment of a fee). With respect to the use of art works, monuments or historical buildings in advertising material, the supervising authorities are entitled to exercise an advance review of all aspects of the planned campaign and may impose modifications at their discretion. The decision on whether to give or deny authorization will be determined on a case-by-case basis. There is no objective set of criteria to rely on.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

While there is no absolute ban to use a third party's branded product in advertising, such use remains uncertain and requires great attention. First of all, such use will have to be 'functional' and 'contextual', eg, a runner will necessarily wear training shoes from one or other (frequently recognizable) brand; a model promoting an elegant evening dress will usually be shown with (also easily recognizable) luxury shoes and accessories of an identical quality level. Second, it will be necessary to demonstrate that the advertiser does not gain an unfair advantage through the association of his product with the use of another brand.

Therefore, advertisers need to bear in mind that the association of their products with branded items of third parties will be evaluated on a case-by-case basis. Such practice may easily face adversity under the provisions of the Civil Code that govern acts of unfair competition. Further, the Industrial Property Code allows third party use of a trade mark that complies with good and fair business practices and prevents such use any time there is a risk of confusion with another company's logo, trade mark or distinctive sign.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Italy which affect advertising (eg Swedish gender equality law)?

Advertisers will have to consider a general principle, according to which 'marketing communication should respect human dignity in every form and expression and should avoid any form of discrimination' (Article 10 of the SR Code).

In recent years, the local SRO has shown increased focus—both through ex officio desist injunctions as well as by dealing with complaints—on sexist advertising.

The Audio-Visual Media Service Code expressly requires audio-visual commercial communication to restrain from performing (or promoting) any form of discrimination in relation to gender.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Article 10 of the SR Code requires commercial communication not to 'offend moral, civil and religious beliefs'. The non-discrimination requirement set by the Audio-Visual Media Service Code applies to race, ethnic origin, nationality, religion, sexual orientation and physical disabilities.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Italy?

Commercial communication always involves the collecting and storing of personal information and, therefore, results in the invasion of privacy of individuals. Performing such practices in Italy, or making use of technical equipment located in the country, will make the provisions of the Data Protection Code applicable (which sets a strictly opt-in mechanism and requires advanced notice and consent). Such a result will also occur when companies place apps or cookies on a local resident's device.

Transferring personal information from Italy to non-EU member states is governed by specific legal and administrative requirements.

JAMAICA

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Jamaica?

In Jamaica advertising is regulated by multiple Acts, Regulations and Codes, including: the Fair Competition Act, Consumer Protection Act, Copyright Act, Trade Marks Act, Town and Country Planning Act, Advertisements Regulation Act, Food and Drugs Act, Registration of Business Names Act, Television and Sound Broadcasting Regulations, the Jamaican Code of Advertising Practice, Children's Programming Code and Code of Marketing Communication Practices for Beverage Alcohol Products.

The Consumer Protection Act and the Fair Competition Act regulate matters pertaining to false or misleading advertisements, and are administered by the Consumer Affairs Commission and the Fair Trading Commission.

The Trade Marks and Copyright Acts govern the protection of intellectual property content in advertising.

The Television and Sound Broadcasting Regulations govern advertising content of licensed commercial broadcasters.

The Bureau of Standards monitors trade in certain products to ensure compliance with prescribed standards.

A number of other statutes regulate the advertising of professional services.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

The Advertisements Regulation Act, Consumer Protection Act and Town and Country Planning Act define advertising as:

- (a) any sky sign, notice, bill, placard, poster and other similar publication;
- (b) any form of communication made to the public or a section of the public for the purpose of promoting goods or services; and
- (c) any word, letter, model, sign, placard, board, notice, device or representation, whether illuminated or not, in the nature of and employed wholly or in part for the purposes of advertisement, announcement or direction including any hoarding or similar structure used or adapted for use for the display of advertisements.

1.3 What is the basic regulatory framework for advertising regulation?

The basic regulatory framework for advertising comprises statutes, governing bodies and codes, including the Consumer Protection Act, Fair Competition Act, Fair Trading Commission, Consumer Affairs Commission, Television and Sound Broadcasting Regulations, the Broadcasting Commission, the Bureau of Standards and the Ministry of Health (Foods & Medicines).

The main codes are the media industry's Jamaican Code of Advertising Practice (JCAP), the Code of Marketing Communication Practices (MCAP) for the alcohol industry and the Children's Programming Code (CPC).

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Regulation of advertising in Jamaica is mainly geared towards ensuring that the content of the advertisement is not in contravention of any act or regulation. The advertising laws prohibit false and misleading advertisements generally. Text message advertising is not specifically regulated in Jamaica.

The Town and Country Planning Act regulates the display of advertisements in prescribed areas of development for which planning permission is needed. The Act regulates the dimensions, appearance and position of advertisements to be displayed in certain areas and the manner in which they may be affixed to the land.

The Consumer Protection Act (as amended) governs the advertisement of goods and services as well as the advertised delivery of goods. Section 32 prohibits misleading advertisements and stipulates that no person in the course of trade or business should advertise, at a specified price, goods or services which he does not intend to offer, nor should he advertise what he does not reasonably believe can be supplied by him at that price and for that particular period. Section 33 regulates advertised delivery dates by incorporating the advertised delivery date as part of the contract between provider and consumer. Where a provider fails without reasonable cause to meet the advertised delivery date and the consumer elects not to accept the goods, the provider is obliged to refund to the consumer all monies paid, plus interest with respect to the period beginning with the date of deposit of the amount and ending on the date of its refund.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

- (a) The Food and Drugs Act regulates advertising practices in the food, drug and cosmetic industries. The Act stipulates that no person shall advertise any food, drug, cosmetic or device to the public for the cure of certain diseases, illnesses or abnormal physical states. The Act also prohibits misleading advertisement of food, drugs and cosmetics.
- (b) The Public Health Act regulates the advertising of tobacco products. Section 3 stipulates that all tobacco products shall contain on their packages a permanently affixed health warning advising tobacco users of the health risk posed by the use of tobacco and tobacco products. Section 14 penalizes 'every manufacturer or retailer who sells or offers for sale a tobacco or tobacco product in packaging that does not bear a graphic warning'. Further 'no tobacco product, including a single stick shall be sold or offered for sale without health warnings.' No tobacco product package may make any claim suggesting that its use is not hazardous or is any less hazardous than other tobacco products.
- (c) The Broadcasting and Radio Diffusion Act and the Television and Sound Broadcasting Regulations prohibit any commercial broadcaster licensee from advertising any tobacco products.
- (d) MCAP provides guidance on the marketing of alcoholic beverages. For example, advertisements for alcohol may not be addressed directly or indirectly to persons under the age of 18, or depict minors in any way to suggest that they are drinking alcoholic beverages.
- (e) The Jamaica Manufacturers' Association's Code of Ethics stipulates that a manufacturer should ascertain all pertinent facts concerning his product, so that he may fulfill his

obligation to avoid product mislabeling, exaggeration, misrepresentation and misleading advertisement.

- (f) Advertising by the Legal Profession is regulated by the General Legal Council under the Legal Profession (Canons of Professional Ethics) (Amendment) Rules 1998 (as amended) which provides that lawyers must advertise in a conservative, non-competitive manner.
- (g) Insurance agents and Chartered professions, such as accounting, are also regulated by special laws. An individual or institution may not be referred to as 'chartered' unless designated by Royal Charter or other duly constituted authority.

1.6 Are any government pre-approvals required?

There are no mandatory government pre-approvals for advertisements in Jamaica except for content owned or regulated by the government. However, advertisements for certain types of products or services must comply with prescribed laws, regulations and standards applicable to the particular industry, product or service. For example, the Standards Act regulates the packaging, labelling, description and advertising of commodities for which a standard specification has been declared by the Bureau of Standards.

The Food and Drugs Act prohibits advertising of any food, drug, cosmetic or device to the public for the cure of certain diseases, illnesses or abnormal physical states.

1.7 Does the media pre-clear advertising?

No formal structure for pre-clearance of advertising exists in media houses in Jamaica. While some media houses will internally vet advertisements before they are aired, the onus is on program sponsors/advertisers to comply with the relevant laws and codes of practice on advertising. Media houses generally rely on advertising agencies/sponsors to obtain consents and releases that may be required for using talent or music and other content in advertisements and to seek legal counsel in determining whether advertising content contravenes any Fair Competition, Consumer Protection or Intellectual Property laws (particularly a competitor's trademark rights, copyright or any privacy or related rights). Under JCAP the Council provides the media with individual advice and guidance, particularly at the pre-publication stage. MCAP also provides guidance on the advertising of alcoholic beverages.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Some statutes impose criminal liability for the contravention of the provisions on advertising and set out specific fines and terms of imprisonment for the commission of offences. For example, under the Consumer Protection Act, a person found guilty of engaging in misleading or deceptive conduct in the course of trade or business or conduct that is likely to mislead the public as to the nature, purpose or characteristics of goods or services, or a person who makes a false or misleading representation in relation to goods or services in the course of trade, is liable to a fine not exceeding one million dollars or imprisonment for a term not exceeding one year, or both. The Advertisement Regulations Act stipulates that any person who contravenes the Act shall be liable on conviction to a fine of 20 dollars and a further fine of 4 dollars for every day during which the offence is continued after his conviction.

1.9 When does a competitor have a right of action? What are the potential remedies?

The Fair Competition Act gives a competitor a right of action to recover damages for loss resulting from breach of the Act. Section 37 prohibits misleading advertising by providing that a ‘person shall not, in pursuance of trade and for the purpose of promoting, directly or indirectly, the supply or use of goods or services or for the purpose of promoting, directly or indirectly any business interest, by any means’ make any representation to the public that is false or misleading or is likely to be misleading in a material respect. The Act also prohibits making false representation to the public in the form of a statement, warranty or guarantee of performance that is not based on adequate research. In addition, the Act prohibits falsely representing to the public in the form of a statement, warranty or guarantee that a particular service is of a particular quality when it is not so. If such an advertisement causes loss to a competitor, the competitor may claim damages.

1.10 When do consumers have a right of action? What are the potential remedies?

The Consumer Protection Act Section 7 provides that a complaint may be made by any person or body who claims to have suffered a disadvantage in relation to the acquisition of goods or services.

The Consumer Protection (Amendment) Act 2012 establishes a Consumer Protection Tribunal which hears consumer complaints and orders remedies. By virtue of Section 44 of the Act, the Consumer Protection Tribunal has power to establish remedies and can make the following types of orders:

- (a) declaring certain transactions to be in breach of the provisions of the Act;
- (b) prohibiting the withholding of supplies or threat thereof;
- (c) suspending or modifying any terms or conditions in an agreement which are manifestly unfair to the consumer or are in contravention of the Act;
- (d) prohibiting the attachment of any extraneous conditions to any transaction;
- (e) requiring the publication of a price list;
- (f) requiring the payment of refund and interest where appropriate;
- (g) requiring the delivery of goods and services; and
- (h) at the request of a party, to protect the confidentiality of that party’s trade secrets or other confidential information.

Under Section 33, where a provider fails without reasonable cause to meet an advertised delivery date, and the customer chooses to not accept the goods, the provider shall refund to the customer all moneys paid, plus any interests on any amount not refunded etc.

Section 34 provides for a fine of up to two million dollars or up to two years imprisonment for contravention of the conditions for demanding and accepting payment.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Jamaica have a primary advertising self-regulation system?

The self-regulation systems for advertising are based on JCAP and MCAP, which complement current advertising laws.

JCAP is based on the British Code of Advertising Practice and the International Code of Advertising Practice. JCAP represents advertisers, advertising agencies, media, manufacturing, trading and other public and private concerns in the interest of the consumer.

The Code is administered by the Advertising Council of Jamaica whose membership comprises representatives of the Media Association Jamaica Limited, the Advertising Agencies Association Jamaica Limited, the Private Sector Organization of Jamaica Limited, and the National Consumers League Limited. Its main purpose is to set out guidelines for professional conduct and provide the public with the set of limitations accepted by those using or working in advertising. Administrators of JCAP believe that 'professional regulations, voluntarily applied, can ensure the elimination of dubious practices more speedily than government legislation' and all concerned agree to observe the Code. Observance of the Code serves to uphold the status of advertising as having an integral role in the marketing of goods and services. The Code also seeks to 'maintain standards in an area of communication which defies legal distinction—that of good manners and taste.'

MCAP was developed by the Jamaica Alcohol Beverage Association which represents producers, distributors and marketers of beverage alcohol products. This Code is aimed at guiding members involved in marketing beverage alcohol products. Members are obliged to provide advertising agencies, media buyers and other parties involved in advertising or marketing with a copy of the Code.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The JCAP and MCAP are self-regulatory advertising codes.

- (a) JCAP is the principal self-regulatory code for advertisers in Jamaica. The Code sets out criteria for professional conduct and gives an indication to the public of the limitations accepted by those using or working in advertising. The key principles of JCAP include that advertisements should:
- (i) be decent (ie not contain statements or visual presentations offensive to the standards of decency and good-manners prevailing among those who are likely to be exposed to them);
 - (ii) be honest (ie not be so framed as to abuse the trust of the consumer or exploit his lack of experience or knowledge);
 - (iii) not without justifiable reason play on fear;
 - (iv) not exploit the superstitious;
 - (v) not contain anything which might lead or lend support to acts of violence, nor appear to condone such acts;
 - (vi) not contain anything which might lead or lend support to criminal or illegal activities nor appear to condone such acts; and
 - (vii) be truthful (ie all descriptions, claims and comparisons which relate to matters of objectively ascertainable fact should be capable of substantiation and advertisers/advertising agencies are required to be ready to produce such substantiation to the Council).
- (b) Key principles of the MCAP include that marketing communications should:

- (i) not be unethical, offend against generally prevailing standards of taste and decency, or otherwise question, challenge or impugn human dignity and integrity;
- (ii) not present abstinence or moderation in a negative way or suggest that refusing a drink is wrong or foolish; and
- (iii) not contain words, images, symbols or portrayals which are likely to be considered offensive or demeaning to people of any gender or any race, religion, culture, sexual orientation or other group.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

There are mechanisms for dealing with complaints within the context of the Codes.

JCAP stipulates that when there is a complaint from a member of the public that the code of practice has been breached, the complaint should be addressed to the Advertising Council of Jamaica. Complaints submitted to the Council must be in writing and must provide examples of references to the advertisement in question. The complainant and the advertiser and/or the advertising agency have a right to appear before the Council in support of or to oppose the complaint and may be represented by an attorney-at-law. The Council is responsible for reviewing the complaints and applying sanctions where applicable. The Council may also originate a complaint if it identifies a breach. The Council will first bring the complaint to the attention of the advertiser in order to rectify the violation. If the advertiser fails to correct the breach the Council may impose sanctions.

MCAP has a Complaint Review Board which when necessary meets to consider complaints from members or other interested parties, including members of the public.

2.4 Is the self-regulation system effective? Is it widely used and followed?

JCAP is widely adhered to by private sector companies which are members of the associations that make up the membership of the Advertising Council of Jamaica, namely: the Media Association Jamaica Limited, the Advertising Agencies Association Jamaica Limited, the Private Sector Organization of Jamaica Limited, and the National Consumers League Limited. The Advertising Standards Authority, which is responsible for ensuring that basic requirements of professional standards are met by its registered members, is also effective.

2.5 Are the self-regulatory system's decisions reported?

Decisions are reported within the Advertising Council of Jamaica, the Jamaica Alcohol Beverage Association and the Advertising Standards Authority, where their respective members are updated on any developments or issues in meetings. There is no general requirement for public disclosure.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

The general ambit of the Codes includes specific categories of advertisements such as alcoholic beverages, privacy and safety and general honesty and integrity in advertising.

- (a) JCAP:
 - (i) Section 1 outlines key principles that companies must abide, whereby all advertisements must:

- (1) be legal, decent, honest and truthful;
 - (2) be responsible to the consumer;
 - (3) conform to the general principles of fair competition;
 - (4) not bring advertising into disrepute or reduce confidence in advertising as a service to industry and the public, and so on.
- (ii) Section 2 provides that advertisements must not:
- (1) play on fear;
 - (2) exploit the superstitious;
 - (3) contain anything that may lend support to acts of violence, illegality or criminal acts.
- (iii) Section 7 prohibits the exploitation by an advertiser of a third party's name or goodwill including their trade name or trademark or product and the imitation of slogans, general layout, visuals and music or sound effects.
- (b) Similarly, MCAP stipulates that advertisements should not:
- (i) be unethical, offensive against generally prevailing standards of taste and decency, or otherwise question, challenge or impugn human dignity and integrity;
 - (ii) present abstinence or moderation in a negative way or suggest that refusing a drink is wrong or foolish; or
 - (iii) contain words, images, symbols or portrayals which are likely to be considered offensive or demeaning to people of any gender or any race, religion, culture, sexual orientation or other group.

2.7 Are there any other self-regulatory systems that govern advertising practices in Jamaica?

The Advertising Agencies Association of Jamaica (AAAJ) re-established the Advertising Standards Authority as a watchdog body for the industry, noting that advertising executives favor self-monitoring over policing by an outside regulator such as the Broadcasting Commission. The AAAJ is an independent body within the industry that seeks to ensure that advertisers adhere to the highest standards of communication and comport with the industry's codes of practice.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Jamaica (eg, consumer protection laws; IP laws; unfair competition laws)?

There are several laws that deal with aspects of advertising including:

- (a) Fair Competition Act;
- (b) Consumer Protection Act;
- (c) Advertising Regulation Act;
- (d) Food and Drugs Act;
- (e) Food and Drugs Regulations;
- (f) Broadcasting and Radio Re-Diffusion Act;

- (g) Television and Sound Broadcasting Regulations;
- (h) The Town and Country Planning Act;
- (i) Copyright Act;
- (j) Trade Marks Act;
- (k) Defamation Act;
- (l) Hire Purchase Act;
- (m) Insurance Act;
- (n) Obscene Publications (Suppression of) Act;
- (o) Sale of Goods Act; and
- (p) Cinematograph Act.

3.2 Is substantiation required for advertising claims?

- (a) **Medical and Related Products:** Health claims from advertisements in relation to medical and related products are specifically addressed in JCAP which covers the following categories:
 - (i) medicines, medical and surgical treatments and appliances;
 - (ii) toiletries and other products which claim or imply therapeutic or prophylactic qualities; and
 - (iii) any other product which is advertised, whether wholly or in part, upon the basis that it may improve, restore or maintain the user's health or his physical or mental condition.

JCAP provides that claims for medical or other professional support for a product whether in copy or illustration, or otherwise, should be substantiated and the extent of such support should not be exaggerated.

- (b) **General:** Points of comparison should be based on facts which can be substantiated and should not be unfairly selected. In particular, the basis of comparison should be the same for all the products being compared and should be clearly stated in the advertisement so that it can be seen that like is being compared with like.

JCAP also provides that 'where a substantial division of informed opinions exists, or may reasonably be expected to exist, as to the acceptability of any evidence which is required to substantiate a claim in an advertisement, that advertisement should neither state nor imply that the claim is universally true or that it enjoys universal support, nor that it represents anything other than the advertiser's opinion or the opinion of such other authorities as may be named.' (Section 4.2.4)

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Puffery is permissible; however, the advertiser may not use puffery to mislead potential consumers. Section 4.2.3 of JCAP states that 'obvious hyperbole, which is intended to attract attention or to

amuse is permissible provided that it is not likely to be taken as a positive claim to superior or superlative status' as it would be seldom possible to substantiate general claims made by advertisers. JCAP further stipulates in Section 4.3.2 that 'consumers should not be led to overestimate the value of goods whether by exaggeration or through unrealistic comparisons with other goods or other prices'.

3.4 What are the rules governing the use of disclosures in advertising?

The advertising codes and statutes are silent on the use of disclosures in advertising.

The relevant statutes focus mainly on the prohibition of false and misleading advertising and promote adequate and accurate disclosures with regard to product information. For example, Sections 6, 9, and 13 of the Food and Drugs Act prohibit false or misleading advertisements; Section 18 of the Consumer Protection Act stipulates that, in addition to the requirements of other enactments relating to the packaging, labeling or description of goods, a provider must provide a consumer with all the information concerning the goods being sold. For instance, they must provide where applicable, the origin, the price in Jamaican currency, care, terms, components, proper use, weight, size, and instructions for assembly and installation of the goods.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Testimonials are addressed in JCAP Section 9 which states that advertisements should not contain or refer to any testimonial or endorsement unless it is genuine and related to the personal experience of a reasonable person. Further, testimonials which are no longer applicable should not be used. The Code also stipulates that testimonials should not make claims to efficacy which cannot be justifiably accredited to use of the product. Moreover, particular care must be taken to ensure that advertisements based on fictional characters are not framed to give the impression that real people are involved; in particular, they should not contain 'testimonials' or 'endorsements' which may give such an impression. Section 9.3 of JCAP also provides that 'where any testimonial contains an expression which conflicts with the Code, advertisers may amend the testimonial in question so as to remove the source of conflict, provided that, in so doing, the advertiser does not distort the sense of original views expressed by the person giving the testimonial'.

3.6 What are the rules governing the use of product demonstrations in advertising?

Product demonstrations in advertising are not specifically addressed in any of the codes or statutes. However, the general principles and guidelines outlined in the statutes and the codes would be applicable.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertisement is permitted, provided it comports with certain rules laid out in the Fair Competition Act, the Trade Marks Act and JCAP. Generally, such advertisements must not be misleading and must not discredit, denigrate or bring contempt on a competitor or his trademark, or seek to capitalize on the reputation of the competitor's mark.

According to JCAP, advertisements containing comparisons with competing products or services are permissible in the interest of vigorous competition and public information, provided they comport with the terms of the Code. The advertisement should not confer unfair disadvantage upon the competition and should be based on facts that can be substantiated. However, in light of the Code's

prohibition against unjustifiable use of the name or initials of any firm, company or institution and its prohibition against taking unfair advantage of the goodwill attached to the trade name or symbol of another firm or its product/service, Jamaican advertisers usually shy away from direct references to a competing product or service.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Under the Trade Marks Act, use of a trademark by an unauthorized user in advertising would normally constitute an infringement. However, by virtue of section 9(8) of the Act, comparative advertising which is fair and honest is permissible without the authorization of the proprietor of the registered mark in question, provided that such use accords with honest practices in industrial or commercial matters and does not take unfair advantage of, and is not detrimental to, the distinctive character or the reputation of the trademark.

The Copyright Act generally confers on the copyright owner the exclusive right to authorize the use or copying of a protected work, and, therefore, certain uses of a competitor's works may infringe copyright. The misuse of a competitor's trademark that comprises or contains an original artistic work could amount to copyright infringement. Further, unauthorized reproduction or modification of an original musical or other artistic work could amount to copyright infringement.

JCAP stipulates that advertisements should not be so similar in general layout, copy, slogans, visual presentation, music or sound effects to other advertisements as to be likely to mislead or confuse.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Labels must give country of origin.

Section 18 of the Consumer Protection Act states that at any time before payment is made for goods, the consumer should be provided with all information concerning the goods being sold. This information includes the origin of the goods. Section 30 states that no person in the course of business or trade in connection with the supply of goods or services shall make a false or misleading representation concerning the place of origin of goods. A person who makes such a misleading representation is liable to a fine of up to one million dollars or imprisonment for a term not exceeding one year.

As regards food, the Standards (Labelling of Processed Food) Regulations 1974 state that where food is processed in Jamaica the label must contain the words 'made in Jamaica', or 'manufactured in Jamaica', or 'processed in Jamaica', or 'distilled in Jamaica', or 'bottled in Jamaica', or 'packed in Jamaica', or 'grown in Jamaica', or 'product of Jamaica', as the case may be. Furthermore, where the food is processed in any country other than Jamaica, the name of that country must be stated. Any seller who offers processed food for sale in containers which breach the law will be fined and, in default of payment, may be imprisoned.

3.10 Are there any special rules governing product packaging?

Several laws and regulations set out guidelines and requirements for product packaging for particular products.

- (a) Under the Food and Drug Act, a 'package' includes anything in which any food, drug, cosmetic or device is wholly or partly contained, placed or packed. This Act states that a person shall not label or package any food, drug, cosmetic or device in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety. Where there is a standard prescribed for such items, packaging must comply with the prescribed standard.
- (b) Under the Public Health (Tobacco Control) Regulations 2013, a 'package' is defined as any covering, wrapper, container, carton, bag or other enclosure that contains a tobacco product. The regulations require health warnings on all tobacco product 'packages', which includes both unit packaging and cartons. The regulations also set out graphic health warnings for use on packages of smoked tobacco products.
- (c) The Bureau of Standards also issues guidelines for packaging of certain products. For example, in July 2017, the Bureau issued new sugar labeling and packaging standards, whereby sugar (sold in quantities less than or equal to 10 lbs) must be pre-packaged in bags that are heat sealed, and not tied with a string or knotted.

4 PRICE ADVERTISING

4.1 What are Jamaica's rules regarding price advertising?

Price advertising is considered critical to fair competition. Accordingly, Section 41 of the Fair Competition Act stipulates that no person who advertises a good for sale should during that period supply goods at a higher price than the price previously advertised. An exception is made, however, in situations where an advertisement appears in a publication, whereby, if the advertiser establishes that the price advertised is in error, the advertisement may prominently state that the prices contained therein are subject to error; or in situations where an advertisement is immediately followed by another advertisement correcting the price mentioned in the previous advertisement.

4.2 What are Jamaica's rules regarding advertising 'free' products?

JCAP Section 4.4.1 stipulates that products should not be advertised as 'free' where there is any cost to the consumer other than costs associated with any delivery, freight or postage. Where such a cost is required to be paid by the consumer, there must be a clear statement within the advertisement that this is the case.

Furthermore, where a claim is made that if one product is purchased another product will be provided 'free', the advertiser should be able to show that he will not be able immediately and directly to recover the cost of supplying the 'free' product, whether in whole or part.

Additionally, the Code states that a trial may be described as 'free' although a customer will be expected to pay the cost of returning the goods provided that the advertiser has made clear obligations to do so.

4.3 What are Jamaica's rules regarding sales and special offers?

Section 40 of the Fair Competition Act provides that a 'person shall not advertise at a bargain price, goods or services which he does not supply in reasonable quantities having regard to the nature of the market in which he carries on business, the nature and of the business carried on by him and the nature of the advertisement'.

4.4 What are Jamaica’s rules regarding rebates?

The Consumer Protection Act and the Sale of Goods Act entitle consumers to cash rebates for defective goods. Section 24 of the Consumer Protection Act (as amended by the Consumer Protection (Amendment) Act) states that where a consumer is encouraged to purchase a good based on the provider’s declaration and description of the good, and the consumer subsequently realizes that the good is defective or materially different than what was described, the consumer may return the good to the provider. The provider should, after taking such time as reasonably required to verify the matters, offer to the consumer in exchange for returned goods, monetary compensation for the value of the goods or such other amount as agreed between the consumer and provider. However, a refund of the good may only be made if the good is returned in the condition it was offered or with minimal damage resulting from exposure.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

The Fair Competition Act contains some prohibitions on retail advertising practices:

- (a) Section 34 prohibits any publication by a supplier of goods of an advertisement that mentions a resale price for goods in an attempt to increase the selling price of goods;
- (b) Section 37 prohibits false and misleading advertisements. This occurs when an advertiser publishes advertisement about a product or service that is misleading or likely to mislead;
- (c) Section 40 prohibits the practice of ‘bait and switch’. This occurs when a merchant advertises at a bargain price, goods or services which he does not supply in reasonable quantities. The Act stipulates that whatever goods or services are advertised must be available for purchase immediately; and
- (d) Section 41 prohibits the sale of goods above the advertised price. This is to prevent advertiser from advertising at one price and increasing the price once a customer is in the store.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

There are restrictions on the advertising of tobacco products. Jamaica became a party to the WHO Framework Convention on Tobacco Control in 2005. This treaty, in conjunction with local tobacco-related legislation, has resulted in numerous restrictions and regulations on tobacco advertising, such as the banning of advertisements of tobacco products in the electronic media such as domestic television and radio, as well as in cinemas. There are also strict regulations regarding outdoor advertising and brand marking. Recently-enacted Tobacco Regulations require 75% of the surface area of cigarette packaging to be covered with health warnings regarding the dangers of smoking.

Under JCAP:

- (a) advertisements for products that claim to ‘improve’ inherent racial characteristics are prohibited;
- (b) no advertisement may claim or suggest that any drink can contribute to sexual prowess; and

- (c) advertisements which may jeopardize the safety of children, such as ones which would cause children to believe that not owning a product will make them inferior, are prohibited.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Telemarketing to wireless phones is not prohibited in Jamaica.

The advertising laws prohibit false and misleading advertisements generally.

There are also some rules which prohibit advertising to certain specific categories of persons and restrict advertising in certain media. For example, JCAP prohibits advertising alcoholic beverages to or targeting children in that ‘advertisements for alcoholic drinks should not be addressed directly or indirectly to those under 18, nor should such advertisements picture them, or other young people who might be taken to be less than 18, in any way which might suggest that they were drinking.’ Similarly, MCAP stipulates that ‘marketing communications for beverage alcohol products should not be targeted or intended to appeal primarily to persons under 18 years of age either through selection of media aimed exclusively or predominantly at such persons, or through style of presentation or content. MCAP members’ websites and other marketing communications on the Internet must ask for positive confirmation that those who use the site are over the legal drinking age and should also contain a responsible drinking message and links to a Social Aspects Organization’s website. (Social Aspect Organizations are non-profit organizations usually partially or wholly funded by the beverage alcohol industry that exist specifically to address the areas of misuse associated with alcohol).

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The Towns and Communities Act Section 9(c) prohibits in public places persons from selling or distributing, or offering for sale or distribution, or marking on any fence, wall or any building, any obscene figure, drawing, painting, or representation, or singing any profane, indecent or obscene song or ballad, or writing or drawing any indecent or obscene word, figure, or representation, or using any profane, indecent or obscene language.

The Obscene Publications Act criminalizes the making, producing and/or possession by any person of any obscene writings, drawings, prints, paintings, printed matter, films, for the purpose or by way of trade.

JCAP stipulates that, ‘advertisements should not contain statements or visual presentations offensive to the standards of decency and good manners prevailing among those who are likely to be exposed to them’. The Broadcasting Commission has also published directives on the prohibition of explicit or violent content.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

- (a) **General Requirements:** Section 11(1), (9) of the Television and Sound Broadcasting Regulations provides that a licensee who engages in commercial broadcasting shall cause to

be kept at his broadcasting station for inspection by an authorized person during business hours of that station, a record of the name of the sponsor of an announcement.

- (b) **Political Broadcasts:** Section 12(1) of the Television and Sound Broadcasting Regulations provides that in relation to a political broadcast, a licensee who engages in commercial broadcasting must:
- (i) ensure that the name of the political party or sponsor, if any, on whose behalf the broadcast is made, is announced in any announcement or advertisement of that broadcast, immediately before the commencement and immediately after the end of, such broadcast; and
 - (ii) not permit any such broadcast other than an advertisement thereof to be dramatized.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

According to JCAP sections 11.1 and 11.2—Identification of Advertisements:

‘Advertisements should be clearly distinguishable as such whatever their form and whatever the medium used. When an advertisement appears in a medium which contains news, editorial or program matter it should be so designed, produced and presented that it will be readily recognized, as an advertisement.

In print media, wherever there is any possibility of confusion, the material in question would be identified by the words ADVERTISEMENT or ADVERTISEMENT FEATURE, and should be boxed in or otherwise distinguished from surrounding or accompanying editorial matter. By-lines naming staff journalists should not be used.’

7.2 Are there any special disclosures or other obligations when integrating advertising content with other content?

See question 7.1 above.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

MCAP addresses Internet advertising. MCAP members’ websites and other marketing communications on the Internet must ask for positive confirmation that those who use the site are over the legal drinking age, and should also contain a responsible drinking message and links to a Social Aspects Organization’s website.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

This is not specifically addressed in any codes or rules. However, rules relating to testimonials and endorsements would apply if the advertiser is representing the statement as a testimonial. See question 3.5 above.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

No.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

JCAP Section 10.1 states that 'Advertisements should not (subject to certain specified cases) portray or refer to by whatever means, any living persons, unless their express prior permission has been obtained'. This requirement applies to all persons, including public figures and foreign nationals. Advertisers should also take care not to offend the religious or other views of those connected in any way to deceased persons depicted or referred to in any advertisement. Although JCAP's requirement of express prior permission relates only to living persons, there are cases in which deceased persons could assert this right through their estates or personal representatives, based on the tort of appropriation of personality (an extension of the common law of passing off) which has been recognized by the Jamaican Courts.

While there is no statutory right of publicity, the existence of a property interest as distinct from a privacy interest attached to a personality was recognized in the Jamaican case of *The Robert Marley Foundation v Dino Michelle Ltd*. The court held that Bob Marley, a celebrity at home and abroad, had a right to the exclusive use of his image and likeness. The right entitled him to exploit it commercially and that right survived his death. The decision has been followed in subsequent local decisions.

Although the Bob Marley case restricted the application of the tort to celebrities, a subsequent Supreme Court first instance decision, *Messam v Morris and Williams* HCV 1219/2004, has extended its application to all persons. Georgia Messam brought a claim against Messrs Morris and Williams for breach of contract, negligence and wrongful appropriation of personality when the first defendant, Clive Morris, a photographer who Messam engaged to photograph her at the party so she could send the pictures to her fiancée, instead handed the pictures to Milton Williams, editor of Hardcopy, a magazine he worked for. The pictures were published without Miss Messam's consent. Messam succeeded on breach of contract and wrongful appropriation of personality with nominal damages of \$1.00 for each claim with costs. Justice Sykes ruled that the claimant need not be a celebrity in order for the tort to be established (referring *Joseph v Daniels* 4 BCLR (2d) 239; and *Athans v Canadian Adventure Camps* 17 OR (2d) 425). Disagreeing with Clarke J in the *Bob Marley* case, Sykes J posited that the tort is not designed to protect celebrities but to protect a person from the loss of marketing his image and therefore targets wrongful commercial use of personality. He also departed from Clarke J on the point that it is necessary to prove that there was a detriment to the celebrity or those claiming through or under him.

The Copyright Act (section 17) recognizes the right to privacy in photographs and films. A person who commissions the taking of a photograph or the making of a film for domestic or private purposes can prevent the copying, broadcasting and other commercial use of that photograph or film. Interestingly, no reference was made to this right in the *Messam* case even though it appears to be directly on point.

9.2 Are there situations when permission is not required?

Some of the situations in which permission is not required as outlined in JCAP are:

- (a) The use of crowd or background shots in which individuals are recognizable, provided that neither the portrayal, nor the context in which it appears, is defamatory, offensive or humiliating.
- (b) Advertisements for books, films, radio or television programs, press features and the like, which contain portrayals of or references to featured individuals, eg an ad for a film/book about great Jamaican musicians or athletes containing references to Peter Tosh or Usain Bolt, respectively.
- (c) Police or other official notices.
- (d) Where, in the Council's opinion, the reference or portrayal in question is not inconsistent with the subject's right to a reasonable degree of privacy and does not constitute an unjustifiable commercial exploitation of his fame or reputation.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are some specific rules governing how certain types of materials should be used generally and these rules impact on use in advertising. For example, these include national symbols and heritage sites which are protected. While use of national symbols/emblems, is generally permitted, there are specific rules governing how they should be used. In particular, in relation to the National Flag of Jamaica, written permission should be sought from the Chancery in the Office of the Prime Minister before it is used. In relation to heritage sites, photographers ought to obtain permission to photograph such sites, and commercial use of the photographs must be licensed by the Jamaica National Heritage Trust.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

It is generally permissible to use other companies' recognizable non-competing products in advertising although the practice is not to feature such products or brands. However, where the personality featured in the advertisement has a sponsorship agreement with another entity, and if that sponsor requires him to wear the particular branded product in the advertising of a third party's non-competing product, the personality's appearance may be allowed or prohibited by the personality's main sponsor depending on the advertiser or the type of product being advertised.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Jamaica which affect advertising (eg Swedish gender equality law)?

No.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Jamaica is generally a conservative and a largely Christian country with a relatively small population. Advertisements which openly promote a liberal or homosexual lifestyle will generally be considered offensive and may also be challenged as being illegal.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Jamaica?

While a considerable degree of legislative freedom exists in relation to advertising in Jamaica, it would be prudent for advertisers and potential advertisers to exercise some restraint in advertising and marketing their products or services, and to pay keen attention to content which may be considered obscene, profane or immoral, especially in connection with adult industries such as alcohol and tobacco.

JAPAN

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Japan?

Advertising in Japan is regulated under a number of statutes, including the Act against Unjustifiable Premiums and Misleading Representations (AUPMR), the Act on Specified Commercial Transactions (ASCT), and other acts and guidelines in respect of specified industries.

There is also a ‘fair commission code’, voluntary rules by trade associations, such as the alcohol beverage industry, the real estate industry, the automobile industry, etc in accordance with the AUPMR in order to standardize expressions in advertising appropriate for each industry. Since each fair commission code is authorized by the Minister of Consumer Affairs Agency (CAA) and the Fair Trade Committee, a member company which obeys its fair commission code will not be censured for infringement of the AUPMR.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

There is no definition of ‘advertising’ under the AUPMR, which instead refers to ‘representations’, being any advertisement or other representation which an entrepreneur makes as a means to induce customers with respect to the substance of the goods or services which he supplies, or the trade terms or any other matter concerning their supply. There is no restriction on the type of media advertisements that may appear in newspapers, magazines, flyers, TV, radio, signboards, the internet (including banners), email messages, direct mail, etc.

1.3 What is the basic regulatory framework for advertising regulation?

The AUPMR provides the main regulatory framework, and is supplemented by industry-specific regulations, such as:

- (a) the ASCT,
- (b) the Medical Care Act,
- (c) the Law on Securing Quality, Efficacy and Safety of Products Including Pharmaceuticals and Medical Devices (the Pharmaceutical and Medical Devices Act) (formerly the Pharmaceutical Affairs Act),
- (d) the Health Promotion Act, and
- (e) the Outdoor Advertisement Act.

The industry-specific ‘fair commission codes’ (as to which see question 1.1 above) also contain rules applicable to advertising, and there are also a number of advertising guidelines issued by government bodies responsible for specific industries.

In addition, local ordinances on advertising issued by local governments prohibit certain kinds of advertising (for example, advertising on gambling and any immoral advertising).

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Certain activities designated under the ASCT (for example, door-to-door sales, mail order sales, telemarketing sales, multi-level marketing transactions, and business opportunity sales transactions) are required to indicate certain information when advertising goods, rights, or services (for example, price, when payment is due, method of payment and cancellation). Misleading advertising and sending e-mail advertising without the prior consent of the addressee are prohibited. If a seller or a service provider fails to comply with these requirements, the Ministry of Economy, Trade and Industry (METI) may order the seller or the service provider to suspend the business activities in question, either partially or completely, for up to one year.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Under the Medical Care Act, advertising of a medical practice, dental practice, hospital, or clinic is not permitted, except certain exceptions, including the fact that the person is a physician or dentist, (and their age, and a brief personal record) and the name, telephone number, and information that indicates the location of the hospital or clinic, and other information related to these people as specifically permitted by the Minister of Health, Labour and Welfare as information that contributes to recipients of medical care making appropriate choices with regard to that care.

The Pharmaceuticals and Medical Devices Act prohibits false or exaggerating advertising in relation to the name, effect, or efficiency of a medicine, quasi-drug, cosmetic or medical equipment (see question 5.1 below).

Advertisements by lawyers, law firms, and foreign lawyers are strictly limited; advertising which is, for example, false, comparative, infringes regulations of bar associations, or is damaging to, or in danger of damaging the dignity of lawyers, etc is prohibited (see question 5.1 below).

1.6 Are any government pre-approvals required?

No, though general advice may be sought from regulators.

1.7 Does the media pre-clear advertising?

Some large media organizations have their own policies that require pre-clearance of advertising, but there is no legislation requiring pre-clearance by the media.

The Advertising Review Counsel, Japan (ARC), a public interest incorporated foundation authorized by the government and which was originally established by the major Japanese newspaper companies, can also research and report on the contents of advertising prior to publication or broadcast, if requested by a member media organization. Such ARC reports are not legally binding, and do not provide the advertiser with any protection.

1.8 How does the government enforce advertising laws? What are the potential remedies?

If a representation in advertising is found to be misleading, the Secretary General of the CAA and/or a prefectural governor of the location where the advertising is published may order the advertiser to cease the misleading representation, to take the measures necessary to prevent a reoccurrence,

and/or to take any other necessary action, including public notice of the matters relating to the implementation of such measures. These are commonly known as ‘cease and desist orders’, but they may be issued even if the violation has already ceased.

Where a seller or a service provider designated under the ASCT has violated:

- (a) the obligation to indicate certain information when advertising goods, rights, or services (for example, price, when payment is due, method of payment, and cancellation);
- (b) the prohibition of misleading advertising; or
- (c) the prohibition on sending e-mail advertising without consent,

and if 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 fails to comply with the above obligations and abide by the above prohibitions, then METI may order the seller or the service provider to suspend its business activities that are connected with such mail order sales, either partially or completely, for up to two years and/or pay a fine of up to JPY3,000,000.

1.9 When does a competitor have a right of action? What are the potential remedies?

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:

- (a) an injunction;
- (b) damages; and
- (c) 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 Japan Advertising Review Organization (JARO—www.jaro.or.jp), a self-regulatory body established by the advertising industry, which handles complaints and inquiries from consumers, competitors and others, and makes recommendations for modification or discontinuance of questionable representations, and request 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 and/or the CAA is another option. However, handling of complaints is at the discretion of the prefectural governor or the CAA, so notification is not always an effective remedy.

In practice, directly contacting and discussing questionable advertising with the advertiser or the advertising agency that is handling it can be a faster and more effective alternative.

1.10 When do consumers have a right of action? What are the potential remedies?

In practice, consumers usually challenge advertising through the CAA or the JARO, although consumers have a right of action if the advertising has infringed the consumer’s rights.

Anyone may contact the CAA and the JARO, and no grounds are required to bring a complaint with either of these organizations.

If the CAA receives notice of questionable advertising, the CAA 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 1.8 above.

If JARO receives a complaint or an inquiry concerning certain advertising, JARO examines the matter and, where necessary, recommends the advertiser to modify or discontinue making questionable representations. Advice or information is also provided in response to inquiries.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Japan have a primary advertising self-regulation system?

Each industry generally has its own code of practice in addition to ‘fair commission codes’ in certain industries. 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.

Also see question 1.9 above regarding the JARO.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Some industries such as alcohol and tobacco industry have self-regulatory advertising codes.

These voluntary rules basically stipulate:

- (a) protection for minors (restrictions on the times of broadcasts, media, and use of celebrities appealing to the younger generation);
- (b) warnings for health; and
- (c) specified manner in terms of, for example, wording, point size of type, and timing of the warning.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Non-compliance with a self-regulatory advising code is very rare and could directly lead to a cease and desist order by the CAA and calls for a commercial boycott by consumers.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Yes.

2.5 Are the self-regulatory system’s decisions reported?

It depends on the industry. Usually, such decisions will be disclosed to the public, for example on the website of an industry association, or such information will be shared within the self-regulatory system.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Some voluntary rules (for example, rules on alcoholic beverages, and on tobacco) prohibit certain advertising in order to protect minors.

2.7 Are there any other self-regulatory systems that govern advertising practices in Japan?

No.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Japan (eg, consumer protection laws; IP laws; unfair competition laws)?

The Unfair Competition Prevention Act, Copyright Act, Trademark Act, Pharmaceuticals and Medical Devices Act, Health Promotion Act, Outdoor Advertisement Act, AUPMR, and ASCT govern advertising claims.

3.2 Is substantiation required for advertising claims?

There are no specific rules on substantiation. However, tests and studies must be objective, must be supported by results and facts, and must be fair.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

No. There is no concept of ‘puffery’.

3.4 What are the rules governing the use of disclosures in advertising?

There are no specific rules governing the use of disclosures.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Endorsement by third parties may not be used without prior consent and must not mislead consumers. Industry codes of practice generally stipulate that testimonials, statements of opinion, beliefs and experience must not mislead consumers, and advertisers must use disclaimers on such statements such as ‘this is an individual experience and not for everyone’. Professional comments, for example, by a doctor or a specialist, must be general and not for a specific good or service.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted. The comparison must be proven objectively, supported by evidence, and presented correctly, appropriately, and fair in methodology. It is permissible to identify a competitor by name or product, although it is rare to do so in practice.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

There are no special copyright rules that may impact comparative advertising.

Under the Trademark Act, to display or distribute advertising materials affixed with a trademark is deemed to be ‘use’ of the trademark. Putting another person’s trademark on advertising material without consent would be an infringement of the trademark.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

The Act on Protection of Names of Specific Agricultural, Forestry and Fishery Products and Foodstuffs (GI Act) has been enforceable since June 2015 in order to secure the profits of producers of specific agricultural, forestry and fishery products and foodstuffs (SAFFPF) by establishing a system for protection of names of SAFFPF based on Annex 1C (Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)) of the Marrakesh Agreement Establishing the World Trade Organization (WTO). 68 local products and one international food (Italian Parma Ham, Prosciutto di Parma) have been registered as Geographic Indication (GI) in Japan as of 27 September 2018.

The agricultural, forestry and fishery products and foodstuffs for which a group of producers may apply registration to the Minister of Agriculture, Forestry and Fisheries (MAFF) include:

- (a) the name;
- (b) the place of production;
- (c) the characteristics; and
- (d) the method of production

of the agricultural, forestry and fishery products and foodstuffs, respectively.

No person may affix a GI pertaining to a SAFFPF or an indication similar to it on agricultural, forestry and fishery products and foodstuffs belonging to the classification to which the SAFFPF under the registration is affiliated, or to agricultural, forestry and fishery products and foodstuffs manufactured or processed using those products as a main raw material or ingredient, or on its package, etc.

MAFF regularly monitors whether the production process management is conducted appropriately. In addition, if a GI is infringed, MAFF may issue an injunction to correct the unlawful use of GIs.

3.10 Are there any special rules governing product packaging?

There are no specific national laws governing product packaging in Japan. However, many local governments regulate overabundant, excessive packaging through local regulations.

4 PRICE ADVERTISING

4.1 What are Japan's rules regarding price advertising?

There is no specific rule regarding price advertising. Tax laws requires that the total price of a good or service includes consumption tax, if the price is indicated (indication of price is optional, excepting ASCT industries which require price indication), although this requirement has been relaxed for a short period until consumption tax is raised to 10%.

4.2 What are Japan's rules regarding advertising 'free' products?

If such 'free' products are deemed to be 'premiums' under the AUPMR, then there are limitations on the maximum value of each premium or the total number of premiums, the kind of premiums, the method in which they are offered and other matters.

4.3 What are Japan's rules regarding sales and special offers?

Sales and special offers are allowed unless they are deemed as dumping, which is prohibited by antitrust laws.

4.4 What are Japan's rules regarding rebates?

There are no specific rules on rebates except where offered to governmental officers in which case it may constitute bribery. In addition, if a rebate affects pricing, it may be contrary to antitrust laws and regulations.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

No.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Under the Medical Care Act, advertising of a medical practice, dental practice, hospital, or clinic is not permitted, with certain exceptions; see question 1.5 above.

Advertisements by lawyers, law firms, and foreign lawyers are strictly limited in Japan; advertising which is, for example, false, comparative, infringes regulations of the national bar association and local bar associations, or damaging or in danger of damaging the dignity of lawyers, etc is prohibited. There is no prohibition on the type of media that may be used, but the wording, placement, and method of advertising are strictly limited.

The Pharmaceuticals and Medical Devices Act prohibits:

- (a) false or exaggerating advertising in relation to name, effect, or efficiency of a medicine, quasi-drug, cosmetic or medical equipment;
- (b) advertising that misleads consumers that a doctor can guarantee the effect or efficiency of a medicine, etc; or
- (c) promotes abortion, or uses an obscene document or image in relation to a medicine, etc.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Spam email (ie sending advertising through email without consent) is prohibited under the ASCT.

There are no legal prohibitions on subliminal messages. However, the regulations of the Japan Commercial Broadcasters Association prohibit the use of subliminal effects in broadcasting, so in practice it is not possible to broadcast advertising with subliminal messages.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The Criminal Code prohibits the distribution, sale or display in public of any obscene document, drawing, etc. Enforcement is somewhat lax.

Each of the large media organizations has self-regulatory rules on usage of words and expressions, and indecent or obscene advertising is generally limited to media that is exclusively for adults.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

No. However, misleading advertising is prohibited in accordance with AUPMR, and an article-style advertisement ('advertorial') in the press usually shows who the advertiser/sponsor is.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

No.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

No. In practice, a copyright notice is included in such advertising, and the licensor of such work will require a copyright notice in a footnote.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

No.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

No.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

No.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

A person who consents to their image being used in advertising consents to the use of his/her name, picture, likeness, voice, and identity (if any) in practice, although there is no specific rule. There is no general rule on ‘fair use’ of publicity in Japan, and privacy and certain kinds of publicity are protected by the Constitution. An advertising agency will not use an individual’s name, picture, likeness, voice or identity without consent.

9.2 Are there situations when permission is not required?

No. However, an infringement of privacy or publicity is too trifling to seek compensation for where an individual cannot be identified because the picture or likeness is unclear.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There is no specific rule governing the types of materials that must be cleared before they are used in advertising; however, consent for the use of trademarks, copyright and publicity is required by other laws.

10.2 Is it permissible to use other companies’ recognizable products in advertising (eg, an actor wearing branded training shoes)?

It is generally not permissible to use other companies’ recognizable products in advertising without permission. However, it would be permissible to use such recognizable products in comparative advertising, though this is somewhat rare in Japan (see question 3.8 above).

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Japan which affect advertising (eg Swedish gender equality law)?

No.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

No.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Japan?

It is very important to conduct cultural research in Japan before advertising there, as what may be acceptable or, for example, amusing abroad may not be so in Japan. In addition, trademarks etc used abroad may infringe local trademarks.

KENYA

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Kenya?

There is no single statute that regulates advertising in Kenya. Rules on advertising are contained in various laws, codes and guidelines.

General principles on representations made to consumers in advertising are contained in the Constitution, the Consumer Protection Act and the Competition Act.

The Marketing Society of Kenya has published a self-regulatory code for its members, called the Code of Advertising Practice and Direct Marketing (the Code).

There are also certain industry specific laws on advertising, which regulate the advertising of goods and services in those particular industries.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

The types of communications considered as advertising vary depending on both the particular law, code or guideline engaged, and the product or service being advertised. The Code, for example, includes the following communications as advertising:

- (a) advertisements on print and electronic material;
- (b) outdoor advertisements;
- (c) cinema and video commercials;
- (d) advertisements in non-broadcast electronic media; and
- (e) view data services such as telephony advertising.

The Code also regulates online advertising.

1.3 What is the basic regulatory framework for advertising regulation?

The basic regulatory framework for advertising is contained in the respective laws or codes which govern advertising. There are also various bodies tasked with enforcement of advertising regulations, key among them being the Kenyan courts, the Advertising Standards Committee (ASC) and the Communications Authority of Kenya. The Capital Markets Authority published draft regulations in 2011 which were to apply to investment advertising, but these regulations have not come into force.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Certain types of advertising are specifically regulated. For instance, the Code regulates disparagement of advertisers, comparative advertising and testimonials. In addition, television advertisements are regulated by the Kenya Information and Communication (Broadcasting) Regulations (the Broadcasting Regulations), which contain several guidelines regarding content of advertisements and the time periods during which advertisements for certain products should be broadcasted. The Broadcasting Regulations require, inter alia, that a licensee must exercise due care in order to avoid content that may disturb or be harmful to children and which contains explicit language, explicit sexual or violent material, music with sexually explicit lyrics or lyrics which depict violence. The Consumer Protection Act prohibits advertising of internet gaming sites that are operated contrary to any written law.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Advertising in the drinks, tobacco, gaming, pharmaceutical and financial services industries are specifically regulated. Advertising of tobacco products is regulated by the Tobacco Control Act. Advertising of alcoholic products is regulated by the Alcoholic Drinks Control Act. Promotions of products and services are regulated by the Betting, Lotteries and Gaming Act, while advertising of internet gaming sites is regulated by the Consumer Protection Act. The Pharmacy and Poisons Board has published Guidelines for Advertisement and Promotion of Medicines and Medical Devices in Kenya, while the Law Society of Kenya has developed a regulatory code of advertising for its members, called the Advocates' (Marketing and Advertising) Rules. The Central Bank of Kenya has also published Prudential Guidelines to regulate advertising by institutions licensed by the Central Bank of Kenya, which include banks and micro finance institutions.

1.6 Are any government pre-approvals required?

There are no Government approvals required in the regulated industries.

1.7 Does the media pre-clear advertising?

The media does pre-clear advertisements. Rules guiding broadcasters on the factors to consider before airing advertisements are contained in the Broadcasting Regulations. The Broadcasting Regulations task broadcasters with ensuring that any descriptions or claims made in all advertisements aired are substantiated by the advertiser. Broadcasters also have an obligation to ensure that advertisements do not contain claims which may mislead members of the public in relation to the products or services advertised and that the advertisements do not unfairly attack or discredit products or services of other advertisers.

1.8 How does the government enforce advertising laws? What are the potential remedies?

There is no specific body established by the Government to enforce advertising laws. However, the Government can enforce advertising laws through the courts. Complainants, including consumers and competitors, may institute actions against advertisers who provide false or misleading information in their advertisements. Potential remedies include injunctions against the broadcast of such advertisements and/or awards of compensation in form of damages.

The ASC constituted under the Advertising Standards Body of Kenya (ASBK) sits as a tribunal and gives rulings and judgments on complaints made to the Advertising Standards Body.

Some statutory bodies have powers to directly enforce advertising laws. The Central Bank of Kenya, for example, has power to issue a directive to any financial institution licensed by it, to amend or refrain from issuing any advertisement which the Central Bank of Kenya considers to be misleading.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor has a right of action where an advertiser gives false or misleading information which directly or indirectly makes reference to the competitor or its products in an advertisement. A competitor may also commence an action where an advertiser makes a claim with respect to its product that is misleading to consumers. The remedy likely to be awarded by the court is an injunction restraining an advertiser from further broadcasting advertisements containing false or misleading information. Although there is a relevant advertising dispute currently before the Kenyan High Court, to date, there have not been any court decisions granting damages with respect to advertising disputes. However, in the matter presently before the courts, the claimant has sought damages with respect to reduced sales of its products allegedly occasioned by the misleading advertisements.

1.10 When do consumers have a right of action? What are the potential remedies?

A consumer has a right of action where he/she suffers loss after consuming a product or using a service pursuant to an advertisement for the product or service which contained false or misleading information. The remedy available to such a consumer would be an award of damages by the court.

A consumer can also file a complaint with the ASC under the Code. The ASC is entitled to impose the following sanctions on an offending advertiser or respondent in a complaint or dispute:

- (a) order the withdrawal of the an advertisement in its current format;
- (b) direct the advertiser to submit the proposed amendment to the Secretariat for pre-publication advice;
- (c) subject the advertiser to pre-publication advice in respect of future advertisements for a specified period;
- (d) publish the names of defaulters in the local media;
- (e) require media members of the ASBK to withhold advertising space from the respondent; and
- (f) refer the advertiser to a disciplinary hearing with one of the umbrella associations.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Kenya have a primary advertising self-regulation system?

The Code is a self-regulatory code which applies to advertising conducted in Kenya. However, this Code is not binding and adherence to its provisions is voluntary, based on the goodwill of advertisers. The Code only applies to all members of the Marketing Society of Kenya (MSK) who have subscribed to the Code. The majority of corporate bodies in Kenya are members of the MSK.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The MSK and the Association of Practitioners in Advertising (APA) under the umbrella of the ASBK have established the Code to regulate advertising and marketing by its members. The Code binds advertisers, practitioners in advertising and media owners who have the principal responsibility of observing the terms of the Code.

The Code provides four basic principles to which advertisements must conform. The principles require that advertisements must be legal, decent, honest and truthful:

- (a) Advertisements must be legal in that their contents must not breach the laws of Kenya and must also not lend support to criminal or illegal activities.
- (b) Under the principle of decency, advertisements must not contain anything which is likely to lead to serious or widespread offence, indignation, umbrage or resentment on grounds of race, tribe, religion, sex, sexual orientation or disability.
- (c) Honesty, as a principle in advertising, requires that advertisements should not contain anything which offends or takes advantage of the susceptibility or vulnerability of consumers and that advertisements should not resemble each other so closely that they as to be misleading or cause confusion.
- (d) Lastly, the principle of truthfulness requires that advertisements should readily be backed with relevant documentation and evidence to establish and substantiate all descriptions, claims and comparisons prior to acceptance for publication or transmission.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The Code provides for a dispute resolution mechanism for the hearing and settlement of complaints made against advertisers. The ASC established by the Code receives, considers and acts upon complaints which are brought to the attention of ASBK in the first instance. Complaints made to the ASC may emanate from competitors, consumers or members of the public, or from criticism from the media. Decisions of the ASC are arrived at by a vote of the majority of the members.

The Code also establishes the Standards Appeal Council (the Council) to consider and determine appeals from parties who are aggrieved by decisions of the ASC. Both the ASC and the Council have power to impose sanctions on an offending advertiser, including an order for removal of an advertisement and a requirement that media members of ASBK withhold advertising space from the offending advertiser.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self-regulation system, although not widely used, is effective and is fast gaining legitimacy among advertisers. This is largely because, where parties submit to the jurisdiction of the ASC, decisions of the ASC and the Council are enforceable against offending advertisers. Kenyan courts have also recognized the dispute resolution role played by these two bodies, as was seen in the *Unilever v Proctor & Gamble* dispute, in which the High Court of Kenya observed that the ASC could be used as a forum for adjudication of advertising disputes where the parties involved submit to its jurisdiction.

2.5 Are the self-regulatory system’s decisions reported?

Some decisions of the ASC and Council are reported online on the ASBK website <http://advertisingstandards.or.ke/rulings/>. However, some decisions are not reported in order to safeguard confidentiality with respect to the parties involved and their affairs.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Advertisers should be aware that even though the Code prescribes certain minimum standards for advertising of various products, these provisions are subject to statutory provisions which regulate advertisement of some products, including:

- (a) cigarettes (Tobacco Control Act),
- (b) alcoholic products (Alcoholic Drinks Control Act) and
- (c) pharmaceutical products (Pharmacy and Poisons Act).

Companies advertising products whose advertisement is regulated by specific statutes should be familiar with those provisions since non-observance is bound to attract stiff penalties.

2.7 Are there any other self-regulatory systems that govern advertising practices in Kenya?

There are no other self-regulatory systems that govern advertising practices in Kenya.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Kenya (eg, consumer protection laws; IP laws; unfair competition laws)?

The general rules governing advertising claims are found in the Constitution, the Consumer Protection Act and the Competition Act:

- (a) The Constitution guarantees the right of consumers to information which is necessary for them to gain the full benefit from goods and services. One of the ways in which this information is relayed to consumers is through advertising.
- (b) The Consumer Protection Act prohibits the making of false, misleading or deceptive representations to consumers and describes instances of what constitutes false, misleading or deceptive representations.
- (c) The Competition Act makes it an offence for any person to make false, misleading or unconscionable representations in connection with the promotion by any means of the supply or use of goods or services.

3.2 Is substantiation required for advertising claims?

Under the principle of truthfulness in advertising, advertisers are obliged to substantiate all advertisements with relevant documentation and evidence in support of all descriptions, claims and comparisons prior to acceptance of the advertisement for publication or transmission. The evidence to be used to substantiate the description, claim or comparison must come from a credible independent research entity acceptable to ASBK. Where research is conducted in-house by the advertiser, such research results must be evaluated and confirmed by a credible independent research entity. The responsibility of substantiation lies solely on the advertiser and remains with them even when handling of advertising is delegated to an agent.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

All types of advertisements require substantiation without exception.

3.4 What are the rules governing the use of disclosures in advertising?

Disclosure requirements in advertising vary depending on the product or service being advertised. For example, under the Betting, Lotteries and Gaming Act, betting tipsters are required to disclose to publishers their real names and permanent addresses.

Similarly, advertisements for financial services rendered by institutions licensed under the Banking Act must disclose the full physical address and contact details of the advertiser.

Marketers engaged in e-commerce with consumers must also provide accurate, clear and easily accessible information about themselves and about the goods or services offered to enable consumers to make an informed decision about whether to enter into the transaction.

There are also disclosure requirements that apply to advertisements for alcohol and tobacco. The Alcoholic Drinks Control Act provides that no person shall promote an alcoholic drink so as to create a false impression that:

- (a) a link exists between consumption of that drink and social or sexual success;
- (b) consumption of that drink is acceptable before or while engaging in driving, operating machinery, sports or other activities that require concentration in order to be carried out safely;
- (c) that the alcoholic drink has a therapeutic value or that it has the ability to prevent, treat or cure any human disease; and
- (d) it is wrong or foolish to refuse that drink.

As a matter of practice, alcoholic products in Kenya usually contain the following warning messages: 'Excessive consumption of alcohol is harmful to your health. Not for sale to persons under 18 years.'

With respect to tobacco, the Tobacco Control Act provides that, subject to the provisions of Part V of the Act, no person should promote a tobacco product by means of an advertisement that depicts, in whole or in part, a tobacco product, its package or a brand element or one that evokes a tobacco product or element. The Act also prohibits the advertisement of any tobacco product on any medium of electronic, print or any other form of communication or the promotion of tobacco or a tobacco product by means of lifestyle advertising.

As regards advertisements for financial services, as indicated earlier in this chapter, the Capital Markets Authority had published draft Capital Markets Authority Advertising Regulations 2011, but these regulations have not come into force. These regulations define investment advertisement to mean any form of advertisement made to any person in Kenya which contains or refers to an invitation or inducement to subscribe for or purchase any form of investment (whether that investment constitutes particular securities which are or are to be offered for subscription or purchase or related generally to investment in some form of securities).

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Rules governing use of testimonials and endorsements in advertising require that any testimonial or endorsement must be genuine and must relate to a consumer's personal experience over a reasonable period. Testimonials should not contain claims in relation to a product's effectiveness which cannot justifiably be attributed to use of the product.

Advertisers are not required to seek a person's permission before using a statement as a testimonial or endorsement.

The Code places restrictions on testimonials from people resident outside Kenya, which are unacceptable unless the address and country of residence of the person making the testimonial is made available to the ASBK.

The Code prohibits depiction or endorsement in a cigarette advertisement of any celebrity in the entertainment or sporting world or any other person who may appeal to persons below 18 years old.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific laws or regulations governing the use of product demonstrations in Kenya.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted by the Code. The guiding principle in all comparisons is that all products and/or services should be promoted on their own merits and not on the demerits of competitive products. The following rules should be adhered to when an advertiser is making comparisons in an advertisement:

- (a) claims made in the comparative advertisement must not be misleading or confusing;
- (b) only facts capable of substantiation can be used in a comparative advertisement;
- (c) the comparative advertisement must not infringe on advertising goodwill;
- (d) the comparative advertisement must not disparage other advertisements; and
- (e) products or services compared in a comparative advertisement must have similar characteristics.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

The Trade Marks Act prohibits the use of a trade mark in Kenya which is identical or similar to a registered trade mark or a well known mark entitled to protection under the Paris Convention or the World Trade Organization Agreement and which is likely to cause confusion among users of the goods or services. This general prohibition also covers use of trade marks in comparative advertising. There are no special rules on copyright. Copyright in advertisements would, therefore, need to be protected under the normal rules of copyright as set out in the Copyright Act.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

The Code requires that claims on geographical origin must not be misleading and they must be factual. In Kenya, stakeholders are deliberating on a Draft Geographical Indications Bill 2007 in line with Article 22 and Article 23 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The draft bill proposes to (among other things) protect against a geographical indication which falsely represents to the public that the goods originate in a given territory.

3.10 Are there any special rules governing product packaging?

There are special rules governing product packaging that are sector-specific. For instance, there are rules which apply to alcoholic beverages, tobacco products, pharmaceutical products, food substances and chemical substances. These rules provide, inter alia, for the warnings that should be included on the product packaging and the relevant information that should be provided to consumers.

4 PRICE ADVERTISING

4.1 What are Kenya’s rules regarding price advertising?

The following rules apply with regard to price advertising in Kenya:

- (a) the stated price should be clear and should match the product advertised;
- (b) the price must be quoted in full and should be the selling price at which the goods will be sold to purchasers making immediate payment;
- (c) the prices quoted must include all necessary incidental costs without which the product cannot be purchased and taxes (including VAT and other non-optional taxes and duties); and
- (d) if the price of one product is dependent on the purchase of another, the advertisement should clarify the extent of any commitment made by purchasers.

4.2 What are Kenya’s rules regarding advertising ‘free’ products?

Advertisement of ‘free’ products is subject to the following rules:

- (a) advertisements offering ‘free’ goods should indicate that such goods are only received subject to purchase;
- (b) no product should be advertised as ‘free’ where there is cost to be incurred by a consumer, other than the actual cost of any delivery, freight or postage and, where such costs are payable by the consumer, the advertisement should clearly indicate this;
- (c) where incidental costs of delivery, freight or postage exceed those that would typically arise if a comparable product was bought from a comparable source, the product should not be advertised as ‘free’; and

(d) advertisers should not seek to recover the costs of the products which they describe as 'free.'

4.3 What are Kenya's rules regarding sales and special offers?

The Code provides general guidelines with regard to special offers and places the following restrictions on special offers:

- (a) an advertiser must not make an offer which requires a person to notify the advertiser that he/she does not wish to receive further goods unless this condition is made clear in the original offer and accepted by the consumer; and
- (b) an advertiser should not dispatch goods to a potential buyer unless an order has been received or the consignment is clearly shown to be 'free'.

Regulations governing advertisement of certain specific products also contain provisions on special offers. The Guidelines for Advertisement and Promotion of Medicines and Medical Devices in Kenya, for example, ban offering free samples, bonus offers and discounts on any medicine sold directly to the public.

4.4 What are Kenya's rules regarding rebates?

There are currently no rules on rebates in Kenya.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

With regard to retail advertising, advertisers should note that where a manufacturer inserts the name of a retailer in an advertisement, the advertisement will be deemed to be a 'retail' advertisement and not that of the manufacturer. Retailers are also permitted to quote price comparisons or specific discounts in advertisements provided that satisfactory documentary evidence of the price reduction is available and can be provided on request, and that a single price reduction or discount may only be advertised for a maximum period of three months.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

All products and services may be advertised on all types of media available for advertising. However, there are controls on how certain products, including tobacco and alcoholic products and medicines, can be advertised. The Code, for example, restricts television advertising of cigarettes to times when the audience is likely to consist of adults only and preferably after 9pm.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Pursuant to the Kenya Information and Communication (Consumer Protection) Regulations, it is an offence to directly market products using automated calling systems without human intervention, facsimile machines or electronic mail without the consent of the subscriber.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Regulations governing indecency and obscenity are contained in the Broadcasting Regulations, which oblige broadcasters to ensure that content aired on their stations does not contain:

- (a) offensive language, including profanity and blasphemy;
- (b) sexual matters in an explicit and offensive manner;
- (c) glorification of violence; and
- (d) anything which is likely to incite or perpetuate hatred of any person or section of a community on account of race, ethnicity, nationality, gender, sexual preference, religion or culture.

Content aired by broadcasters includes advertisements. Therefore, these prohibitions also apply to television and radio advertisements.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

The following rules apply with regard to identification of advertisers or sponsors:

- (a) the identity of advertisers should always be disclosed in features, announcements or promotions whose content is controlled by the advertisers;
- (b) all distance selling advertisements with written response mechanisms, for example, advertisements sent by registered post, facsimile or electronic mail must contain the names and addresses of the advertisers;
- (c) advertisements by political parties must clearly be identified and distinguished so as not to be confused with normal programming; and
- (d) sponsorship of a program by an advertiser must be acknowledged immediately before and after the program is broadcast and the connection between the program's subject matter and the sponsor's commercial activities must be identified.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are no special rules governing the integration of advertising and entertainment content. However, general rules against passing off in trade mark and substantial copying and reproduction of material protected under copyright apply. There are no rules regulating product placement in Kenya.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no special disclosure obligations when integrating advertising content with other content.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no special rules governing advertising on social media. However, advertisers will be liable if they make false, misleading or deceptive representations to consumers, which are prohibited under the Consumer Protection Act.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

Please see question 8.1. Where a consumer places a false, misleading or deceptive statement on an advertiser's Facebook page, the advertiser could avoid liability by demonstrating that the consumer acted on his own and not on instructions from the advertiser.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

There are currently no judicial decisions with regard to advertising on social media and user generated content.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

Image rights are recognized and protected under Kenyan law. Therefore, before a person's picture or likeness is used in advertising, the consent of that person should be obtained. The person's consent should also be obtained where their name or voice is used in an advertisement since this might be considered by consumers to be an endorsement of the product or service being advertised. There is no prescribed process for obtaining consent. It is a contractual arrangement with the owner of the image rights.

9.2 Are there situations when permission is not required?

There are no situations when consent is not required.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are no specific rules governing types of materials which must be cleared before they are used in advertising. However, some organizations usually have their own internal approval procedures that apply to materials used in advertising.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

It is not permissible to use other companies' recognizable products in advertising without the companies' consent, as this would amount to infringement of either trade mark or copyright, or the tort of passing off.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Kenya which affect advertising (eg, Swedish gender equality law)?

The Code requires that in order to preserve cultural and traditional norms and practices, characters and situations depicted in cigarette advertisements should not be shown so that they directly or

indirectly imply traditional values, aspirations or historical associations, or behavioral norms of the community to which the advertisements is aimed.

The National Flags, Emblems and Names Act prohibits the use of the national flag of Kenya, certain specified emblems and specified names or their imitations in advertisements without Government permission.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

We are not aware of any other cultural norms that should be considered.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Kenya?

Other than the principles set out above, there are no general principles applicable to advertising in Kenya that we would wish to highlight.

LUXEMBOURG

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Luxembourg?

In Luxembourg advertising is not regulated by a single law but by a wide variety of laws and regulations. Some general principles apply to all kinds of products. The legal provisions protecting consumers or concerning unfair competition are examples of this. Certain categories of products such as drugs, alcohol, tobacco and financial products are specifically regulated, as are types of media such as television and emails. Provisions relating to personal data as well as intellectual property may also impact upon advertising to a certain extent.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

Advertising is widely defined as 'any form of communication made in connection with a commercial, industrial, artisanal or liberal activity which has the effect of promoting the supply of goods or services'. The simple fact of showing a product on the internet, for instance, can be regarded as advertising.

1.3 What is the basic regulatory framework for advertising regulation?

Advertising is generally allowed in Luxembourg, except where it is expressly prohibited or regulated by a specific law or regulation. Some legal requirements apply to all types of advertising, while others only apply to specific categories of products or services, or to specific means of communication. There is no clearance scheme and no enforceable code of practice for advertising in Luxembourg.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The use of text messages for the purposes of direct marketing, whether using an automated system or not, is only allowed if a subscriber or user has given their prior consent (opt-in).

The use of emails for the purposes of direct marketing is allowed only in respect of customers who have given their prior consent (opt-in). However, where email addresses are obtained from customers in the context of the sale of a product or a service, such data may be used for the direct marketing of similar products or services in respect of which customers have a right to object (opt-out).

The use of an automated calling system for direct marketing purposes is only allowed if a subscriber or user has given their prior consent (opt-in).

Audiovisual commercial communications have to meet specific additional requirements. By way of example, they must:

- (a) be identifiable as such (surreptitious advertising is prohibited, and placement of products is only authorized if consumers are duly informed);
- (b) not use subliminal techniques;
- (c) not infringe human dignity;
- (d) not include discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation; or

- (e) not encourage misbehavior that can be detrimental to health or security or to the protection of environment.

In addition to the rules applying to advertising in general, radio advertising must, in particular, comply with certain volume limits and must not exceed a certain frequency set by the applicable regulation. The specific requirements relating to audiovisual commercial communications set out above have not yet been extended to radio advertising.

Online advertising is regulated indirectly through regulations applying to specific products or services.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Several industries are subject to specific laws which govern their advertising. These are some of the main ones, but the list is not exhaustive.

- (a) **Alcohol:** Alcohol advertising is permitted in all media, subject to compliance with several requirements which include:
 - (i) For any audiovisual commercial communications, the Law of 27 July 1991 on Electronic Media, as amended (Law on Electronic Media) provides that communications relating to alcoholic beverages must not be aimed specifically at minors and must not encourage immoderate consumption of such beverages.
 - (ii) Television advertising and teleshopping for alcoholic beverages must not specifically target minors or depict minors consuming these beverages. Claiming that alcohol has therapeutic qualities, is a stimulant, a sedative or a means of resolving personal conflicts is also prohibited.
- (b) **Tobacco:** Tobacco advertising is prohibited (the Law of 11 August 2006, as amended, concerning anti-smoking), except for advertising placed inside tobacco shops provided certain conditions are met, online advertising restricted to professionals or directed at consumers located outside the European Union.
- (c) **Medicines:** Advertising prescription-only medicines is prohibited, except to professionals.
Advertising of medicines which are not prescription-only is permitted provided that a marketing authorization has been obtained from the Ministry of Health.
- (d) **Food and Drink:** Advertising and labeling for food and drink is regulated.
- (e) **Automotive:** Advertising for cars must contain specific disclosure on fuel economy and CO2 emissions.
- (f) **Financial products:** Advertising for financial products must contain a specific disclaimer when referring to the past performance of a product, or contain specific information when advertising consumer credit.

1.6 Are any government pre-approvals required?

Advertising of medicines is submitted to a prior approval: any advertising reaching the public through any means whatsoever is prohibited if it has not been previously authorized by the Minister of Health or by an official appointed by the Minister for this purpose. However, this prohibition does

not apply to general advertising, mentioning exclusively the name and composition of the product, the name of the manufacturer and his address.

1.7 Does the media pre-clear advertising

It is not a common practice and not mandatory. However, advertisers, media and agencies can make a request for prior advice on their ads to the *Commission Luxembourgeoise pour l'Ethique en Publicité* (CLEP) (as to which see question 2.1).

1.8 How does the government enforce advertising laws? What are the potential remedies?

There are no governmental agencies in charge of enforcing advertising laws in Luxembourg. Advertising issues may be handled by the criminal courts at the request of the *Procureur d'Etat* (State Prosecutor), a consumer or a competitor. The civil courts may also consider advertising matters at the request of a consumer or an authorized consumers' association, a competitor or the Ministry of the Economy.

In addition, the CLEP (see question 2.1 below) can consider any individual's claim.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor may bring an unfair competition claim before the courts if someone acting in the same field of activity does not comply with advertising law and regulation. A court may order the defendant to stop the infringing advertising and to pay the claimant damages as compensation for the loss suffered.

The claimant may also file summary proceedings seeking injunctive relief. Failure to comply with such an injunction may lead to a criminal fine ranging from €251.00–120,000.00.

In the event of the illegitimate use of a trade mark in advertising (unlawful comparative advertising, for instance), the trade mark owner may bring proceedings for infringement of its intellectual property, seeking an injunction preventing the use of its trade mark as well as damages.

In some circumstances when there are no intellectual property rights at hand, a company may also bring a claim for '*parasitisme*' against another when the latter tries to take advantage of the reputation the former company has acquired or the investment it has made.

1.10 When do consumers have a right of action? What are the potential remedies?

The Luxembourg Consumer Code prohibits unfair commercial practices (which could include advertising or marketing), such as misleading or aggressive commercial practices committed by a professional and directly connected to the promotion, sale or supply of a product to consumers.

A commercial practice is more likely to be regarded as misleading if, in its factual context, it causes or is likely to cause the consumer to take a decision that he would not otherwise have taken. It applies to any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor.

In the event of unfair commercial practices, consumers can bring actions either before the criminal or civil courts. A fine ranging from €251.00–120,000 can be imposed as a criminal sanction.

Consumers can obtain compensatory damages by proving that the advertising has caused them loss. They can also obtain a court order preventing the advertiser from continuing to engage in unfair commercial practices which can carry a daily penalty where compliance is delayed. Such an order can also be obtained through summary proceedings.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Luxembourg have a primary advertising self-regulation system?

The *Commission Luxembourgeoise pour l'Ethique en Publicité* (CLEP) acts as a self-regulatory body in Luxembourg. CLEP was set up by the *Conseil Luxembourgeois de la Publicité* (CLP), which is a non-profit association formed by the country's major active players in the fields of marketing and commercial communications. CLEP aims to maintain standards of loyalty and ethics for advertising in all media throughout the Grand-Duchy of Luxembourg.

CLEP advises the advertising community and handles complaints. It is also entitled to act on its own initiative. CLEP can ask for modifications or decide to ban an advertisement, but its decisions are only binding on members of the CLP. Any advertiser may become a member of the CLP provided a membership fee is paid. At present, the CLP has approximately 60 members.

2.2 Is there a self-regulatory advertising code? What are the key principles?

CLEP enacted a Code of Ethics which sets out non-compulsory general guidelines relating to advertising, as well as guidelines specific to children, alcohol or drugs.

All marketing communications should be legal, decent, honest and truthful and should be prepared with a due sense of social and professional responsibility. They should also conform to the principles of fair competition, as generally accepted in business.

No communication should impair public confidence in marketing. Amongst others, the main principles are set out below:

- (a) **Decency:** Marketing communications should not contain statements or audio or visual treatments which offend standards of decency currently prevailing in the country and culture concerned.
- (b) **Honesty:** Marketing communications should not abuse the trust of consumers or exploit their lack of experience or knowledge. Relevant factors likely to affect consumers' decisions should be communicated in such a way and at such a time that consumers can take them into account.
- (c) **Social responsibility:** Marketing communications should respect human dignity and should not incite or condone any form of discrimination, including that based upon race, national origin, religion, gender, age, disability or sexual orientation. They should not, without good reason, play on fear or exploit misfortune or suffering, nor should they appear to condone or incite violent, unlawful or anti-social behavior.
- (d) **Environmental responsibility:** Marketing communications should refrain from encouraging the consumer to behave irresponsibly towards the environment.

- (e) **Respect for privacy:** Marketing communications should strictly observe the rules ensuring the protection of privacy, in particular by refraining from using personal documents for advertising purposes.
- (f) **Truthfulness:** Marketing communications should be truthful and not misleading. They should not contain any statement, claim or audio or visual treatment which, directly or by implication, omission, ambiguity or exaggeration, is likely to mislead the consumer.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

CLEP can directly examine any ethical question.

At the request of an advertiser or on its own initiative, CLEP can review advertising before it is broadcast.

A consumer can also ask CLEP to consider a complaint by providing their surname, first name and full address. The complainant will receive an acknowledgement of their complaint within 10 working days. Meanwhile, the respondent advertiser will be informed of the complaint and given 10 working days to communicate their response.

If the matter comes before an ordinary or an administrative court before or during CLEP's consideration of the complaint, CLEP can decide to abandon the complaint, either permanently or temporarily.

If, after examination, CLEP considers the advertising to be a breach of its Code of Ethics, the respondent advertiser will be asked in writing to modify or withdraw the offending advertising.

If there is no answer, or in the case of a refusal by the respondent advertiser, CLEP can advise the media not to broadcast, or to suspend the broadcasting of, the offending advertising.

When it appears that the issue is exclusively about decency, CLEP limits itself to providing an opinion. Responsibility for complying with that opinion then falls upon the respondent advertiser, the advertising network and the media.

CLEP's opinions and decisions have to be delivered within 15 working days of the complaint being submitted.

2.4 Is the self-regulation system effective? Is it widely used and followed?

CLEP does not yet play a major role in regulating advertising practice in Luxembourg. The first version of CLEP's Code of Ethics was enacted in 2009 and, to date, it has issued very few decisions. Nor has CLEP provided specific guidance which can serve to interpret legal provisions.

In 2015, a new version of the Code of Ethics containing specific provisions on online behavioral advertising was adopted and provides the following:

- (a) Online marketing communications should ensure that the public is comfortable using digital media, in particular by ensuring that features such as weight, dimensions, the use of sound and the duration of marketing communications are reasonable.

- (b) Processing of behavioral data by electronic means, such as cookies or fingerprinting for marketing purposes, requires the prior consent of the data subject concerned. Behavioral advertising must be clearly identifiable as such.

That said, there are also relatively few court decisions on advertising issues, which perhaps indicates that advertisers are capable of self-regulation.

2.5 Are the self-regulatory system's decisions reported?

Theoretically, the decisions of CLEP can be published on its website, but no decision has been published so far.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Not applicable.

2.7 Are there any other self-regulatory systems that govern advertising practices in Luxembourg?

In Luxembourg, various industries have also enacted their own code of ethics which contain provisions on advertising, marketing and commercial communications. By way of example, these include the Code of Ethics of the Luxembourg Pharmaceutical Association and the Code of Ethics of the Luxembourg Bankers Association.

In addition, the CLEP is a member of the European Advertising Standard Alliance (EASA) and refers to EASA guidelines and Code of Ethics.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Luxembourg (eg, consumer protection laws; IP laws; unfair competition laws)?

The basic laws governing advertising claims are as follows:

- (a) The Luxembourg Consumer Code (Business-to-Consumer);
- (b) The Law on sales, sidewalk sales and misleading and comparative advertising (Business-to-Business and Business-to-Consumer);
- (c) The Data Protection Law in the electronic sector (this contains provisions which apply, for example, to online behavioral advertising);
- (d) The Law on Electronic Media;
- (e) The Law on Copyright, Related Rights and Databases;
- (f) The Benelux Convention on Intellectual Property (Trade Marks, Designs and Models)
- (g) The General Data Protection Regulations (GDPR) and the Luxembourg Data Protection Law.

Various other Luxembourg laws contain provisions on advertising in specific sectors such as for the labeling and packaging of foodstuff, financial services, medicines, tobacco and alcohol.

3.2 Is substantiation required for advertising claims?

Any advertising claims must not be misleading; ie they must be true, accurate and, in particular, capable of substantiation. However, there are no requirements about what might constitute valid evidence. For instance, there is no requirement for a minimum number of individuals to test a product in order to substantiate a claim that a product shows a particular rate of efficiency. However, an advertising statement based on tests conducted on only ten individuals is very likely to be regarded as not being accurate and therefore misleading.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Luxembourg legal provisions regarding misleading advertising apply to all commercial communications, and do not include any derogations for certain types of advertising claims. As a result, any advertising messages claiming a result or including a comparison with competitors (such as being 'the best' or 'No 1' for instance) need to be substantiated.

However, not all laudatory messages or exaggerations are regarded as being misleading. Such messages are tolerated if there is obviously no risk of confusion on the part of the public. For instance, claiming that a product is eco-friendly does not necessarily require proof that it has no impact on the environment, as that is obviously impossible. It does, however, need appropriate substantiation.

3.4 What are the rules governing the use of disclosures in advertising?

Disclosures, where legally required, must not be misleading. They must be accurate, comprehensible by consumers, and legible. There are, however, no specific legal requirements about the size or type of font used, or the size of disclosures.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Endorsements and testimonials are not regulated as such in Luxembourg. They must, however, comply with the general rules which apply to advertising and, notably, must not be misleading or unfair.

In particular, advertisers must not mislead consumers through any statements or signs which make consumers believe that the products advertised benefit from any sponsorship or support, whether it be direct or indirect.

An advertisement can also be considered to contain a misleading omission where an advertiser hides or provides material information in an unclear, unintelligible, ambiguous or untimely manner; or where the advertiser fails to identify the commercial intent of its commercial practice. An example of this is where, instead of ordinary people, actors are used in an advertisement to endorse a product without making it clear that the testimonials are not real.

3.6 What are the rules governing the use of product demonstrations in advertising?

Product demonstrations in advertising are not specifically regulated. The general rules regulating advertising may apply and especially those concerning misleading advertising.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is defined as ‘any advertising that, explicitly or implicitly, identifies a competitor or goods or services offered by a competitor’.

Comparative advertising is considered lawful provided that it respects the conditions set by the law, notably, it:

- (a) must not be misleading;
- (b) must only compare goods or services having the same purposes;
- (c) must not discredit or denigrate the compared products or services; and
- (d) must not create a confusion on the market between the advertiser and a competitor.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

Luxembourg law does not require that the competitor’s trade mark or product be marked by a specific symbol such as ‘TM’, ‘®’ or ‘©’. If comparative advertising meets the legal requirements, the trade mark or copyright owner has no right to challenge the use by a competitor of its trade mark or copyrighted product in advertising. However, it may bring a claim for infringement of its intellectual property before the courts and claim injunctive relief as well as damages.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

Any advertising claiming that a product has a certain geographic origin should comply with general rules concerning the prohibition of unfair commercial practices and misleading advertising.

According to Luxembourg Consumer Code: ‘A commercial practice shall be regarded as misleading:

- (a) if it contains false information or
- (b) in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:
 - (i) the existence or nature of the product;
 - (ii) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, **geographical or commercial origin** or the results to be expected from its use, or the results and material features of tests or checks carried out on the product’.

If comparative advertising concerns products having a designation of origin, the advertising is only lawful if it compares products having the same designation of origin.

Specific rules may apply to certain types of products (wines, cheese, champagne).

3.10 Are there any special rules governing product packaging?

Product packaging should comply with general rules concerning the prohibition of unfair commercial practices and misleading advertising.

There are special labelling rules governing specific types of products (wines, tobacco, foodstuffs, medicine etc):

- (a) **Food:** As regards foodstuffs, specific information must be provided, such as:
 - (i) the name of the food;
 - (ii) the list of ingredients;
 - (iii) any ingredient or processing aid causing allergies or intolerances used in the manufacture or preparation of a food and still present in the finished product, even if in an altered form;
 - (iv) the quantity of certain ingredients or categories of ingredients;
 - (v) the net quantity of the food;
 - (vi) the date of minimum durability or the 'use by' date;
 - (vii) any special storage conditions and/or conditions of use;
 - (viii) the name or business name and address of the food business operator;
 - (ix) the country of origin or place of provenance where provided for;
 - (x) instructions for use where it would be difficult to make appropriate use of the food in the absence of such instructions;
 - (xi) with respect to beverages containing more than 1.2% by volume of alcohol, the actual alcoholic strength by volume; and
 - (xii) a nutrition declaration.
- (b) **Cosmetics:** Sale of cosmetics as well as labelling are mainly regulated by EU regulations. Luxembourg law requires specific information to be displayed at least in one of the Luxembourg official languages (either French, German or Luxembourgish). The information required includes:
 - (i) nominal content (ie given by weight or by volume, except for packaging containing less than five grams or five milliliters, free samples and single-application packs); and
 - (ii) date of minimum durability until which the cosmetic product, stored under appropriate conditions, will continue to fulfill its initial function.

EU Regulations also contain a list of substances which requires special precaution as well as associated warnings (such as 'not to be used on peeling or irritated skin', 'not to be swallowed', 'avoid contact with eyes', etc) to be displayed on packaging. Where it is impossible for practical reasons to label particular precaution information on the product itself, this information shall be mentioned on an enclosed or attached leaflet, label, tape, tag or card or warned by a specific symbol.

4 PRICE ADVERTISING

4.1 What are Luxembourg's rules regarding price advertising?

There is no obligation to indicate the price of goods and services in advertising, although, when it is done, the price must be disclosed in a legible, unambiguous and visible manner. It must be written in

Euros, and include VAT and other taxes. The price paid cannot be higher than the price displayed. As a result, if the advertised price only applies to specific cases, the conditions to qualify for this price must be disclosed in a clear manner.

4.2 What are Luxembourg's rules regarding advertising 'free' products?

Sales with a free gift (*vente avec prime*), where free products or services are offered with purchases, have been lawful in Luxembourg since 2002. There are no restrictions regarding the value of the free gift compared to the price of the purchase.

An exception exists for medicines, as they cannot be offered for free unless it is on an exceptional basis and only to qualified persons. Also, tobacco products cannot be offered for free, nor can alcoholic beverages to minors under 16.

4.3 What are Luxembourg's rules regarding sales and special offers?

In Luxembourg, the term '*soldes*' (bargain sales) can only apply to sale offers or sales with reduced pricing made during a 'sales' period, which only takes place twice a year, each period not exceeding a maximum of one month. A Grand-Ducal regulation fixes the opening and closing dates of both periods of 'sales' every year. These restrictions do not apply to online shops. Special offers are possible during other periods of the year provided they are not described as '*soldes*'.

4.4 What are Luxembourg's rules regarding rebates?

Under the current regime, rebates are no longer specifically regulated in Luxembourg. To be lawful, they must, however, not be misleading and construed as unfair commercial practices.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Not anymore.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

- (a) **Tobacco:** All forms of tobacco advertising are prohibited (except for advertising placed inside tobacco shops, provided certain conditions are met, and online advertising restricted to professionals or targeted to non-EU countries). This prohibition includes the use of the trade mark or logo on everyday objects other than those directly related to smoking.
- (b) **Medicines:** Advertising medicines that cannot be delivered without a medical prescription, or which contain narcotics or are reimbursable by the healthcare system, is prohibited (except to professionals and under specific conditions).
- (c) **Lawyers:** As a rule, advertising legal services is prohibited.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Misleading advertising is prohibited. Advertising will be considered as misleading if, in any way, including in its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and, by reason of its deceptive nature, is likely to affect their economic behavior or, for those reasons, injures or is likely to injure a competitor.

For example, direct marketing using an automated calling/communication system is only allowed if the subscriber or the user has given their prior consent (opt-in).

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Luxembourg law does not have general provisions on decency in advertising as such, although audiovisual commercial communications must not prejudice human dignity.

In addition, indecency in advertising, whatever the media involved, will be considered in the light of '*outrage aux bonnes moeurs*', the criminal prohibition on affronting public decency. This prohibition is general and does not only concern advertising. Other specific criminal offences which might apply to advertising include discrimination or incitement to hatred based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.

CLEP's Code of Ethics also provides that advertising must respect human dignity. In this regard, advertising must not denigrate, offend or show contempt for either men or women. Representation of the body in advertising must be decent and not excessive.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Yes, commercial communications must indicate the name of the person or company on whose behalf it is made.

There are also specific provisions which vary depending on the media used. These are some examples:

- (a) **Print:** It is mandatory to mention the details of the advertiser including, as a minimum, its corporate name, corporate form, address of registered office, and company registration place and number.
- (b) **Flyers:** Information which must feature on flyers includes the advertiser's corporate name, corporate form, address of registered office, company registration place and number, place where the publication has been printed or produced and place where the publication has been made available to the public.
- (c) **Digital:** It is standard practice to include a hyperlink enabling consumers to find the advertiser/sponsor's details.
- (d) **Sponsored programs:** The name, logo and/or any other symbol of the sponsor must be clearly indicated.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Yes, as a general rule the advertiser must not mislead consumers. Any advertising must be clearly identified as such in order not to be construed as clandestine advertising.

Advertorials (ie advertisements giving information about a product or service in an editorial manner) are allowed, provided that it is made clear to consumers that the advertiser paid for it and that it is advertising. In newspapers or other written publications, this is generally done by including the word '*publi-communique*' (Advertising' or 'Advertorial') at the top of the article. On the radio, the message generally starts with a disclaimer indicating that it is an advertisement.

Product placement is prohibited in audiovisual programs produced after December 2009 and, always, in programs for children. There are some exceptions: product placement is permitted in movies as well as series or entertainment programs, subject to certain conditions, in particular, that the public is clearly and appropriately informed of the product placement at the beginning and at the end of the program.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Yes. Viewers must be clearly informed about product placement. Product placement must be identified in an appropriate manner for programs at the beginning, during and/or at the end of programs, as well as after a commercial break, except if the program has not been produced or ordered by the media service provider or one of its affiliates.

Viewers must also be clearly informed about sponsored programs. Sponsored programs must be clearly identified as such by the name, logo and/or any other symbol of the sponsor, such as a reference to its product(s) or service(s), or a distinctive sign thereof, in an appropriate manner for programs at the beginning, during and/or at the end of the programs.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Advertising and marketing via social media is not regulated as such, but must comply with Luxembourg laws governing advertising and marketing in general (provided, of course, that the advertisement or the marketing is available in Luxembourg). The following provisions may be of particular relevance:

- (a) the Luxembourg Consumer Code (Business to Consumer);
- (b) the Law on sales, sidewalk sales and misleading and comparative advertising (Business to Business and Business to Consumer);
- (c) the rules applying to online behavioral advertising. Although this area is not subject to any specific regulation, the Data Protection Law in the electronic sector applies. It aims at

strengthening transparency and fair use standards, particularly with regard to the use of cookies. For example:

- (i) prior consent (opt in) is needed for the use of cookies, unless the cookie is strictly necessary for the provision of a service to that subscriber or user;
- (ii) subscribers or users must be provided with clear and comprehensive information about the purpose of the practice. In particular, they should be notified about the identity of the advertising network provider, and that the cookie will allow the advertising provider to collect information; and
- (iii) browser settings can be used as a means of obtaining consent, but the consent must be obtained 'prior' to the use of cookies.

In addition, the CLEP's Code of Ethics contains some specific provisions on online behavioral advertising. However, these provisions are non-binding.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

Yes, an advertiser may be held liable for statements made by consumers on its website or Facebook page, but only in limited cases. In such cases, the advertiser can be regarded as a web host, which means that it will only be held responsible for the information stored if:

- (a) the information stored is obviously illicit or if the advertiser has been made aware of its illicit character, and
- (b) does not quickly act to remove the information or make access to it impossible from the moment it becomes aware or should have become aware of the illicit content.

With the GDPR, businesses and organizations that want to use UGC must do so with the express consent of the creator.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

Not applicable.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

The use of an individual's name, picture, likeness, voice and identity in advertising requires his/her prior consent. Specific authorization must be obtained from an individual to use those elements for advertising purposes. Non-compliance with these requirements entitles the individual to request the withdrawal of the advertising together with compensatory damages. In addition, specific information must also be provided to comply with the GDPR, especially concerning the identity of the data processor, the purposes of the processing and the rights of the data subjects. Non-compliance with these legal provisions may lead to criminal sanctions or administrative fines.

9.2 Are there situations when permission is not required?

Not applicable.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Whatever the materials used in advertising, the general principles described above apply, including those regarding the use of national emblems or images of statesmen. Consumers must not be misled by ads giving the impression that the advertising is an official communication or is made in co-operation with an official body.

The use of a public monument or place may, in certain cases, require the prior authorization of the architect, especially if he/she is still alive or died less than 70 years ago.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

The use of a third party's trade mark is allowed in advertising, provided that there is no risk of confusion as to the origin of the products. It is not, however, possible, as a rule, to show in advertising another company's product which is protected either by copyright or as a design without their prior authorization.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Luxembourg which affect advertising (eg Swedish gender equality law)?

Luxembourg is a multilingual country as it has three official languages: Luxembourgish, French and German. Many other languages, such as English and Portuguese, are also spoken. There is no specific requirement regarding the language that must be used in advertising. However, when particular disclaimers are needed, it is highly advisable to use one of Luxembourg's three official languages. In practice, French and German are commonly used in written advertising, as well as, to a lesser extent, English (even though it is not an official language.). Luxembourgish is mainly used in radio or television advertising.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

None, other than those common to all countries that respect human rights, such as not inciting hatred or discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Luxembourg?

When advertisers operate in Luxembourg, it is advisable to seek legal local advice and adapt the campaign to local rules.

It is also advisable to keep in mind:

- (a) the three official languages in relation to the target of the advertising;
- (b) the higher level of information and transparency required under the GDPR; and
- (c) the fact that the GDPR's changes and new requirements concern any type of media. Quite recently the European Court of Justice ruled that the administrator of a fan page on a famous social media was jointly responsible with the social media for the processing of the visitors' personal data.

MALAYSIA

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Malaysia?

In Malaysia, advertising is governed through the Advertising Standards Authority (ASA) to promote and enforce high ethical standards in advertisements. The Malaysian ASA was created as an independent body that ensures advertising complies with relevant codes and initiatives while functioning as a complaints mediation service. Its tasks include:

- (a) managing complaints and issues raised by consumers, companies and other relevant parties pertaining to advertising content and standards.
- (b) resolving complaints in an effective and professional manner while adhering to existing rules and guidelines.
- (c) managing and promoting the complaints aspects of the advertising self-regulation system in Malaysia.
- (d) building confidence amongst all members of the advertising industry, the corporate world, the government and the community at large on the advertising self-regulation system.
- (e) ensuring propriety in advertising to match the Malaysian value system and psyche.
- (f) assisting in the design, creation and implementation of best practices in complaints handling procedures and protocols.
- (g) staying abreast with the advertising, branding and communications industry in order to effectively uphold high advertising standards.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

Advertisement means an announcement of a public nature whether for the sale or purchase or provision of goods or services or constituting of an invitation to participate in an activity and conveyed by or through any signage, image or sound disseminated through electronic or paper medium for advertising purposes.

The definition for advertisement is provided for in the Malaysian Code of Advertising Practice (ASA Code) and the Malaysian Communications and Multimedia Content Code (CMCF Code).

1.3 What is the basic regulatory framework for advertising regulation?

See question 1.1 above.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The ASA Code and the CMCF Code provide parameters on all forms of advertising practices whether in print, digital media or by telecommunication means. The ASA’s Code of Practice provides:

- (a) **Advertisements on audio text services:** advertisers should clearly indicate to system users whether or not their services are free of charge, and should not charge users unless such warnings have been provided beforehand. Advertisements should indicate the cost of the services.

Advertisement of audio text hosting services aimed at young persons or children must carry the following warning messages: 'This call costs \$X.XX per minute/per call. Callers under 18 must seek parent's or guardian's approval before calling'.

- (b) **Advertisements for chat line and related services:** These must include the company's name and office number. Chat line advertisements should always include the legal age limit for callers and warnings on the dangers of meeting up with strangers encountered through chat lines.

Where an advertisement gives the website address (uniform resource locator or url) for non-chat services, that page must not have links or 600 numbers to chat services. Advertisements for chat lines and related services should not contain lewd, sexually suggestive or offensive material.

- (c) **Children:** The use of children or young people in an advertisement is not encouraged unless the products advertised are relevant to them and also in the context of promoting safety for the children and young people. Further, advertisements pertaining to activities of a society or club for children and young people must be that of a club or society that is properly supervised.
- (d) **Cosmetics:** Advertisement claims for vitamins in cosmetics should be restricted to a statement that the product contains a specified vitamin or vitamins.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

The advertising of pharmaceuticals is regulated by the Medicines (Advertisements & Sales) Act 1956 and the Medicines Advertisements Board Regulation 1976. Other practices and products are prohibited—as to which see questions 5.1 and 5.3 below.

1.6 Are any government pre-approvals required?

Government pre-approvals are required for controlled products. For example, medicinal products need to be approved by the Medicine Advertisement Board, which is part of the Ministry of Health. The Board may:

- (a) issue approval for an advertisement;
- (b) review, revise its policies and guidelines as necessary; and
- (c) cancel/withdraw the approval granted.

1.7 Does the media pre-clear advertising?

TV, radio and newspapers advertisements are pre-cleared before they are broadcast or published. Under their licenses, broadcasters must take reasonable steps to ensure that the advertisements they broadcast are compliant with the Malaysian Code of Advertising Practice and the Malaysian Communications and Multimedia Content Code.

Foreign advertisers must have a local contact address or have a local distributor's address placed in all forms of advertisements.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The Ministry of Domestic Trade, Co-operatives and Consumerism and the Ministry of Health have their respective enforcement divisions. The enforcement divisions monitor advertisements advertised in the print and electronic media to ensure compliance with the existing rules and legislation. They also conduct investigations into cases involving advertisements of products. Errant advertisers face a maximum fine of RM50,000 (USD15,000) or a prison term of up to three years. Advertising agencies can be fined up to RM100,000 (USD30,000) for a first-time offence and RM200,000 (USD45,000) for subsequent infringements.

1.9 When does a competitor have a right of action? What are the potential remedies?

Malaysia has established the Competition Act 2010 and the Price Control and Anti-Profiteering Act 2011 and adopted Article 10bis of the Paris Convention to avoid unfair trade. An 'act of unfair competition' is defined as any act of competition contrary to honest practices in industrial or commercial matters which includes false advertising. The Competition Act empowers the Competition Commission to conduct market reviews, and to carry out investigations and enforcement duties. The Act also establishes a Competition Appeal Tribunal which has the exclusive jurisdiction to review any decision made by the Commission. As regards penalties, first-time offenders are required, unless otherwise expressly provided, to pay a fine not exceeding RM5 million (USD1.5 million) for companies or not exceeding RM1 million (USD300,000) for individuals. Individual offenders may, in addition or in lieu of fine, be subjected to an imprisonment term not exceeding 5 years.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers are protected under the Consumer Protection Act 1999. The Act states that a supplier and manufacturer are prohibited from using misleading and deceptive conduct, false misrepresentation and unfair claims in selling the product or service. The Act gives consumers the right to claim for damages for unfair practices from the supplier and manufacturer. Under this Act, an aggrieved consumer may refer any dispute or claim of less than RM10,000 to the established Consumer Redress Tribunal.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Malaysia have a primary advertising self-regulation system?

Malaysia practices an advertising self-regulation system. The Advertising Standards Authority (ASA) was established in 1977 to provide independent scrutiny of the then newly-created self-regulatory system set up by the industry. Its chief tasks are to:

- (a) promote and enforce high ethical standards in advertisements;
- (b) investigate complaints;
- (c) identify and resolve problems;
- (d) ensure that the system operates in the public interest; and
- (e) act as a channel for communications with those who have an interest in advertising standards.

The constituent members of ASA are the Malaysian Advertisers Association, the Association of Accredited Advertising Agencies of Malaysia, the Malaysian Newspaper Publishers Association, the Media Specialists Association and the Outdoor Advertising Association of Malaysia.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Malaysia's self-regulatory advertising code is the Malaysian Code of Advertising Practice for paper publications and Malaysian Communications and Multimedia Content Code for electronic media.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Complaints from members of the public, or those representing them, that the Code has been breached should be addressed to the Chairman of the Advertising Standards Authority, including sufficient details of the complaint, along with contact information, especially the postal address or e-mail, of the complainant. It is helpful if complainants can, wherever possible, provide examples of, or copies of, any advertisements to which they take exception. Investigations will not be initiated without written confirmation from the complainant.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self regulation system is effective. Sanctions are common for those who violate the Code. The principal sanctions are the withholding of advertising space from advertisers and the withdrawal of trading privileges from advertisers/advertising agencies. Both sanctions are applied by the media. In addition, there is the sanction of adverse publicity.

2.5 Are the self-regulatory system's decisions reported?

No. The Advertising Standards Authority of Malaysia will only inform the parties involved of their decision. However, they have discretion to publish details of the outcome of investigations it has undertaken.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Advertisements in Malaysia must be legal, decent, honest and truthful. Advertisements must project the Malaysian culture and identity, reflect the multi-racial character of the population and advocate the philosophy of 'RUKUN NEGARA' which reads as follows:

- (a) Believe in God;
- (b) Loyalty to King and Country;
- (c) Upholding the Constitution;
- (d) Rule of Law;
- (e) Good Behaviour and Morality.

Advertisements must not identify or type-cast each particular racial group or sex with vocations, traditional values and backgrounds.

2.7 Are there any other self-regulatory systems that govern advertising practices in Malaysia?

No.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Malaysia (eg, consumer protection laws; IP laws; unfair competition laws)?

The Trade Descriptions Act 2011 states that it is an offence for any person to use or to supply or offer any goods which contain false description. For false description made through advertisement, the presumption of liability is on the person who, directly or indirectly, offers to supply goods or services. It means that, for any false description of goods placed in an advertisement, action can be instituted against the manufacturer or seller of the goods. False description of goods in and by advertisement is also regulated under the Direct Sales Act 1993.

The Consumer Protection Act 1999's latest amendment in 2010 introduced a Committee on Advertisements, which provides power to the Ministry of Trade to take action against those that produce false and misleading advertisements.

3.2 Is substantiation required for advertising claims?

Advertisements should not contain any statements or visual presentation which directly or by implication, omission, ambiguity, or exaggerated claim, is likely to mislead the consumer about the product advertised, the advertiser, or about any other product or advertiser. All descriptions, claims and comparisons which relate to matters of objectively ascertainable fact should be capable of substantiation; and advertisers and advertising agencies are required to hold such substantiation ready for production without delay to the Advertising Standards Authority of Malaysia.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

It is seldom possible to substantiate general claims by an advertiser that its product is of superlative quality ('best', 'finest') in a manner which is universally acceptable. Such claims, however, are permissible, provided that their inclusion in an advertisement does not create a false impression concerning any quality possessed by the product which is capable of assessment in the light of generally accepted standards of judgement. Obvious hyperbole, which is intended to attract attention or to amuse, is permissible, provided that it is not likely to be taken as a positive claim to superior or superlative status.

3.4 What are the rules governing the use of disclosures in advertising?

Truthfulness and honesty are the key rules in use of disclosures in advertising.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Advertisements should not contain or refer to any testimonial or endorsement unless it is genuine and related to the personal experience over a reasonable period of time of the person giving it. Testimonials or endorsements which are obsolete or otherwise no longer applicable, (eg where there has been a significant change in formulation of the product concerned) should not be used. Testimonials from persons who reside outside Malaysia are not acceptable unless an indication of their address and country of residence is given in the advertisement.

3.6 What are the rules governing the use of product demonstrations in advertising?

Product demonstrations are permissible in Malaysia. Placement advertisements are usually permissible if tastefully done.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted for advertisements communicated electronically (this includes television, radio, online services and audio text hosting services). Part 3 of the Malaysian Communications and Multimedia Content Code states that:

- (a) Comparative advertising is allowable in the interest of vigorous competition and public information. It shall, however, respect the principles of fair competition and shall be so designed that there is no likelihood of the consumer being misled as a result of the comparison.
- (b) The subject matter of a comparison shall not be chosen in such a way as to confer an artificial advantage upon the advertiser or so as to suggest that a better bargain is offered than is truly the case.
- (c) Points of comparison shall be based on facts that can be substantiated and should not be unfairly selected.
- (d) Advertisers should not attack or discredit other businesses or their products.
- (e) Advertisers should not make unfair use of the goodwill attached to the trade mark, name, brand, logo, slogan or the advertising campaign of any other organizations.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

In Malaysia, the Trade Marks Act 1976 does not expressly disallow comparative advertising. There has yet to be a reported decision of the High Court or higher court on the issue of comparative advertising in Malaysia. However, Section 38(1)(b) of the Trade Marks Act 1976 is very similar to the old UK trade mark law, which disallows comparative advertising by using a competitor’s trade mark.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

The Malaysian Code of Advertising Practice states that claims relating to geographic origin must not be misleading.

3.10 Are there any special rules governing product packaging?

The Malaysian Code of Advertising Practice cautions that particular care should be taken in the packaging and labelling of goods to avoid causing confusion with competing products.

Product packaging is also regulated under the Consumer Protection Act 1999. Packaging of goods must be in conformity with the safety standard, and statements made about the goods on any packaging or label on the goods must be true and not misleading.

4 PRICE ADVERTISING

4.1 What are Malaysia's rules regarding price advertising?

Some of the general principles set out in the Malaysian Code of Advertising Practice regarding the quotation of prices are:

- (a) price advertising must not mislead a consumer into buying knowing there are hidden costs to the buyer;
- (b) for advertisements for bundled products, there must be clear product/price differentiation;
- (c) there must be no omissions to what is offered at the shelves to what is to be paid to the cashier; and
- (d) claims which use formulas such as 'prices from as low \$X.XX' are not acceptable where there is a likelihood of the consumer being misled as to the availability or as to the applicability of the benefits offered. Such claims should not be used:
 - (i) when the price or other advantage claimed bears no relation to the general level of prices or benefits, and in particular where it does not apply to the goods or services actually advertised or to more than an insignificant proportion of them, or
 - (ii) when the claims apply to spoiled or imperfect goods, or to goods or services, which are in some respect less complete, or subject to greater limitations than the bulk of those on offer.

4.2 What are Malaysia's rules regarding advertising 'free' products?

If the term 'free' is used, then it must truthfully be free of monetary considerations.

If a bundled product is free eg 'free sample', this is acceptable if the main product is not overly above normal prices.

Products should not be described as 'free' if there is additional cost to the consumer, other than the actual cost of any delivery, freight or postage.

4.3 What are Malaysia's rules regarding sales and special offers?

A 'sale' in an outlet is permissible as long as it is truly sold at a price lower than the previously advertised price.

A merchant can be taken to task by the ASA for false use of the word 'sale' or 'discount' or 'special offers'.

4.4 What are Malaysia's rules regarding rebates?

Cash rebates, if an inducement to buy further products, are not permissible. However rebates in the form of vouchers are permissible as long as the rebate vouchers are not restricted in product choice within the same merchant outlets.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

In all cases, the merchant's details on the outlet, date of purchase, the actual price paid to the merchant and the discount applied or voucher rebate amounts must all be transparent to the buyer.

An undertaking in an advertisement for money back guarantee must clearly state the time period/duration for the claim to be made by the consumer and also should make due allowance for the time taken for delivery and return of the product in the advertisement.

Meanwhile, the word 'guarantee' should not be used in any way that could diminish consumers' legal rights. Substantial limitations should be spelt out in the advertisement. Before commitment, consumers should be able to obtain the full terms of the guarantee from the advertisers. Advertisers should also inform consumers about the nature and extent of any additional rights provided by the guarantee in their advertisement, over and above those stipulated by law, and should make clear how to obtain compensation.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

- (a) **Tobacco:** Under the Control of Tobacco Product (Amendment) Regulations 2013, advertising of tobacco products are prohibited on TV, radio, in newspapers and magazines and other domestic print media.
- (b) **Alcohol:** Under the Malaysian Code of Advertising Practice and the Malaysian Communications and Multimedia Content Code, advertising of alcohol on TV and radio is prohibited. Direct advertising in newspaper and magazines and other domestic print media is not allowed.

Children should not be portrayed in advertisements for alcoholic beverages; however, in a scene where it would be natural for them to be present (eg a family situation), they may be included; provided that it is made clearly that they are not drinking alcoholic beverages.

Advertisements should not depict activities or locations where drinking alcohol would be unsafe or unwise. In particular, advertisements should not associate the consumption of alcohol with operating machinery, driving, any activity relating to water or heights, or any other occupation that requires concentration in order to be done safely. The content of advertisements should never associate drink with driving.

- (c) **Pork products:** Under the Malaysian Code of Advertising Practice and the Malaysian Communications and Multimedia Content Code, advertising of pork products is prohibited on TV, radio and in newspapers, magazines and other domestic print media.
- (d) **Weapons/violence:** Under the Malaysian Code of Advertising Practice and the Malaysian Communications and Multimedia Content Code, advertising of weapons or advertising depicting weapons and violence are prohibited on TV, radio and in newspapers, magazines and other domestic print media.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Restricted—Advertising must not contravene the Personal Data Protection Act 2010.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The ASA Code, and the CMCF Code prohibit the exposure of body parts, scenes of an amorous, intimate or suggestive nature, and kissing between adults in advertisements on TV, radio, newspapers, magazines and other domestic print media. Clothes imprinted with words or symbols which could convey undesired messages (such as menacing contents) are similarly prohibited.

Under the CMCF Code, advertisements must not project women as an object for sex or be shown to merely satisfy men’s desire and satisfaction; and it must portray positive images of women.

The use of crude words or references, hate speech and offensive language/terms are most likely to cause offence and further if the language is conflicting to audience expectation in the advertisement. For example:

- (a) crude words or reference to sexual intercourse and sexual organs;
- (b) any portrayal (words, speech or pictures, etc.), which denigrates, defames or otherwise devalues a person or group on the basis of race, ethnicity, religion, nationality, gender, sexual orientation or disability; or
- (c) the use of disparaging or abusive words.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Part 3 of Advertisement in The Malaysian Communication and Multimedia Content Code (CMCF) provides that every advertiser, sponsors, online publishers, broadcasters and owners of other electronic media should ensure that their advertisements are designed and presented in such a way that it is clear and represented. The advertiser/sponsor’s advertisement features, announcements or promotions are disseminated in exchange for a payment or other reciprocal arrangement. Therefore, if the content of the advertisement is controlled by the advertisers/sponsors, it should also be clearly identified as such in their advertisements.

For example, advertisements on alcoholic drinks and liquor are not allowed in Malaysia. However, an alcohol company is allowed to be the advertiser/sponsor for an international sporting event held in Malaysia, such as F1, A1 or GP (special exemptions). They are only to promote and advertise/being a sponsor to the sporting events; but not directly advertise their products. In addition, alcohol companies are permitted to use their logo or trade name as part of the advertising characteristics and branding (Johnny Walker, Fosters Beers, Absolut and Chivas).

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Yes, there are a few special rules governing the integration of advertising content and entertainment (or editorial) content in Malaysia. These rules are laid out in the ASA Code and the CMCF Code.

The ASA Code provides that advertisement must be clearly distinguished from editorial content. Where paid-for space is in the style of an editorial, whether paid for by the same or different advertisers, particular care is needed to ensure that no part of it can be mistaken for editorial matter. The word ‘advertisement’ should stand alone, at the head of the advertisement in such size and weight and type as to be easily seen.

Similarly, advertisements targeted at children must be clearly recognizable as such and separated from editorial matter.

Meanwhile, the CMCF Code states that, in creating and offering news, reports, entertainment and advertisements, content providers must bear in mind the need for a balance between the desire of viewers, listeners and users to have a wide range of content options and access to information on the one hand and the necessity to preserve law, order and morality on the other.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Yes, in general all advertisements must provide a special disclosure when integrating advertising content with other content. This is in accordance to the Malaysian Code of Practices by the Advertising Standards of Authority (ASA).

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Yes. Section 211 of the Communication and Multimedia Act 1998. The Act states:

‘No content applications service provider, or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person.’

Also, a point to note is that advertising on social media should not infringe any third-party intellectual property rights.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

Yes.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

Yes—The Communication and Multimedia Act 1998.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

There are no specific rules or prohibition of using an individual’s name, picture, likeness, voice, and identity in advertising under the Communications and Multimedia Act 1998, the Malaysian Communications and Multimedia Content Code and the Malaysian Code of Advertising Practice.

However, it is important to note that Article 5(1) of the Malaysian Constitution provides that ‘No person shall be deprived of his life or personal liberty save in accordance with law.’ In 2010, Federal Court Judge Gopal Sri Ram ruled in the case of *Sivarasa v Badan Peguam Malaysia* that the right to personal liberty includes a right to privacy.

The tort of invasion of privacy was not recognized in Malaysia until recently. The Malaysian High Court cases of *Ultra Dimension Sdn Bhd v Kook Wei Kuan* [2004] 5 CLJ 285 and *Lew Cher Phow @ Lew Cha Paw v Pua Yong Yong* [2009] 1 LNS 1256, Johor Bahru High Court Civil Suit No MT 4-22-510-2007 had held that invasion or violation of privacy is not a recognized tort or a cause of action in Malaysia. In the former case, the plaintiffs failed in their action for invasion of privacy against the defendant for taking a photograph of a group of kindergarten pupils, including the plaintiff’s child, at an open area outside the kindergarten and published it in two local newspapers. As for the latter case, the plaintiffs failed in their application to restrain the defendants from having a CCTV which faces their house and to remove the same. Similarly, in the High Court case of *Dr Bernadine Malini Martin v MPH Magazines Sdn Bhd & Ors* [2006] 2 CLJ 1117, the Court again stated that invasion of privacy is not an actionable wrongdoing.

However, by departing from the previous position, the Court of Appeal in the case of *Maslinda Ishak v Mohd Tahir Osmans* [2009] 6 CLJ 653 shed light on the tort of invasion of privacy; and the case of *Lee Ewe Poh v Dr. Lim Teik Man* [2010] 1 LNS 1162 is the first reported Malaysian case that recognizes the invasion of privacy as an actionable tort.

Both the *Maslinda Ishak* and *Lee Ewe Poh* cases concern the issue of women’s modesty.

9.2 Are there situations when permission is not required?

See question 9.1 above.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Yes—advertising is governed through the Advertising Standards Authority. The Advertising Standards Authority Malaysia is the independent body responsible for ensuring that the self-regulatory system works in the public interest. The primary object of this Code is the regulation of

commercial advertising. It applies therefore (except as expressly provided) to all advertisements for the supply of goods or services or the provision of facilities by way of trade, and also to advertisements other than those for specific products which are placed in the course of trade by or on behalf of any trader.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

It is permissible to use other companies' recognizable products, for example, trade marks in advertising. The use is statutorily and legally necessary to indicate the intended purpose, and therefore it does not constitute as an infringement. This position is based on Section 40(1)(e) of the Malaysian Trade Marks Act 1976, which states that a registered mark of a recognizable product is not infringed by the use of the mark where it is necessary to indicate the intended purpose of a product, provided the use is in accordance with honest practice.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Malaysia which affect advertising (eg Swedish gender equality law)?

Advertisements should not contain statements or visual presentation which are, or likely to be, interpreted to be contrary or offensive to the standard of morality or decency prevailing in Malaysian society.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Advertisements should not directly or by implication exploit the religious requirements/beliefs of any community.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Malaysia?

No.

MEXICO

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Mexico?

There is no specific or unique Advertising Code in Mexico. Advertising regulation is dispersed through several laws, which are enforced by different authorities, each in its own sphere of competence.

Thus, the applicable law, regulation and standards will depend on the kind of products or services being advertised. Some products or services, particularly those related to health, are more regulated than others.

This creates a panorama of ambiguity with regard to what is the relevant authority to hear the case, enforce the applicable law and the proceeding to follow.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

There is no specific definition for ‘advertising’. However, in accordance with the Federal Consumer Protection Law, information and advertising regarding goods, products or services, released through any media or mean, shall be truthful, verifiable, and exempt of texts, dialogues, sounds, images, trademarks, designations of origin, and other descriptions that lead or may lead to mistake or confusion by being either deceptive or unfair.

The Guidelines for the Analysis and Verification of Information and Advertising issued by the Federal Consumer Protection Agency (Profeco), define the term ‘media’ as those platforms that are used to disseminate advertisements in general and that include television, cinema, radio, billboards, the sides of transportation, neon signs, posters, newspapers, magazines, direct mail, catalogues, brochures, flyers, point of sale material, as well as any other media, whether printed, electronic, by phone, computer, telecommunication or through other technologies.

1.3 What is the basic regulatory framework for advertising regulation?

The Federal Consumer Protection Law establishes norms against misleading advertising, sets the rules for comparative advertising and regulates offers and promotions. The main point of this Law is consumer protection. The Federal Consumer Protection Agency is responsible to enforce this Law.

The General Health Law and its Regulations regulate the advertising of products and services used for health and human consumption. The Federal Commission for the Protection against Sanitary Risks (Cofepris) is responsible to enforce this Law.

There are other Laws that regulate specific topics, such as the Federal Radio and Television Law that establishes the main provisions for television and radio broadcasting of advertisements; the General Tobacco Control Law and its Regulations that forbid any type of tobacco advertising; the Industrial Property Law which considers that engaging in acts contrary to proper practice and custom in industry, commerce and services, that amount to unfair competition and that relate to the subject matter regulated to the Law, shall constitute an administrative infringement, among others.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

There are no specific regulations for certain types of advertising practices—general rules apply.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

The main industries whose advertising practices are specifically regulated are products for health and human consumption such as food products, non-alcoholic and alcoholic beverages, pharmaceuticals and medical devices, cosmetics, insecticides and toxic substances. The General Health Law and its regulations regulate the advertising of these products.

The General Tobacco Control Law and its Regulation practically forbids tobacco advertising; it is only allowed in adult magazines under some restrictions.

Specific Laws such as the Transparency Law of Financial Services regulate advertising of financial services.

The Regulations to the Federal Gambling and Draws Law state that advertising regarding gambling/draws may only be carried out and shown after the Ministry of the Interior (Secretaría de Gobernación) has granted the gambling house/draw organizer a permit to operate.

1.6 Are any government pre-approvals required?

The advertising of some products for health and human consumption such as alcoholic beverages, tobacco, pharmaceuticals and medical devices, insecticides and toxic substances require a previous authorization granted by The Federal Commission for the Protection against Sanitary Risks.

Interested parties shall file an application and pay government fees to the authority, which after reviewing the advertising will issue the permission if this complies with the Law.

The Federal Commission for the Protection against Sanitary Risks has the ability to order the broadcasting media to suspend advertising of products that does not have the authorization or does not comply with the General Health Law and its regulations.

1.7 Does the media pre-clear advertising?

Media platforms do not pre-clear advertising. However, the Federal Consumer Protection Agency and the Federal Commission for the Protection against Sanitary Risks provide pre-clearing services

Interested parties submit the proposed advertising and the authorities answer with comments or suggestions.

Notwithstanding the above mentioned, the pre-clearance is not binding and there is no guarantee that advertising that was already pre-cleared will be definitively allowed.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The Federal Consumer Protection Agency can initiate actions for misleading advertising ex officio or per party's request. Thus, the authority initiates the investigation for misleading advertising and requires the party responsible for the advertising to answer the complaint and file evidence.

Once the party responsible for the advertising answers the complaint and after analyzing the evidence in the authority's laboratory if necessary, the Federal Consumer Protection Agency may decide to close the file or initiate an infringement proceeding. If a violation of the law is confirmed, the authority may order:

- (a) suspension of the advertising;
- (b) that the information in the advertising be corrected; or
- (c) the imposition of economic fines.

In case of recidivism, the Federal Consumer Protection Agency may fine up to 10% of the annual gross income obtained by the infringer from the commercialization of the goods, products or services contained in the applicable advertising corresponding to the last fiscal year in which the infringement was committed.

The Federal Commission for the Protection against Sanitary Risks can also initiate actions for misleading advertising ex officio or per party's request. If a violation of the law is confirmed, the authority can impose economic fines. As is the case with the Federal Consumer Protection Agency, the health authority has the power of ordering the broadcasting media to suspend advertising of products that may violate the General Health Law and its regulations.

1.9 When does a competitor have a right of action? What are the potential remedies?

See below.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers and competitors may file a complaint before the Federal Consumer Protection Agency and/or the Federal Commission for the Protection against Sanitary Risks for misleading advertising. Thus, after the misleading advertising is confirmed, the authority may impose to the responsible of the advertising economic fines.

However, after the competitor or consumer files the complaint, they are no longer part of the proceeding and only may be notified of the final decision of the authority. They will not obtain remedies at this stage.

Consumers may obtain remedies only if the party responsible for the advertising does not comply with an offer or promotion in the terms it was advertised. Here, per consumer request, the Federal Consumer Protection Agency shall fix a date and hour to hold a settlement hearing in order to mediate the interest of the parties. If they do not reach an agreement, the consumer may initiate other actions before civil courts.

Competitors may try to seek economic relief before civil courts in case of comparative misleading advertising and after the decision of the Federal Consumer Protection Agency becomes final and firm.

Finally, competitors may participate actively against misleading advertising that involves intellectual property rights and denigrates their products or services, their industrial or commercial activity or establishment. This provision shall not apply to the comparison of products or services protected by a trademark for the purpose of informing the public, provided that the comparison is not biased, false or exaggerated within the meaning of the Federal Consumer Protection Law.

The Mexican Institute of Industrial Property (IMPI) holds these actions under the Industrial Property Law. The authority may impose economic fines on the infringer and order preliminary injunctions, such as an order to suspend the advertising.

The party that seeks economic relief from intellectual property infringement can only pursue damages after such infringement has been declared by the authorized administrative authority. Finally, the law states that a civil judge has the ability to determine damages, the minimum amount of which is of 40% of the commercial value of the infringing product. No other type of damages are allowed in the law.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Mexico have a primary advertising self-regulation system?

The National Council for Advertising Self-Regulation and Ethics (CONAR) is the Mexican self-regulatory body in charge of promoting and enforcing the Code of Ethics of the advertising industry, by providing pre-clearance services and deciding disputes regarding advertising matters.

2.2 Is there a self-regulatory advertising code? What are the key principles?

CONAR has a Code of Ethics which states general principles of advertising. The key principles are the following:

- (a) **Legality:** Advertising should comply with applicable Law.
- (b) **Veracity and Honesty:** Information about the characteristics of products or services will be truthful and verifiable. In addition, advertisers should be honest and will avoid the use of misleading or partial information that may mislead consumers.
- (c) **Respect and Dignity:** Advertising should avoid the use of images, text or sounds that offend the standards of decency according to the values of Mexican society, without prejudice to minorities. Advertising should avoid the promotion of violence, discrimination and denigration of any kind.
- (d) **Fair Competition:** Advertising should not denigrate, copy or imitate, directly or indirectly, creative advertising or ideas of third parties.
- (e) **Comparative Advertising:** Comparative advertising should be objective, verifiable, representative and relevant in the comparison. It can highlight benefits of the goods or services with respect to others, always in a positive way without pejoratively qualify the products or services of the competitor.
- (f) **Health, Welfare and Environmental care:** Advertising should avoid the use of images, texts and sounds that may induce to activities contrary to physical and mental health or environmental care.
- (g) **Protection of Children:** Advertising addressed to children should take into account their vulnerability, critical capacity and experience. It should also avoid the use of images, texts or

sounds that may represent a risk to their health or their respect for family or school authorities.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Yes—CONAR has a dispute resolution mechanism.

Any interested party may file a complaint before CONAR, which will then notify the responsible advertiser. The responsible advertiser will answer the complaint and then the Council will issue a resolution. This proceeding can take about 15 working days.

This decision can be appealed once before CONAR, which will notify the responsible advertiser. The responsible advertiser will answer the appeal and then the Review Committee will study the case and issue a resolution. This proceeding can also take 15 working days.

Resolutions are binding for members.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self-regulation system is effective since it is faster than any other legal proceeding and the resolution is binding on members of CONAR.

Even when a party is not a member or refuses to comply with the resolution, the Council may notify to the competent authority if the advertising violates the applicable Law. Thus, the authority can initiate legal actions.

CONAR has signed cooperation agreements with different authorities involved with advertising such as the Federal Consumer Protection Agency and the Federal Commission for the Protection against Sanitary Risks.

2.5 Are the self-regulatory system’s decisions reported?

The resolutions issued by CONAR are reported to the parties. Additionally, the Council is implementing a platform to publish its resolutions on its webpage.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

CONAR also promotes the Self-Regulation Code for Food and Non-Alcoholic Beverages Advertising targeted to Child Audience (PABI Code). This Code intends to set the self-regulatory advertising standards for those products directly targeted to children, which are stricter than the principles of the Code of Ethics.

In addition, CONAR has signed cooperative agreements with different authorities and can inform them about advertising that may violate the law.

2.7 Are there any other self-regulatory systems that govern advertising practices in Mexico?

N/A

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Mexico (eg, consumer protection laws; IP laws; unfair competition laws)?

- (a) Federal Consumer Protection Law (Chapter III) and Regulations of the Federal Law on Consumer Protection (articles 22 to 24);
- (b) Industrial Property Law (article 213);
- (c) Federal Copyright Law (article 23, Chapter VII and article 173);
- (d) General Health Law (article 3, 17Bis, 225, 270, 272 Bis 2, Title Thirteenth);
- (e) Regulations of the General Law of Health in regard to advertisements;
- (f) Transparency of Financial Services Law (Articles 12, 15, 15 bis);
- (g) Commercial Code (unfair competition) (Article 6);
- (h) Regulations to the Federal Gambling and Draws Law (Articles 9, 94, 108, 110);
- (i) Guidelines for Comparative Advertising or Information on Prices of Goods, Products or Services;
- (j) Regulations on Health control of Products and Services (article 25) and Guidelines; and
- (k) Federal Telecommunication and Radio Law (article 15, 196, 216, 217, 219, Section II).

3.2 Is substantiation required for advertising claims?

According to Mexican Law, advertising claims shall be truthful and verifiable. Therefore, the authority can verify at any time the substantiation of the advertising claims through visits or documentation requirements.

In the specific case of health services, herbal remedies, alcoholic beverages, tobacco, drugs, dietary supplement; medical equipment, pesticide, cosmetic surgery procedures, beauty services, food and non-alcoholic beverages, a license issued by the Health Authority is required before the release of any advertising campaign. In order to obtain the permission, advertisers must submit before the authority the documentation that sustains the advertising claims.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

In principle, in accordance with Mexican law, all advertising must be truthful and verifiable and free of texts, dialogues, pictures or sounds and other descriptions that lead or may lead to mistake or confusion by being deceptive or unfair (Federal Consumer Protection Law, article 32). However, puffery cannot be considered illegal per se, as long as it is obvious to the consumer that the characteristics of a product or service are exaggerated in the advertising. In any case, the analysis of whether or not the puffery elements in the advertising are acceptable, will be made on a case-by-case basis by the authority.

3.4 What are the rules governing the use of disclosures in advertising?

As mentioned, according to Mexican law, all advertising shall be truthful and verifiable and exempt of texts, dialogues, sounds, images, trademarks, descriptions that lead or may lead to mistake or confusion by being either deceptive or unfair.

Deceptive or unfair information or advertising shall be understood as that which makes reference to characteristics or information related to any good, product or service that, either truthfully or not, misleads or causes confusion due to the imprecise, false, exaggerated, biased, contrived or tendentious manner in which it is presented.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

There are no specific rules in Mexico governing the use of endorsements and testimonials, however as part of advertising both must comply with the general rule laid down in the Federal Consumer Protection Law (see question 3.4) on which it is stated that the information shall be truthful, verifiable, and exempt of text, dialogues, sounds, images and other descriptions that lead or may lead to mistake or confusion by being either deceptive or unfair.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules in Mexico governing the use of products demonstrations, however as part of advertising it must comply with the general rule laid down in the Federal Consumer Protection Law (see question 3.4) which states that information shall be truthful, verifiable, and exempt of text, dialogues, sounds, images and other descriptions that lead or may lead to mistake or confusion by being either deceptive or unfair.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Yes, according to Mexican law, any information or advertising that compares products or services, either of the same trademark or of different trademarks, may not be misleading or unfair due to the imprecise, false, exaggerated, biased, contrived or tendentious manner in which it is prepared. Comparative advertising is permitted in Mexico, as it is made in order to inform consumers.

Additionally, there are some specific regulations (Guidelines for Comparative Advertising or Information on Prices of Goods, Products or Services) regarding comparison of prices which include rules such as:

- (a) comparison should be made with exactly the same product;
- (b) prices of goods compared should not be expressed in percentages; and
- (c) proof of purchase of the products whose prices are compared must be displayed.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

According to the Industrial Property Law, trying to achieve the purpose of denigrating the products, services, industrial or commercial activity or property of another competitor could be an administrative offense; comparing products or services protected by a trademark will not be

considered illegal if it is made for informing consumers, and provided that the comparison is not biased, false or exaggerated in terms of the Federal Consumer Protection Law.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

Any claim which includes a reference to the geographic origin of a product is subject to the general rule established in the Federal Consumer Protection Law (see question 3.4) which states that information shall be truthful, verifiable, and exempt of text, dialogues, sounds, images and other descriptions that lead or may lead to mistake or confusion by being either deceptive or unfair. As with any other type of claims, a geographic origin claim must be substantiated when so required by the Federal Consumer Protection Agency.

3.10 Are there any special rules governing product packaging?

The Federal Consumer Protection Law states that the information shown on national or foreign products or their labels, bottles/containers, packaging and in the relevant advertising must be expressed in the Spanish language, using understandable and legible terms, and in accordance with the metric system; and the price should be given in Mexican currency. This information may be additionally expressed in another language or in another measurement system, provided that Spanish is used simultaneously.

In the case of registered trademarks in Mexico, they can be displayed in advertising without a translation into Spanish.

4 PRICE ADVERTISING

4.1 What are Mexico’s rules regarding price advertising?

According to the Federal Consumer Protection Law (article 7 and 7 bis), any supplier is bound to inform and respect the prices, fees, interests, charges any other conditions which has offered, assumed, or agreed upon with the consumer regarding the delivery of a good or the rendering of a service.

In addition, the supplier is bound to exhibit in a prominent manner the total amount to be paid for the goods or services such supplier offers.

Price advertising in Mexico must be shown in Mexican currency.

4.2 What are Mexico’s rules regarding advertising ‘free’ products?

Advertising free products must comply with the general rule laid down in the law on which the information shall be truthful, verifiable, and exempt of text, dialogues, sounds, images and other descriptions that lead or may lead to mistake or confusion by being either deceptive or unfair.

4.3 What are Mexico’s rules regarding sales and special offers?

Any ‘offer’ ‘sales’ ‘discount’ ‘markdown’ shall be understood as offering to the public products or services of the same quality at reduced price or at a price lower than the regular prices at said commercial premises. Suppliers must also observe the following rules:

- (a) The conditions, as well as the period of time of the service concerned, or volume of the goods offered, shall be indicated in the advertising.
- (b) If a period of time is not set, the assumption will be that the goods/services are offered for an indefinite period of time until public announcement of the revocation of the promotion or offer is made, in a sufficient manner and through the same media used for the original advertising.
- (c) Any consumer that meets the requirements shall be entitled to acquire the goods/services during the established period of time or as long as they are available.

4.4 What are Mexico's rules regarding rebates?

Purchasing policies and rebates must specify clearly deadlines, terms and conditions.

If the rebate is part of a door-to-door, non-immediate or indirect selling, suppliers must specify the option of requesting return and next steps; how the costs of transportation and shipment of goods is covered; approximate information on delivery dates, and the name and address of the supplier.

In case of breach, the consumer is entitled to the substitution of the product or the return of the amount paid, and in any case to a refund or compensation, in the following cases:

- (a) when the net content of one product, or the amount delivered, is less than the amount indicated in the container or packaging;
- (b) if the good does not correspond to the quality, trademark or specifications;
- (c) if the good has been repaired but is not left in adequate conditions for its use or purpose; and where
- (d) service is rendered in a deficient manner or not rendered or provided due to causes attributable to the supplier.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Please see questions 4.2, 4.3 and 4.4.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Yes, there are.

According with the Tobacco Control General Law, all tobacco advertising is forbidden through all media channels. The only exception is that tobacco can be advertised in adult content publications.

In addition, the following prohibitions and limitations must be taken into account:

- (a) Prescription medicines (prohibition);
- (b) Alcoholic beverages (a permit is required from the applicable Mexican authorities);

- (c) Gambling/raffles/draws (a permit is required from the applicable Mexican authorities);
- (d) Financial services (a number of requirements are established by the applicable Mexican authorities and must be observed);
- (e) Dietary supplements (a permission is required from the applicable Mexican authorities); and
- (f) Guns (the Federal Law on Guns and Explosives states that such advertising must be limited to sports guns for the use in hunting and in a shooting range).

Since July 2014, there is a new set of Guidelines which have set new parameters regarding the nutritional value of non-alcoholic beverages and food. Those parameters have to be met in order to establish the type of TV programs in which the advertisements of food and non-alcoholic beverages can be aired. If the nutritmental value is not according with such Guidelines such products can only be aired in the following time schedule:

- (a) Monday through Friday: 0:00 to 14:40 and 19:30 to 23:59;
- (b) Saturday and Sunday: 00:00 to 7:00 and 19:30 to 23:59.

Also, such products with low nutritmental value can be aired during the transmission of the following types of programs: soap operas, sports, news, and series which are not for a population of under 18.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

No, there are no specifically prohibited advertising practices. However, in cases where a person who has received advertising asks that no more advertising is sent to him/her, the advertiser must not send additional advertising to that person.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

No, there are no such specific laws. However, article 7 of the Mexican Constitution establishes a human/fundamental right, which can be exerted by individuals, organizations and businesses, consisting of the freedom to communicate opinions, information and ideas through any means (this includes advertising).

Article 7 of the Mexican Constitution also states that:

- (a) no law or authority may establish previous censorship mechanisms nor limit the above-mentioned freedom; and
- (b) the limits to the latter are established in article 6 of the Mexican Constitution in the following cases:
 - (i) attacks on the public morality or on a third party's private life or rights; or
 - (ii) causing a crime or provoking disturbances on public order.

In addition, anti-discriminatory rules might apply when advertising implies attacks on a gender, race, and religious basis.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

There is a general rule requiring that any advertisement has to identify the advertiser/sponsor. This general rule is set both in the Federal Civil Code, which regulates all kinds of offerings and by the Federal Consumer Protection Law with entails that all kind of advertising has to be properly identified by those who are paying for it.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Under the new Federal Telecommunications Law (which deals with open signal TV, satellite/cable TV, and radio), the integration of advertising content with any editorial content is prohibited, in order to avoid any possible deceitful advertising.

Additionally, advertising must, in any case, comply with the general rule established in the Federal Consumer Protection Law (as to which see question 3.4) which states that the information in ads must be truthful, verifiable, and exempt of text, dialogues, sounds, images and other descriptions that lead or may lead to mistake or confusion by being either deceptive or unfair.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

No, there are no special disclosures or other obligations when integrating advertising content. However, the general rule established in the Federal Consumer Protection Law (see question 3.4), which states that the information in the ads must be truthful, verifiable, and exempt of text, dialogues, sounds, images and other descriptions that lead or may lead to mistake or confusion by being either deceptive or unfair, is applicable.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

No, there are no special rules governing the use of social media for advertising purposes.

Any advertising done through the social media is subject to the general rules of advertising regulation.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

No, the advertiser cannot be held responsible for advertising claims made in user generated content, unless the former has paid or compensated the user in any way for making those claims.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

Neither the Mexican Courts nor the self-regulatory body has issued any decision regarding the use of social media advertising and user generated content.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

According with article 87 of Federal Authors’ Rights Law, a portrait of a person may only be used or published with the express consent of the person portrayed or that of his representatives or of the owners of the corresponding rights. The authorization to use or publish the portrait may be revoked by the person who gave it, who in that case shall be liable for the damages and prejudice that might be caused by such revocation. This consent includes the use of the portrait for advertisements.

On the other hand, Federal Personal Data Protection Law has the purpose of protecting all personal data held by private parties, which may include advertisers and sponsors, in order to regulate its legitimate, controlled and informed data processing, to ensure the privacy and the right to informational self-determination of individuals. Any use or treatment of the personal data, such as the name has to be authorized by its proper owner.

9.2 Are there situations when permission is not required?

No—both Laws establish the obligation to have permission for the use of such type of information and images.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Yes, there are. Under the Federal Historic Sites and Monuments Law, any use of sites or monuments with any historic or artistic value must be authorized by the National Institute of History and Anthropology (INAH) or by the National Institute for the Fine Arts and Literature (INBA).

Cases in which a permit from the relevant authorities is required should also be taken into account (see question 5.1).

10.2 Is it permissible to use other companies’ recognizable products in advertising (eg, an actor wearing branded training shoes)?

No, because it might be a cause of a trademark infringement according with the Industrial Property Law. An authorization or license from the trademark owner must be obtained.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Mexico which affect advertising (eg Swedish gender equality law)?

Advertisers must observe, in the contents of their ads, article 1 of the Mexican Constitution, namely:

'Any form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religion, opinions, sexual orientation, marital status, or any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people, is prohibited.'

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

No, there are not.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Mexico?

Advertisers must be very careful regarding the information they might be transmitting about their products or services. When using compared advertising, although it is permitted in Mexico, it has to avoid any kind of possible misconduct that might affect the reputation of any competitor. Also, they have to be aware of a possible trademark right infringement. Deceitful advertising is heavily scrutinized by both the Federal Consumer Protection Agency and the Federal Commission for the Protection against Sanitary Risks in order to avoid any possible risks for consumers. So, advertisers must be aware of the rules against deceitful advertising.

NEW ZEALAND

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in New Zealand?

Advertising in New Zealand is regulated by a combination of self-regulatory bodies and legislation that impacts on, or restricts, advertising in New Zealand in some way.

Intellectual property, contract law, passing-off and defamation are all areas of law that are relevant to advertising, as well industry specific laws, such as gambling or tobacco laws. In respect of legislation, the Fair Trading Act 1986 (FTA) is the primary act controlling marketing and advertising in New Zealand.

The FTA includes a general prohibition on conduct in trade that is misleading or deceptive or is likely to mislead or deceive. This general provision captures advertising in any form that may mislead or deceive consumers.

The Advertising Standards Authority (ASA) self regulates advertising in New Zealand. It provides both guidance to advertisers, through the issue of various Codes and guidance notes and a mechanism for complaints against advertisements to be made and heard.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

The ASA considers that ‘advertisement’ in the context of the application of its Codes should be taken in its broadest sense to include ‘any message, the content of which is controlled directly or indirectly by the advertiser, expressed in any language and communicated in any medium with the intent to influence the choice, opinion or behaviour of those to whom it is addressed’. The definition includes various media, including traditional and new media such as websites, emails or SMS messaging.

1.3 What is the basic regulatory framework for advertising regulation?

There are currently a total of 11 Codes developed by the ASA which apply to the entire content of an advertisement. The Codes cover various topics, including advertising to children, comparative advertising, environmental claims and advertising food. The Code of Ethics provides a number of overarching principles, including that advertisements must not mislead or deceive and must be prepared with a due sense of social responsibility.

A new Advertising Standards Code will come into effect on 1 November 2018 for all new advertisements, and starting from 1 February 2019, all advertisements will need to comply. The new code consolidates six of the current codes:

- (a) Advertising Code of Ethics;
- (b) Code for People in Advertising;
- (c) Code for Advertising Vehicles;
- (d) Code for Advertising Food;
- (e) Code for Comparative Advertising; and
- (f) Code for Environmental Claims.

The six codes identified above will be retired on 1 February 2019.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The Unsolicited Electronic Messages Act 2007 prohibits commercial, electronic messages, sent to or from New Zealand, without the consent of the receiver. ‘Electronic messages’ covers email, fax, instant messaging, mobile phone text and image-based messaging.

The Electronic Messaging Compliance Team directly enforces the Unsolicited Electronic Messages Act by investigating complaints about spam. The possible enforcement options include formal warnings, infringement notices and court actions. An organisation found in breach of the Act can be penalized up to NZ\$500,000 and, in the case of an individual, NZ\$200,000.

In limited cases, direct marketing calls could trigger the Telecommunications Act 2001 which prohibits the use of a telephone for the purpose of disturbing, annoying or irritating any persons, whether by calling up without speech or by wantonly or maliciously transmitting communication or sound, with the intention of offending the recipient.

The Marketing Association of New Zealand (in conjunction with the ASA) has issued a Code of Practice for Direct Marketing in New Zealand which all marketers are expected to comply with. Principle 4 of the Code provides that marketers must carry out their business in a way that is socially responsible. The Marketing Association maintains Do Not Mail (DNM) and Do Not Call (DNC) registers containing details of consumers who have requested no unasked-for mail and/or telephone calls.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Various industries have their advertising specifically regulated. These include, but are not limited to:

- (a) **Food:** The Food Act 2014 provides for certain restrictions on advertising food, for example prohibiting advertising that is likely to deceive a purchaser with regard to the nature, quality, strength, purity, composition or origin.
- (b) **Alcohol:** The Sale and Supply of Alcohol Act 2012 regulates the advertisement of alcohol generally and prohibits certain advertising of alcohol, including advertising alcohol that is free of charge or advertising likely to have special appeal to minors. The ASA also has a Code for Advertising and Promotion of Alcohol which includes requirements that advertisements must not encourage excessive consumption of alcohol or underage drinking.
- (c) **Tobacco:** The Smoke-free Environments Act 1990 prohibits advertising of tobacco products. Following the amendments in the Smoke-free Environments (Tobacco Standardized Packaging) Amendment Act 2016, the use of all brand imagery or other marketing devices on tobacco products is prohibited.
- (d) **Gambling:** The Gambling Act 2003 regulates advertisements in relation to gambling, including certain prize competitions. Advertising in relation to gambling is also regulated by the ASA’s Code for Advertising Gaming and Gambling. The Code includes requirements that advertisements must not be directed at minors and not promote reliance on gaming.
- (e) **Therapeutic Products:** The Medicines Act 1981, the Medicines Regulations 1984 and the Misuse of Drugs Regulations 1977 contain provisions relating to advertisements for therapeutic products. The ASA also has a Therapeutic and Health Advertising Code, which

contains the requirement to include certain information, such as listing all the active ingredients in a product.

- (f) **Hazardous Substances:** The Hazardous Substances and New Organisms Act 1996 provides for particular requirements for the advertisement of hazardous substances. This includes requirements for identification, labeling and packaging.
- (g) **Securities:** The Financial Markets Conduct Act 2013 regulates the advertisement of offers of financial products to the public.
- (h) **Consumer Contracts:** Credit Contracts and Consumer Finance Act 2003 requires all lenders to comply, at all times, with the lender responsibility principles and exercise care, diligence and skill in any advertisement for providing credit finance under an agreement.

1.6 Are any government pre-approvals required?

In general, government pre-approvals are not required. There are however certain self-regulatory approvals. The Association of New Zealand Advertisers provides certain voluntary industry pre-vetting systems to assist advertisers, advertising agencies and the media to comply with the ASA Advertising Codes of Practice. There is a voluntary pre-vetting system for all liquor advertising and therapeutic advertising. The Association of New Zealand Advertisers is responsible for administering the advertising industry's voluntary systems. Approval by the Liquor Advertising Pre-vetting System and the Therapeutic Advertising Pre-vetting System is strongly recommended by the ASA.

1.7 Does the media pre-clear advertising?

All television commercials require Commercial Approval Bureau (CAB) approval before they will be accepted for screening by the television stations or digital media outlets in New Zealand. Every script or finished commercial is assessed against the ASA's current advertising Codes of Practice, precedents set by previous Advertising Standards Complaints Boards decisions and the broadcaster's own house rules. Once an advertisement is approved by CAB, it is given a classification which determines the times of day it may be broadcast. CAB is a self-regulatory body.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The Commerce Commission (CC), an independent government entity, enforces the FTA. Where a breach has occurred, the CC has various powers to investigate. This includes voluntary information requests, statutory notice and search warrants. The CC may take criminal or civil action under the FTA. Civil action may include the CC seeking interim injunctions during the course of an investigation to stop an unlawful activity or may seek permanent injunctions at the conclusion of an investigation. A breach of a criminal offence in the FTA (such as misleading and deceptive conduct generally) may result in a larger fine; not exceeding NZ\$200,000 in the case of an individual and not exceeding NZ\$600,000 in the case of a body corporate. A breach of a lesser offence (such as a breach of information standards) may result in a fine not exceeding NZ\$10,000 in the case of an individual and NZ\$30,000 in the case of a body corporate. The CC also has the right to apply to the courts for corrective advertising orders which may order the business to disclose information to the public generally or publish a corrective advertisement or statement.

1.9 When does a competitor have a right of action? What are the potential remedies?

The FTA, being a consumer protection piece of legislation, allows certain remedies to be granted, such as an injunction, on the application of a person who does not necessarily need to have suffered harm from the relevant conduct. Such persons would include competitors.

Generally, the CC would be the informant under criminal proceedings under the FTA.

Competitors can also raise complaints with the ASA if they feel an advertisement has breached an ASA Code, or the CC, if they feel that an advertisement has breached one of the consumer protection laws that the CC enforces, such as the FTA.

The CC will not necessarily action all complaints it receives. If an investigation proceeds, the competitor making the complaint will have limited involvement with the matter.

The ASA has a particular process for a competitor to lay a complaint. If both parties agree to the complaint being heard through the ASA, they will be required to forgo their right to take the matter through the courts. If for example, the competitor is seeking damages, they should raise the matter through the courts as opposed to taking it through the ASA process which does not provide for the award of damages.

The decision will be based solely on the ASA Codes of Practice. The remedy available under this process is that offending advertisements are requested by the ASA to be withdrawn. These requests are invariably complied with by the advertiser. The decision of the Adjudication Panel is final and there is no appeal procedure within the complaints process.

The fee to lodge a complaint by a competitor is between NZ\$5,500 and NZ\$10,000. Additional fees may be payable. If the complaint is successful, the advertiser will be requested to voluntarily pay the hearing fee which is refunded to the complainant on receipt.

1.10 When do consumers have a right of action? What are the potential remedies?

A consumer can bring an action under the FTA, even if they have not suffered harm from the conduct in question. It is sufficient if there may be harm to members of the public. In this instance, the primary remedy available is an injunction.

If a consumer has suffered harm due to a breach of the FTA, damages may be available.

Consumers may also bring a complaint to the ASA, free of charge or file a complaint with the CC, in accordance with the same procedures as referred to at paragraph 1.9.

If consumers file a complaint with the ASA, the primary remedy, if successful, is the ASA requesting that the advertiser remove the offending advertising. This is a voluntary remedy, however, such requests are generally followed. Consumers are also required to waive their right to take any other proceedings in relation to the matter, if the complaint is judged within the ASA's jurisdiction.

If a consumer files a complaint with the CC, and the matter is investigated, the remedies available will depend on the action taken by the CC. If the CC settles a matter, this may include redress for persons affected by the conduct.

2 SELF-REGULATORY FRAMEWORK

2.1 Does New Zealand have a primary advertising self-regulation system?

New Zealand has a primary advertising self-regulation system governed by the ASA. The ASA is made up of representatives from various areas in the advertising industry, including marketing agencies, magazine and newspaper publishers' associations, broadcasters and marketing associations. The ASA is funded by the media and advertising industries.

The ASA Codes of Practice cover various areas, including advertising different types of products, such as alcohol, as well as, different methods of advertising, such as comparative advertising. New Codes are developed and existing Codes are amended when necessary.

The ASA also provides Guidance Notes in relation to certain types of advertising. This includes, for example, the current Guidance Note on Social Media and the application of ASA codes.

The ASA has a Complaints Board and a Complaints Appeal Board which administers the Codes of Practice and adjudicates appeals.

If a complaint is upheld, the ASA will generally request that the advertisement is removed. Such a request is invariably followed.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The ASA currently has 11 Codes of Practice in place. The Codes are made up of principles as well as rules that relate to the particular topic covered by that Code. The Code of Ethics is an overarching Code (to be replaced by the new Advertising Standards Code from 1 November 2018) that provides general principles that apply to all advertising. These include:

- (a) advertisements must comply with the laws of New Zealand;
- (b) no advertisement should impair public confidence in advertising;
- (c) no advertisement should be misleading or deceptive;
- (d) all advertisements should be prepared with a due sense of social responsibility; and
- (e) all advertisements should respect the principles of free and fair competition generally accepted in business.

The rules of the Code of Ethics include that advertisements should:

- (a) be clearly distinguishable as such;
- (b) contain truthful presentations;
- (c) not use tests, research or surveys in a way that is misleading;
- (d) not contain anything that clearly offends against generally prevailing community standards;
- (e) not contain anything that is likely to cause widespread offence;
- (f) not, without justifiable reason, play on fear;
- (g) not contain anything which supports unacceptable violent behavior;
- (h) not denigrate identifiable products of competitors;
- (i) not contain testimonials that are not genuine;

- (j) not, unless prior consent is obtained, portray persons or person's property in a way that is likely to convey the impression of genuine endorsement;
- (k) identify the advertiser in matters of public interest or political issues; and
- (l) not, unless justifiable on educational or social grounds, contain dangerous or illegal practices.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The ASA has an Advertising Standards Complaints Board (ASCB) which considers complaints about advertising in all media. The ASCB has three main functions:

- (a) to adjudicate on complaints received about advertisements which may breach the Codes of Practice;
- (b) to advise the ASA on the interpretation of the Codes, and where possible, improvements to the Codes;
- (c) to report to the ASA on any aspect of advertising which is causing concern.

The ASCB is made up of a mix of public and industry representatives.

The ASA complaints process requires that complainants waive their right to take or continue proceedings against the advertiser concerned, if the complaint is judged to be within the ASCB's jurisdiction.

The ASA also has an Advertising Standards Complaints Appeal Board (ASCAB) which adjudicates on appeals from decisions of the ASCB. In general, reasons for a right of appeal include:

- (a) that the proper procedures were not followed,
- (b) the introduction of new evidence,
- (c) that evidence provided to the Complaints Board had been severely misinterpreted,
- (d) that the rules of natural justice were not followed, or
- (e) that the decision was against the weight of evidence.

The ASCAB is made up of two public representatives and one industry representative.

2.4 Is the self-regulation system effective? Is it widely used and followed?

In general, the ASA is regarded as relatively effective and is widely used and followed. The ASA 2017 annual report records that the amount of advice on the Codes to the industry increased 27% from the year before, and 37% of the advertisements complained about were removed or changed. If a complaint is upheld, the advertiser is requested to immediately withdraw the advertisement and media members of the ASA are also requested not to broadcast or publish an advertisement which has been held to breach the Codes. These requests are invariably followed.

2.5 Are the self-regulatory system's decisions reported?

Decisions of the ASA, regardless of whether the complaint is upheld or not, are reported. All decisions of the ASCB are circulated to the parties in the first instance. This is followed by the decision being sent to all ASA members and then released to the media by being published on the ASA's website, which is publically available.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

The key areas of focus in relation to the regulation of advertising generally in New Zealand are that all advertisements must comply with the laws of New Zealand. In particular, ensuring that the content of advertisements do not either by inclusion or omission, mislead or deceive consumers in any way.

In respect of the ASA Codes in particular, focus is often placed on its Code of Ethics and the overarching principles that it provides for.

2.7 Are there any other self-regulatory systems that govern advertising practices in New Zealand?

There are complementary self-regulatory systems that work alongside the ASA. In particular in relation to pre-vetting certain advertisements. One example of this is the Association of New Zealand Advertisers which has a pre-vetting service for advertisements of alcohol or therapeutic products. CAB reviews advertisements before they are submitted to television stations or digital media outlets in New Zealand. Approval from CAB will not, however, guarantee that the advertisement does not breach the ASA Codes or the FTA.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in New Zealand (eg, consumer protection laws; IP laws; unfair competition laws)?

Intellectual property, contract law, passing-off and defamation are all areas of law that are relevant to advertising, as well as industry specific laws, such as gambling or tobacco laws.

The FTA is the primary act controlling marketing and advertising in New Zealand.

The FTA includes a general prohibition on conduct in trade that is misleading or deceptive or is likely to mislead or deceive. This general provision captures advertising in any form that may mislead or deceive consumers.

The FTA also provides for various more specific prohibitions relating to representations in trade. These cover general prohibitions, such as false or misleading statements in relation to the need for any goods and services, or false or misleading statements that goods are of a particular kind, standard, quality or grade of a particular product or service. As well as specific provisions relating to the provision of a prize, for example, prohibiting the offer of a prize that the promoter does not intend to provide.

3.2 Is substantiation required for advertising claims?

New Zealand's consumer protection legislation includes an offence relating to unsubstantiated representations in trade. A representation is unsubstantiated if the person making the representation does not have reasonable grounds for making the representation at the time it is made, irrespective of whether the representation is false or misleading. Substantiation refers to the requirement of verification, confirmation and evidence or proof that a representation made by a trader is correct. This requirement does not apply to a representation that a reasonable person would not expect to be substantiated. Failure to comply could result in criminal liability, with fines of

up to NZ\$600,000 for a company or up to NZ\$200,000 for an individual. There are a number of defences available to traders, including the defence that the statement was a reasonable mistake.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

The requirement to substantiate a claim specifically does not apply to a representation that a reasonable person would not expect to be substantiated. Accordingly, 'puffery' is still, in general, allowed under the FTA.

At common law, in general, the use of 'puffery' or 'mere puff' is not treated by the law as a misrepresentation.

However, 'puffery' can still in certain circumstances fall within the provisions of the FTA. If the use of language is intended to influence decision-making and is inaccurate, it may breach the FTA. Consideration will also be given to whether a particular statement conveys a definite element of fact.

3.4 What are the rules governing the use of disclosures in advertising?

Disclosures or disclaimers are often used in advertising. They can be used to prevent or neutralize a representation or conduct from being misleading or deceptive, if it would otherwise have been without the disclosure.

However, they cannot work to lessen liability that has already occurred, for example, fine print cannot correct a misleading headline statement.

There are certain considerations in using such disclaimers, including ensuring that any disclaimer is sufficiently prominent in any advertising.

Particular products require certain disclosures to be included in advertising, including for example, every advertisement for a prescription medicine must include the words 'prescription medicine' (or similar meaning), the name and appropriate quantitative particulars of each active ingredient, a statement of the purpose for which the medicine is intended to be used, a statement that the medicine has risks and benefits and a statement about how to find further information on the risks and benefits.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

The FTA prohibits false or misleading representations that goods or services or that a person, has any endorsement. Endorsements that are not paid for or solicited must in fact be genuine endorsements in order to not be misleading. Claiming that a celebrity uses a certain product, for example, when they do not, or they are paid to, can breach the FTA.

Advertisements should not contain any personal testimonials unless they are genuine, current and actually relate to a personal experience of the person giving the testimonial and such experience is typical and not an exceptional case.

3.6 What are the rules governing the use of product demonstrations in advertising?

The general provisions of the FTA apply to product demonstrations.

As such, the advertiser must ensure that the product demonstration must not be misleading or deceptive or the product demonstration must not include unsubstantiated representations.

The ASA Code of Ethics also provides that advertisements should not contain any statement or visual presentation which is misleading or deceptive, makes false and misleading representations, abuses the trust of the consumer or exploits his or her lack of experience or knowledge.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted in New Zealand, however, like all advertisements, comparative advertisements must not be misleading or deceptive under the FTA. Engaging in comparative advertising does not in itself carry a greater legal duty, however, advertisers can expect such advertising to be under close scrutiny of competitors. Comparative advertisements must show the full story and not leave out information that is necessary for a true and fair comparison to be made. If a claim is true, it could still be misleading by conveying a half-truth.

The ASA Code for Comparative Advertising provides three elements that advertisements must comply with; they should:

- (a) be accurate and informative;
- (b) make clear the nature of the comparison
- (c) not mislead or deceive the consumer.

A specific competitor does not need to be named to be regarded as comparative advertising; a comparison may be made with all competition within a specific industry.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

There are specific rules in New Zealand that may impact comparative advertising, including the Trade Marks Act 2002 which provides for the honest use of competitor trademarks in advertising. Under section 94 of the Trade Marks Act, a comparative advertisement will constitute trade mark infringement when use of a registered trade mark 'otherwise than in accordance with honest practices in industrial or commercial matters ... takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark'. When determining what 'otherwise than in accordance with honest practices' means, the courts have held that the overriding question is whether a reasonable reader would be likely to say upon the full facts that the advertisement is not honest.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Under the Geographical Indications (Wine and Spirits) Registration Act 2006 (GIWSRA), there are special rules imposed on the use of geographic indications (GI) on wines and spirits for specific geographical locations where a quality, reputation or other characteristic is linked to that location. To use a registered GI in relation to a wine or spirit, a person must ensure the wine or spirit originated from the place of geographical origin to which the GI relates, and the GI is used according to its registration in New Zealand. Failing to comply with the rules is considered a breach of section 9 of the FTA under the GIWSRA.

Further, section 13(j) of the FTA prohibits false or misleading representations concerning the place of origin of goods. For example, a ‘made in France’ claim will not breach the FTA if the entire product is produced in France. If the product’s important components are imported from elsewhere, or there are offshore manufacturing processes, such a claim may risk breaching the FTA. Given the growing trend of sourcing components and placing manufacturing processes offshore, there will be many cases where a ‘made in France’ claim will risk breaching the FTA. The CC recommends the use of more specific terms to avoid breaching the FTA. For example, ‘packaged in France’, or ‘designed or assembled in France from imported components’.

3.10 Are there any special rules governing product packaging?

Currently, there are no specific rules governing product packaging in New Zealand. However, special rules will apply to particular kinds of goods. These include:

- (a) **Food packaging:** food packaging must comply with the labelling and composition requirements set out in the Australia New Zealand Food Standards Code;
- (b) **Hazardous substances:** the Environmental Protection Agency (EPA)’s Hazardous Substances (Packaging) Notice 2017 sets the rules for the packaging of hazardous substances, including the rules for child-resistant packaging; and
- (c) **Tobacco products:** as further detailed at paragraph 5.1, all tobacco products must follow the prescribed standardised packaging requirements as set out in Smoke-free Environments Regulations 2017.

4 PRICE ADVERTISING

4.1 What are New Zealand’s rules regarding price advertising?

The FTA prohibits false or misleading representations in respect to the price of any goods or services. It also prohibits goods or services being advertised at a specified price, where there is no intention to sell the goods at that price.

Certain ASA Codes, such as the Children and Young People’s Advertising Code, provide for particular requirements in relation to price. This includes where price is mentioned, the complete price of a product should be made clear as well as any additional items required to be bought separately.

A reference to a Recommended Retail Price of a product is permitted. However, it is illegal for a supplier to specify or enforce a minimum price at which goods may be sold at under the Commerce Act 1986.

4.2 What are New Zealand’s rules regarding advertising ‘free’ products?

The FTA’s prohibition on any misleading or deceptive conduct extends to the advertisement of any ‘free’ products. As do the general principles in ASA Codes for advertisements to be truthful and not misleading.

If a product or service is advertised as free, it must be truly ‘free’. There cannot be any, direct or indirect, additional cost to the customer.

A product will not be regarded as ‘free’ if, for example, a product is linked to a ‘free’ gift, and if the ‘free’ gift is not taken by the customer results in the price of the product being reduced.

If there are any limitations on the offer of a free product, such as only with orders over a certain price, then these should be clearly stated.

4.3 What are New Zealand’s rules regarding sales and special offers?

Sales and special offers must not be misleading or deceiving.

Any goods that are advertised as part of a sale must be priced at a reduced level. Any limitations of a sale must be made clear, including any excluded products.

If an advertisement is comparing the sale price of the product to its normal selling price, the ‘normal’ price will be regarded as the price at which the product has been sold for a reasonable time immediately before the offer.

Advertising ‘special offers’ must be offering something genuinely different. This can include offering products at lower prices than normal or additional features. A special offer to a wide audience risks misleading consumers if only a limited amount of people are able to take it up. An advertisement must clearly state any limitations or qualifications that apply to the offer.

4.4 What are New Zealand’s rules regarding rebates?

Rebates are in general permissible under New Zealand law. Advertising of rebates is covered by the general prohibitions in the FTA. When advertising any rebate system, it must be clear and unambiguous to the consumer about how, when, in what circumstances and under what conditions any rebate will be advanced.

The CC has in the past commented that cash-back schemes can risk breaching the FTA. In particular, given the amount and type of qualifications that can apply to these types of schemes, it is important that any promotion of the rebate is consistent with how such rebate will work in practice.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Advertising of sales must be kept up to date, to ensure that it refers to the currently available discounts.

Terminology such as ‘50% off’ can be misleading if only a small portion of products available are actually reduced in price by 50%.

The advertised duration of a sale should be upheld, ending a sale prematurely to its advertised dates can breach the FTA.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Certain products or services may not be advertised in New Zealand at all. Such products include tobacco, overseas gambling and controlled drugs.

The advertising of tobacco in all media, including point of sale advertising, is banned by the Smoke-free Environments Act 1990. Further, the Smoke-free Environments Regulations 2017 standardised the packaging of tobacco by requiring the brand name and variant of a product to be printed with a prescribed colour, placement, type face and font size.

The advertisement of overseas gambling is prohibited under the Gambling Act 2003. It is an offence to publicise or promote gambling, or a gambling operator outside New Zealand or when an advertisement is likely to induce people to gamble outside New Zealand.

The advertisement of 'controlled drugs' is prohibited by the Misuse of Drugs Regulations 1977, with some limited exceptions for advertisements distributed solely to or mainly for medical practitioners and pharmacists.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Certain advertising practices are prohibited in New Zealand. These include the sending of unsolicited electronic commercial messages to or from New Zealand, without the consent of the receiver, which is prohibited by the Unsolicited Electronic Messages Act 2007. Electronic messages for the purposes of the Act are messages sent using a telecommunications service and are sent to an electronic address (this does not include voice calls using a standard telephone service or a voice-over internet protocol).

Ambush marketing is prohibited by The Major Events Management Act 2007. The Act prohibits businesses attempting to create an association with major events through advertising without any formal association with the event or sponsors. The Act also provides for the establishment of 'clean zones' around the venues of major events within which any advertising must be authorised by organizers.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The publication of any objectionable material is banned by the Films, Videos, and Publications Classification Act 1993. Whether material is objectionable, is determined by considering if the content of a publication describes, depicts or expresses, or otherwise deals with matters such as sex, horror, crime, cruelty or violence in such a manner that the availability of the publication is likely to be injurious to the public good.

Additionally, one of the principals of the ASA Code of Ethics is that advertisements should not contain any offensive material or anything that would offend against generally prevailing community standards of decency.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

The advertiser or sponsor may need to be identified in an advertisement depending on the medium of the advertisement and the subject matter of such an advertisement.

The ASA Code of Ethics requires in the context of ‘advocacy advertising’ that the identity of an advertiser in matters of public interest or political issues should be made clear.

The FTA prohibits false or misleading representations that goods, services or a person has any sponsorship, approval or endorsement. Silence as to whether any such sponsorship, approval or endorsement exists, may breach this prohibition where in the context such silence would mislead consumers.

The Unsolicited Electronic Message Act requires that a commercial electronic message (an electronic message, such as an email or text that markets or promotes goods or services) must clearly and accurately identify the person who authorised the sending of it and how to contact them.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Advertising is in general required to be identifiable as such and accordingly, it must so far as possible, be differentiated from or not be incorporated into entertainment or editorial content.

The ASA Code of Ethics requires that all advertisements are clearly distinguishable as such, regardless of what medium is used. When an advertisement is incorporated into news or editorial matter, it must be presented in such a way that it is clearly recognizable as an advertisement.

Commercial product placement in entertainment programs, while very common in New Zealand, if it is not ‘clearly distinguishable’ could breach this requirement. The ASA has not been required to make a decision on this point to date. If the product placement was clear to the viewers, this may be sufficient to determine the advertisement to be ‘clearly distinguishable’.

The ASA Children and Young People’s Advertising Code requires that advertisements are clearly recognizable as such by children, and separated from editorial, programs or other non-advertising content.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no particular special disclosures that are required when integrating advertising content with other content. However, it will need to be clear from the content, that the advertisement is an advertisement and is distinguishable from such other content. What is required to make an advertisement distinguishable will be considered in the context of its use. The ASA has commented in the past that obvious product placement in entertainment shows, for example, may make it sufficiently distinguishable.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

New Zealand does not currently have any particular legislation that governs the use of social media for advertising purposes. The increase in marketing via social media has increased the attention on

how the legal controls, which to a large extent were created in the context of more traditional marketing (print/television for example), apply to different concepts in the use of social media.

The ASA comments in its Identification of Advertisements Guidance Note in 2018 that they will have jurisdiction over representations made on social media platforms an advertiser uses to promote their brand or product, over which the advertiser controls directly or indirectly. Accordingly, in general the ASA codes will apply.

The FTA includes a prohibition on making false or misleading representations that goods or services have any sponsorship, approval or endorsement. Endorsement in particular is a concept that has become more relevant in the context of social media, especially if the endorsement has been paid for. This is particularly relevant to tweets containing endorsements. This is discussed in more detail below in paragraph 8.2.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

The ASA’s jurisdiction extends not only to those representations made from the advertiser itself, but also to User-Generated Content (UGC) where it is regarded as advertising. The ASA has commented in its ASA Guidance Note on Social Media in 2012 (Social Media Guidance Note) that this will be considered on a case by case basis. The ASA has however, stated that matters to be considered include:

- (a) whether the advertiser solicited the submissions of UGC and adopted it and used it in its advertising;
- (b) whether the advertiser received unsolicited content which it then incorporated in its advertising;
- (c) whether the advertiser solicited the UGC (including through a competition entry for example) that was then posted on the advertiser’s site.

The Social Media Guidance Note also states that paid for Twitter endorsements should include the hashtag #ad. Advertisers should also take care in what they re-Tweet as they may be liable if the content is misleading.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

The ASA has considered various complaints concerning advertising on social media platforms. An example of an ASA decision in this regard, was a complaint against Hell Pizza (a Pizza chain that has in the past come to the ASA’s attention through their advertisements) whose Facebook website featured a ‘confessional’ page where the public was invited to ‘confess’ unacceptable actions, the best of which would win a prize. The matter was settled with the advertisement being withdrawn and a public apology being given.

Another example concerned the Facebook ‘posts’ of a bar, in particular ‘TGIF!! Its party time with POWER hours with different \$5 Drinks every hour! ... So get ... down here and go animal!’ This was held to encourage immoderate consumption of alcohol, particularly the reference to ‘Power hours’ and ‘go animal’, breaching the Code for Advertising Alcohol. It was also considered not to have been prepared with a high level of social responsibility.

Another example where a social media complaint was upheld is where the ‘Ritzling’ Wine Facebook page contained an advertisement promoting the product along with the words ‘Bottled Happiness’. In this decision the Complaints Board said that the advertisement implied that liquor will create a desirable change in mood, and therefore ruled that the Facebook Page did not observe the high standard of social responsibility required under Principle 2 and Guideline 2(c) of the Code for Advertising Liquor.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

Information about an identifiable individual is regarded as ‘personal information’ and its collection, storage and use is governed by the Privacy Act 1993.

Personal information must, in general, be collected from the person whom it relates to. There are limited circumstances where this does not apply, as further detailed in paragraph 9.2.

The person collecting the information must inform the other person of certain matters relating to the information, including that the information is being collected, the reason for which it is being collected and the intended recipients of the information.

Personal information collected for one purpose cannot, in general, be used or disclosed for any other purposes. There are limited circumstances where information can be used for a different purpose, including, for example, if the information is used in a form in which the individual concerned is not identified.

Personal information may only be held for the duration required for the use that it was collected for and persons must be given the ability to access, review and correct any personal information held about them.

The ASA Code of Ethics also provides that an advertisement should not portray any person, whether in a private or public capacity, in a way that is likely to convey the impression of genuine endorsement, without that person’s consent.

9.2 Are there situations when permission is not required?

There are certain exceptions where personal information can be collected in ways other than from the individual concerned. These include:

- (a) where the information that is used is publically available information. In such cases the information collected must be from publically available information. Collecting the information by other means will not be allowed simply because that information is also publically available;
- (b) the person concerned authorizes collection of the information from someone else;
- (c) non-compliance would not prejudice the interests of the person;
- (d) the information will be used in a form in which the person will not be identified.

A further exception can exist in certain circumstances, when the personal information is collected where there is no reasonable expectation of privacy and no harm has arisen through the use of the information.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Certain materials require a form of clearance before being used in an advertisement. This includes, for example, the use of the New Zealand Coat of Arms, or the name and emblem of the United Nations, both which require clearance from the Ministry of Culture and Heritage before they can be used.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Other companies' recognizable products can be used in advertising in certain circumstances. However, such use can breach intellectual property laws or the FTA if the use is not in accordance with the exceptions provided, or for example, the use falsely suggests a connection with the advertised product.

The Trade Marks Act provides for certain exceptions, including, an 'honest practice' exception from trade mark infringement where a trade mark is used where necessary to indicate the intended purposes of particular goods or services. There is also an exception for 'honest use' in the case of comparative advertising.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of New Zealand which affect advertising (eg Swedish gender equality law)?

In general, there are no specific rules particular to New Zealand culture that affects advertising. The Flags, Emblems, and Names Protection Act 1981 prohibits the use of the word 'Anzac' in trade or business. This is to prevent the phrase from being commercialised and to ensure that the word is not used in a way that is offensive to public sentiment.

Further, the Haka Ka Mate Attribution Act 2014 (the Act) applies to the use of the traditional All Blacks' Haka in New Zealand. Pursuant to the Act, Ngati Toa Rangatira have the right to be identified as creator of the Haka when the Haka is used in circumstances including the communication of the Haka to the public (eg a television, website or radio advertisement). A statement that is clearly and reasonably prominent; and likely to bring Te Rauparaha's identity as a composer of Ka Mate and chief of Ngati Toa Rangatira, to the attention of the viewer or listener must be included.

Although, there are other Hakas which are not covered by the Act, the use of the Haka generally is culturally sensitive, and past promotions that have used the Haka inappropriately have attracted negative press following criticism from both politicians and prominent Maori figures in New Zealand. Accordingly, we would generally suggest that the Haka is not used in advertisements, or that great care is taken if an advertiser decides to include any reference to the Haka in an advertisement.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

New Zealand cultural norms are similar to those in other western countries. New Zealand culture places importance on treating everyone equally, whether different cultures or different genders. Honesty and fairness are also highly regarded.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in New Zealand?

Advertisements in New Zealand are monitored by consumers, competitors and government authorities. Misleading conduct or representations, either overtly or by omission are in general, highly regulated and enforced in New Zealand.

 NICARAGUA 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Nicaragua?

In Nicaragua, there is no special law governing advertising. There are, however, areas of law that provide regulations for consumer protection, including intellectual property and specific laws for particular goods (such as alcoholic beverages, tobacco, and pharmaceutical products) and forms of advertising (such as broadcast and non-broadcast). There is also a self-regulation code that comprises the entire alcohol industry.

There is no unique regulating entity; however, the main regulator for consumer protection is the General Department of Protection of Rights of Consumers and Users (DIPRODEC). The regulation of advertising for pharmaceutical products is given specifically to the Ministry of Health.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

The Law of Protection of Rights of Consumers and Users (Law No 842) broadly defines advertising as: 'all form of public communication made by a provider for promoting directly or indirectly the acquisition of goods and/or services is considered advertising'.

1.3 What is the basic regulatory framework for advertising regulation?

In Nicaragua, the basic regulatory framework for advertising regulation is contained in laws and norms that regulate:

- (a) advertising conducted by suppliers of goods and services;
- (b) advertising addressed to/involving minors;
- (c) abusive, false or misleading advertising;
- (d) advertising of specific goods;
- (e) unfair competition;
- (f) protection of personal data used in advertising;
- (g) social impact of advertising;
- (h) public display;
- (i) use of national symbols in commercial advertising; protection of trademark rights;
- (j) currency to use in price advertising; and
- (k) promotion of gender equality in communications activities, which includes advertising.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

No, there are no types of advertising practices that are specifically regulated.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

- (a) **Medicines:** Advertising in mass telecommunications media, such as television, radio, press, public places, etc, is limited to over-the-counter or popular medicines. The advertising of medicines sold under medical prescription through any mass communication media is totally forbidden. In such cases, advertising (or literary material) may only be aimed to medical doctors and health professionals.
- (b) **Tobacco:** Advertising through any mass communication media is totally forbidden.
- (c) **Alcohol:** There is a self-regulation code which specifically regulates advertising in the alcohol industry, in which there is an emphasis on regulating the advertising of alcoholic beverages so that it does not encourage drinking in minors or associate any type of behavior with the consumption of alcoholic beverages.

1.6 Are any government pre-approvals required?

In the case of medicines, either over-the-counter or popular medicines, or medicines sold under medical prescription, the advertising must be approved by the Ministry of Health of Nicaragua.

1.7 Does the media pre-clear advertising?

In general, the media does not pre-clear advertising. There is no law or regulation to enforce this.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The government enforces advertising laws through administrative departments such as:

- (a) the Department of Pharmacy of the Ministry of Health, which regulates advertising related to the pharmaceutical industry for human consumption. This department is in charge of approving and controlling said advertising throughout the national territory, as well as being in charge of issuing resolutions on controversies and violations to the laws;
- (b) the General Department of Protection of Rights of Consumers and Users (DIPRODEC), which regulates abusive, comparative, false or misleading advertising that may affect consumers; and
- (c) the National Institute for the Promotion of Competition (PROCOMPETENCIA), which is the authority in charge of knowing and prosecuting complaints filed by competitors for abusive, false or misleading advertising.

In cases involving the violation of the laws related to the protection of consumers, the relevant authorities will apply any of the following sanctions, notwithstanding to the corresponding civil actions that might be applicable:

- (a) fines according to the severity of the violation;
- (b) temporary closure of activities throughout the country;
- (c) prohibition of the continuity of the act of violation;
- (d) order to rectify, at the expense of the offender, the content of the advertisement with the same means used for the original dissemination;

- (e) removal and destruction of advertising material; and
- (f) temporary or permanent closure of the facilities.

Potential administrative remedies against a decision issued by the pertinent authority are: clarification, revision, and appeal.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor has a right of action when identifying unfair competition practices (eg a case of comparative advertising when the alleged facts cannot be objectively proven, or that, on being checked by the corresponding authority, are found to contain false or inaccurate affirmations or information).

Any natural person or entity that considers that its economic activity is being affected by any action that limits, restricts or obstructs the competition, or has knowledge of any anti-competitive practice implemented by an economic agent, can file a complaint with PROCOMPETENCIA to begin an investigation.

The Law on the Promotion of Competition (Law No 601) prohibits all acts of unfair competition between economic agents that cause and carry out damage or a threat in the following cases:

- (a) acts of falsehood;
- (b) acts of degradation;
- (c) comparative acts;
- (d) malicious machination acts;
- (e) confusion;
- (f) fraud;
- (g) instigation; and
- (h) imitation.

In case of acts of unfair competition, PROCOMPETENCIA might apply any of the following sanctions, notwithstanding to the corresponding civil actions that might be applicable:

- (a) fines according to the severity of the violation;
- (b) temporary closure of activities throughout the country;
- (c) prohibition of the continuity of the act of violation;
- (d) order to rectify, at the expense of the offender, the content of the advertisement with the same means used for the original dissemination; and
- (e) removal and destruction of advertising material.

Administrative remedies against a decision issued by PROCOMPETENCIA are: clarification, revision, and appeal.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers have a right of action when goods or service providers fail to fulfill all the conditions established for their advertised promotions or commercial offers, and when there exists misleading or abusive advertising. Consumers may file an administrative complaint following the procedure provided by the Law of Protection of Rights of Consumers and Users (Law No 842) to demand the restoration of their rights and compensation for damages caused, notwithstanding to filing a judicial complaint.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Nicaragua have a primary advertising self-regulation system?

In Nicaragua, there is no primary advertising self-regulation system to cover all industries. There exists, however, the Unique Code of Self-Regulation of Advertising and Commercial Communication of Alcoholic Beverages and Products of Alcoholic Content (Alcohol Code) that comprises the entire alcohol industry, whose main actors are the producers, advertisers, distributors, and importers that legally operate within the country's borders and to whom these conditions apply. This Code is binding on all the signatories and establishes advertising parameters that promote responsible consumption through the Nicaraguan Institute for the Promotion of Responsible Consumption (INPROCRES). The initiative to implement a self-regulation system that not only works in parallel with the law, but that also deepens ethical principles regarding this matter, began as a response to the global strategy to reduce harmful alcohol consumption, approved by the 63rd World Health Assembly in 2010.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Yes, the Alcohol Code is binding on all of its signatories. It deals only with the alcohol industry. This code sets out three main principles that it seeks to protect:

- (a) Respect towards those who have decided not to consume alcohol.
- (b) That those who are of legal drinking age and freely decide to do so, drink with moderation.
- (c) That the sensitive population (minors, people with a medical condition that makes it advisable for them not to drink, pregnant women, drivers or other individuals engaging in similar tasks) do not consume at all.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

An independent administrative procedure exists for disputes provided by the Alcohol Code, which does not involve any governmental entity and is adopted and followed by all of its signatories, who are bound to the Code.

When one of the signatories infringes any of the provisions of the Code, it is possible to file a complaint directly to INPROCRES through their website, by e-mail, or by mail. INPROCRES processes the complaint and forwards it to the Court of Dispute Resolution (a separate organ created by this Code that handles these issues), which opens a period to present allegations. Once this period ends, the Court deliberates and issues a definitive resolution. There is no provision for appeal in this procedure.

The decision of the Court of Dispute Resolution may order:

- (a) the content of the advert to be amended; or

(b) the advert to be withdrawn.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self-regulation system came into effect on 9 April 2014. It is still too early to provide an accurate opinion as to its effectiveness and scope of action.

2.5 Are the self-regulatory system's decisions reported?

The Court of Dispute Resolution's decisions will be duly informed through INPROCRES to the plaintiff and the defendant. Upon issuance of the decision, INPROCRES proceeds to publish the decision on their website and any other media they deem appropriate for the knowledge of the general public. Also, each year, the Court of Dispute Resolution provides an assessment of their activities for that year, which INPROCRES will make public if deemed necessary.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

According to the Alcohol Code, any marketing, communication, advertising, or promotional material related to alcoholic beverages consumption must be intended for a public legally able to consume the same. Additionally, it is important to note that all advertised products must contain a label, as provided by INPROCRES to comply with the parameters established in the Code, warning that alcohol can be harmful to health when consumed irresponsibly, and that it is a product intended for those who are 18 years of age or older.

2.7 Are there any other self-regulatory systems that govern advertising practices in Nicaragua?

There are no other self-regulatory systems in Nicaragua other than the one explained above.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Nicaragua (eg, consumer protection laws; IP laws; unfair competition laws)?

Advertising claims in Nicaragua will be governed by one or many of the following laws, depending on each case:

- (a) Law of Protection of Rights of Consumers and Users (Law No 842);
- (b) Law of Penal Code (Law No 641);
- (c) Law of Childhood and Adolescence Code (Law No 287);
- (d) Law of Medicines and Pharmacies (Law No 292);
- (e) Procedural Norms to Regulate Promotional and Advertising Material of Pharmaceutical Products (Ministry of Health, Norm 044);
- (f) Law of Tobacco Control (Law No 727);
- (g) Law of Promotion of Competition (Law No 601);
- (h) Law of Protection of Personal Data (Law No 787);
- (i) General Law on Media and Social Communication (Law No 57);
- (j) Tax Plan of the Municipality of Managua;
- (k) Law of Characteristics and Use of National Symbols (Decree No 1908);
- (l) Law of Trademarks and Other Distinctive Signs (Law No 380);

- (m) Law of Currency (Decree No 1-92); and
- (n) Law of Equal Rights and Opportunities (Law No 648).

3.2 Is substantiation required for advertising claims?

With the exception of drug (medicine) advertising, substantiation is not required for advertising claims. In other words, prior to launching an ad campaign, there is no need to substantiate the advertising claims in order to obtain approval.

Of course, if a consumer or a competitor files a complaint alleging that there is a case of false or misleading advertising, then it will be necessary to substantiate the claims in the advertisement. Therefore, it is always advisable to review the ads—preferably with a lawyer with expertise—in order to make sure that the claims can be substantiated (in case it becomes necessary later to do so).

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

As noted earlier, with the exception of drug (medicine) advertising, substantiation is not required for advertising claims. Therefore, puffery may be tolerated to a certain extent.

3.4 What are the rules governing the use of disclosures in advertising?

There are no specific rules governing the use of disclosures in advertising.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

There is no specific regulation on the use of endorsements and testimonials in advertising.

It is worth noting that the Law of Protection of Personal Data (Law No 787) establishes that personal information, whether it be a claim made by an individual or a picture posted in social media, cannot be used without the individual's consent.

3.6 What are the rules governing the use of product demonstrations in advertising?

There is no specific regulation on this matter.

In general, though, consumer advertising should be free from deception and unfair practices.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

In Nicaragua comparative advertisement is permitted under the following conditions:

- (a) that the comparison refers to facts that are objectively comparable (this applies for cases in which a competitor alleges that its product has a technical advantage over another, etc); and
- (b) that no false or inaccurate information is included.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

As long as the comparative advertising is not likely to cause confusion or association regarding the corporate origin of the products or services of the third party and the advertising complies with the conditions underlined in question 3.7, the use of a competitor's trademark or products may be used.

The Law of Trademarks and Other Distinctive Signs (Law No 380) establishes limitations on the right to a registered trademark. For example, a third party may not be blocked from using it commercially in connection with:

- (a) instructions or information pertaining to the characteristics of the products or services he/she/it produces or markets; inter alia, those relating to its quantity, quality, use, geographical origin or price; or
- (b) instructions or information regarding the availability, use, application or compatibility of the products or services he/she/it produces or distributes; in particular, with respect to parts, spare parts or accessories.

The above exceptions would apply as long as such use is made in good faith in the exercise of lawful industrial or commercial activities; and is not likely to cause confusion or association regarding the corporate origin of the products or services of the third party.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

No—There is no specific regulation on this matter. However, geographic origin included in advertising must be true.

3.10 Are there any special rules governing product packaging?

Yes—There are special rules governing product packaging depending on the type of product. The packaging of products is regulated by the labeling standards:

- (a) **Products used in animal feeding and establishments, sanitary registration and control requirements (RTCA 65.05.52:11):** The advertising of products used in animal feed should not contain ambiguities, omissions or exaggerations that induce error in the user, in particular, regarding the safety of the use, handling, nature and composition of the product. Advertising of such products may not contain information other than that which is approved through the product’s health registration. Advertising of unregistered products is prohibited.
- (b) **Veterinary medicines and related products, sanitary registry and control requirements (RTCA 65.05.51:08):** Any advertising of veterinary drugs and related products of restricted use and exclusive sale in establishments approved by the regulatory authority by retained prescription is prohibited. The advertising of over-the-counter products or products for sale in a veterinary store in any communication medium must not contain ambiguities, omissions or exaggerations that entail the possibility of misleading the user, particularly with regard to safety in the use, handling, nature and composition of the product for veterinary use. Advertising of such products may not contain information other than that which is approved through the product’s health registration. Advertising of unregistered products is prohibited.
- (c) **Cosmetic products, labeling of cosmetic products (RTCA 71.03.63: 07):** The use of the following is prohibited:
 - (i) Deceptive claims; or
 - (ii) Therapeutic properties claim for the product in relation to a specific disease or for the treatment of skin problems and related issues.

4 PRICE ADVERTISING

4.1 What are Nicaragua's rules regarding price advertising?

The Law of Protection of Rights of Consumers and Users (Law No 842) provides that it is unlawful to print or mark more than one sale price on any product. If more than one sale price is found on a product, the consumer will have the right to purchase the product by paying the lowest amount found thereon.

In general, deceptive pricing practices will be considered to be misleading or false advertising, and could result in a consumer complaint.

The prices of the products as shown on the commercial shelves must include the applicable tax.

4.2 What are Nicaragua's rules regarding advertising 'free' products?

In Nicaragua there are no specific rules regarding advertising 'free' products. However, regulations for this commercial practice are provided by the Law of Protection of Rights of Consumers and Users (Law No 842) in order to force providers to fulfill all the conditions advertised.

In general, advertising of 'free' products or services is acceptable as long as the advertising is not false or misleading.

4.3 What are Nicaragua's rules regarding sales and special offers?

The Law of Protection of Rights of Consumers and Users (Law No 842) establishes that providers must fulfill all the conditions of their promotions or commercial offers as advertised.

In general, advertising in the form of sales and special offers should be free from false or misleading information.

4.4 What are Nicaragua's rules regarding rebates?

The Law of Protection of Rights of Consumers and Users (Law No 842) establishes that providers must fulfill all the conditions of their promotions or commercial offers as advertised.

In general, advertising in the form of offering rebates should be free from false or misleading information.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

There are no other key restrictions which advertisers should be aware of regarding retail advertising practices in Nicaragua.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

The Law of Medicines and Pharmacies (Law No 292) prohibits any kind of advertising for prescription, psychoactive, and narcotic drugs. However, it is permitted to provide medical doctors and health professionals with all scientific literature in connection with these drugs. This scientific

literature must be first submitted for approval and registration before the Department of Pharmacy of the Ministry of Health and may later be provided to medical doctors and health professionals by authorized medical representatives.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

The Law of Protection of Rights of Consumers and Users (Law No 842) prohibits goods/service providers from advertising out of working hours through direct or indirect contact with potential clients (visits, text messages, phone calls, etc). It also establishes that goods/service providers must not share with third parties any information obtained from consumers/users without their previous voluntary and express authorization.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The Childhood and Adolescence Code (Law No 287) prohibits use of children and teenagers in any kind of advertising that includes indecency, obscenity, or any disrespect to their integrity.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

There is no specific regulation on this matter.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are no special rules that govern the integration of advertising content and entertainment (or editorial) content.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no special rules in connection with this topic.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

While there are no rules that specifically govern the use of advertising in social media, regulation exists for advertising content in mass media, including social media. As for content, legal dispositions outlaw any form of advertising that proves to be prejudicial against, inter alia, the state, moral values, Nicaraguan culture, or women's rights, and instead call for the inclusion of values that promote peace, education, and culture. According to national laws, content must be clear and accurate. The promotion of certain products, like tobacco and ethical drugs, through mass media is strictly prohibited.

The current regulation for the content of advertising in the mass media, including social media, comprises:

- (a) Law of Medicines and Pharmacies (Law No 292), which regulates the advertising of pharmaceutical products for human consumption; and
- (b) Law on Characteristics and Use of National Symbols (Decree No 1908), which prohibits the use of national symbols in advertising.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

Advertising claims made in user generated content do not imply the advertiser’s approval or consent, or that the advertiser complies with statements made in such form. Consequently, an advertiser is not immediately responsible for any comments—whether positive or negative—made by users. It is an accepted practice that advertisers include disclaimers on users’ statements.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

At present, there have not been any decisions regarding this topic.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

The Law of Protection of Personal Data (Law No 787) provides protection for an individual’s identity and personal information. This information, whether it be a claim made by an individual, or a picture posted in social media, cannot be used without the individual’s consent. If an individual expressly demands that their information be removed, it must be removed in a timely manner. In case the unwanted publicity is not taken down, or if the information was acquired through an unlawful source, the individual may take legal action against whoever has wrongfully acted.

9.2 Are there situations when permission is not required?

In general, permission is required. However, permission may not be required when the information circulates in public sources accessible to the general public and the use of the information does not negatively affect an individual’s integrity.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Specific regulations exist for:

- (a) the use of national symbols; and
- (b) all material related to the advertising of pharmaceutical products for human consumption.

10.2 Is it permissible to use other companies’ recognizable products in advertising (eg, an actor wearing branded training shoes)?

There is no specific regulation on this matter.

Nevertheless, such use may be permissible if it is not likely to cause confusion or association regarding the corporate origin of the products or services of the third party.

Whenever possible, in order to eliminate any risks, it would be advisable to obtain express authorization from the other company in respect of its recognizable products.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Nicaragua which affect advertising (eg Swedish gender equality law)?

In Nicaragua, the Law of Equal Rights and Opportunities (Law No 648) provides regulation for the promotion of gender equality in all communication activities, which may include advertising. Based on this, advertisements must not portray any kind of message, image, information, etc that discriminates or negatively affects women's integrity and distorts their role in society.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

There are no other specific cultural norms that should be considered in advertising; however, it is important to note that discrimination of any kind is prohibited by the Constitution of the Republic of Nicaragua.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Nicaragua?

Whilst there is no specific legislation related to ambush marketing, some of the common forms of this practice (eg, using tickets of an event as prizes for sweepstakes) may potentially infringe laws regulating trademarks, copyrights, unfair competition, and consumer protection.

Generally speaking, commercial advertising aimed at the promotion of goods and services (unregulated) by any media (television, radio, billboards, etc) must comply with the applicable laws, moral and good customs.

 NIGERIA 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Nigeria?

In Nigeria, advertising is regulated by the Advertising Practitioners Council of Nigeria (APCON), which was established pursuant to the Advertising Practitioners (Registration etc.) Act, Cap A7 (APA).

However, certain products and services are regulated by other regulatory bodies alongside the APCON. For example, the Nigerian Communications Commission (NCC) regulates advertising and sales promotion by NCC license holders.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

Any form of communication to the public or a target audience through the media, which aims to impart information about products and services and which is paid for by an identified sponsor is regarded, under the Nigerian Code of Advertising Practice and Sales Promotion (NCAP), as advertising.

1.3 What is the basic regulatory framework for advertising regulation?

The basic regulatory framework for advertising in Nigeria includes APA and NCAP. As a result of the powers conferred on the APCON under the APA, the APCON enacted the NCAP to control all aspects of advertising.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The practice of advertising generally is regulated by the APA and the NCAP, which regulate the registration and practice of advertising practitioners.

However, the Telephone Consumer Bill, which is currently before the National Assembly, seeks to regulate telemarketing in Nigeria.

Below is a summary of the provisions of the Bill:

- (a) prohibition of unsolicited advertisement by telephone between 9pm and 8am;
- (b) the NCC will be the administrator of the Bill;
- (c) all forms of telemarketing communication are only allowed if the contacted party has consented to such contact;
- (d) telephone solicitation using an artificial or pre-recorded voice to deliver messages or text messages calls cannot be made to any residential telephone line prior to 8 am or after 9pm; and
- (e) consumers who register their residential telephone line(s) in a ‘do-not-call Register list’ may not be solicited without their prior express consent.

The Bill is yet to be passed into law and it is not yet known if and when this will occur.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

The following industries' advertising practices are specifically regulated:

- (a) **Food and drug industry:** The National Agency for Food and Drug Administration and Control (NAFDAC), pursuant to the NAFDAC Act, regulates the advertising of regulated products such as processed food, bottled water, drugs, alcohol, bio-fertilizer and bio-pesticide. All materials used to create the advertisement, including scripts, story-boards, art work, and the audio and video itself must be approved by NAFDAC;
- (b) **Financial industry:** The Central Bank of Nigeria (CBN) (pursuant to the CBN Act, and the Banking and other Financial Institutions Act (BOFIA)), is responsible for the supervision and examination of banks and other financial institutions in Nigeria. The CBN ensures that banks and other financial institutions comply with the banking laws and other operational directives in relation to advertisements by these bodies. These laws provide, amongst other things, that only a bank or a person authorized by the CBN may publish or broadcast advertisements inviting the public to deposit money. Under section 40 of BOFIA, banks must submit any advertisement to the CBN for approval;

Insurance industry: The National Insurance Commission (NAICOM) is the body responsible for regulating the insurance sector in Nigeria. Pursuant to the National Insurance Commission Act and the NAICOM Operational Guidelines (Insurers and Re-insurers) 2011, advertisements in relation to insurance must be approved by NAICOM; and
- (c) **Telecommunications industry:** Pursuant to the NCC Consumer Code of Practice Regulations and NCC's Guidelines on Advertisement and Promotions, all advertisements are required to meet certain requirements, such as proper disclosure of prices and financial implications on promotions, restrictions on comparative advertising, and restrictions placed on unsolicited telemarketing.

The above sectoral regulations run concurrently with APCON's regulation.

1.6 Are any government pre-approvals required?

Generally, all advertisements, before they are published, are required to comply with the NCAP. The APCON, through one of its statutory committees called the Advertising Standards Panel, reviews advertisement materials and approves those that comply with the NCAP. However, in addition to these pre-approvals, the regulatory agencies listed in question 1.5 also pre-approve advertisement materials meant for advertisement of products and services that fall within their sectoral regulatory power.

1.7 Does the media pre-clear advertising?

No, they do not. However, media owners are required, pursuant to Article 119 of the NCAP, to ensure that no advertisement in the media offends any part of the NCAP, the Oath of Advertising Practice or any law of the Federal Republic of Nigeria. This is enforced by ensuring that all advertisements published by them have the Advertising Standards Panel Certificate Approval. Any media house that publishes or exposes an advertisement without an Advertising Standards Panel Certificate Approval will be liable to pay a fine of not less than N500,000 pursuant to Article 140 (a) of the NCAP.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Advertising laws are enforced through the APCON and the regulatory agencies responsible for sectors with specific advertising regulations. Various penalties are prescribed in the relevant laws, regulations and guidelines, which regulate advertising practice.

For instance, the APCON through its Disciplinary Committee may take the following actions against a guilty practitioner:

- (a) order the Registrar to strike his name off the relevant part of the register;
- (b) suspend him from practice for a specified period;
- (c) reprimand him;
- (d) order him to pay to the council any costs of proceedings or any other sums of money whatsoever incurred by the council; or
- (e) caution him and postpone for a period not exceeding one year any further action against him on one or more conditions as to his conduct during that period.

Aggrieved practitioners have a right of appeal to the Court of Appeal pursuant to Section 28 of the APA.

The Court of Appeal may, on an appeal:

- (a) confirm, vary or set aside any finding of fact, penalty imposed or direction given by the Disciplinary Committee;
- (f) confirm the rejection by the Disciplinary Committee of the application for restoration or direct the restoration of the name to the register;
- (g) remit the matter to the Disciplinary Committee for further consideration; or
- (h) make such other order as to costs or otherwise as may seem just to it.

The other sectoral agencies also enforce advertisement laws through the exercise of prosecution powers granted to them under relevant sector specific advertisement laws and regulations. Offenders are usually liable, upon conviction, to pay a fine or serve a term of imprisonment, or both a fine and a term of imprisonment. For instance, the NAFDAC Act imposes a fine of N50,000 or a term of imprisonment of up to one year or, in some cases, both on any one that breaches its regulations on advertising.

Also, the NCC Act imposes a fine or a term of imprisonment of up to one year (or both) fine for first offenders and a fine or imprisonment for a term of three years (or both) for second time offenders.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor may have a right of action under the tort of slander of goods or malicious falsehood, where an aggrieved trader can establish that a false statement was published about his goods and/or services with the intention to injure him. However, such action will only succeed if the aggrieved party can show that he suffered injury as a direct result of the false statement. Statements which aim to draw away a rival's customers or make comparisons between products of rival traders, even when proven to be false, are not actionable per se under the tort of slander of goods (but may constitute a

breach of the rule against comparative advertisement under the NCAP). Such statements must be proven to have been made with malicious intention before it will be actionable.

Potential remedies will typically include damages to the extent of the wrong suffered and injunctive orders preventing further publication of such injurious falsehood. Thus, a claimant must establish to the satisfaction of the court the amount of damages suffered by him as a result of the publication of the malicious false statement.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumer rights are protected under the Consumer Protection Council Act, Cap C25 (CPC Act).

A right of action will arise when a consumer suffers loss, injury or damage as a result of the use or impact of any goods, product or services.

Specifically, a consumer has a right of action for remedies under the CPC Act as well as a right of civil action for compensation or restitution in any competent court.

An injured party may make a complaint in writing or seek redress through the Consumer Protection Council (the Council) or a State Committee which is established under the CPC Act in each State of the Federation to assist the Council.

Remedies will include compensation for damages. In addition, the CPC may impose the following penalties on manufacturers who have been convicted of relevant offences under the Act:

- (a) a fine of N50,000 where it fails to carry out the statutory duty imposed on it under the CPC Act to notify the general public of any unforeseen hazard arising out of the use of its product. The manufacturer is required to arrange for the product to be withdrawn from the market;
- (b) a fine of N50,000 where it sells or offers for sale any unsafe or hazardous goods or proffers any information or advertisement which, in contravention of any consumer protection law, results in injury or loss to a consumer;
- (c) a fine of not less than N10,000 if it neglects or refuses to attend and testify before the Council or a State Committee or to answer any lawful enquiry or to produce any document that may be required of it;
- (d) a fine of N10,000 if it is discovered:
 - (i) that it has willfully made or caused to be made any false entry or statement in any report required to be made under the Act; or
 - (ii) to have willfully made or caused to be made any false entry in any account, record or memorandum kept by any person, partnership, company or trade association; and
- (e) a fine of N10,000 if it violates an order of the Council or a State Committee.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Nigeria have a primary advertising self-regulation system?

Yes, a self-regulation system does exist in Nigeria in relation to advertising. As explained above, the regulatory body charged with the responsibility of regulating and controlling advertising practice in Nigeria is the APCON. The APCON has enacted the NCAP to control all aspects of advertising.

The APCON carries out its responsibilities through its statutory committees as follows:

- (a) The Advertising Standards Panel (ASP) vets and approves advertisements before exposure in the media and defines acceptable standards for advertisements broadcast or published in Nigeria, in line with the NCAP.
- (b) The Advertising Practitioners Investigating Panel investigates complaints of professional misconduct brought against practitioners and determines whether the relevant offence has been committed. This forms the basis for disciplinary procedures.
- (c) The Advertising Practitioners Disciplinary Committee adjudicates cases of professional misconduct and sanctions practitioners who have behaved improperly.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Yes. The NCAP serves as the self-regulatory advertising code in Nigeria.

Some of the key principles of in the NCAP include:

- (a) all advertisements must not contain misleading information nor fall foul of the relevant legal obligations. Visual illustrations, words or sounds that offend public decency are expressly prohibited;
- (b) advertisements must not exploit, depict or suggest sexual behavior;
- (c) advertisements should be prepared with a high sense of social responsibility, avoid providing misinformation and be mindful of Nigeria's culture; and
- (d) all advertisements should conform to the principles of fair competition.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Disputes which relate to professional misconduct are investigated and adjudicated by the Disciplinary Committee. The decisions of the Committee are enforced by the APCON.

All other disputes are subject to legal action or alternative dispute resolution processes, such as mediation, conciliation and arbitration.

Enforcement of court decisions and/or arbitral awards is by recourse to the powers of the court.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self-regulation system is effective, widely used and followed. All advertising practitioners are compelled by the APA to register with the APCON and comply with its rules and regulations. Accordingly, the APCON is able to compel compliance amongst advertising practitioners with the standards for advertisements in the industry.

2.5 Are the self-regulatory system's decisions reported?

The decisions of the disciplinary council are not reported.

An interested person may write to the APCON for the Disciplinary Committee's past decisions.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Some of the key areas of focus are:

- (a) all advertisements must be legal, decent, honest and must avoid references to gender discrimination, sexual behavior, superstition and exploitation of fear and distress;
- (b) special care must be taken with all advertisements directed at minors. These advertisements must not promote negative social behavior, lifestyle or attitude. Products not suitable for minors are not to be advertised in media targeted at them;
- (c) advertisement of products and services should not unfairly discredit, disparage or attack other products, services, advertisements or companies and neither should they exaggerate the nature or importance of competitive differences;
- (d) advertising claims, testimonials and endorsements must be subject to proof and substantiation;
- (e) restrictions as regards the time of day at which certain products, such as alcoholic products and condoms, can be advertised; and
- (f) companies have to be mindful of the guidelines of regulatory agencies (ie the APCON, the NAFDAC and the NCC on advertisements and promotions).

2.7 Are there any other self-regulatory systems that govern advertising practices in Nigeria?

There are no other self-regulatory systems that govern advertising practices in Nigeria.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Nigeria (eg, consumer protection laws; IP laws; unfair competition laws)?

Other than the provisions of the APA and the NCAP, together with the principles detailed therein, the basic laws governing advertising claims include the law of contract, intellectual property laws and tort. Criminal law will also be applicable in relation to any contravention of applicable statutes, regulations and guidelines. The primary applicable laws include:

- (a) the Advertising Practitioners (Registration, etc) Act, Cap A7;
- (b) the Nigerian Code of Advertising Practice, Sales Promotion and Other Rights/Restrictions on Practice (5th Edition);
- (c) the Consumer Protection Council Act, Cap C25;
- (d) the Nigerian Copyright Act, Cap 28;
- (e) the Patents and Designs Act, Cap P2; and
- (f) the Trade Marks Act, Cap T13.

3.2 Is substantiation required for advertising claims?

Substantiation is required for all advertising claims, testimonials and endorsements. Article 23 of the APCON Code provides that any description, claim or illustration made in any advertisement shall either be subject to empirical proof or must capable of substantiation.

The NCAP does not specify any rules for the substantiation of advertising claims. Therefore, the general rule of evidence under the Nigerian law, that credible and verifiable facts must be adduced in support of claims, will apply.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

All claims, descriptions and/or illustrations in advertising messages require substantiation. Advertisers are prohibited from engaging in product hype or any form of product promotion which employs the use of the superlative or unsubstantiated or misleading claims, testimonials or descriptions.

3.4 What are the rules governing the use of disclosures in advertising?

There are no specific rules governing the use of disclosures in advertising. However, the NCAP directs that all relevant factors that are likely to affect consumers' decisions must be communicated in such way and at such time that consumers can take them into account.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

All testimonials and endorsements in advertisements must be genuine and the models used shall be alive and suitable for the products, services and ideas they endorse in the advertisements (Article 9 of the NCAP).

Models must be individuals who understand the implication of what they are doing and able to give their consent to being used as a model.

Also, as stated above, advertisers are prohibited from engaging in any form of product promotion which employs the use of the superlative or any unsubstantiated or misleading claims, testimonials or descriptions.

3.6 What are the rules governing the use of product demonstrations in advertising?

Advertisers must be capable of providing a demonstration or sample of the advertised product if requested to do so by the ASP. Claims made by such demonstrations must be capable of being empirically proven.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is not permitted. Specifically, two or more advertisements for competing or similar products or services must not be placed adjacent to each other in print, outdoor or electronic media. Also, advertisements of products and services shall not imitate the slogans or illustrations of another advertisement in such a manner as to mislead the consumer. Neither should advertisements of products and services unfairly discredit, disparage or attack other products, services, advertisements or companies. They must also not denigrate any person or group of persons, professions or product or seek to bring them to public ridicule or contempt.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

As stated above, comparative advertising is not permitted. Advertisements must not contain any item which breaches any Nigerian or international copyright law or omit anything which the laws on intellectual property require.

Generally, all advertisements must conform to the principles of fair competition generally accepted in business, and fair comments expected in free human communication. It is necessary that permission is obtained from the trade mark owner before any competitor's trade mark or products are used.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Nigeria is a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs agreement), but there is currently no domestication of this law nationally.

3.10 Are there any special rules governing product packaging?

There are rules governing product packaging in Nigeria such as the NAFDAC Regulations contained in the NAFDAC Act. These states that food and drug producers must take adequate steps to inform consumers of their products about the ingredients contained in bottled water and other beverages, pre-packaged foods, herbal medicines, cosmetics and other health care products.

Some of these NAFDAC's subsidiary regulations and guidelines that touch on product packaging and labelling include:

- (a) Bottled Water (Labelling) Regulations;
- (b) Drug Labelling Regulations 2005;
- (c) Food Fortification with Vitamin A Regulations 2005;
- (d) Food Products (Advertisement) Regulations;
- (e) Guidelines for Registration of Imported Cosmetics;
- (f) Herbal Medicine and Related Products (Labelling) Regulations 2005;
- (g) Guidelines for Change of Product Package Label Design of all Regulated Products in Nigeria; and
- (h) Pre-packaged Food (Labelling) Regulations 2005.

4 PRICE ADVERTISING

4.1 What are Nigeria's rules regarding price advertising?

Pricing information must be disclosed in such a manner that consumers will not be required to incur hidden or extra cost for products and services, in addition to the advertised cost/price.

Hidden or disguised adjustments, unrealistic price comparisons or exaggerated claims that relate to the worth or value of a product or service are also prohibited.

4.2 What are Nigeria’s rules regarding advertising ‘free’ products?

The following rules apply to advertising ‘free’ products:

- (a) free products, eg give-away items for alcoholic beverages, should not be directed at children, sportsmen/women and pregnant women in terms of their appeal;
- (b) advertisements must not, as a means to attract consumers to such products or services, offer any product or service as ‘free’ if it is intended for sale;
- (c) promoters/brand owners/organizers of an advertising campaign should not try to recover their costs by reducing the quality or by inflating the price of any product that must be bought in order to obtain the free item;
- (d) an offer will only be deemed to be ‘free’ if consumers will not pay more than the minimum possible cost for responding to the promotion, for the delivery of the product/service or for the cost of any travel involved for the consumer to receive the free product/service; and
- (e) an individual element of a product should not be described as ‘free’ if the cost of that element is included in the overall package price.

4.3 What are Nigeria’s rules regarding sales and special offers?

The following rules apply to sales promotions and special offers:

- (a) promotions must cause no harm to consumers or their property and must not be offensive to the audience. Literature accompanying promotional items must provide any necessary safety advice;
- (b) advertisers must ensure they have adequate stock of the advertised products to satisfy demand;
- (c) promoters should take reasonable steps to avoid disappointing participants;
- (d) promoters can’t encourage consumers to make a purchase as a precondition to applying for promotional items if the number of items is limited;
- (e) if the promoters cannot supply demand, they should offer a refund or substitute products in accordance with directions prescribed by the APCON;
- (f) promotions are to be conducted under supervision of persons who are aware of applicable rules and ensure conformance, and adequate resources must be made available to administer them; and
- (g) promoters must obtain legal advice before embarking on any prize promotion to ensure that they are lawful.

4.4 What are Nigeria’s rules regarding rebates?

Nigerian law does not have any provisions for rebates. All prices specified in advertisements must be the same as the market value for the goods and services.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

There are no other key restrictions which advertisers should be aware of.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Advertisements of tobacco products are strictly prohibited. Advertisements for alcoholic beverages are not to be scheduled in children's, sports and religious programs. Advertisements for condoms are not to be aired during children's programs or aired between 6am and 8pm on the radio and 6am and 10pm on the television.

Prescription only medicines may not be advertised to the public. Also, advertising communications for medicines should not be addressed at children.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

There are currently no specific prohibitions placed on any type of advertising practice.

However, the Telephone Consumer Protection Bill 2013 HB 427, which is currently before the National Assembly, seeks to protect telephone consumers from the activities of telemarketers and also provides for sanctions against telemarketers who contravene the provisions of the Bill. This Bill has not yet been passed into law.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The NCAP contains provisions which regulate indecency and obscenity in advertisements. Specifically, Article 2 of the NCAP provides that all advertisements must not use illustrations, words or sounds that offend public decency and that advertisements must not be offensive or obscene. In addition, advertisements should not exploit, depict or suggest sexual behavior either in obvious or implied context.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Advertisements soliciting patronage must show the correct identity (name and address) of the advertiser.

With the exception of teaser advertisements, media organizations are not to allow advertisements that do not indicate the proper identity of the sponsor to be broadcast or published.

Additionally, advertisements are not to bear a sign-off that uses broad terms such as 'committee of friends', or 'concerned citizens', or 'supporters' without verifiable names and addresses. Persons constituting such groups on whose behalf advertisements are placed should, as far as is practicable, be listed.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are no special rules governing the integration of advertising content and entertainment (or editorial) content.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no special disclosures or other obligations when integrating advertising content with other content.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no special rules governing the use of social media. However, the NCAP contains general guidelines on internet and other electronic media marketing as follows:

- (a) the commercial nature of the communication must not be concealed;
- (b) there must be clarity of the terms of any offer and clarity as to the procedure of concluding a contract;
- (c) before posting marketing communications via electronic media to public groups, due consideration must be given to the standards of acceptable commercial behavior held by such groups;
- (d) unsolicited messages must not be sent unless there is reasonable belief that the consumer in question will be interested in the subject matter of the offer;
- (e) all advertisements using electronic media must include clear and transparent mechanisms enabling the consumer to opt-out of future communications; and
- (f) any applications used to enable consumers to open marketing or advertising messages must not interfere with the consumer's normal use of electronic media.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

There is no law regulating a product manufacturer's liability for claims in user generated content. Ordinarily, a product manufacturer will not be liable for claims in user generated content, unless the manufacturer sponsored such statement.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

We are not aware of any key court or self-regulatory decisions in relation to the use of social media and user generated content.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

The NCAP requires that an individual's right to privacy must be protected. Additionally, pictures, names, likenesses or other attributes of an individual must not be used in a manner that suggests their personal endorsement without their prior consent. It further requires agencies, advertisers and individuals to negotiate and execute proper advertising agreements.

9.2 Are there situations when permission is not required?

Permission is always required to use an individual's name, picture, likeness, voice and identity in advertising.

The permission of an individual or his estate must be sought even where the individual is deceased, is a historical figure, or simply appears in the background.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

The NCAP prescribes the following rules in relation to the types of materials that have to be cleared before they can be used in advertisements:

- (a) Nigerian locations and ambience must be correctly depicted, and respect must be shown for Nigeria's national institutions and culture;
- (b) Nigerian languages must be used in such a way that depict their original meaning; and
- (c) the majority of the content of advertisements (ie, the equipment, footage and production) must, as far as possible, be Nigerian.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

The general rule is that all advertisements must conform to the principles of fair competition generally accepted in business and fair comment expected in free human communication. Therefore, provided that this rule is obeyed, use of other companies' recognizable products may be used in advertisements, particularly where the advertisement is not in relation to the same sector as, or in relation to goods and/or services in competition with, the other companies' brand, goods or services.

Also, where a person's or company's recognizable product is to be used in a manner that is likely to contravene generally acceptable principles of fair competition accepted in business and fair comment expected in free human communication, it may be necessary to obtain the permission of the owner of brand, goods or services.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Nigeria which affect advertising (eg Swedish gender equality law)?

The following rules apply:

- (a) females appearing in advertisements must be decently clothed in a manner that does not suggest sexual immorality or offend public morality;
- (b) African women must not be depicted as a caricature; and
- (c) advertisements must not detract from the sanctity of marriage or family values.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Consideration for other cultural norms (such as religious concerns) is to be guided by the following rules:

- (a) advertisements are not to disparage or exploit religious belief, mislead people or use 'miracles' as bait to elicit patronage; and
- (b) advertisements promoting a particular belief must not offend the right of people to hold a contrary belief.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Nigeria?

All advertisers in Nigeria must strictly comply with the APCON Code and other guidelines and regulations made by regulatory bodies in special sectors of the economy. Sanctions will be applied for failure to comply.

 NORWAY 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Norway?

The main law governing advertising is Act No 2 of 9 January 2009 relating to the Control of Marketing and Contract Terms and Conditions (the Marketing Control Act). The Marketing Control Act is the Norwegian implementation of the EU's Directive on Unfair Commercial Practices (Directive 2005/29/EC).

Since this Directive is based on so called 'full/maximum harmonization', there is an obligation on Norway (and on all Member States of the EU) that the implementation of the Directive is in line with the rules of the Directive. Thus, the wording of the Directive, as interpreted by the Court of Justice of the European Union, is important for the interpretation of Norwegian law.

The Marketing Control Act applies to advertising in all media. For advertising on broadcast media and on-demand services, there are additional requirements set out in the Broadcasting Act and Regulations.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

The regulatory framework does not offer one specific definition of what constitutes advertising. The general rule is that the majority of communication by a trader in any media, for the purpose of promoting itself, constitutes advertising. There is no requirement that the communication is a direct message encouraging consumers to purchase the products or services.

1.3 What is the basic regulatory framework for advertising regulation?

The Marketing Control Act and the Broadcasting Act constitute the basic regulatory framework for advertising regulation.

The Broadcasting Act and related Regulations regulate advertisements on broadcasting and on-demand services. Both the Act and Regulations are implementations of the EU Directive 2010/13/EU on Audiovisual Media Services.

Although the Marketing Control Act and Broadcasting Act are based on EU law, they go further than the EU Directive in areas such as advertisements targeted directly at children, which are strictly regulated.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Certain types of advertising practices are specifically regulated in the Marketing Control Act, such as telemarketing, the distribution of free newspapers and advertisements delivered direct to a consumer's doorstep or mailbox.

The Broadcasting Act contains detailed regulations regarding the time of day and length of broadcast advertising, as well as the disclosure of sponsors. Product placement is allowed but must also follow certain disclosure requirements.

Advertising directed towards children is specifically regulated both in the Marketing Control Act and in the Broadcasting Act and Regulations. One key regulation is the prohibition of advertisements directly targeting children and encouraging them to purchase the advertised products or to persuade their parents or other adults to buy the products for them. This prohibition applies across all media. In broadcasting, all advertising directed towards children is prohibited even if the advertisement does not contain a direct encouragement to purchase a product. In addition to business to consumer regulations, the Marketing Control Act regulates advertising practices between businesses. This includes provisions on good business practices among traders and provisions on unfair competition in an advertising perspective. Regulations on comparable advertising are particularly important.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There is a general ban in all media of the advertisement of products such as alcohol, tobacco, prescription medicines and guns. The provisions relating to the advertisement of these products are included in the general regulations on trade of such products. These regulations are further outlined under question 5 regarding prohibited practices.

1.6 Are any government pre-approvals required?

There are no government pre-approvals required. It is not possible to receive a binding preliminary statement from the government regarding the lawfulness of an advertisement.

1.7 Does the media pre-clear advertising?

There is no regulatory requirement for media to pre-clear advertising. The practice of advertising pre-clearance among the different media is varied, but most broadcasters prefer to pre-clear advertisements. Printed and online media usually assess their advertisements to a certain degree before publishing, but there is no regulatory pre-clearance routine. Both the advertiser and the publisher may be held responsible for any unlawful advertisements. The Consumer Authority (see question 1.8 below) will, however, normally bring cases regarding unlawful advertisements against the advertiser directly and not the organization that has published or broadcast the advertisement.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The Norwegian Consumer Authority (CA) (formerly Consumer Ombudsman) is an independent supervisory authority that prevents and stops illegal marketing and unfair contract terms and other forms of illegal commercial practices targeted to consumers.

The CA is a public enforcement authority. It works to make markets easier and safer for consumers. It also provides guidance to businesses on consumer law. This is achieved by offering guidance, and entering into dialogue with traders, by effective use of economic sanctions and thorough information. It also works to protect the rights of the consumers and to ensure that consumers may take informed decisions.

The Marketing Control Act regulates how the CA operates, and is the most important law it enforces. In addition to this, it ensures that traders comply with other parts of consumer protection legislation such as the Cancellation Act, the Financial Services Act and several other laws.

When traders infringe the Marketing Control Act, the Cancellation Act, the Financial Agreements Act or other pieces of legislation that the CA enforces, the CA may prohibit this conduct and impose administrative fines. Natural or legal persons that are accessories to infringements may also be the subject of decisions by the CA. The CA's decisions may be appealed to the Market Council. The CA considers cases following complaints from consumers and traders, but will also look at marketing measures on its own initiative. Through negotiation with traders, it can seek to reach voluntary arrangements, which may include an agreement that the advertisement being pulled without any further sanctions. Following failure to reach such a solution, the CA may submit the case to the Market Council which is the first instance administrative court for marketing cases. The CA may also take matters of principle to the Market Council, even when there is no dispute with the trader concerned. The CA also enforces certain parts of the regulatory framework governing broadcast advertising. The CA and the Market Council have the authority to issue decisions banning unlawful advertising. They also have the authority to impose prohibitions, enforcement penalties and infringement penalties.

Decisions from the Market Council may not be appealed by any of the parties. Traders who disagree with the decisions against them may bring their case before the ordinary courts. However, the CA cannot bring decisions that have gone against them in the Market Council before the ordinary courts. Decisions in favor of the trader are therefore final.

The CA devotes considerable efforts to internet access, mobile telephony and TV. It works with digital services and marketing in digital channels, including content marketing, advertising in social media, hidden marketing and user reviews.

The CA also participates in a broad range of international co-operation forums, to contribute to strong consumer protection across national borders.

1.9 When does a competitor have a right of action? What are the potential remedies?

Competitors have a right of action if a trader's advertisement contravenes good business practice or constitutes unfair competition. Cases between traders may not be brought before the Market Council. In order to take action against a competitor's advertising, a trader may either bring the case before the ordinary courts or before the self-regulatory body 'Næringslivets Konkurransutvalg' (NKU). The NKU does not issue binding decisions or award compensation, but its decisions are usually respected by traders. See question 2 for further information. Ordinary courts may give preliminary rulings to stop a competitor's infringing advertisement if the requirements for such a ruling are met.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers as individuals or groups are not party to the cases that the CA brings against a trader, even though a case may be initiated by a complaint from a consumer. The CA does not have authority to represent consumers in civil matters. Cases in the Market Council are therefore between the CA and the trader. Consumers cannot gain any remedies before the Market Council.

Consumers may, in addition to bringing a complaint against an advertiser to the CA, bring a case before the ordinary courts. This must be done in accordance with ordinary civil law. Civil remedies available for a consumer to claim in a court case include, amongst other remedies, damages. It would, however, normally be difficult for a consumer to document a financial loss caused by an

advertisement that met all the requirements for a claim for damages. Norwegian civil law does not provide for the awarding of punitive damages.

Individual and class action consumer suits against advertisers relating to unlawful advertisements are very rare in Norway.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Norway have a primary advertising self-regulation system?

There are multiple self-regulatory advertising systems in Norway. This framework compliments the regulatory framework for advertisers. Regulations relating to self-regulation govern different areas of trade and ensure that the same ethical standards in advertising are upheld by all parties within the same trade.

One set of regulations governs editorial advertising by the Norwegian Press Association. The Editorial Advertising Regulations apply to all members of the Norwegian Press Association, regardless of whether the advertising is produced for the printed media, online publications or television.

Another major system of self-regulation underpins the advertising of unhealthy food and drinks that are directed towards children. The Food and Drink Industry Professional Practices Committee governs this system. The Committee is a collaboration of the major industry players, the Confederation of Norwegian Enterprises (NHO), Hovedorganisasjonen Virke, and ANFO Advertisers Association.

The NKU is responsible for self-regulation in collaboration with the NHO, the Hovedorganisasjonen Virke, the Coop Norway SA, the Kreativt Forum, the ANFO Advertisers Association, the Media Businesses' Association (MBL), TV2 AS and Posten. NKU provides non-binding statements in disputes between traders regarding compliance with the Marketing Control Act.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The Editorial Advertising Regulations outline the well-established principles of the division between editorial material and advertising and the disclosure of advertising and sponsors in the media.

Self-regulation in the food and drink industry takes place under the Food and Drink Industry Practices code. This consists of guidance for businesses active in this sector. In addition, there is a list detailing which products are considered unhealthy and therefore governed by the code and guidance.

The key principle of the code is that the advertising of unhealthy food and drinks that are targeted at children under the age of 13 is not acceptable and that caution and consideration must be exercised in marketing to young people in general. However, the product itself, including packaging and display of the product, is not considered marketing.

The NKU derives its mandate from the Marketing Control Act. The NKU's key focus is on marketing practices that constitute unfair competition between traders.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

All three self-regulation systems have dispute resolution mechanisms.

Any party may bring a complaint concerning non-compliance with the Editorial Advertising Regulations before the Press Complaints Commission (PCC). The PCC is authorized to give reasoned opinions on the practices of media organizations who are members of the Norwegian Press Association. Such opinions are directed towards the media organization that has published the advertisements and not the advertiser itself. However, these cases do tend to attract negative publicity for the advertiser as well. There have been several recent examples of the PCC using its jurisdiction to rule on questions relating to regulatory compliance. The PCC does not offer damages, fines or injunctions. Parties seeking these remedies must bring such claims to the ordinary courts in accordance with the relevant civil law.

Compliance with the Food and Drink Industry Practices code is supervised by the Food and Drink Industry Professional Practices Committee (MFU).

Both traders and consumers may bring complaints before the MFU regarding marketing activities that infringe the code. The trader defending the complaint is entitled to respond to the complaint before a decision is taken. The complainant will be notified of any decision taken and the decision will also be published on the MFU website. The MFU does not issue fines or other financial penalties.

The NKU provides its opinion on disputes between traders about whether a form of marketing is in violation of the Marketing Control Act.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The principle of disclosing advertising, as set out in the Editorial Advertising Regulations, is generally accepted in Norwegian media. Practical solutions on how to disclose advertisements and sponsorship varies however and is often challenged.

A united food and drink industry has backed the self-regulation system for advertisements that target children and it is widely used and followed.

Statements from the NKU express the opinion of the representatives from the business community concerning marketing practices. The statements therefore carry significant weight in business and court practice. Although the NKU's statements, in formal terms at least, are only considered advisory and not legally binding, serious businesses will take statements from the NKU into account. The NKU does not offer damages, fines or injunctions. Claims for these remedies must be brought before the ordinary civil courts.

Regardless of any statement from the NKU, parties may bring the same case before the civil courts.

2.5 Are the self-regulatory system's decisions reported?

All decisions from the self regulatory systems are reported and available to the public.

Decisions from the PCC regarding editorial advertising are published on its website www.pfu.no.

Decisions from MFU regarding food and drink advertising directed towards children are published on the MFU website www.mfu.as.

Statements from the NKU are sent to the parties concerned and published on the NKU's website www.konkurranseutvalget.no, and on www.lovdatabasen.no.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Not applicable.

2.7 Are there any other self-regulatory systems that govern advertising practices in Norway?

Not applicable.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Norway (eg, consumer protection laws; IP laws; unfair competition laws)?

The Marketing Control Act has a broad scope of application and relates to the control of marketing, commercial practices and contract terms and conditions in consumer relations. It also requires traders to follow good business practice in their transactions with one another, eg advertising can be deemed unfair if a trader has taken undue advantage of a competitor's IP rights.

The law, in general terms, prohibits unfair commercial practices, eg misleading or untruthful marketing or the use of certain aggressive marketing techniques. The CA and the Marketing Council seek to influence traders to comply with the provisions of the Marketing Control Act and can, if necessary, impose penalties.

Advertising claims made in certain specific market sectors are regulated by special laws or regulations. For instance, in the areas of marketing of financial services, foodstuff or cosmetics, Act No 46 of 25 June 1999 on Financial Contracts and Financial Assignments, Act No 124 of 19 December 2003 on Foodstuff or Act No 126 of 21 December 2005 on Cosmetics, would apply respectively. There are special enforcement authorities supervising these laws, eg, the Financial Supervisory Authority of Norway and the Norwegian Food Safety Authority.

Telemarketing is strictly regulated in Norway. Consumers can opt out of unsolicited phone calls from telemarketers by registering with the Brønnøysund Register Center. Traders operating in the market are obliged to respect this and regularly update their lists of consumers appearing on the register.

Written confirmation is needed after telephone sales are made. The trader must send a letter, e-mail or SMS to the consumer who must then actively confirm the deal. Agreements are only binding once the consumer has returned written confirmation to the trader.

Consumers have the right to avoid receiving free editions of newspapers and advertisements delivered at their doorstep or mailbox by clearly marking the mailbox with a 'No, thanks!' notice.

3.2 Is substantiation required for advertising claims?

There is no requirement to provide substantiation of a claim in the actual marketing. However, section 3 of the Marketing Control Act requires that documentation shall be available to substantiate factual claims made in marketing, including as to the properties or effect of products. The documentation must be in the possession of the advertiser at the time that the marketing takes place. The CA has the authority to issue a prohibition order or penalty if a trader does not, within 48 hours of receiving a request for documentation relating to an allegation of a specific effect used in marketing, send it such documentation. The same applies if an allegation of a specific effect clearly cannot be documented.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

There is no special exemption for messages that do not need substantiation. However, examples from the enforcement of the Marketing Control Act show that clearly exaggerated statements or statements which are not meant to be taken literally are not enforced, eg, 'Red Bull gives you wings'.

3.4 What are the rules governing the use of disclosures in advertising?

The Market Council and the CA may conduct such investigations and inspections, including requests for the delivery of documents, objects and samples of goods, as they consider necessary in order to perform their statutory duties. If necessary, assistance may be requested from the police. All persons are obliged to provide the Market Council or the CA with the information that these authorities require to be able to perform their statutory duties, including information required to determine whether a commercial practice is unfair. The Market Council and the CA may request that the information be submitted in writing or orally within a time limit (see question 3.2 regarding the 48-hour rule).

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Endorsements and testimonials are treated like other claims in marketing and have to comply with the same requirements. Accordingly, the use of endorsements and testimonials in advertising cannot be misleading, untruthful or be contrary to good business practice and must not take undue advantage of a competitor's or a person's IP rights.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no special provisions targeting product demonstrations. As a general rule, product demonstrations have to be true and cannot be misleading. The product demonstration must avoid presenting information in an unclear, unintelligible, ambiguous or unsuitable manner. A product demonstration should not, therefore, omit or hide material information that consumers normally would require to be able to make an informed economic decision. In assessing whether information has been omitted/is misleading, limitations of space or time on the medium used to communicate the commercial practice shall be taken into account as well as of any measures implemented by the trader to make the information available to consumers by other means. The practice can only be regarded as misleading if it is likely to cause consumers to make an economic decision that they would not otherwise have made.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is allowed. There is a special regulation of 19 December 2000 on Comparative advertising ('Forskrift om sammenlignende reklame') which regulates in detail the extent that comparative advertising is allowed. The main rule of comparative advertising is that it is allowed provided it is not misleading, untruthful or is contrary to good business practice in traders' transactions with one another. The comparative advertising must ensure that:

- (a) it compares goods or services meeting the same needs or that are intended for the same purpose, and
- (b) it objectively compares verifiable and representative features of those goods and services (which may include price).

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Comparative advertising must not:

- (a) discredit the trade marks, trade names of a competitor;
- (b) confuse products of designated origin;
- (c) take unfair advantage of the reputation of another trader;
- (d) present imitations or replicas bearing a protected trade mark or trade name; or
- (e) create confusion as to the origin of the goods or services.

The use of a competitor's logo can easily confuse the recipient of the advertising into believing that the advertiser has approved or is affiliated with the logo's owner. Such cases have in practice been considered to be in conflict with good business practice and breach the Marketing Control Act. A reference to a competitor's word mark or trade name is allowed to identify the goods or services which are under comparison. However, reference must not be made in such a way that it takes unfair advantage of the good reputation of the competitor.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Yes. Under Section 31 of the Marketing Control Act—Application of incorrect geographical descriptions to wines and spirits: 'It shall be prohibited in the course of trade to apply a geographical description to a wine or spirit which does not originate from the geographical location designated by the description. This shall apply even if the actual place of origin is also stated, or if the geographical description has been translated or is followed by an expression like 'kind', 'type', 'imitation' or something similar'.

3.10 Are there any special rules governing product packaging?

Yes. Under Section 26 of The Marketing Control Act—Misleading business methods: 'It shall be prohibited in the course of trade to use an incorrect or otherwise misleading representation which is likely to influence the demand for or supply of goods, services or other products. In this chapter, 'representation' shall mean any form of announcement or statement made orally, in writing or otherwise, thus including descriptions, pictures, demonstrations, the form, size or type of packaging,

etc. The Ministry may by regulation issue more detailed provisions relating to comparative advertising’.

Under Section 30 of The Marketing Control Act—Copying the products of another person: ‘It shall be prohibited in the course of trade to use copies of distinguishing marks, products, catalogues, advertising materials or other produced items in such a manner and under such circumstances that the use must be considered an unfair exploitation of the efforts or results of another person, and to present a risk of confusion’.

4 PRICE ADVERTISING

4.1 What are Norway’s rules regarding price advertising?

The main rule for price advertising is that it is allowed insofar as it is not misleading or untruthful. There is extensive practice from the enforcement authorities regarding this issue. Against this background, the CA has also drawn up its own guidelines concerning price advertising. It is questionable whether some of the requirements in these guidelines go further than what the EU’s Directive on Unfair Commercial Practices (Directive 2005/29/EC) allows. Given the requirement of full harmonization of this directive, certain aspects of the CA’s guidelines might not, in our opinion, stand a challenge against the rules of the Directive.

4.2 What are Norway’s rules regarding advertising ‘free’ products?

It is prohibited to describe a product as ‘gratis’, ‘free’, ‘without charge’ or similar 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 item. The CA has a strong tradition of firm enforcement regarding such types of advertising.

4.3 What are Norway’s rules regarding sales and special offers?

In the marketing of sales, prices must be reduced in relation to a real former price. The price advantage must be displayed and specified. Therefore, the trader is normally obliged to indicate in the marketing the former price or the reduction in percentage terms. Documentation must be available to substantiate that the same product has been sold in a certain quantity at the indicated former price in the period directly prior to the sale. Normally the CA asks for documentation of actual sales (at the former price) in the six weeks prior to a campaign. Rebates are treated as a form of marketing of a sale/discount and, therefore, the above rules apply.

4.4 What are Norway’s rules regarding rebates?

Rebates are treated as a form of marketing of a sale/discount. Please see question 4.3.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

The CA has strict practice regarding ‘lowest price’ claims and price guarantees. Documentation must be available to substantiate a lowest price claim and a trader must regularly research market prices and immediately lower its prices if lower prices are found elsewhere. Regarding price guarantees, all important limitations or conditions must be indicated in the marketing. ‘Price guarantee’ or equivalent terms must not be used if the limitations render the real price reduction practically null.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Norwegian tobacco and alcohol legislation is considered restrictive. This includes legislation on advertising for tobacco and alcohol. The act on Prevention of the Harmful Effects of Tobacco (the Tobacco Act) includes a prohibition against tobacco advertising which prohibits all forms of advertising of tobacco products. The same applies to smoking accessories, imitation tobacco products and tobacco substitutes, including e-cigarettes.

Tobacco products may also not be included in the advertising of other products or services. Further, a brand name or trade mark that is mainly familiar as a brand or mark for tobacco products may not be used in the advertising of other goods or services, so long as the name or mark in question is used in connection with a tobacco product. Tobacco products may not be launched with the aid of brand names or trade marks which are familiar as, or used as, brands or marks for other goods or services.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

All forms of tobacco sponsorship are prohibited. The term tobacco sponsorship means any form of public or private contribution to any event, activity or individual with the intent or the direct or indirect effect of promoting the sale of tobacco products. Visible displays of tobacco products and smoking accessories are also prohibited.

The Alcohol Act states that all advertising of beverages containing alcohol is prohibited. The term 'advertising' is broadly defined as any form of mass communication for marketing purposes, including advertising in print, film, radio, television, internet, illuminated advertising, posters, signs, images, exhibitions and distribution of printed matter and samples.

Prescription drugs may not be advertised to consumers, but advertising aimed at health personnel, such as doctors and nurses, is allowed. Non-prescription drugs may be advertised to consumers.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

There are no laws or regulations governing what is considered indecent or obscene in Norway. The general provision in the Marketing Control Act on 'good marketing practice' may however apply to all advertising. An advertisement may contravene good business practice if the marketing offends against general ethical and moral views and if it employs offensive means. Advertisements that are considered indecent or obscene in Norway may be prohibited by the CA on the grounds that they contravene 'good marketing practice'.

In marketing that is directed towards children, the use of violence, sexuality or drugs in advertisements will contravene the provision on good marketing practice.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

The Broadcasting Act and Regulations require that sponsors of programs are disclosed. In this context 'sponsors' means any direct or indirect contribution made to the production or transmission of one or more programs by a natural or legal person not personally engaged in the production or broadcasting of such programs.

Where a program is sponsored, information to this effect shall be given prior to and/or after the program. Information about the sponsor may be given in the form of the name, trade mark or logo of the sponsor. The content and form of presentation of a sponsored program must be such as to maintain the full editorial integrity of the broadcaster.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

The principle of identification of advertising and the separation between advertising and editorial material is a basic principle in the Norwegian advertising legislation and strictly enforced. This is expressed both in the Marketing Control Act, the Broadcasting Act and Regulations, as well as the self-regulation system of the Norwegian Press Association.

The PCC recently decided that a Norwegian fashion magazine had, in two separate articles, failed to sufficiently disclose the relationship between the editor and the brands that were presented. The PCC decided that even if a new collection from a brand was considered relevant editorial material for a fashion magazine, the magazine should have disclosed that the editor was close friends with a key individual behind the collection and that the failure to disclose was misleading.

Sponsor identification in broadcasting and disclosure of commercial connections with bloggers are examples of regulations on branded content.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Traders are obliged to disclose advertising content as such when integrating it with other content. The disclosure obligations will vary depending on the media and the form of advertisement and must be assessed on a case by case basis.

For social media, the disclosure regulations are very specific. See question 8 below for more information on disclosure of advertising in social media.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

The CA monitors compliance with the Marketing Control Act in social media. In order to ensure that advertising in social media complies with the general provisions in the Marketing Control Act, the CA has provided specific guidelines which explain the more general provision in the Marketing Control Act on the disclosure of advertisements and the application of these provisions in social media.

The main purpose of the guidelines is to explain to advertisers and social media users how to comply with the ban on hidden advertisements and how, in practice, advertisers should disclose advertising when integrating advertising with user generated content.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

The key rule is that users who have received payment or other advantages, such as free products in return for the promotion of products or services from a trader, must sufficiently disclose such relationships. Failure to comply with this may lead to administrative sanctions from the CA or Market Council against the social media user who has published the content and, in certain cases, against the advertiser as complicit in the unlawful practice.

Disclosure must be conducted by users of all social media including blogs, Facebook and Instagram. In blogs, disclosure must be conducted by adding the text 'Advertisement' at the beginning of each blog post that constitutes an advertisement. User generated posts with advertisements on Facebook must also include the text 'Advertisement' at the beginning of the post. On Instagram, users must disclose advertisements in user generated content by including #advertisement in the first #.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

The Guidelines for advertising in social media have been in effect since 2011 and have been recently updated to include new social media. Since 2011, the CA has not brought any social media users or advertisers before the Market Council for breach of these regulations. Neither have there been any court cases between the CA and advertisers. The CA is, however, monitoring the most popular social media profiles in order to see whether their promotions of products and services sufficiently disclose their relationship with the advertiser. Until now, a soft approach has been taken by the CA by informing the social media profiles of the regulations and seeking to reach a voluntary agreement on compliance.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

Act No 2 of 5 December 1965 on Copyright regulates the use of an individual's picture in general. The main rule is that photos depicting a person cannot be reproduced or shown publicly without that person's consent. These rules are supplemented by case law and also by Norway's obligation to respect article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Therefore, using an individual's picture for commercial purposes in advertising, would normally require that person's consent in order to avoid the advertiser being liable to pay compensation, especially if that person's identity has commercial value in itself and the person is identifiable or 'in focus'.

Advertising practices where an individual's name, likeness, voice and identity are used without prior consent can, depending on the situation, be a breach of the Act of 14 April 2000 No 31 relating to the processing of personal data, the General civil penal code and case law regarding the protection of the individual's privacy. Normally, the person's consent would be needed, but there can be certain exceptions.

If the person's picture, name or identity has a commercial value in itself, it can also be considered in conflict with good business practice and, therefore, a breach of the Marketing Control Act if the person has not given his or her prior consent for this to be used in advertising.

9.2 Are there situations when permission is not required?

There are certain exceptions to the rule regarding the depiction of a persons' image. For instance, the person's consent is not necessary if the picture is of current or general interest; the picture of the person is less important than the main contents of the picture; or the subject of the picture is a group assembled for a meeting, an outdoor procession or situation or event of general interest.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are no specific rules in the Marketing Control Act governing types of materials that must be cleared before they may be used in advertising, but see further information in question 10.2.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Marketing communications must not portray or refer to any persons, unless prior permission has been obtained (see questions 9.1 and 9.2). It is also prohibited to use the Norwegian coat of arms in any way in advertising. As a general rule, marketing should not make unjustifiable use of names, initials, logos and/or trade marks of another business or in any way take undue advantage of a business or of their goodwill. The same applies to all other intellectual property rights. If the use of rights, logos or products is of secondary importance in an advertising campaign this may still be permissible, but this has to be closely assessed on a case by case basis.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Norway which affect advertising (eg Swedish gender equality law)?

Marketing shall, according to the Marketing Control Act, not conflict with good marketing practice. The enforcement authorities in Norway put emphasis on whether the marketing offends against general ethical and moral views and whether it employs offensive means. The marketing material

should not conflict with sexual equality, exploit the body of one of the sexes or convey an offensive or derogatory appraisal of women or men.

Furthermore, special attention should be paid when commercial practices are targeted towards children. Particular care needs to be exercised with regard to the impressionability, lack of experience and natural credulity of children. In assessing a contravention, the enforcement authorities will take into account age, development and other factors that make children particularly vulnerable.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Not applicable.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Norway?

Not applicable.

PANAMA

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Panama?

There are four principal areas of law and regulation regarding advertising in Panama.

- (a) Consumer protection laws, particularly the Consumer Protection Law No 45 of 2007;
- (b) Intellectual Property Laws, particularly copyright and trade mark law, which impact upon creative treatments and the use of third-party trade marks in comparative advertising;
- (c) Sector-specific laws that impinge upon advertising for particular goods or services, such as medicines, gambling, breastfeeding, tobacco and alcohol; and
- (d) There is a particularly significant role in our system for self-regulation. The ASEP (Public Services Authority) has issued several resolutions regarding self-regulation in radio and television.

There are other laws regarding specific areas of advertising, such as designated areas to install advertisement, lighting in electric ads, etc.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

Law No 45 of 2007 and Executive Decree No 46 of 2006, both regarding consumer protection, define advertising as ‘information broadcasted by any mean or communication form, in order to promote or offer goods or services for the final consumer’.

Additionally, Law No 35 of 1996, modified through Law No 61 of 2012, defines an advertising expression or sign as ‘any caption, slogan, phrase, combination of words, design, engraving or any other similar means, that is original, identifies and it is used in order to attract the attention of consumers or users on a given product, merchandise, service, business or property’.

1.3 What is the basic regulatory framework for advertising regulation?

In general terms, the main legislation regulating advertising is Law No 45 regarding consumer protection, in which it is established that the supplier has the obligation to advertise its products or services truthfully, without misleading information of qualities or prices.

The content of Law No 45 is enforced by the Authority for Consumer Protection and Competition Defense (ACODECO), the Consumer Protection Authority and the Judicial System.

In addition, there are several consumer associations, formally constituted through the territory of the Republic of Panama and recognized by ACODECO, that also contribute to the enforcement of Law No 45 of 2007.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

- (a) **TV and Radio:** Executive Decree No 189 of 1999 establishes that advertising in local radio and TV must comply with Panamanian laws regarding alcohol, health products and drug addiction. This Law also prohibits local TV and radio from broadcasting advertisements:

- (i) regarding health activities or services without preapproval;
 - (ii) with subliminal stimuli; or
 - (iii) narrated by unauthorized broadcasters.
- (b) **E-mail and other equivalent electronic communication media:** Law No 51 of 2008 regarding e-commerce states that e-mail advertisements must be identified with the term 'advertising' in such a way that the e-mail account owner realizes it is advertising before opening the correspondence; additionally, e-mail advertisements must contain an option to block future communication of that nature and from that sender.
- (c) **Text Messages:** Resolution AN No 3887-Telco of 2010, forbids telephone service-providers from sending promotional text messages to users other than those who are subscribed to their company and active in their data base as receivers of SMS/MM for commercial and/or promotional broadcasting. Moreover, any pre-paid or post-payment customer may file a request to stop receiving commercial or promotional messages in writing, by telephone or in person. The company is obliged to carry this out within a period of 8 hours and at no cost. Additionally, this resolution also provides that the allowed timeframe to send promotional text messages is from 8:00am to 8:00pm.
- (d) **Foreign advertisements:** Executive Decree No 273 of 1999 determines that advertisements produced abroad can only be displayed on local TV and in cinemas if an authorized Panamanian broadcaster has dubbed the voices in them.
- (e) **Billboards:** Each district of Panama has a Municipality Office which must enact the rules regarding billboard installation in their respective territories; because of this there is extensive legislation in this area. However, the general rules are that:
- (i) billboards require preapproval;
 - (ii) billboards require payment;
 - (iii) billboards must be of certain size; and
 - (iv) the content of billboards must be accordance to the rules of morality and good morals.
- (f) **Audiovisual advertisement:** According to Executive Decree No 1 of 1978, modified by Executive Decree No 109 of 1980, audiovisual advertisements for Panamanian radio, TV and cinema, must be in Spanish and produced in Panama and performed by national artists.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There are several industries that are subject to specific laws which govern their advertising, and/or have particular, specific provisions in legislation that apply to them. These are some of the main ones, but the list is not exhaustive.

- (a) **Alcohol:** Law No 299 of 1992 details that alcohol advertising shall not, among other prohibitions:
- (i) stimulate abuse in consumption;
 - (ii) use models or testimonials from persons under 21 years old;
 - (iii) be directed to minors;
 - (iv) be placed in programs where the audience is mostly children and adolescents or in psycho-pedagogical orientation programs;

- (v) use obscene elements;
- (vi) encourage illegal activities; or
- (vii) display models ingesting alcoholic drinks.

In addition, alcohol advertisements must display messages such as: 'do not drink when driving, driving under the effect of alcohol increases the risk of accidents' and 'alcohol can produce brain, fetus and liver damage'.

- (b) **Tobacco:** All forms of advertising, promotion and sponsorship of tobacco and its products, whether through indirect or subliminal means, aimed at minors or adults are prohibited by Law No 13 of 2008.
- (c) **Medicines:** Prescription-Only-Medicines are heavily regulated, and can only be advertised in advertising directed at medical professionals. Over-the-Counter medicines can be advertised to consumers, subject to pre-approval.
- (d) **Cosmetics, food supplements and pharmaceutical products:** Advertising for cosmetics, food supplements and pharmaceutical products can encounter problems if they make claims alleging to prevent, treat or diagnose a disease, illness or adverse condition. They are also subject to pre-approval.
- (e) **Drug-Addiction Prevention:** Law No 48 of 1996 orders local TV networks to display anti-drug-addiction messages in between documentaries or series with drug content. Radio stations and newspapers must include at least one anti-drug message a day.
- (f) **Breastfeeding:** Law No 50 of 1995 that promotes the importance of breastfeeding, heavily regulates the advertisement of growth formulas directed to children from 1 year old. Additionally, advertisement of formulas directed to children under the age of one is forbidden.
- (g) **Gambling:** Promotions and raffles can only be advertised after approval has been given by the Game Control Board.

1.6 Are any government pre-approvals required?

- (a) Advertisements regarding health-related products (included medicines, cosmetics, alcohol, and food supplements) must be pre-approved by the Advertisement Commission of the Ministry of Health.
- (b) The Panamanian Game Control Board is in charge of approving gambling games or promotions.
- (c) The Municipality Office must give its consent prior the installation of a billboard.

1.7 Does the media pre-clear advertising?

No, there is no private entity of such nature, although there are self-regulation agreements that have been adopted by local TV networks and radio stations.

1.8 How does the government enforce advertising laws? What are the potential remedies?

In Panama, the main entity supervising advertisement compliance is ACODECO, which is entitled to do so according to Law No 45 of 2007. It establishes the link between advertising and supplier, highlighting the importance of truthful information. ACODECO's Complaints Department has the

power to enforce advertisements in cases up to US\$2,500. ACODECO can impose fines for up to US\$25,000 per offence. ACODECO can act ex officio or based in a complaint lodged by a consumer.

Advertisements regarding health products must be pre-approved by the Advertisement Commission of the Ministry of Health. If an advertisement is not pre-approved or does not comply with regulations, the Commission can impose fines from US\$5,000. These fines are notwithstanding the health consequences on costumers.

The Panamanian Game Control Board is in charge of approving gambling games or promotions and has the power to impose fines on those who advertise gambling games that have not been pre-approved, or do not show the approval resolution number. The fines can go up to US\$100,000.

The Municipality Office approves the installation of billboards; however, it does not regulate their content. Fines for illegally installed billboards can go up to US\$10,000.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor has the right of action in cases of:

- (a) **Unlawful use:** Where their trademark is used to compare it to a similar or identical one, with the purpose of destroying its distinctiveness or commercial value, causing harm to the owner.
- (b) **Unfair competition:** Where false information is used against a certain establishment, its products or services, with the purpose of diverting the client to another establishment.
- (c) **Advertisement expression/trademark registration:** If a third party tries to register or effectively registers a trademark or advertisement expression identical or very similar to one of the competitor's property.

In the case of unlawful use and unfair competition, the affected party has a right of civil action (in the Fair Competition and Consumer Protection Civil Courts or the regular Civil Courts) to request the suspension of the prejudicial acts and reparation or damages. The claimant will need to show that (i) it was identified by the relevant statement or claim; (ii) the claim was not merely misleading, but actually false; and (iii) the claim has caused him damage.

In the case of advertisement expression/trademark registration, the affected party can file an opposition process against the registration of the trademark. If the trademark is already registered, a nullity/cancellation action can be initiated. Both opposition processes and nullity/cancellation actions can be initiated in the Fair Competition and Consumer Protection Civil Courts. They must prove that the application or registration is similar or identical in such a way that can confuse consumers, in addition, the previous use or registration of the original advertisement sign or trademark must be also be proven.

1.10 When do consumers have a right of action? What are the potential remedies?

- (a) Consumers can file a complaint in ACODECO in cases of:
 - (i) lack of sufficient information in advertisements,
 - (ii) misleading advertising,
 - (iii) non-compliance of an agreement,
 - (iv) abusive practices, and

(v) in general, any situation where they feel their rights are being compromised.

ACODECO's Complaints Department can act in cases up to \$2,500. ACODECO can impose fines for up to \$25,000 per offence.

- (b) When the claim exceeds \$2,500.00, the consumer can file a suit at the Fair Competition and Consumer Protection Civil Courts. These courts have competence over any controversy resulting from an individual or collective claim born in a consumer relationship.
- (c) Criminal actions can be initiated in cases when the offer or advertisement of products or services includes false information or characteristics that lead to serious injuries or harm. This is punishable with one to three years of prison.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Panama have a primary advertising self-regulation system?

There are self-regulation agreements that have been adopted by local TV networks and radio stations.

2.2 Is there a self-regulatory advertising code? What are the key principles?

There is no specific law or code of advertising self-regulation; however, there are two documents (i) between local TV companies and (ii) between radio stations, agreeing to self-regulate their content. The ASEP adopted the TV agreement by means of Resolution No. JD-1556 of 1999, and the Radio agreement through Resolution No. 3285 of 2002.

The principles for both radio and TV are that advertising must not:

- (a) praise intentional violence and cruelty towards people;
- (b) attack the dignity or discriminate people based on their race, color, gender, religion and ideology;
- (c) praise the use of illegal drugs, alcohol and cigarettes;
- (d) show scenes or messages of explicit sexual content lacking educational substance; or
- (e) use obscene language.

Whilst the agreement between TV networks stipulates the content with those characteristics may be broadcasted from at 8.00 pm, radio stations agreed on 10.00 pm.

These agreements specifically address content, not advertising; however, it is customary to also self-regulate advertising based on these principles during these specified time frame.

In addition, Article 162 of ASEP's Executive Decree No 189 of 1999 establishes that advertising broadcast by local TV and radio stations is not subject to preapproval by any authority (except when law requires it).

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

There is no mechanism of such nature.

Government agencies will enforce advertising laws if the self-regulatory system has failed to work if there is a serious issue of consumer detriment or if advertising is broadcast without the proper pre-approval.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Generally speaking, the self-regulation system is effective: local TV networks and radio stations will, in most cases, broadcast appropriate content in the specified time frame. A report approved by representatives of the Panamanian television industry has been delivered to the Self-Regulation Advisory Board, which includes the following criteria that are currently in use:

- (a) Category A will be a program aimed at children;
- (b) Category B can be viewed under the guidance of an adult;
- (c) Category C for people fulfil further criteria (adult audience); and
- (d) Category D is exclusively for adults.

2.5 Are the self-regulatory system's decisions reported?

Not that we are aware of.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

In Panama, there have been occasions on which questionable billboards have been installed and the government has refused to order their removal on the grounds of free speech. On these instances, the advertising agency, its client or the media feel pressure from the Catholic Church and Civil Society in general, and end up removing or modifying the content in order to end controversy.

2.7 Are there any other self-regulatory systems that govern advertising practices in Panama?

Advertising agencies seldom refer to international standards of advertising ethics in order to know if their content is according to certain principles.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Panama (eg, consumer protection laws; IP laws; unfair competition laws)?

Advertising claims are closely monitored by ACODECO. Law No 45, indicates that any type of publicity, whether promotions of products and services, advertisements or publicity campaigns, must be true, authentic, visible, legible, truthful and without ambiguity. Also, the advertising must clearly indicate the terms of the promotions, sales, discounts and special conditions of the goods and services that are being offered. Audio and multimedia advertisements are also monitored by ACODECO.

Law No 5 of 2007 establishes the definition of unfair competition. See question 1.9.

See also question 3.8 as to claims relating to geographic origin.

3.2 Is substantiation required for advertising claims?

According to Law No 45, manufacturers, importers and distributors are responsible for the suitability, quality and truth of commercial advertising and the qualities attributed to products and services.

Likewise, the company authorizing, paying or requesting the broadcast of such advertisement is linked to all claims, information or offers made public through any media, which become part of the sales contract between buyer and seller.

Generally, substantiation must show that there was a ‘reasonable basis’ for making the claim.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Panamanian law does not regulate ‘puffery’, nor does it state criteria for its acceptance; however, the Law does state that any advertisement shall be considered deceptive or misleading when it causes consumer error or confusion as a result of an exaggerated portrayal of the characteristics and information of a product or service. In general, the law does not except any practice from being truthful.

In view of the above, a conservative approach to mitigate a potential risk would be to take measures to ensure that the advertising sticks closely to the truth, and avoid puffery as it could be considered misleading advertising or lacking sufficient information; both practices are considered an offense against the consumer.

3.4 What are the rules governing the use of disclosures in advertising?

All disclaimers to advertising claims should be disclosed in a clear and conspicuous manner. A disclaimer cannot ‘cure’ an otherwise false or misleading advertisement, it can only enhance or clarify the language.

Panamanian Law states that footnotes, disclaimers, disclosures or legends which clarify, constrain, restrict or limit the use of any product or service must be visible, legible, clear, true and without ambiguity. In any kind of disclaimer, the font size, phrase or duration must be proportionate to the rest of the ad. Thus:

- (a) in TV advertising, the disclosure message should last at least half the duration of the television advertisement;
- (b) with respect to radio, messages to clarify, constrain, restrict or limit the use of goods or services must be announced at the end of the ad at the same speed as the announcement, so that they can easily be heard and analyzed; and
- (c) as to announcements made by means of written or printed communication, messages must be displayed using a contrasting, legible and clear color.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Advertising based on testimonials must be true and authentic. ACODECO is empowered to request providers of the advertised product or service for the identification, address, and general data of the people offering testimonials, with the purpose of proving their statements. The provider must have the appropriate information available for ACODECO for a 6-month period, in case it is necessary to prove the claim.

Even though endorsements are not specifically addressed in Law No 45, it is understood that this rule applies to them too.

3.6 What are the rules governing the use of product demonstrations in advertising?

Demonstrations must accurately reflect how the product works without any ‘embellishment’ or ‘artificial enhancements’.

A notary public must be present when the demonstration is made in order to make it valid.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is allowed, to the extent that the it is not intended to:

- (a) cause any damage or dilution to the distinctive quality of a third parties’ trademark, or
- (b) cause any disparagement, or discredit with false statements, the trademark owner’s products and services.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

Use of third-party trademarks in comparative ads is not prohibited by the Panamanian Law, provided that it complies with the points made in question 3.7. However, a competitor could feel that its trademark is being affected and file a complaint of Unlawful Use or Unfair Competition, as explained in question 1.9.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

Claims related to geographical indications, indications of origin and appellations of origin were effectively, introduced into the Panamanian Trademark Law by means of Chapter IV of Law No 61 of 5 October 2012:

- (a) **Geographical indication:** This identifies a product as originating in the territory of a country, or a region or locality of that territory, when a certain quality, reputation or other characteristic of the product is attributable fundamentally to its geographical origin.
- (b) **Indication of provenance:** This is the expression or sign used to indicate that a product or service comes from a country or a group of countries, a region or a specific place.
- (c) **Appellation of origin:** This is the name of a country, a region or a locality, which serves to distinguish a product originating from there and whose quality or characteristics are due exclusively or essentially to the geographical environment, including natural factors and human factors. The denomination of a product that, without being a geographical name, denotes a geographical origin when applied to that product whose quality, reputation or other characteristic is essentially attributable to its geographical origin, will also be considered as denomination of origin.

In addition, the law includes the procedures and requirements requested by the Trademark Office when making a claim for a geographical indication, indication of origin or appellation of origin.

The Law also provides that claims relating to geographic origin can be challenged through a cancellation or nullity action through Unfair Competition Civil Courts.

3.10 Are there any special rules governing product packaging?

Effectively, under Law No 45 of 2007, there are general rules for product packaging. In addition, there are other regulations for packaging of different goods such as food products, medicine goods and goods that require special treatment due to their dangerous composition.

4 PRICE ADVERTISING

4.1 What are Panama's rules regarding price advertising?

The price on products or services must be clear and accurate, and in no way may it deceive consumers or induce them into error or confusion. Any product which is sold below its regular price or at a discounted price must have a tag that indicates the lowest price at which it was sold in the last 3 months. Suppliers or retailers must inform consumers of the duration of the special offer and/or the minimum number of products available under the offer.

If a product is mistakenly tagged at the wrong price, the lowest price will prevail.

4.2 What are Panama's rules regarding advertising 'free' products?

Panamanian Legislation does not regulate the use of the term 'free' on products or services; however, it does state that the price on products or services must be clear and accurate, and may in no way deceive consumers or induce them to error or confusion.

Please be aware that a 'free' product may create a tax obligation (VAT), and it is advisable to include this provision in any advertising of such nature.

4.3 What are Panama's rules regarding sales and special offers?

In any kind of special sale, offer or discount, a tag must be visible showing the lowest price of the product in the last three months and the new discounted price.

The establishment must clearly show whether products throughout the whole store are in the sale or if the sale applies to a few particular items.

It is forbidden to show marked-up prices to deceive consumers into believing that there is a sale or special offer, when there is not.

Suppliers or retailers must always inform customers as to the duration and/or the minimum number of products available under the special offer.

4.4 What are Panama's rules regarding rebates?

We are not aware of any rules specifically regarding rebates. General rules of advertising law will apply.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

The main thing the Consumer Protection Authority seeks is truthful information.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

- (a) All forms of tobacco advertising are prohibited by Law No 13 of 2008.
- (b) Advertising of prescription drugs through packaging, labels, inserts, is prohibited.
- (c) Advertising of prescription drugs shall only be directed at professionals.
- (d) Unauthorized persons are forbidden to advertise therapeutic treatments, cures and medications.
- (e) Local TV and radio are forbidden to broadcast advertisements:
 - (i) regarding health activities or services without preapproval;
 - (ii) with subliminal stimuli and
 - (iii) narrated by an unauthorized broadcaster.
- (f) Law No 57 of 2011 establishes that importers and merchants that distribute firearms, their accessories and ammunition are forbidden to promote and advertise these products without warning the public about the dangers of irresponsible use of firearms.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

By Resolution No JD-018-93 it is forbidden to place advertising on any kind of tree on streets, highways, trails and public parks, by means of nails, wires, glue, or other methods that compromise the life of the tree.

For regulation (not prohibition) of advertising practices See question 1.4 above.

On a side note, telemarketing is allowed under Panamanian legislation.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The Panamanian Constitution, in Article 85, provides that 'Social communication media are instruments of information, education, recreation and cultural and scientific diffusion. When used for publicity or propaganda, those should not be contrary to the health, moral, education, and cultural formation of society and national conscience. Its operation will be regulated by law'.

In addition, self-regulation agreements between local TV networks and radio stations stipulate certain timeframes in which obscenity will not be broadcast. See question 2.2 above.

The Criminal Code also contains some provisions in connection with the content of publicly-available material. It penalizes the action of offending the dignity, honor or decency of another person through any means of communication.

The Code of the Family and Minor clearly states that mass media entities must respect the moral values, and the physical and mental health of minors.

Law No 35 of May 10, 1996 and its amendment (Law No 61 of October 5, 2012) prohibit the registration of trademarks contrary to morality, public order and good customs.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Article 32 of Executive Decree No 45 of 2009 establishes that offers of goods and services made through telephonic sales, catalogs, mail, or by any means of communication shall display the name and address of the company.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are no special rules of this kind that we are aware of. For general advertising rules see section 3 above.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

It is advisable that the media displaying the advertising editorial content discloses the company that is promoting it. However, there are no obligations of this kind that we are aware of. For general advertising rules see section 3 above.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no special rules of this kind that we are aware of. General rules of advertising apply to social media.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

It could be argued that both the consumer and the advertiser are responsible for this kind of content; the first for being the intellectual author of the claim and the second for allowing the information to be displayed.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

There are no key court decisions regarding social media that we are aware of.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

There are several provisions governing an individual's identity:

- (a) Article Nos 575 and 57 of the Family Code (Law No 3 of 1994), establish that the State guarantees respect for intimacy, personal freedom, security and family honor. Article 577 of the same law provides that every person has the exclusive right over their image, which cannot be reproduced publicly in any way without the owner's consent, even in cases when it has been captured on public places.
- (b) Article 37 of Law No 64 of 2012 states that someone's portrait cannot be commercialized without their consent.
- (c) Article 91 of Law No 35 of 1995, modified by Law No 61 of 2012, forbids the use of names, pseudonyms, signatures and portraits of third parties without the consent of the owner.

Furthermore, please note that the name of a person, and their picture constitute personal data that can enable a person to be identified. Consequently, according to the Political Constitution of Panama this kind of data is protected in the Panamanian territory. Bearing in mind the aforesaid, in order to use such information, it is a requirement to have the authorization or consent of the owner of the data.

9.2 Are there situations when permission is not required?

According to Article 577 of the Family Code (Law No 3), consent is not required when the images constitute information of public interest; however, such use must take into consideration human dignity.

In addition, Article 37 of Law No 64 has a similar exemption: the publication of someone's portrait will not require the owner's consent when it relates to scientific or cultural matters, or where it constitutes public interest.

Article 91 of Law No 95 provides an exception to the prohibition against the use of names, pseudonyms, signatures and portraits of third parties without the consent of the owner in the case of historic characters.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

The Panamanian State, according to Article 1A of Law No 34 of 1949 as modified by Law No 2 of 2012, is the owner of the national symbols' intellectual property rights (flag, coat of arms and national

anthem); therefore, it is necessary to request permission to use such rights for commercial purposes. The State can also reserve the right to ask for royalties.

Advertisers wishing to use historic places in advertising have to obtain prior approval from the Historic Heritage Department of the National Institute for Culture to use the location.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

See answer to question 3.8.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Panama which affect advertising (eg Swedish gender equality law)?

Law No 4 of 1999 regarding equal opportunities for women establishes that the media should avoid messages and images that imply the superiority or inferiority of men or women.

The Code of the Family and Minors states that mass media entities must respect the morals, physical and mental health of minors. This Code establishes that selling, lending or in any other way providing minors with publications, movies or cassettes (although not expressly mentioned, advertising could be considered as one of these) that offend the morality or disturb the integral development of minors and youth may be punished with imprisonment from 1 to 12 months and a fine of up to US\$ 25,000. The same sanction applies to those who, through publicly available material, encourage crimes, corruption or bad habits.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Panamanian Law No 20 of 2000, establishes a special intellectual property regulation for the collective rights of indigenous population, in order to protect their cultural identity and traditional knowledge. Article 2 provides that the indigenous population has exclusive rights over their creations. The norm implies that any use of their creations by a third party has to obtain prior permission; although the norm does not expressly mention advertising, it could be considered as one of the cases when pre approval is required.

Additionally, is important to have in mind when advertising sensitive issues that Panamanian society is mostly Catholic and fairly conventional; the Church plays an important role in shaping the views of the general population. Therefore, a conservative approach might be to take measures for the content to be relatively traditional in order to avoid controversy.

For example, a few years ago, a graphic advertisement depicting a crucified person was denounced by religious groups and society. Without a legal basis to remove the advertisement, activists approached the owner of the advertisement to plead their case, and the owner voluntarily removed the advertisement, presumably to avoid being churned by its clientele.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Panama?

Generally speaking, we would strongly encourage companies looking to advertise in Panama to request the help of a qualified lawyer before issuing an advertising containing regulated issues.

PARAGUAY

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Paraguay?

In Paraguay, there are several norms, rules and laws that regulate advertising and propaganda through the mass media, including, inter alia:

- (a) the Law on Consumer Protection;
- (b) the Trademark Law; and
- (c) the Law on Advertising and Promotion of Tobacco and Alcoholic Beverages.

In addition, there is an Advertising Self-Regulation Code, established by the Centre for Regulation, Standards and Studies of Communication (CERNECO).

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

In general, the different laws applicable to advertising/publicity do not give a definition of ‘advertising’. However, the concept of the term ‘advertising’ may be extracted from Article 2 of the Law on Advertising and Promotion of Tobacco and Alcoholic Beverages, according to which commercial advertising or publicity includes ‘information that aims to guide, induce or stimulate the purchase or consumption of certain products or brands’.

1.3 What is the basic regulatory framework for advertising regulation?

There is no specific legal framework in Paraguay that exclusively legislates advertising as an independent topic, with the exception of advertising relating to certain products (such as tobacco or alcoholic beverages). On the contrary, its regulation is disseminated amongst several rules and laws, such as the Law on Consumer Protection and the Trademark Law, among others, as discussed in question 1.1 above.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

No—in Paraguay there is no legislation regarding advertising; and so advertisements can be disseminated freely, without major restrictions, except for certain exceptions:

- (a) With respect to cable television and radio broadcasts, providers of such services require a prior license from the competent government authority (although this is actually a requirement for service providers (television channels and radio stations) rather than the advertising agencies themselves.
- (b) The Law on Road Safety and Traffic, together with its Regulatory Decree, imposes a series of delimitations regarding commercial advertising to be carried out on public roads. In this sense, signs, demarcations or elements that resemble road signs that affect the driver’s range or scope of view cannot be placed or maintained on public roads. Also, commercial advertisements or other elements that may affect the driver’s range or scope of view or the proper perception of traffic signals cannot be placed on the public highway and domain strip.

Signs and other sorts of advertising means should be placed outside the safety zone in the case of rural areas, and should not be placed on sidewalks, in areas of prolongation of

pedestrian paths, on the edges of the road, or on public transport stops in the case of urban areas, nor in places that could impede normal pedestrian traffic or interrupt or confuse visibility from the road.

Ads relating to alcoholic beverages cannot be placed on public roads.

- (c) In addition, under a Resolution issued by the Municipality of Asunción, advertisements located in the public domain, including plazas, parks, sidewalks, etc, must comply with a series of requirements in terms of size, material to be used, among others.
- (d) In 2017 Law No 5830 was issued, establishing a National Registry within the Office of Consumer Protection, whereby consumers and users of mobile phone services may register their names and phone numbers in order to ban corporations and individuals from remitting to such numbers any unsolicited/unwanted advertising.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Yes—the advertising practices of industries that manufacture and market certain products, such as alcoholic beverages, tobacco, pharmaceutical products, among others, are specifically regulated as follows:

- (a) **Tobacco and Alcoholic Beverages:** The Law of Advertising and Promotion of Tobacco and Alcoholic Beverages establishes a series of norms regarding the diffusion and promotion of these products, including:
 - (i) the hours during which tobacco products and alcoholic beverages can be advertised on television (8 pm to 6 am);
 - (ii) health warnings to be included in the advertising of such products in the written press, or on public roads or spaces of public access, which, in the case of products containing tobacco, shall include the legend: ‘smoking produces cancer and respiratory diseases’, and in the case of alcoholic beverages: ‘excessive consumption damages health’ and ‘sale is forbidden to children under 18 years of age’;
 - (iii) formats that cannot be adopted or included in advertising of tobacco products and alcoholic beverages, eg, the incorporation of images of minors or images related to familiar environments, which could induce abuse or excessive consumption, among others;
 - (iv) the requirement that the content of the publication should be informative and not persuasive; and
 - (v) other prohibitions, such as the prohibition on using figures of athletes, or on the installation of posters, murals, etc near educational institutions, health establishments and public administration premises.

In addition, in December 2015, a new law was sanctioned regulating different aspects of the consumption and advertisement of tobacco and tobacco products, by which the publicity, advertisement, sponsorship and promotion of tobacco products by all means of communication (including TV, radio, newspapers, magazines, mobile phone, internet, mailing propaganda and advertising signs) is strictly prohibited, with the exception of publicity carried out within the store, shop or sales point where the products themselves are offered. With regards to the labelling of such products, the Law further stipulates that that health messages and warnings describing the harmful

effects caused by tobacco must be written on every box, package, parcel or container of tobacco products. Such warnings must be placed on the external sides or main areas displayed, and must contain the warning message to be approved by the Ministry of Health in clear, visible and colored letters, among other requirements.

- (b) **Dietary Supplements:** The advertising of products known as dietary supplements is regulated by Decree 3586/15, according to which, inter alia:
 - (i) the advertisement of a dietary supplement must be limited to a description of the actual benefits attributed to each of the supplement's ingredients and the features of the product's composition, and must not expand on any alleged benefits nor present information that could confuse or deceive the consumer regarding the composition, origin, properties, etc of the product;
 - (ii) the advertising must be truthful and, inter alia, must state the full characteristics of the product and must not induce consumers to acquire any particular eating habits in order to allegedly improve or preserve their health. The same must be in line with a healthy lifestyle; and
 - (iii) advertising for dietary supplements must not attribute a higher nutritional value to the product than it actually has, nor must it affirm that, in itself, it fulfills a person's nutritional requirements.
- (c) **Food:** Advertising in relation to food is regulated by the Health Code, which provides that any advertising that falsely attributes therapeutic properties to food, or that misleads or deceives the public in terms of its nature, quality or origin, is prohibited.
- (d) **Pharmaceutical products:** With regards to medicines and pharmaceutical products, the Law on Health and Other Products grants the national health authority, the Office of Health Surveillance, the faculty to establish the criteria for promotion and publicity of the same. It also provides that pharmaceutical products that may be publicized directly to the public are:
 - (i) products that do not require medical prescription,
 - (ii) products that are intended for the relief or treatment of minor symptoms, and
 - (iii) products that have a wide margin of safety.

On the other hand, advertising messages must comply with the conditions and requirements for which the product was registered and should not induce self-medication, abuse or indiscriminate use, nor include expressions that claim special healing guarantees for medicines. The health authority has the power to limit or prohibit the advertising and promotion of medicines, and the advertising of medicines not registered in the country is prohibited.

1.6 Are any government pre-approvals required?

Government pre-approvals are required only in relation to advertisements to be displayed in places considered public or in the private municipal domain of the City of Asunción (for example, squares, parks), which require prior authorization from the municipal authorities.

1.7 Does the media pre-clear advertising?

Not generally, although those who carry out commercial advertising for medicines must ensure that they are duly registered in the country and that they do not circulate illegally.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The State executes or enforces the laws related to advertising through various administrative bodies and judicial authorities appropriate to the rule that has been infringed.

Thus, for example, the Office of Health Surveillance is the body in charge of applying the rules related to advertising of medicines marketed in national territory and of applying the appropriate sanctions, which include reprimand, fines, confiscation and suspension or cancellation of the corresponding health registration. In addition, this authority has the power to order, as a precautionary measure, the suspension of all advertisement of unregistered drugs or those illegally traded. It also has the power to prohibit certain types of advertisements that are against the public interest. The sanctions are imposed following an administrative trial before the corresponding body.

Likewise, infringement of the norms that regulate advertising contained in the Law on Consumer Protection are surveilled by the Office of Consumer Protection, which is also in charge of imposing and determining the applicable sanctions following an administrative trial.

1.9 When does a competitor have a right of action? What are the potential remedies?

Competitors, or individuals or corporations who consider themselves injured by the conduct or practices of firms whose activities are similar to their own, are entitled to pursue their rights under the rules that regulate unfair competition under the Trademark Law and the Merchant Code.

In this sense, the Trademark Law establishes the acts and practices to be considered 'unfair competition practices', including:

- (a) acts likely to cause confusion or a risk of association with respect to the products or services of a third party; and
- (b) the use of false indications or allegations capable of denigrating or discrediting the products or services of third parties.

The Merchant's Code establishes a prohibition on acts of unfair competition, namely:

- (c) the use of names or distinctive signs that could cause confusion with those legitimately used by third parties;
- (d) the imitation of a competitor's products or the performance of other acts likely to create confusion with the products or activity of said competitor;
- (e) the dissemination of news or plaudits about the products or activity of a competitor when the same could cause its discredit or the appropriation of the merits of said product; and
- (f) the use of any means contrary to the principles of professional ethics that could cause damage to the competitor.

In the event of any of the aforementioned acts, the injured party has the right to file a lawsuit before the Civil and Commercial Courts of First Instance for the purpose of stopping the commission of the harmful acts or preventing their repetition, and obtaining reparation for damages and losses caused. A claim should be brought within the period of two years after the party has gained knowledge of the harmful acts, or, at any rate, four years from the last date on which the act/practice was committed.

Additionally, under the Trademark Law, the owner of a trademark has the right to initiate a civil action for infringement of its rights against those who apply or place the same or a similar sign on products or services identical or linked to those protected by the trademark in question. Action may

be brought even where the actions of third parties may generate a risk of association with the trademark of the owner, or where there is a risk of dilution of the distinctive force of the trademark. Such action has, as its object, the cessation of illegitimate acts and the payment of the costs of the trial, as well as the seizure or confiscation of the products in violation, including printed or advertising material.

Also, under the Trademark Law, in accordance with the Criminal Code, the fraudulent imitation of a trademark, the placing in trade of counterfeit trademarks and the illegitimate promotion of a protected trademark, constitute a punishable act, subject to prosecution by the criminal authorities, which can lead to sanctions such as imprisonment and fines.

Simultaneously with action for infringement, the owner of a trademark can request the cessation of acts that constitute infringement, or seizure of the products and advertising media as precautionary measures.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers have the right to act when third parties violate any of the rules contained in the Law on Consumer Protection related to advertising.

In this sense, when suppliers or advertisers:

- (a) provide false or incomplete information to consumers,
- (b) do not meet the specific requirements for the advertising of certain products, or
- (c) make an advertisement that may be considered deceptive, inter alia,

the consumer has the right to present a complaint to the Office of Consumer Protection (SEDECO), a department of the Ministry of Industry and Commerce, which will ask the company to answer the complaint or claim within five days. After that, the parties are summoned to a conciliation hearing and, usually, the process ends at this stage with an agreement between the parties. If there is no agreement, SEDECO will instruct an administrative trial and impose the corresponding sanctions.

Also, consumers can also resort to the civil and commercial courts for the purpose of obtaining compensation for damages in cases where they can reliably prove damage caused by illicit advertising.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Paraguay have a primary advertising self-regulation system?

Yes—through the Centre for Regulation, Standards and Studies of Communication (CERNECO), a non-profit association whose objective is the dissemination, study and correct application of legal norms related to advertising and communication. CERNECO is an advertising self-regulation entity, that has issued a Code that must be respected/observed by its partners and members. It is made up of representatives of most sectors of the communication and advertising industries in Paraguay, including advertisers, advertising agencies, media, and government agencies, among others. Currently, it has approximately 70 associates.

The body surveilling the Self-Regulation Code is the Self-Regulation Council (CONAR), an internal body responsible for the verification of complaints submitted, the performance of the investigative process, and the imposition the corresponding sanctions where applicable.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Yes, CERNECO has issued a Self-Regulation Code, the main objective of which is to establish the rules to be respected and abided by advertisers, advertising agencies, media, and associated companies in the creation and dissemination of advertising messages to consumers. The Code gives definitions for certain terms such as ‘advertising’ (which includes not only communication to the public made through the media, but also the enunciations in the packing and packaging of the products), ‘advertising agency’, ‘media’, among others. CERNECO’s members commit to comply with the ethical principles established throughout the various norms that constitute the Code.

Some of its principles are:

- (a) the precedence of the consumer’s interest over the advertiser’s interest;
- (b) ‘case by case’ analysis of advertising messages;
- (c) social responsibility;
- (d) free competition;
- (e) respect for the dignity, privacy, family nucleus and social interest of individuals and public and private institutions as well as national symbols;
- (f) respect for morality, good customs and public order—advertising should not incite the commission of crimes or dangerous practices; and
- (g) the subjection of advertising to principles such as veracity, loyalty, decency, honesty, legality, fair competition and reliability.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Yes, the system has such a mechanism through the CONAR. It works in the following way:

- (a) Submission of a complaint (verbal or written), addressed to the President of the CONAR, alleging violation of one of the norms contained in the Code, with presentation of the corresponding evidence;
- (b) Board meeting and analysis of the complaint;
- (c) Notification to the defendant to answer the complaint within four days, and submit the corresponding evidence for acquittal, if any;
- (d) Conciliation hearing;
- (e) If there is no conciliation, CONAR continues the process, issuing a decision within ten business days. Such decision may be appealed through the Review Resource;
- (f) Sanctions which may be imposed are:
 - (i) exhortation to the party to correct or withdraw the relevant advertisement or advertising campaign;
 - (ii) public warning;
 - (iii) suspension of CERNECO member status; and
 - (iv) expulsion from CERNECO.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The Self-Regulation System works quite well and is quite effective. In general, during the conciliation hearing, the parties reach an agreement and the imposition of any subsequent sanction is dispensed with.

It is generally used by companies, but is rarely used by consumers, due to lack of knowledge of this mechanism amongst the general public.

2.5 Are the self-regulatory system's decisions reported?

In general, they are not, although they can be published if CONAR so provides in its decision.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Key principles include:

- (a) Advertising must be truthful, adequate and complete and must respect people's dignity, privacy and honor, as well as national symbols and public and private institutions; it must not incite the commission of crimes or dangerous activities.
- (b) Advertising should not promote racial, social, political, religious discrimination, etc.
- (c) Advertising must not deceive or mislead consumers, as regards the information and statements contained therein, and must provide certain mandatory information regarding the characteristics of the product or service, including:
 - (i) value,
 - (ii) price,
 - (iii) terms of guarantee,
 - (iv) quality, and
 - (v) origin, inter alia.
- (d) Advertising that refers to research or scientific information must be supported by an identifiable, verifiable, and available source.
- (e) Advertising must respect the intellectual and industrial property rights enshrined in national legislation. No trademarks, slogans, themes, visual presentation, musical or sound effects or concepts of third parties may be used, unless the corresponding authorization has been obtained. This prohibition includes advertising campaigns that have been made in other countries, and so advertising, media or advertising agencies should refrain from reproducing ads, totally or partially, without proper authorization.
- (f) Comparative advertising should be objective and have the purpose of informing the consumer about the proven advantages of the product against the competition, but should not denigrate any competing product. It is acceptable as long as:
 - (i) the comparison shall only be between products that are subject to comparison, association or that may bear a similarity or refer to similar products/services;
 - (ii) it highlights the advantages of the advertised product rather than the disadvantages of the product used in the comparison; and
 - (iii) the rights of third parties are respected.

These are some of the fundamental principles contained in the Code, although there are others related to respect for people, the environment, the advertising of consumer loans, insurance and investments.

2.7 Are there any other self-regulatory systems that govern advertising practices in Paraguay?

No—there are no other self-regulatory systems other than CERNECO.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Paraguay (eg, consumer protection laws; IP laws; unfair competition laws)?

The main rules that regulate advertisements are:

- (a) the Trademark Law, which includes a chapter related to unfair competition; and
- (b) the Law on Consumer Protection.

There are also rules related to advertising disseminated throughout different legal rules and laws, namely:

- (c) the National Constitution, regarding the protection of dignity, privacy and respect for the origin and ideology of the people, as well as free competition in the market; and constitutional remedies, such as *habeas data*, for example, which is an individual complaint that may be filed by any person who considers his/her private data has been violated by a third party with the purpose of obtaining an immediate order from the Court compelling such third party to cease the infringement and aiming at the 'restoration or amendment of the damages caused by such infringement';
- (d) the Criminal Code, with regard to the protection of intellectual rights, privacy and confidentiality of individuals, their honor and reputation, the protection of personal data and property in general;
- (e) the Code of Childhood and Adolescence, which contains certain rules in relation to advertising aimed at minors and that which utilizes minors;
- (f) the Health Code and the Law on Health Products etc, regarding the advertising of medicines, foods and dietary supplements;
- (g) decrees and resolutions of the Office of Health Surveillance (regarding food advertising and dietary supplements), MERCOSUR technical standards (regarding food labeling), among others; and
- (h) the Electronic Commerce Law on internet advertising.

This list is not exhaustive and there are laws, decrees and administrative resolutions applicable to specific cases, products and services.

3.2 Is substantiation required for advertising claims?

Yes. Pursuant to the CERNECO Self-Regulation Code, all advertising must be clearly identifiable as such and must identify the advertising firm, with anonymous advertising prohibited. In addition, advertising that refers to research or scientific information must be supported by an identifiable,

verifiable, and available source. The same must be presented in clear and understandable terms. Additionally, advertising that uses statistical data or surveys must be carried out in a serious and methodical manner, not abusing the results to the detriment of other competitors. In cases where the testimony or recommendations of people about the quality of products is used, they must be authentic, and must be based on the experience of the people who give them in all advertisements.

It should also be noted that the truthfulness of all descriptions, allegations and comparisons made in the advertisements must be objectively verifiable, with advertisers and agencies offering such proofs when required.

Additionally, the Law on Consumer Protection establishes that advertising considered deceptive is prohibited, deceptive advertising being any form of information or communication of an advertising nature that is false, or susceptible of misleading the consumer regarding the features, nature, origin, etc of the products or services offered, and thus, *a contrario sensu*, all advertising must be truthful, clear, precise and complete.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Yes—in general, mere statements and exaggerations regarding products and services, as long as they are not false or likely to induce the consumer to error, do not require any kind of justification or prior justification, and are usually accepted.

3.4 What are the rules governing the use of disclosures in advertising?

There are no specific rules in this regard. However, the CERNECO Self-Regulation Code contains some rules related to statements and affirmations in advertisements, namely:

- (a) the total prohibition of anonymous advertising; the advertiser must be identified;
- (b) news or reports that are disseminated through payment and as advertising elements must be clearly identifiable;
- (c) advertising that refers to research must be supported by an identifiable source, which must be available; and
- (d) affirmations and expressions in advertisements must be verifiable.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

There are no rules in this regard. However, the Self-Regulation Code of CERNECO provides that when testimonies or recommendations from people are used about the quality of the products, they must be authentic and based on the experience of the same. In addition, outdated or obsolete testimonials or recommendations cannot be used.

3.6 What are the rules governing the use of product demonstrations in advertising?

Product demonstrations as means of advertising are not specifically regulated in Paraguay; however, the general rules contained in the Law on Consumer Protection and the Self-Regulation Code of CERNECO are applicable to them.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Yes—in general, comparative advertising is allowed in Paraguay, as long as it is subject to the general regulation of the Trademark Law on Unfair Competition (ie it does not discredit or devalue the products or services of the competition) and respects the intellectual property rights of third parties.

However, the Law on Consumer Protection prohibits comparative advertising if it induces, by means of fraudulent actions or general and indiscriminate statements, the consumer to consider one product or service superior to another.

The Code of Self-Regulation of CERNECO, on the other hand, has a special chapter in relation to comparative advertising. In addition to defining it, the Code provides how comparative advertising should be carried out, namely, it must always be objective and not denigrate the competitor's products, must be made between comparable products, among other regulations.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Yes—those contained in the chapter of the Trademark Law that refers to unfair competition. Acts which may be considered unfair competition include the use or propagation of indications or false allegations, capable of denigrating or discrediting the products or services of third parties, including third-party companies.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Yes. In 2013, the Law on Geographical Indications and Designations of Origin was sanctioned in Paraguay, establishing a series of rules with respect to the use and registration of products and their geographical indications and designations of origin.

This Law makes a distinction between:

- (a) geographical indications (defined as the name of the country, region, Department, district or locality, or a determined place), which serve to designate a product which originates from such place, when a certain feature, reputation or other characteristic of the product concerned is only attributable or assignable fundamentally to its geographical origin; and
- (b) designations or appellations of origin, which serve to designate a product which originates from a particular country, region, district etc, and where the quality or features of the product are essentially due to the geographical environment where it is produced; these include natural factors as well as those which are the result of human activity.

The Law creates a registry for products that contain such characteristics and determines the persons entitled to have their products use a certain geographical indication.

Registration of a geographical indication or appellation of origin grants its owners and authorized users the right to utilize such geographical indication or appellation of origin in relation to their products, and to prevent third parties from doing so. Therefore, it is understood that only those persons or entities who have been recognized as being entitled to geographical indication or appellation of origin may utilize and endorse their products in advertisements and diffusion of the products as bearing certain characteristics/features and use the geographical indication concerned.

3.10 Are there any special rules governing product packaging?

There are several Technical Resolutions issued by the MERCOSUR regarding the packaging of products, which have been adopted by Paraguay; therefore, in most cases, product packaging is harmonized within the countries that conform the MERCOSUR.

One rule common to all products in Paraguay is that all labels must be in Spanish or contain a translation of the product, its instructions etc, into Spanish.

There are also regulations specifically regarding foodstuffs, namely:

- (a) containers, and packages of foods must be registered before the National Institution of Food and Nutrition (INAN) and approved by the same; and
- (b) such products must contain a list of their ingredients.

4 PRICE ADVERTISING

4.1 What are Paraguay rules regarding price advertising?

Under the Paraguayan Law on Consumer Protection, the prices of products or services, including taxes, must be accurately shown, in the country's currency, in the offer.

As far as services are concerned, advertising must show:

- (a) the price, including taxes,
- (b) a breakdown of price, where appropriate,
- (c) the means of payment,
- (d) the term of validity of the quotation remitted and
- (e) the term of the service.

Where the need for additional services arises, which were not included in the original quotation, this must be notified to the consumer before the performance of the service or its utilization, except when the service rendered may not be interrupted without causing damage to the consumer or affecting the quality of the service.

In addition, there exist special norms related to the offer and prices of certain services such as, eg, credit operations, which, according to the Law on Consumer Protection, must indicate:

- (a) the price for payment in cash,
- (b) the amount of interest payable, the annual or monthly interest rate, the late interest rate, and
- (c) any other amount charged over the price as commission, expenses, fees, etc,

as well as:

- (d) the number of instalments to be paid,
- (e) the frequency of instalments, and
- (f) the total amount to be paid for the service, which shall not exceed the price to be paid in cash together with the interest.

4.2 What are Paraguay rules regarding advertising ‘free’ products?

There are no specific rules regarding the offer of ‘free’ products in Paraguay; therefore, this is subject to the general rules contained in the Law on Consumer Protection, which are:

- (a) the offer shall be clear and accurate and shall not be misleading for the consumer; and
- (b) if the offer is for a limited time only, the offer must mention its term of validity, otherwise, the same shall be considered permanent.

Similar provisions are also contained in the Self-Regulation Code of CERNECO.

4.3 What are Paraguay’s rules regarding sales and special offers?

There are no specific rules regarding the offer or advertising of discounts, seasonal sales or other special offers. Therefore, these are subject to the general principles contained in the Law on Consumer Protection and the Self-Regulation Code of CERNECO, namely, an offer must:

- (a) be clear and precise,
- (b) indicate the price and sale conditions accurately; and
- (c) not be misleading for the consumer nor take advantage of the consumer’s ignorance and/or lack of knowledge.

The term of the offer and its conditions must also be mentioned accurately.

4.4 What are Paraguay’s rules regarding rebates?

There are no special norms related to rebates.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Generally, advertisers and corporations must take into consideration the general principles contained in the various norms that regulate or refer to advertising. In other words, they must:

- (a) ensure that the advertisement is true, clear, accurate and not misleading for the consumer;
- (b) respect the rights of consumers as far as their privacy and intimacy is concerned;
- (c) not discriminate, on religious, racial and/or sexual grounds;
- (d) not do anything against morality and good customs, nor induce consumers to commit crimes or undertake hazardous activities.

It is also worth noting that the Self-Regulation Code of CERNECO advises that special care must be taken with respect to advertisements that feature children or which are directed to them.

There are also provisions concerning advertisements in public places and/or which are owned by the government or the municipality.

In addition, the current rules concerning specific products and services must be taken into account, namely, those concerning the advertising of pharmaceutical products, alcoholic beverages, among others.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Yes. For example:

- (a) children and teenagers cannot be featured in advertisements related to alcoholic beverages and tobacco products;
- (b) pharmaceutical products, foodstuffs and dietary supplements must be registered in the country in order for them to be advertised; and
- (c) no advertisement related to pharmaceutical products sold under medical prescription may be conducted.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

There are several advertising practices that are prohibited under the Paraguayan legislation. With regards to telemarketing and mobile phone services, the Law on Telecommunications states that companies that offer/render mobile phone services must publish or broadcast their lists of users, although any user has the right to request to have his/her name removed from such guides.

Also, with respect to communications via electronic means, the Law on Electronic Commerce states that 'providers of goods and services over the internet' must offer consumers the chance to oppose the use of their data for marketing purposes, by means of a simple and expense-free mechanism, at the time such data is collected, as well as in all commercial communications directed to the them. In all unsolicited commercial electronic communications, the provider must include in the message an easy method to opt out from the lists of recipients of such communications; moreover, the recipient's data must not have been obtained by infringing their privacy rights.

Other prohibited practices include misleading advertising and abusive advertising, which constitutes, under the Law on Consumer Protection, any advertising that has a discriminatory character, or exploits the fear of consumers, takes advantage of the lack of maturity of children, infringes environmental values or induces the consumer to behave in a manner detrimental to his/her health or safety.

In accordance with the Self-Regulation Code of CERNECO, advertising must be truthful, honest, etc, so it must not deceive or intimidate the consumer, contain comparisons based on unfair facts, or denigrate products, services, professional activity of third-party companies.

Also, in 2017, Law No 5830 was issued, establishing a National Registry within the Office of Consumer Protection, whereby consumers and users of mobile phone services may register their names and phone numbers in order to ban corporations and individuals from remitting to such numbers any unsolicited/unwanted advertising.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The Law on Consumer Protection prohibits 'abusive' advertising, namely, advertising that is discriminatory or that violates environmental values.

Additionally, the Self-Regulation Code of CERNECO prohibits any advertising that violates morals and good customs, induces people to commit punishable acts or dangerous practices, encourages the commission of environmentally dangerous practices, among others.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Under the Self-Regulation Code of CERNECO, advertising cannot be anonymous; the advertiser must always identify himself.

Additionally, the Consumer Defense Law determines that service providers must provide consumers with their identification data (ie name and address).

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

The Self-Regulation Code of CERNECO requires that all advertising must be clearly identifiable as such, and also establishes that advertising in the form of news, report, article, note, text, legend or any other form that is disseminated through payment must be clearly identified so that it is distinguished from the news material and does not confuse the consumer.

Additionally, and as far as the contents of advertising notices and their integration into the contents of entertainment programs are concerned, the Code of Ethics of the Syndicate of Journalists in Paraguay determines that its members must work independently and avoid performing advertising or propaganda, except when such are related to public interest institutional advertisements. Also, this Code considers that certain activities, namely, those carried out by public relations people, spokespersons and press advisors within the same sector to which the coverage is performed or directed, are incompatible with journalism.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Yes—The obligations mentioned previously, namely:

- (a) identification of the advertiser;
- (b) identification of the advertisement as such; and
- (c) identification of news and reports when they have commercial purposes.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

No, there are no special rules governing the use of social media for advertising purposes; therefore, the general rules of advertising are applicable.

In addition, some provisions contained in the Law on Electronic Commerce Law regarding the responsibility of providers/suppliers of goods and services via the internet and respect for intellectual property rights and privacy may be applicable.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

Although there are no specific norms regarding advertisers, the Law on Electronic Commerce sets out a series of responsibilities in electronic communications. The Law stipulates that publications which violate the intellectual property rights of third parties must be removed by internet network providers, which must provide an easy mechanism for removal of such publications. Such providers are responsible for the content where there is a presumption, as stated by an administrative or judicial body/entity, that they have acquired effective knowledge of the infringement and that the material violates the law.

On acquiring knowledge of the illicit material or that the material infringes third parties' rights, for example, the publisher/advertiser must contact the person responsible for the social network in order for such material to be removed or suspended.

Nevertheless, the advertiser is not the only person responsible for the material, given that the provider of internet services is also held responsible once notified of the illicit act.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

No, there is no jurisprudence or decisions issued by the Paraguayan Courts or any self-regulatory decisions that address the issue of advertising in social media and privacy/people's rights in Paraguay.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

In Paraguay, there are several norms that make reference to the use of one's name, portrait, image, voice, etc, namely:

- (a) the National Constitution, which guarantees respect of a person's intimacy, dignity and private image, as well as the protection of the person's documents of identification and private communications;
- (b) the Copyright Law, which establishes that the portrait of a person cannot be placed in commerce without the consent of the person concerned or his/her successors-in-law. There is an exception to this restriction where the publication is for scientific, educational or cultural purposes;
- (c) the Trademark Law, which stipulates that names, nicknames, pseudonyms and/or photographs that may relate to living persons, or any sign that will affect the personality right of a third party may not be registered as trademarks without their consent, or, if dead, the consent of their heirs, up to the fourth degree of consanguinity; and

- (d) the Civil Code, which protects the name of a person (individual or corporation), and establishes that whoever is damaged by the improper use of his/her name, has an action to compel the infringer to cease in his/her infringement and have him/her pay compensation for damages.

The contravention of any of the aforementioned laws could lead to, in case of violation of what is established by the National Constitution, a remedy of *amparo*, a specific remedy for the protection of constitutional rights in order for the cessation of the illegitimate act; and an action for damages as per the provisions of the Civil Code.

Additionally, the Paraguayan Criminal Code sets out several types of conduct that contravene the image and honor of a person and makes them criminal offenses. Offenses against a person's privacy, and the recording, storage, transmission and broadcast of a person's image without their consent are established as criminal offenses. These crimes depend upon the victim coming forward and reporting them, and requesting that they be investigated, although there are some exceptions, for example, where there is a public interest in the prosecution and resolution of the offense.

Under the Heading 'Criminal Offenses against the Honor and Reputation', the Criminal Code characterizes three main types of criminal offenses that affect the image and reputation of people, which are: slander, libel and defamation. Such offenses are regulated under what is known as private criminal action, which has a different procedure than that applicable to public criminal actions and/or public offenses, and therefore the public entity; the Public Ministry or Prosecutor's Office in charge of investigation criminal offenses does not intervene, and these claims are filed and prosecuted by the victim before a specialized criminal court.

9.2 Are there situations when permission is not required?

Yes—where there is a public interest involved or when the publication has scientific, cultural and/or teaching or information purposes.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are no specific rules regarding the utilization of historical places in advertising. However, the National Constitution, together with the National Cultural Law and the decrees and resolutions of the National Office of Culture, strongly protects Paraguayan culture and Paraguay's monuments and historical places. It is therefore always very important that advertisers check the type of product/service to be advertised and do not include such monuments and places in advertising campaigns related to certain types of products, such as alcoholic beverages, for example.

Also, advertisers must take into consideration the contents of any advertising aimed at or produced for children and teenagers and, as far as television is concerned, the time of broadcast. The daytime hours up to 8pm are considered as 'of protection of children and teenagers', and therefore the use of certain types of materials and products in advertising to be broadcast during such hours should be avoided.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

There are no specific rules regarding such use, although the utilization of a third party's products shall not be illegitimate, so long as such use is aleatory and not for the purpose of promoting or denigrating the product, and no reference or mention of the product is made. On the other hand, if reference to or mention of the product and/or brand is made throughout the advertisement and/or the product/brand plays an important role or has a great exposure throughout or within the advertisement, such use may be considered a violation of the product/brand's owner rights, and shall constitute a cause of action against the advertiser or the publishing agency, as applicable.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Paraguay which affect advertising (eg Swedish gender equality law)?

Yes, in Paraguay there are several rules in that respect.

Firstly, the National Constitution sets out that all citizens/inhabitants are equal in dignity and rights and no discrimination is acceptable; the State/Government has the obligation to remove any obstacles and impeding factors that maintain or favor discrimination. Likewise, special emphasis is given to equality between men and women. Therefore, any advertising that incites discrimination between men and women will infringe the guarantee established by the National Constitution.

Secondly, the Law on Consumer Protection prohibits abusive advertisements, which term includes all sorts of advertisements that are discriminatory or induce discrimination.

The Self-Regulatory Code of CERNECO states that in no case shall publicity that stimulates or promotes racial, social, political, religious discrimination or that based on nationality, age or sex, be admissible.

In addition, the National Constitution sets out special protection for indigenous groups, regarding their identity, and rejecting any form of discrimination against them.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Yes, advertisements must respect morality, good customs, public order and national symbols. In this sense, Paraguay is a country with a long-standing religious tradition, whose population is principally catholic, and thus respect towards the catholic religion, its principles and main symbols and/or representatives is of the utmost importance.

In addition, the Paraguayan culture and customs should be taken into account, which include the National language, Guarani, the use of which in advertising may provoke either a very favorable or, on the contrary, an extremely unfavorable reaction from the public. In this sense, respect towards traditions and the language is very important.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Paraguay?

In general, advertising/publicity and the respect of third parties' rights is an area in expansion in Paraguay, but there is still considerable ignorance amongst consumers and corporations as far as consumers' rights are concerned; this, however, has been changing rapidly during the past five years, especially with the promotion of the Office of Consumer Protection. In many cases, the persons in charge of marketing have no idea of the norms that regulate the marketing of certain types of products and utilize expressions in advertisements that could violate the rights of consumers or the interests of consumers.

Therefore, it is our recommendation to always take into consideration the complete set of norms that constitute Paraguay's advertising/publicity legal framework, which would be:

- (a) the National Constitution,
- (b) the Code of Children and Teenager's Rights,
- (c) the Law on Consumer Protection,
- (d) the Trademark Law,
- (e) the Merchant Code,
- (f) the Civil Code, and
- (g) the Criminal Code;

and those related to particular products, such as:

- (h) the Health Code and the decrees and resolutions issued by the Office of Health Surveillance with respect to pharmaceutical and household cleaning products;
- (i) the Health Code and the decrees and resolutions of the Office of Health Surveillance and the National Institute of Food and Nutrition;
- (j) decrees and resolutions issued by the Technical Institute for Standardization and Metrology with respect to certain types of products (eg, shoes); and
- (k) the Law on Electronic Commerce for the providers of Internet Services.

PERU

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Peru?

The main legal framework on advertising is the Law for the Repression of Unfair Competition (Legislative Decree No 1044), which seeks to prohibit and punish acts of unfair competition (such as deceptive practices, confusion, disparagement and undue comparison), as well as specific violations of commercial advertising.

The Consumer Protection Code (approved by Law No 29571) includes a sub chapter to the protection of consumers against advertising abuses.

In the context of the Andean Community, Decision No 486 establishes the common intellectual property regime, regulating the use of trademarks in advertising.

The National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) is the Peruvian administrative agency responsible of the fulfillment of the regulations before mentioned.

Finally, self-regulation advertising norms are contained in the Code of Advertising Ethics, which is applied by the Advertising Self-Regulation Council (CONAR).

1.2 What types of communications are considered to be 'advertising'? How is this determined?

The Law for the Repression of Unfair Competition defines advertising as any form of communication, disseminated by any means or carrier, and objectively suited or designed to promote, either directly or indirectly, the image, trademarks, products or services of a person, firm or entity in the exercise of its commercial activity.

The Law is applicable only to communications which may have a commercial purpose or effect. It is not applicable for institutional advertising, political propaganda or any other form of communication.

1.3 What is the basic regulatory framework for advertising regulation?

Advertising shall respect the following principles:

- (a) **Truthfulness and accuracy:** advertising must be truthful, not misleading and, when appropriate, backed by evidence. It must not omit relevant information;
- (b) **Authenticity:** the recipient of advertising should be able clearly to distinguish it as such: advertising should not be disguised as news or journalistic opinions;
- (c) **Legality:** advertising must comply with the mandatory provisions of law that apply to advertising activity;
- (d) **Social appropriateness:** advertising may not encourage or promote any kind of discrimination, or antisocial, criminal, or illegal activities; and
- (e) **Lawfulness:** advertising must respect the free and fair competition in the market, avoiding confusion of consumers and denigration of competitors.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

According to the Directive No 005-2009-COD-INDECOPI, providers may not disseminate any kind of commercial advertising through phone calls, text messages or emails to people whose telephone numbers or emails are recorded in the Register named 'Gracias ... no insista' administered by INDECOPI.

This nation-wide registration is free of any charge. Consumers may withdraw from the Register 'Gracias ... no insista' at any time. There are exceptions to the application of this Directive (for example, in case of the recipient's consent to receive certain advertising even though it is registered).

In addition, Peruvian Law N° 28493 and Supreme Decree N° 005-2009/MTC regulate the use of unsolicited commercial emails (spam). They provide that:

- (a) all unsolicited commercial, promotional, or advertising email must contain the word 'advertising' in the subject field of the message;
- (b) the sender must be identified; and
- (c) the email must indicate a valid and activated email address, so the recipient could notify the desire to be removed from the sender's list.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There are several industries that are subject to specific regulation which govern their advertising.

- (a) **Alcohol:** Alcohol advertising is allowed but must consider the following restrictions:
 - (i) Advertising must include the claim 'DRINKING ALCOHOLIC BEVERAGES IN EXCESS IS HARMFUL', under certain specifications, depending on the medium used; and
 - (ii) it must not induce the consumption of alcoholic beverage to minors.
- (b) **Tobacco:** Advertising involving tobacco products cannot be launched through TV, radio, open or closed means of communication, including the Internet. The prohibition includes names, logos, or brands of tobacco products. The dissemination of tobacco advertising is allowed only for adults, under certain restrictions.
- (c) **Medicines:**
 - (i) The advertising of Prescription Only Medicines (POM) must be directed and disseminated only to medical professionals.
 - (ii) Over the Counter (OTC) medicines can be advertised to consumers, subject to certain controls (if the advertising refers to the therapeutic properties of the OTC medicine, it must include the product's main warnings and precautions).
- (d) **Food and non-alcoholic beverages:** Law No 30021 and its regulation seeks to reduce children's exposure to marketing of foods and non-alcoholic beverages high in saturated fat, sugar or salt. The goal is to minimize risks to children's health, particularly to control obesity.

Advertising of such products directed to children under 16 years old, must not:

- (i) encourage excessive consumption of the products;

- (ii) show inadequate portions of such products, considering the context and/or the age of the audience to which the advertising is directed;
- (iii) generate expectations regarding its intake;
- (iv) create a sense of urgency or dependence;
- (v) use endorsements or testimonials to induce the consumption of such products; or
- (vi) show images of natural products if they are not.

Labels must include the claim 'High in (sodium/sugar/saturated fat): Avoid excessive consumption' or 'Contains trans fats: Avoid consumption', as the case may be.

1.6 Are any government pre-approvals required?

No government pre-approvals are required. Supervision of the enforcement of the Law is carried out only for advertising which has been disseminated in the market.

1.7 Does the media pre-clear advertising?

Local regulation does not establish that media may pre-clear advertising. However, media could be responsible for infringing dissemination rules for advertising. Thus, internal decisions may be adopted prior to disseminating advertising.

1.8 How does the government enforce advertising laws? What are the potential remedies?

INDECOPI is the administrative authority that monitors and punishes any act or conduct of unfair competition, even when it had been performed by means of advertising.

The Commission for Supervision of Unfair Competition (CCD) considers cases at first instance at INDECOPI and the Tribunal for Defense of Competition and Protection of Intellectual Property (TDC) considers claims on appeal.

The CCD has exclusive jurisdiction at the national level to apply the Law for the Repression of Unfair Competition. It is empowered to issue precautionary measures and to initiate proceedings ex officio.

In addition, the authority may apply corrective measures which include, inter alia:

- (a) the cessation or rectification of the misleading or false advertisement;
- (b) the removal of the effects produced by the advertising; the confiscation and/or destruction of the products, labels, packaging, infringing material and other elements of false identification; and
- (c) the publication of the conviction decision.

The performance of acts of unfair competition may be sanctioned with a warning or fines of up to 700 Tax Units (each tax unit is equivalent to approximately US\$ 1270.00) as follows:

- (a) for a slight infringement without real effect on the market: a warning may be issued;
- (b) for a slight infringement: a fine of up to 50 Tax Units;
- (c) for a serious infringement: a fine of up to 250 Tax Units; and
- (d) for a very serious infringement: a fine of up to 700 Tax Units.

The fine must not exceed 10% of the offender's gross income during the fiscal year preceding the proceeding.

INDECOPI is not competent to order civil penalties.

1.9 When does a competitor have a right of action? What are the potential remedies?

The Law for the Repression of Unfair Competition establishes that any person (including a competitor or any participant in the market) has the right to file a claim before the CCD.

To file a claim there is no need to prove that the illegal act or conduct caused harm or detriment. It shall be sufficient to note that harm may occur (real or potential harm or detriment).

As previously mentioned, the CCD may issue precautionary measures, order corrective measures, and impose fines of up to 700 Tax Units (each tax unit is equivalent to approximately US\$ 1270.00). The fine must not exceed 10% of the offender's gross income during the fiscal year preceding the proceeding.

Infringements of the Law shall be subject to statute of limitation of 5 years.

Finally, it is possible to recover all legal expenses related with the proceeding, including administrative fees and attorneys' fees.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers have the right to file a claim before the CCD when the information provided in the advertising is called into question and no claim is lodged with regard to the non-fulfillment of the users' expectations in a specific consumer relationship.

On the other hand, if a consumer has entered into a contract with a supplier (or is about to enter one) and specifically argues that his expectations have not been fulfilled based on the information provided in the advertising, then such consumer should file a claim before the Consumer Protection Commission (CPC) of INDECOPI.

The CPC and its offices nationwide are the primary enforcement authority for the Consumer Protection Code. They are empowered to issue precautionary measures and to initiate proceedings ex officio.

In addition, they may order corrective measures, such as:

- (a) repair or replacement of the product,
- (b) refunds,
- (c) confiscation and destruction of the infringing goods, and
- (d) temporary closure of the establishment that has infringed the regulation.

The CPC may also impose fines of up to 450 Tax Units (each tax unit is equivalent to approximately US\$ 1270.00) as follows:

- (a) for a slight infringement: a warning or a fine of up to 50 Tax Units;
- (b) for a serious infringement: a fine of up to 150 Tax Units; and
- (c) for a very serious infringement: a fine of up to 450 Tax Units.

The fine must not exceed 10% of the offender's gross income during the fiscal year preceding the proceeding.

INDECOPI administrates a Public Register where providers sanctioned for infringing the Consumer Protection Code are recorded for a period of 4 years. Infringements of the Consumer Protection Code shall be subject to statute of limitation of 2 years.

Finally, in both cases, consumers can recover all legal expenses related with the proceedings, including administrative fees and attorneys' fees.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Peru have a primary advertising self-regulation system?

In Peru, self-regulation of advertising is promoted by the Advertising Self-Regulation Council (CONAR), a non-governmental organization made up of representatives of three associations: the National Association of Advertisers (ANDA), the Peruvian Association of Advertising Agencies (APAP), and the National Society of Radio and Television (SNRTV).

The self-regulation system has as its objective to promote fairness between competitors and to protect consumers.

CONAR has issued a Code of Advertising Ethics, which contains the main ethical principles applicable to commercial advertising; and a Code of Proceedings, which regulates the ethical procedure to be followed before the technical entities, the Permanent Ethics Committee and the Tribunal (which considers claims on appeal).

A proceeding before CONAR can be initiated by a party or can be commenced ex officio.

The Code of Proceedings establishes that CONAR may process a claim even though a claim is being brought before INDECOPI against the same advertiser for the same offense. Rather, the law does not prohibit an advertising claim from being brought simultaneously before INDECOPI and before CONAR.

2.2 Is there a self-regulatory advertising code? What are the key principles?

In Peru there is a self-regulatory advertising code named the Code of Advertising Ethics which contains the ethical principles applicable to commercial advertising.

The key principles underlying the Code of Advertising Ethics are:

- (a) **Lawfulness:** advertising must respect the free and fair competition in the market, avoiding confusing consumers and denigrating competitors;
- (b) **Decency and social appropriateness:** advertising must respect the dignity and privacy of the human being, the family unit, and the interests of society. And it must respect national institutions and symbols;
- (c) **Legality:** advertising must comply with the mandatory provisions of law that apply to advertising activity;
- (d) **Truthfulness:** advertising should make a truthful presentation of the products and/or services that are being offered. Before dissemination of advertising, the advertiser must hold

documentary evidence to prove all claims, whether direct or implied, that are capable of objective substantiation. When the advertising contains a clearly highlighted message, the advertiser must take the necessary measures to ensure that the remaining parts of the advertising are understandable and do not introduce relevant limitations or modifications to the main message; and

- (e) **Authenticity:** the recipient of advertising should be able to clearly distinguish it as such.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The Code of Proceedings of CONAR contains the procedure to be followed before the Permanent Ethics Committee at first instance, and before the Tribunal in case of appeal.

The procedure is simple and with short deadlines and respect the parties' right of defense.

When a claim is filed, CONAR promotes conciliation between the parties in order to conclude the proceeding without a decision.

Once the parties have filed all relevant arguments for the judgment of the case, an oral hearing may be requested by the authority. The decision issued by the Permanent Ethics Committee is notified to the parties involved and, if necessary to the media. The parties may appeal the decision before the Tribunal.

CONAR may impose as sanctions:

- (a) written warnings addressed to the advertiser, to the Board of Directors, to the National, Regional or World Headquarters, when applicable,
- (b) Public warning through the media and through the members of CONAR.

CONAR may also order complementary measures:

- (c) the modification of the claim questioned in the advertising;
- (d) the removal or cessation of the dissemination of the illegal advertising; and
- (e) rectification of the misleading information.

The media must ensure the enforcement of CONAR's decisions.

The Technical Secretary of the Permanent Ethics Committee supervises the implementation of all the decisions, including precautionary measures, sanctions and corrective measures.

In case of failures to carry out one of these decisions, the delegate or representative of the offender could be suspended from the right to speak, and even to vote, in the General Assembly of the Association to which it belongs.

CONAR may publish the non-compliance of the measure in CONAR's newsletter; ANDA's magazine and/or the media.

In addition, it is empowered to expel the offender from the CONAR, when appropriate.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self-regulation system has its main strength in the speed of processing cases and in the fact that CONAR works closely with three powerful entities: ANDA, APAP, and SNRTV. Since they are united by the desire to promote fairness between competitors and to protect consumers, they have signed agreements to effectuate CONAR decisions. Therefore, advertising contracts often include clauses obliging both advertisers and media to abide by all these pronouncements.

Nevertheless, since CONAR is a private entity, it does not have any law enforcement or prosecution power. Also, it is not empowered to impose fines. Moreover, if someone outside CONAR breaches the Code of Advertising Ethics, there is nothing that an affected competitor can do through this self-regulation system. Because of these weaknesses, the majority opts to initiate proceedings before INDECOPI, which reviews approximately 100 claims every year, in comparison with 15 brought before CONAR.

2.5 Are the self-regulatory system's decisions reported?

According to the Code of Proceedings, CONAR may report its decisions through any medium or other mechanism.

All resolutions (and even the pending cases) are available to the public in the CONAR offices and on its website (www.conarperu.org). Anyone may request copies of these documents on payment of the shipping or mailing costs.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

There are some key areas of focus in the Code of Advertising Ethics that companies should be aware of:

- (a) **Promotions:** Promotions must not mislead consumers. If they are limited in time, advertising should include the period of duration and the minimum stock available.
- (b) **Undue comparison:** Comparisons must be truthful, accurate and must not denigrate competitors. They should not contain subjective claims.
- (c) **Advertising directed to minors:** Advertisers shall be aware of the targeted audience and must respect the naivety, credulity and inexperience of children. Advertising directed to minors, or in which they participate should respect their physical, mental and moral integrity.

2.7 Are there any other self-regulatory systems that govern advertising practices in Peru?

ANDA promotes 'Advertising Compromises' between its members.

To date, only one 'Advertising Compromise' has been adopted by the majority of its members. It consists in following the 'Internal Directive on Advertising of Food and Non-alcoholic Beverages directed to children under 12 years old' subscribed on February 15, 2012. The objective of such Internal Directive is to promote healthy balanced diets and an active lifestyle in children.

Through images, sounds, text and/or representations, advertising must include the following references:

- (a) the importance of achieving energy balance;
- (b) encourage daily physical activity;
- (c) maintenance of a balanced and healthy diet;
- (d) encourage active lifestyles;
- (e) encourage the intake of fruits and vegetables; and
- (f) highlight the importance of prevention in health from a healthy diet, daily exercise, or some other similar.

Compliance with the Internal Directive will be monitored and evaluated periodically by CONAR.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Peru (eg, consumer protection laws; IP laws; unfair competition laws)?

The use of advertising claims is regulated mainly in the Law for the Repression of Unfair Competition. This Law establishes that advertising shall be assessed taking into account that it is an instrument for promoting, directly or indirectly, the contracting or consumption of products and services. Evaluation is carried out on the content of an advertisement as a whole, including words and numbers, spoken and written, visual and musical presentations, and sound effects, on the basis that the recipient of the advertising will carry out a full and superficial analysis of each advertising slot which he/she views.

In addition, the Consumer Protection Code contains some complementary dispositions, establishing that advertising should not contain information or images that could directly or indirectly mislead consumers, especially concerning the characteristics of the product, the price or the sales conditions. It also establishes that advertising claims are legally binding for providers, so they will be considered incorporated in the contracts with consumers.

Finally, Decision No 486 establishes the common intellectual property regime, regulating the use of trademarks in advertising.

3.2 Is substantiation required for advertising claims?

Substantiation is required for objective claims in advertising.

Before the dissemination of any message referring to characteristics of an announced product or service that may be verified, the advertiser must have proof to support the claim. The kind of evidence depends on the type of claim and the type of product or service advertised. At a minimum, an advertiser must have the level of evidence that the advertising says or implies it has.

In most cases, it is expected by the authority that advertising claims regarding health or safety must be supported by competent and reliable scientific evidence (tests, studies or other) following generally accepted methods and procedures. Such scientific evidence may be conducted by the advertiser or by an outside researcher.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

In contrast to verifiable claims, subjective claims cannot be proved true or false by any generally accepted criteria and, thus, do not require substantiation. Subjective claims often express opinions, preferences, values, feelings, and judgments. Even though they may involve facts, they do not make factual claims.

The Law allows the use of humor, fantasy and exaggeration in advertising, as it is considered an advertising technique.

Nevertheless, subjective claims must not be used in comparisons. INDECOPI has issued a mandatory precedent saying that subjective comparative claims are essentially illegal per se.

3.4 What are the rules governing the use of disclosures in advertising?

There are special rules governing the disclosures used in advertising of certain products.

For example, advertising of alcoholic beverages and OTC medicines must include disclosures following the required specifications, depending on the medium used.

Also, INDECOPI has issued a mandatory precedent regarding the use of disclosures in advertising (not applicable for advertising of products governed by specific rules). According to such mandatory precedent, if a product or service advertised has particular conditions (warnings, restrictions or purchase requirements), and such information has not been completely included in the advertising, then:

- (a) the advertiser must make available to consumers alternative sources of information where the particular conditions of the product or service are detailed;
- (b) these alternative sources of information may be call centers or web pages and should be easily available at the time of the dissemination of the advertising; and
- (c) the advertising must clearly and expressly indicate the existence of the alternative sources of information.

The information included in an alternative source must complement (not contradict) the principal message of the advertising.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Testimonials in advertising have specific regulations:

- (a) The dissemination of testimonial advertising must be supported by authentic and recent experience of the person. If the message is objective, the advertiser shall have the proof in advance which supports in fact that the content of the testimonial advertising is true.
- (b) The person must give his or her written consent for the dissemination of testimonial advertising.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no special rules governing the use of product demonstrations in advertising. Nevertheless, they must comply with the general principles of the Law for the Repression of Unfair Competition (ie truthfulness, accuracy, legality and authenticity).

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is advertising that compares alternative brands, which may be identified by name or other distinctive information. It is permitted by Peruvian legislation, as long as it satisfies the following provisions:

- (a) the information must be true in terms of its objective and verifiable condition. Such information is subject to substantiation by the advertiser. Subjective claims must not be used in comparative advertising;
- (b) the information must be accurate in terms of its clear and current condition, presented in a way such that ambiguity or lack of precision is avoided;
- (c) it should avoid unjustified irony, satire, humor or sarcasm, in view of the circumstances; and
- (d) it should avoid allusions to strictly personal circumstances of the owners or representatives of the company whose goods are subject to comparison.

In summary, comparative advertising must confront objective characteristics of the good or services compared. It must not mislead or confuse consumers nor denigrate competitors.

3.8 Are there any special copyright or trademark rules that may impact comparative advertising (eg, whether the use of a competitor's trademark or products may be used)?

There are special trademark rules that may impact comparative advertising.

Decision No 486 establishes that anyone may use a registered trademark in comparative advertising, without the consent of its owner, as long as the use:

- (a) is in good faith;
- (b) does not constitute use as a trademark;
- (c) is confined to identification or information purposes only; and
- (d) is not likely to create confusion over the origin of the goods or services.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

There are no special rules governing claims relating to geographic origin in advertising. Nevertheless, advertising must comply with the general principles of the Law for the Repression of Unfair Competition (ie truthfulness, accuracy, legality and authenticity).

3.10 Are there any special rules governing product packaging?

There are no special rules governing product packaging in advertising. Nevertheless, the packages are themselves considered advertisements, so they must comply with the general principles of the Law for the Repression of Unfair Competition (ie truthfulness, accuracy, legality and authenticity) and with all the Law.

However, there is a specific Law (Ley de Rotulado de Productos Industriales) that regulates the relevant information that must be included in the packages of industrial goods in order for consumers to know what they are buying. The CPC is the entity that will enforce any claim regarding this matter.

4 PRICE ADVERTISING

4.1 What are Peru's rules regarding price advertising?

The rules regarding price advertising are the following:

- (a) the amount announced as price of a product or service in advertising must include applicable taxes and any additional charge essential for its acquisition;
- (b) when the price of a product or service is announced in foreign currency, the advertising must include the equivalent price in national currency, in identical characters and equivalent size; and
- (c) when the advertising offers products with prices for credit sale, it must include:
 - (i) the amount of the initial quota (if applicable),
 - (ii) the total amount of interest,
 - (iii) the actual annual interest rate, and
 - (iv) the amount and detail of any additional applicable charge.

4.2 What are Peru's rules regarding advertising 'free' products?

The rules regarding advertising 'free' products are the following:

- (a) The advertising of 'free' products must include the period of duration of the offer and the minimum stock of products available.
- (b) If the total amount of the free products exceeds 15% of a Tax Unit (each tax unit is equivalent to approximately US\$ 1270.00), it is necessary to request an authorization from the government authority (the Ministry of Internal Affairs). The number of the authorization must be included in the advertising.

4.3 What are Peru's rules regarding sales and special offers?

The rules regarding sales and special offers are the following:

- (a) Advertising must include clearly the period of duration of the offer and the minimum stock of available units of the products on offer. Otherwise, the advertiser would be obliged to provide consumers the products or services in the conditions indicated in the advertising.
- (b) In cases where the sales promotion has special conditions or restrictions, providers may use an alternative information source (web sites or call centers) to give consumers more detailed information. This source should be free and easily accessible for consumers and must be referred in the advertising.

4.4 What are Peru's rules regarding rebates?

There are no special rules regarding rebates.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

There are no other key restrictions which advertisers should be aware of regarding retail advertising.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

There are products that may not be advertised in certain media.

- (a) **Alcohol:** Alcohol advertising cannot be exhibited during cultural or social events that are targeted to minors.
- (b) **Tobacco:** Advertising involving tobacco products cannot be launched through television, radio, open or closed means of communication, including the Internet. The dissemination of tobacco advertising is allowed only for adults, under certain restrictions.
- (c) **Medicines:** The advertising of Prescription Only Medicines (POM) must be directed and disseminated only to medical professionals. It cannot be launched through media accessible to the general public.
- (d) **Adult content:** Advertising of erotic or adult content services must be targeted to adults. The advertising of these services is permitted in the written press of restricted circulation for adults, and on radio and television between 1:00 am to 5:00 am.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

There are no advertising practices that are specifically prohibited.

Nevertheless, as we mentioned, according to the Directive No 005-2009-COD-INDECOPI, providers may not disseminate any kind of commercial advertising through phone calls, text messages or emails to people whose telephone numbers or emails are recorded in the Register named 'Gracias ... no insista' administered by INDECOPI. This nation-wide registration is free of any charge and is valid for two years, and may also be renewed. People interested may withdraw from the Register 'Gracias ... no insista' at any time.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

According to the Law for the Repression of Unfair Competition, advertising of erotic or adult content services must be targeted only to the adult public. The dissemination of advertising of this kind of services is permitted only in the written press of restricted circulation for adults and, in the case of radio and/or television, between the hours of 1:00 am and 5:00 am.

The Code of Advertising Ethics of CONAR rules that advertising should not contain presentations or statements that might be offensive to the decency standards of the audience it intends to reach. Again, the advertising of erotic or adult content services is allowed, but must be targeted only to the adult public.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Peruvian legislation does not establish the obligation to identify who is the advertiser or the sponsor of the advertising.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are special rules governing 'disguised advertising'.

The dissemination of advertising under the cover of alleged news, journalistic opinions or recreational material, without a clear warning of its advertising nature constitutes an infringement of the principle of Authenticity. 'Disguised advertising' must include visible and clear claims such as 'paid advertising' or 'infomercial'.

A mandatory precedent issued by INDECOPI describes when this conduct is contrary to the law:

- (a) 'disguised advertising' or 'infomercials' are located and designed to look like an objective article, news, interview, program or similar, depending on the medium used.
- (b) consumers are not able to identify easily their true character (ie ascertain that they are advertisements) and may be influenced by the persuasive effect of this misapprehension.
- (c) a payment or compensation may be offered to the media in order to disguise the advertising under the appearance of news, features or interviews. However, this element is not considered decisive.

Both the advertiser and the media shall be responsible for any infringement of the principle of Authenticity.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no special disclosures or other obligations when integrating advertising content with other content.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no special rules governing the use of social media for advertising purposes.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

According to the general law, an advertiser would not be responsible for advertising claims made in user generated content, unless he/she has direct participation in the execution and/or dissemination of the advertising claims.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

There are no key court or self-regulatory decisions that advertiser should be aware of regarding the use of social media and user generated content.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

The Peruvian Civil Code regulates the use of an individual’s name, picture, likeness, voice and identity, under the term ‘image’. It establishes that the use of an individual’s image requires prior and express consent.

In addition, it states that in cases where the individual has died, permission may be given by the spouse, children, parents or siblings, in that order.

9.2 Are there situations when permission is not required?

There are situations when permission is not required.

The Peruvian Civil Code establishes that permission will not be required when the use of the image is justified by reason of:

- (a) the renown of the person;
- (b) the position that the person holds;
- (c) relevant facts and public interest; or
- (d) scientific, didactical, or cultural purposes, as long as these are related to public events or ceremonies.

These exceptions are not applicable when the use of the image impacts on the honor, decorum and reputation of the individual involved.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are no specific rules governing the types of materials that must be cleared before they may be used in advertising.

Nevertheless, we suggest a respectful use of images and statements when referring to: patriotic symbols (the national seal, the flag, among others); national institutions; cultural assets the church, or other relevant institutions in Peru.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Decision 486 that establishes the Common Intellectual Property Regime, states that registered trademarks may be used without the consent of its owner, as long as use:

- (a) is in good faith.
- (b) does not constitute use as a trademark.
- (c) is confined to identification or information purposes only; and
- (d) is not likely to create confusion over the origin of the goods or services.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Peru which affect advertising (eg Swedish gender equality law)?

There are no specific rules that are particular to the culture of Peru which affect advertising.

Nevertheless, according to the principle of social appropriateness, it is prohibited that advertising induce the recipients of the message to commit an illegal act or an act of discrimination or offense based on origin, race, sex, language, religion, opinion, economic condition or of any other kind. This restriction is especially sensitive considering the wide variety of ethnic groups and races that exist in Peru.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

There are no other cultural norms that should be considered.

Nevertheless, we suggest a respectful use of images or statements when referring to the patriotic symbols (the national seal, the seal of the State, the flag, among others), national institutions, cultural assets, the church, or other relevant institutions in Peru.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Peru?

Bearing in mind that advertising regulation in Peru is quite complex, and that INDECOPI is empowered to impose significant fines against illegal advertising as well as important corrective measures, our recommendation would be to request legal advice prior to the dissemination of any advertisement.

 POLAND 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Poland?

Advertising is regulated on a general level by a number of legal acts, in particular the Act on combating unfair competition (Unfair Competition Act). The Unfair Competition Act aims to protect fair competition amongst competitors. Certain advertising-type behaviors are also regulated under the Act on combating unfair commercial practices—an Act aimed at protecting consumers' interests (Unfair Commercial Practices Act). Additionally, some products or industry sectors are specifically regulated (eg alcohol, pharmaceuticals, certain types of claims used in relation to foodstuffs).

There is also a self-regulation system organized by the Union of Associations—the Advertising Council, as well as self-regulation of particular industry sectors (particularly in the pharmaceutical and medical devices sector).

Self-regulation is not binding. However, infringement of its rules may in some cases be considered infringement of good market practice and, therefore, be considered unfair competition or unfair market practice.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

There is no general legal definition of advertising. However, there are some definitions applicable to particular industry sectors. For instance, the term 'advertising' is defined for alcoholic beverages.

Any communication aimed at promoting a product and, directly or indirectly, encouraging demand for products or services may be considered advertising. Whether any particular activity falls within the definition of advertising is made on a case-by-case basis, but is generally quite broad.

1.3 What is the basic regulatory framework for advertising regulation?

The basic framework for advertising activity is provided under the Unfair Competition Act. Advertising activities contrary to the Unfair Competition Act are considered an act of unfair competition and may result in civil action instigated, as a principle, by an advertiser's competitors.

The Unfair Competition Act, except for a general clause defining a tort of unfair competition (applicable also to advertising), specifically prohibits:

- (a) any advertising contrary to law or good commercial practices;
- (b) misleading advertising;
- (c) advertising referring to emotions and causing fear;
- (d) the exploitation of superstitions or the trust of children; and
- (e) hidden and intrusive advertising.

Arguably, the broadest category is 'misleading advertising', where 'misleading character' is evaluated in view of all relevant aspects, covering the information given in advertisements in respect to quantity; quality; components; method of manufacturing; usefulness; possible use and the means of repair or maintenance, as well as consumer behaviors.

Additionally, there is a specific provision under the Unfair Competition Act that means both an advertising agency or other party who prepared the advertisement can be held liable for the tort of unfair advertising (as well as the advertiser).

Some advertising activities, such as hidden advertising and bait advertising, are regulated under the Unfair Commercial Practices Act.

In some cases, where unfair advertising may infringe the collective interests of consumers, the Act of 16 February 2007 on Competition and Consumer Protection (Consumer Protection Act) may apply. Action under this Act is undertaken in the public interest by the consumer and the appropriate competition authority.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

There are specific provisions regulating certain media such as TV; radio; press; means of electronic communications; and automated calling systems:

- (a) **TV and radio:** Advertising on TV and radio is regulated under the Broadcasting Act of 29 December 1992 (RTV Act). It sets out specific requirements regarding the length of advertising and teleshopping breaks; overall content of advertising; rules regarding types of broadcasts which may or may not be interrupted by adverts; additional restrictions regarding advertising directed to minors (including ban on advertising of unhealthy foods in proximity to the children broadcasts); and rules regarding sponsorship. Additionally, the RTV Act prohibits hidden advertising, theme placement and only allows product placement when specific conditions are met.
- (b) **Press:** Press advertising is also regulated very generally by the Press Law of 26 January 1984 (Press Law). Under this Act, advertisements must be clearly identified to prevent confusion with editorial content. Additionally, the press is expressly allowed to reject advertising which is contrary to its policy or nature of publication. Press Law may in certain cases apply to activity conducted on the internet (especially on news portals).
- (c) **Electronic communications:** Sending unsolicited marketing to a specified individual by means of electronic communications (such as e-mail) is prohibited unless the recipient has given prior consent to receive such communications, for example, by making their e-mail address available.
- (d) **Automated call systems:** Poland's Telecommunication Law bans the use of automated calling systems for direct marketing unless a subscriber or an end user has given his prior consent to such use. Under the Telecommunications Law, the marketer must obtain consent for automated calls before making first contact with the consumer. General consent to use personal data for marketing purposes is insufficient.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Advertising is specifically regulated for a number of industries. These include:

- (a) **Alcohol:** Advertising and promotion of alcoholic beverages is generally prohibited, except in the case of beer, which may be advertised subject to specific restrictions (eg mandatory disclosures and warnings). The general prohibition of advertising does not apply to non-public advertisements (directed to a closed circle of people) as well as advertisement at the point of sale (though not all points of sale are covered by this exception) wholesale premises and bars, nightclubs, etc. Additionally, in some cases, manufacturers or distributors of alcoholic beverages may publically communicate their sponsorship of public events. This concept is often used in order to circumvent the general prohibition.
- (b) **Medicinal products:** Advertising of medicinal products is harmonized within the EU. However, some additional national restrictions apply. The advertising of medicinal products

may only be conducted by either the marketing authorization holder (MAH) or a parallel importer (or upon their request). Advertising of prescription-only drugs, medicines containing psychotropic or narcotic substances as well as any medicinal products reimbursed from public funds cannot be directed to the general public (but may be targeted at healthcare professionals). Advertising of medicinal products not authorized for use in Poland is strictly prohibited. Advertising cannot refer to product characteristics which are not covered by the relevant authorization, i.e. so called 'off-label use'. There are a variety of restrictions regarding the content and mode of advertising of medicinal products addressed to the general public, as well as obligations regarding necessary disclosures and warnings.

The advertising of pharmacies (both conventional and online) is forbidden; however, publishing information on the location and working hours of pharmacies is permissible. The advertising of healthcare services is also prohibited; however, health care providers may describe the scope and type of health services rendered.

- (c) **Gambling:** The advertising of the majority of forms of 'hard' gambling, such as cylindrical games (eg roulette); card games; dice games; betting and games on automated machines is prohibited (unless conducted within premises of a casino; a betting outlet; or on a website registered as an online betting outlet). Mutual betting services, which have obtained an official permit, may be advertised, subject to specific restrictions (eg mandatory disclosures and warnings). Operators of mutual betting services are also allowed to publicize their sponsorship of certain events (subject to certain restrictions). It is also possible to advertise promotional games of chance.
- (d) **Tobacco:** Advertising of tobacco products is completely prohibited. The ban on tobacco advertising covers any advertisement or promotion of tobacco products; tobacco props or imitations of tobacco products or props; and of symbols relating to the use of tobacco. Imitations of packages for tobacco products cannot be exposed in stores. Moreover, tobacco manufacturers are prohibited from sponsoring sport; cultural; educational; health; and socio-political activities.
- (e) **Financial Products:** There are various rules affecting the sale of financial products under, for example, the Banking Law and the Act on Consumer Credit.

1.6 Are any government pre-approvals required?

There are no government pre-approvals required and it is not possible to request pre-approval from the relevant bodies.

Please note, games of chance (eg promotional lotteries) require an official permit, official approval of terms and conditions and compliance with other requirements (eg presentation of a bank guarantee covering prizes offered) before they are actually organized. If a promoter is unsure whether a promotion falls within the strictly regulated category of games of chance, they may apply for an official interpretation (usually issued within 30 days).

1.7 Does the media pre-clear advertising?

Broadcasters are liable for the content of broadcasts. Additionally, the media are obliged to ensure compliance with the law. In Poland, various advertising restrictions apply, which are also reflected in the RTV Act and the Press Law. Additionally, media may be liable for assisting unfair competition or be directly liable under industry-specific regulations. The majority of media therefore have some internal clearance procedures.

Please note that the self-regulatory bodies, eg the Advertising Council, upon request, may issue an opinion on advertising copy submitted to it. This advice is provided as a service and is not binding on the advertiser.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The government enforces advertising rules through its agencies, particularly the Office of Competition and Consumer Protection (OCCP); the National Broadcasting Council (NBC); and (in respect of medicinal products) the Chief Pharmaceutical Inspector (CPI).

The OCCP supervises advertising activities to ensure that they not infringe the collective interests of consumers. For example, by ensuring that advertisements are not misleading in any way. In the past, the OCCP focused mainly on the advertisements disseminated by the telecoms and cable TV operators; banks; and insurance companies – since they had the greatest potential to mislead to consumers due to the scale of their activity. There were also cases from other industry sectors, eg the fast-moving consumer goods sector.

The President of OCCP may decide a practice violates collective consumer interests and order the advertiser to discontinue those activities and eliminate their results eg by issuing a statement in a form decided by the OCCP. The OCCP may also impose fines of up to 10% of annual revenue. However, in practice, fines are not usually that high.

NBC (the broadcasting regulator) monitors compliance of radio and television advertising. If a broadcaster is in breach of TV or radio advertising regulations, the NBC may impose fines.

The CPI enforces rules relating to pharmaceutical advertising. If the advertisement fails to comply with such rules, CPI may:

- (a) prohibit the further publishing of the advertisement;
- (b) publish the CPI’s decision or order the advertiser to issue a correction; and/or
- (c) order the elimination of the results of the violation. The Chief Veterinarian enjoys the same powers in respect to advertising of veterinary medicinal products.

Furthermore, violation of certain provisions regarding advertising may result in criminal liability (eg in case of alcoholic beverages and pharmaceutical products). In such a case, criminal law enforcement authorities are engaged. In some cases, specialized bodies may also participate in criminal proceedings (eg State Agency for the Prevention of Alcohol-Related Problems—‘PARPA’— which may act as the prosecutor in cases involving alcohol advertising).

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor may bring a civil action, particularly under the Unfair Competition Act, where its interests are infringed or threatened due to an act of unfair competition. Please refer to question 1.3 above for an explanation what types of activities are considered acts of unfair competition in relation to advertising. Infringement of any industry-specific limitations or prohibitions (as described in question 1.5 above), including administrative or criminal laws, may also constitute grounds for civil action by a competitor.

If the activity is a recognized act of unfair competition, the following remedies can be sought:

- (a) cessation of the prohibited activity;
- (b) eliminating the effects of the prohibited activity (eg, destruction of advertising materials);
- (c) publishing one or several corrective statements;
- (d) damages and accounts of profits; and/or

- (e) payment of a specified amount to a social cause in support of Polish culture or national heritage.

The above claims (except for point (d)) may also be raised by regional or national organizations protecting the interests of businesses, eg associations of businesses or trade bodies established with the statutory purpose of protecting certain industry sectors may bring a claim against individual advertisers. Courts may decide on products, packaging, advertising materials and other objects directly related with committing a tort of unfair competition, eg, copycat advertising. In particular, the court may order the destruction of materials.

Furthermore, entities which help, induce or benefit from the illegal act may also be held liable.

A competitor may also notify regulatory bodies about observed breaches and rely on the enforcement by such authorities.

1.10 When do consumers have a right of action? What are the potential remedies?

As a principle, consumers have a direct right of action when their interests are threatened or infringed as a result of an unfair commercial practice. The consumer may demand:

- (a) cessation of the prohibited activity;
- (b) elimination of the continuing effects of the prohibited activity;
- (c) publication of one or several corrective statements;
- (d) damages and accounts of profits; and/or
- (e) payment of a specified amount to a social cause in support of Polish culture or national heritage or consumer protection.

Claims indicated in points (a), (c) and (e) above may also be brought in court proceedings by the National Ombudsman; Insurance Ombudsman; Consumer Ombudsman; and consumer protection organizations.

A consumer may also rely on the statutory warranty for conformity of a product/service with agreement. This may apply in particular when untrue or misleading claims in respect of the properties of a purchased product were made in the course of advertising.

Finally, a consumer may make a complaint to the Advertising Council to have the advertisement declared as contrary to the Code (see question 2.1 below).

2 SELF-REGULATORY FRAMEWORK

2.1 Does Poland have a primary advertising self-regulation system?

Yes. The Polish advertising industry has adopted a system of self-regulation. The advertising industry created the Advertising Council (Rada Reklamy), which is a member of European Advertising Standards Alliance (EASA Alliance). The Advertising Council is a union of associations of advertisers; advertising agencies; as well as media associations. These associations, acting as members, elect Council's governance bodies and create its policies. The Council is funded by the advertising industry: mostly from the membership fees and license fees for the use of ethical advertising certifications.

The Council's body—the Advertising Ethics Committee—issues decisions on conformity of particular advertisements with the Code of Ethics in Advertising (Code). The Council also monitors advertising by periodically conducting market studies to verify compliance with rules of ethical advertising.

Decisions of the adjudicative panel of the Advertising Ethics Committee have persuasive effect but are not strictly binding. However, since the Advertising Council considers whether a trader has engaged in honest trade practices, non-compliance with a decision may demonstrate a breach of fair market practice standards. If so, such behavior, arguably, may constitute unfair competition.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Yes. The Polish self-regulation system provides for two types of codes of conduct:

- (a) general rules for advertising under the Code; and
- (b) industry sector-focused rules (eg, Beer Advertising Standards and codes of ethics in pharmaceutical advertising and marketing).

Generally, codes constitute sets of principles that are more restrictive than legal frameworks for advertising. Such obligations are accepted by advertisers on a voluntary basis. The Code applies to all entities related to the Polish advertising industry. While not legally binding, advertisers that agree to comply with the Code are permitted to display a mark certifying ethical advertising. The English version of the Code may be accessed at: <http://www.radareklamy.pl/dokumenty.html>.

The Code regulates basic principles of advertising, as well as specific rules with regard to advertising to children; advertising containing ecological information; sponsorship; direct marketing; and sales promotion.

The key principles are:

- (a) advertisements should not contain any form of discrimination or any elements encouraging acts of violence;
- (b) advertisements should not take advantage of misfortune or cause anxiety or fear;
- (c) advertisements should not mislead consumers;
- (d) advertisements cannot exploit the lack of knowledge of consumers;
- (e) sponsorship and sponsorship-related agreements must clearly indicate all interested parties and obligations vis-à-vis the sponsor; and
- (f) direct marketing (especially offers) should be easily identifiable.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Yes. Under the Code, a complaint may be submitted by a consumer (free of charge) or other entities, in particular by competitors (for a fee). The board of the Advertising Council may also file a complaint. After pre-evaluation by a speaker-arbiter (a member of the Advertising Ethics Committee appointed as a reporter for a particular case), the case is decided by the Advertising Ethics Committee, consisting of representatives of advertisers, media and advertising agencies. The advertiser whose practice is being challenged may respond to the claim in writing. Afterwards, a hearing is scheduled where both parties are heard. In consumer complaints, the consumer does not (and cannot) attend but is represented instead by the speaker-arbiter. The consumer is informed afterwards about the outcome of the proceedings.

The Adjudicating Panel may:

- (a) reject the complaint entirely;
- (b) dismiss the complaint if there are no facts or evidence suggesting infringement of the Code;
- (c) decide that the advertisement infringes the Code;
- (d) identify modifications that should be made to the advertisement in order to remedy the infringement of the Code; and/or

- (e) decide that the advertisement should be withdrawn.

Appeals based on new facts or pieces of evidence may be submitted to the Board of Appeal within 10 days of the decision being delivered to the parties. The Adjudicating Panel may also publish decisions in selected industry publications.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self-regulation system is strongly endorsed by the advertising industry in Poland. Voluntary, collaborative rulemaking (eg the Code of Pharmaceutical Marketing Ethics) is an additional stimulant for the development of fair advertising in Poland. The Advertising Council improves transparency of the monitoring and enforcement of advertising rules in Poland. More than 300 complaints, for nearly 250 advertisements, were filed with the Advertising Council in 2017. The vast majority of complaints are filed by consumers.

The advertising self-regulation system is parallel to the statutory regulations. However, claims under the self-regulation system are processed quickly (usually within a few weeks, which is much faster than in the courts). Claims under the self-regulation system are also less expensive. This, in theory, allows quick and efficient resolution of complaints.

On the other hand, the only sanctions for non-compliance with the Code, repeated offences and/or consistently ignoring the Code or decisions, are suspension or termination of the license to use certificates showing fair advertising and compliance with the Code by the infringer (see also comments in question 2.2 above). Advertisers who have had the right to display the ethical advertising mark withdrawn must wait twelve months from the date it ceased violating the Code before it may be permitted to display the mark again. Additionally, the standard of protection, in particular in respect to offensive, discriminatory advertising is, in our assessment, rather low.

2.5 Are the self-regulatory system’s decisions reported?

All decisions of the Advertising Council are published on its website (<http://www.radareklamy.org>). When complaints are upheld, the advertising agency and publisher who distributed the advertisement (if they participate in self-regulation system) are notified by the Council. The Adjudicating Panel may also decide to publish its decision in industry specific media.

If the Advertising Council considers the given advertisement misleading or otherwise not compliant with the Code, it may forward the decision to other entities (such as governmental bodies supervising advertising).

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Regulators of the advertising market have traditionally focused on advertisements in the telecoms; cable TV; banking; paramedical (particularly food supplements) and insurance sectors, as those sectors had the greatest potential to mislead consumers due to the scale of their activity. Thus, entities operating within such industries should, in particular, consider the additional guidance provided by the self-regulation.

As a general rule, the self-regulation system allows the quick implementation of rules to reflect the approach of the market regulators, i.e. before such rules are officially codified. Therefore, the rules on advertising contained in the self-regulation system may be more stringent than those contained in the law. The self-regulation codes may shed some additional light on industry practice and accepted behaviors, which may be particularly important for new entrants to the local markets.

2.7 Are there any other self-regulatory systems that govern advertising practices in Poland?

The Polish Marketing Association (SMB) has implemented the ‘Robinson List’ which is an opt-out system for direct marketing that consumers may sign up to. The Robinson List is binding for SMB members only.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Poland (eg, consumer protection laws; IP laws; unfair competition laws)?

Disputes between competitors as to the honesty and accuracy of claims made in advertisements are regulated primarily under the Unfair Competition Act. However, the Unfair Competition Act regulates only general principles (i.e. that claims within the advertisements must be compliant with law and honest trade practices—see also question 1.3 above). Specific restrictions on advertising are set out in the industry-specific acts which may determine whether an advertisement is compliant with the Unfair Competition Act.

Disputes between advertisers and consumers as to the honesty and accuracy of claims made in advertisements are regulated under consumer protection laws (in particular, the Unfair Commercial Practices Act). This Act forms the basis for direct consumer actions. Again, the Unfair Commercial Practices Act in some instances must be read along with the industry-specific advertising restrictions. However, in principle, it encompasses a number of self-explanatory and generally applicable rules regarding advertising.

There is a degree of overlap between the Unfair Commercial Practices Act, the Unfair Competition Act and many industry-specific rules, which, when taken together, create a general framework for what is acceptable in advertising.

As a principle, under the applicable regulations, advertising claims must be true, verifiable and cannot be misleading. A special regime for comparative advertising applies. Specific industry-focused regulations apply for ‘sensitive’ products (eg alcohol; medicinal products; and tobacco). In some cases, advertisements for certain products are completely banned (eg medicines not authorized for use in Poland). Also, certain types of claims may be specifically regulated, eg claims made regarding the financial terms of consumer loans.

Additionally, rules regulating sales to consumers provide that warranties and assurances made by the manufacturer regarding the products or services, including assurances made in advertisements, are binding upon the seller and may constitute grounds for a claim regarding nonconformity of goods with the sales contract/statutory warranty. These rules may be enforced by consumers in the course of the civil court proceedings.

In specific cases, untruthful or misleading advertising may be subject to the consumer protection laws protecting collective consumers’ interests. General consumer (public) interest in the field of advertising is supervised by OCCP who may enforce relevant rules based on a complaint or at its own volition.

3.2 Is substantiation required for advertising claims?

As a rule, all claims made in advertising must be substantiated in case they are challenged. There are no detailed, national regulations regarding substantiation of claims common for all industries (although there are more detailed EU-wide rules specific to particular sectors, such as medicines or foodstuffs). In practice, evidence of truthfulness of claims is required when advertisements are

challenged before courts or by the supervising authorities (eg pharmaceutical regulatory bodies). Under the Unfair Competition Act the burden of proof is reversed: the advertiser is obliged to demonstrate the truthfulness of the information.

Additionally, the Code requires advertisers to have underlying materials available determining the consistency of advertisements. The advertiser must be able to present such materials on demand by the Advertising Council.

3.3 Are there certain types of advertising messages that do not require substantiation (i.e., puffery)?

In some cases, where it is customary and obvious that claims are used in an exaggerated way and so perceived by the public, the above obligation does not apply.

In Polish practice, it is generally accepted that advertising is aimed at presenting a product in the best light possible. Therefore, some qualities may be exaggerated. Recipients of advertising communications are expected to view advertising critically. So-called 'superlative advertising', using slogans such as 'The best prices' or 'Incomparable quality', is allowed without substantiation. In general, as long as the advertising merely aims to create a vague and general positive association with a product or a brand and does not include 'hard claims' (eg 'No 1 in Poland') referring to particular features of products, it is usually allowed.

3.4 What are the rules governing the use of disclosures in advertising?

Under Polish law, advertising may be considered misleading when correct, verifiable information is presented in a way that may create a false impression, in particular when material information is omitted (known as a misleading omission). Therefore, disclosures should always be provided when failure to include such disclosure could impact a consumer's purchasing decision or their decision whether to enter into an agreement.

Disclosures must be presented in a way that enables consumers to understand them. If disclaimers are included in the ad, they must be easy to read (i.e. sufficiently prominent) and must be communicated (i.e. displayed on screen) for the time necessary for them to be read.

Some disclosures are specifically required by law (eg disclosures regarding fuel consumption and CO2 emission in car advertisements; in advertising of medicinal products; and detailed disclosures in advertisements of consumer credit). Many of these obligations are derived from European law.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

There are no specific provisions of law regarding the use of endorsements and testimonials. In some industries, there are limitations regarding endorsements by particular professionals (eg pharmaceuticals cannot be endorsed by medical professionals; and advertisements for foodstuffs using health claims may not exploit endorsements by physicians and health care professionals). Additional rules regarding the use of personal images apply (as described below in question 9).

Moreover, suggesting the endorsement of a person without such person's consent may be deemed to infringe their personal rights; may be misleading; and may infringe personal image rights.

3.6 What are the rules governing the use of product demonstrations in advertising?

Product demonstrations are not specifically regulated under Polish law. General provisions on advertising and product communication nevertheless apply. As a rule, the products shown must be identified in such a way as to enable consumers to clearly recognize the product shown amongst the

available versions of the product. This is particularly important in the car ads, where usually the best equipped models are shown.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted, subject to the rules under the Unfair Competition Act. A comparative advertisement must meet eight criteria in order to be considered compliant with honest trade practices (and therefore allowed), namely, it must:

- (a) not be misleading;
- (b) compare (objectively and in a verifiable manner) only products and services fulfilling the same needs or intended for the same purpose;
- (c) compare one or more material, characteristic, verifiable and typical features;
- (d) not create confusion in the market (as far as the compared products, trader or trade marks are concerned);
- (e) not disparage a competitor's products, distinguishing marks, trade marks, names or competitor's business;
- (f) in respect of products protected by a geographical name of origin, relate to products bearing the same distinguishing marks;
- (g) not exploit the reputation of distinguishing marks of the competitor in an unjustified manner; and
- (h) not present a product as an imitation or replica of products bearing a protected trade mark or trade name.

If the comparative advertisement relates to special offers, the terms of such special offer must be clearly communicated (including applicable dates).

Comparative advertising may also constitute an unfair commercial practice within the meaning of the Unfair Commercial Practices Act if it is misleading as to the product or its labeling; trade marks; trade names or other distinguishing marks of the entrepreneur or his products.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Use of trade marks in comparative advertising is allowed under the EU comparative advertising directive, which is implemented in Poland. Therefore, provided that the use of a trade mark is indispensable in order to make comparative advertising effective, or to identify the goods or services of a competitor, making reference to a trade mark or trade name does not constitute a breach of an exclusive right, if the requirements for fair comparative advertising (as described in question 3.7 above) are met. However, when it comes to copyright, the approach towards comparative advertising is not unequivocally settled.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

There are no specific provisions of law regarding indications of geographic origin except one—that such information must be truthful. Under the Unfair Competition Act, labelling goods or services with a false or fraudulent geographical indication indicating directly or indirectly a country, a region or a locality of origin, or using such indication in commercial activity, advertising, commercial correspondence, invoices or other documents shall be deemed a tort of unfair competition. Also, the designation of goods or services or absence thereof which might mislead customers as to their origin shall be deemed an act of unfair competition.

A claim as to geographic origin made in advertising must be substantiated in case it is challenged. If the advertised product has no features relating to declared origin, it may be misleading. As a consequence, legal actions may be brought against such producer (as described in questions 1.8–1.10 above).

Regardless of the above, please note that for particular categories of products (eg food) there may be specific legal provisions regarding indications of geographic origin.

3.10 Are there any special rules governing product packaging?

The packaging of the product is one of the criteria used to assess a product's safety. The packaging should ensure the product's safety, and should be safe in itself. The packaging for each product must contain such information as:

- (a) producer's name,
- (b) producer's address,
- (c) state where the seat of producer is located (if its registered seat is outside the territory of the Member State(s) and EFTA State(s)), and
- (d) information identifying the product (unless the purpose of the product is obvious).

Please note that for a number of industries there may be specific regulations regarding their packaging (eg toys, medicinal products, food). Many of these specific legal provisions originate from European law.

4 PRICE ADVERTISING

4.1 What are Poland's rules regarding price advertising?

When advertising includes a product's price and is specific enough to be considered as a proposal to sell the product, all essential information regarding price should be included. In particular, the following information should be provided: the price inclusive of taxes; or where due to the nature of the product the price cannot reasonably be calculated in advance, the manner in which the price is calculated; as well as all the additional freight, delivery or postal charges; or where these charges cannot reasonably be calculated in advance, the information that such additional charges may be payable. Failure to provide such information may be considered unfair market practice.

When the price is advertised, for example, in the press; periodicals; catalogues; posters; on TV or online; the price per unit of the product or service should be indicated as well as the date or time frame when this price applies.

4.2 What are Poland's rules regarding advertising 'free' products?

Under the Unfair Commercial Practices Act, a product may be presented as 'gratis', 'free', 'without charge' or similar only if the consumer does not have to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.

However, it is prohibited for advertisers to offer free products (known as 'bonus sales') different or unassociated with the main product being purchased, unless one of the following conditions is met:

- (a) the bonus is of small value or a sample of product; or
- (b) the bonus constitutes a prize in a lottery (game of chance) or competition (game of skill).

However, it is uncertain whether such a general prohibition of bonus sales is in line with EU laws.

4.3 What are Poland's rules regarding sales and special offers?

Large shops and retail outlets are subject to certain limitations on products sold without a profit margin. This restriction applies to stores with a sales floor larger than 400 m². The purpose of this regulation is to stop large stores from unfairly competing against small businesses by offering products without a profit margin with the aim of eliminating small competitors from the market. However, this restriction does not apply during end-of-season sales lasting no more than one month (organized twice a year); to products close to the end of their shelf life date; or in the case of liquidation sales.

4.4 What are Poland's rules regarding rebates?

There are no regulations on rebates in Polish law, except for anti-monopoly rules.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

When a price reduction or discount is communicated, the information on the initial price and new price (with applicable rebate) should be indicated. Products introduced to the market for the first time cannot be presented as described in the preceding sentence (i.e. as being on sale). When discount is caused by product's properties (eg close expiration date, defects), the reason for discount should be clearly indicated along with information on price reduction ('before' and 'after' prices).

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Some products cannot be advertised under Polish law. These include: alcoholic beverages (with the exception of beer); some forms of gambling ('hard' gambling, such as card or dice games, roulette, gambling machines); tobacco products; prescription-only medicines; medicines not authorized in the Polish market; state-reimbursed medicines; drugs containing narcotic and psychotropic substances; and healthcare services. However, some of these prohibitions are not absolute (for example, alcoholic beverages may be advertised non-publicly; and reimbursed medicinal products, prescription-only drugs and drugs containing narcotic and psychotropic substances may be advertised to professionals). For specifics, please see question 1.5 above.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

The Broadcasting Act prohibits 'theme-placement', which is defined as commercial communications consisting of reference to a product, service or their trade marks in broadcast scripts or dialogues in return for payment or similar remuneration. However, product placement featuring an image of a product is permissible under certain conditions.

For additional restrictions, please see question 1.4 above.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Polish law does not provide for specific regulations governing indecency or obscenity in advertising, but such practices may infringe honest commercial practices under the Unfair Competition Act. Some product specific rules apply. For example, beer advertisements cannot associate the product with sexual attraction.

General criminal law prohibits the broadcasting of any pornographic content, including in advertising, to minors below the age of 15.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

There are no specific rules regarding disclosing the identity of advertisers or sponsors. Anonymous advertisements (eg, anonymous teaser campaigns) do appear in Poland. However, when an infringement occurs, governmental and judicial bodies may demand that an advertiser's identity is disclosed.

Certain advertisers engaging in some specific forms of promotion may be required to disclose their identity. For example, a producer or a distributor of alcoholic beverages sponsoring a mass event may only present its name or its trade mark. Advertisers must also disclose their identity in TV or radio programs where they are engaging in product placement.

Generally speaking, when a publication is paid for or connected with other benefits provided to its publisher, it is sufficient to indicate that the publication is sponsored (without the need to identify the sponsor). Recipients must know that the publication/broadcast is not objective editorial material, but is actually paid-for commercial content.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Misleading advertisements are prohibited. The Unfair Competition Act and the Unfair Commercial Practices Act oblige advertisers to provide audiences with clear information on the nature of the communication.

Specific regulations apply to product placement (and similar activities) in TV and radio broadcasting. The Broadcasting Law provides that, where product placement occurs, the audience must be informed. Product placement of products which cannot be advertised legally on TV is also prohibited. Product placement is permitted exclusively in cinematographic works, films or series made for audiovisual media services, sports programs and light entertainment programs (with the exception of programs for children). Product placement must not prejudice the autonomy and editorial independence of the broadcaster and the broadcaster cannot give undue prominence or directly encourage persons to buy the product/service. Direct reference to products or services in dialogue is forbidden under Broadcasting Law.

There are also certain restrictions in the RTV Act regarding length of commercial breaks. The commercial breaks must be clearly announced in the broadcast.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Yes. Product placement in programs has to be identified with a graphic sign (in television) or with an acoustic symbol (in radio) at the beginning and at the end of the program, as well as after each advertising break. The neutral information identifying the provider of the product or service placed as well as the product/service itself should be given at the end of the programs.

Under the Press Law, commercials must be clearly indicated in order to prevent confusion with editorial content.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

In Poland, there are no specific provisions regarding advertising and marketing via social media. Therefore, general rules on advertising and marketing apply. Public profiles of products, brands or manufacturers are treated as any other public advertising.

The regulations regarding ‘undercover’ marketing (stealth marketing) are of particular importance. Polish law proscribes any advertising which purports to be independent and neutral, in particular when making references to the quality of products. This law effectively prohibits advertisers from using fictitious social media profiles to endorse or market products or services. Generally, Polish law forbids misleading omissions, such as non-disclosure of the commercial nature of an activity undertaken by a business towards a consumer. Additionally, the regulations on spam may be relevant to the marketing via social media. Under the Electronic Services Act, it is forbidden to send unsolicited commercial information to a specified individual recipient via means of electronic communication, in particular via e-mail. This provision is applicable to commercial messages sent, for example, via Facebook. The consent of the recipient is necessary to avoid violation.

In practice, social media in Poland is used to circumvent the most restrictive regulations banning advertising of products of certain kind, eg alcoholic beverages. It is very common for alcohol producers to have fan pages. The Polish regulator of alcoholic beverages market (PARPA) claims that certain social media constitute public means of dissemination of information, and are therefore subject to all restrictions related to public advertising of alcohol.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

The Polish law does not provide for special rules concerning advertising made involving user generated content. Moreover, to our knowledge, there is no case-law or relevant decisions of regulatory bodies. The self-regulatory advertising organization, i.e. the Council for Advertising, has not made any clear statements, confirming the potential liability of advertisers. However, according to general rules of civil liability, if an advertiser does not participate in the creation of user generated content and does not contribute to the publication of illicit claims (in particular, does not mandate the user to post such content and does not reward such actions or encourage people to undertake them), there are no grounds to hold the advertiser liable for actions of others.

The assessment would be different if the user-generated content was triggered by a hidden commercial relationship with the sponsor/advertised brand owner.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

We are not aware of any key judgments regarding use of social media or user generated content. As mentioned above, the Polish regulator of the alcoholic beverages market (PARPA) claims that certain social media constitute a public means of dissemination of information, and are, therefore, subject to all restrictions regarding the public advertising of alcoholic beverages. Despite this view, there are very few successful cases prosecuting illegal advertising of alcoholic beverages, including advertisements run in social media.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

In Poland, an individual's name, picture, likeness, voice, and identity are protected under general rules of civil law concerning personal rights and under copyright law (as regards the use of individual's image). In general, third parties cannot use the above materials without the consent of the person depicted. Polish law does not set out special rules related to the form of the granting of consent. However, it is recommended that consent is in writing for evidential purposes and is 'conscious' (i.e. an individual is aware of any circumstances in relation to the dissemination of his image). The case law in this respect is not developed, although in recent years there have been more cases decided, particularly addressing the appropriation of celebrities' or sportsmen's names and images. If there are doubts in relation to the scope of the consent, these will be decided in favor of the individual whose image is exploited.

Use of an individual's image is also regulated by the Code. Advertisements should not portray or refer to any natural person without such person's consent, irrespective of whether a person is generally known in connection with performing public or social functions or is a private individual person. Particularly, advertisements should not describe or refer to property of a specific person in a way likely to convey clearly and obviously the impression of a personal endorsement.

9.2 Are there situations when permission is not required?

Copyright law states that, in the absence of an express restriction to the contrary, permission is not required to use an image when the person depicted received payment. Additionally, consent is not required when a public person's image was taken during performance of a public function and when the depicted person is only an element of larger picture of a gathering, landscape or public event. However, in such a case, the person's depiction must not be prominent or central to the picture. In the case of advertising, these general rules on the use of images are likely to be interpreted restrictively. For example, a person who agreed to pose for a picture and received payment should be informed beforehand that the picture will be used in advertising. While use of images does not require express consent, use may still infringe a person's moral rights when used in a defamatory context or in connection with controversial products or services. Therefore, as a principle, it is always recommended to obtain an individual's consent before using his/her image in an advertisement.

Even when permission is not required under copyright law (and, therefore, there is no infringement), use of person's image is restricted by soft-law (see description of the Code's regulation of use of individual's image in question 9.1 above). Therefore, advertisers adhering to the self-regulation system undertake to acquire express permission even when it is not strictly required by law.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are specific rules regarding clearance of advertising materials in Polish law. They concern historical buildings (i.e. Palace of Culture in Warsaw) or historical persons (Frederic Chopin). Special rules concerning the use of their image or name in advertising are contained in specific legal acts (i.e. the law on the protection of the name and heritage of Frederic Chopin). Specific rules apply to the organization of games of chance (see question 1.6 above).

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

There are no specific regulations regarding use of other companies' recognizable products in advertising. General provisions of intellectual property law and unfair competition law will apply. Therefore, in specific cases, a license to use particular intellectual property rights may be required to feature such protected products. In some cases, use may be misleading, in particular it may create an impression of a connection between the advertiser and another company. Depending on the specific circumstances, this may be caught under the tort of passing off (an attempt to promote one products 'in the glitter' of other's renowned products/services).

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Poland which affect advertising (eg, Swedish gender equality law)?

We are not aware of any particular cultural rules that would apply to Poland specifically.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

We advise the advertisers to avoid use of religious symbols or imagery in advertisements directed to the Polish market, since these matters may prove rather sensitive and meet public opposition. Poland is a strongly catholic country, and any religious connotations may cause controversy.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Poland?

Not applicable.

PORTUGAL

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Portugal?

In Portugal, advertising is regulated in general terms by the law contained in the Advertising Code (Decree-Law 330/90 of October 23 and subsequent amendments). The Advertising Code contains generic references as to how advertising should be regulated. It is a principle-based regime and refers to key principles such as:

- (a) lawfulness;
- (b) identification;
- (c) truthfulness;
- (d) respect for consumer rights;
- (e) health and safety; and
- (f) the use of Portuguese language.

Advertising is also regulated according to the medium of advertising, for example radio, television, press, text messages etc. There are industry-specific regulations for certain types of products such as medicines; financial products; gambling and tobacco.

Additionally there is a 'Code of Conduct' issued by the Advertising Self-Regulatory Body (ARP). ARP's Code of Conduct is based on the International Chamber of Commerce Code of Conduct (see question 2.1 **Error! Reference source not found.** below).

1.2 What types of communications are considered to be 'advertising'? How is this determined?

The Advertising Code defines 'advertising' as any form of communication made by public or private entities, in connection with a commercial activity, business, craft or liberal activity, with the direct or indirect purpose to promote, for commercialization, any goods or services, or to promote ideas, principles, initiatives or institutions. Communications from any Public Administration with the purpose, whether directly or indirectly, of promoting the supply of goods or services, are also considered 'advertising'.

1.3 What is the basic regulatory framework for advertising regulation?

The basic regulatory framework for advertising regulation is the Advertising Code and the Code of Conduct issued by ICAP.

The Unfair Commercial Practices Law (Decree-Law 57/2008 of March 26 and subsequent amendments) and Portuguese Consumer's Protection Law (Law 24/96 of July 31 and subsequent amendments) also contain some provisions in relation to advertising.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

There are specific regulations for the following types of advertising:

- (a) **Text message:** The law on Personal Data and the Protection of Privacy in Electronic Communications (Law 41/2004 of August 18 and subsequent amendments) applies to

advertising via text message. For this type of advertising it is necessary to obtain prior and explicit consent from the addressee at the time the mobile number that is to be advertised to is collected (opt-in consent).

- (b) **Post:** The Law which regulates Advertising by Phone Telecopy and Mail (Law 6/99 of January 27 and subsequent amendments) states that recipients of postal advertising must be informed at the time their data is collected (ie before the first communication of their personal data to third parties) that their postal address will be used for marketing purposes. Recipients must be given the opportunity to oppose such usage, free of charge (opt-out consent).
- (c) **TV:** Television advertising is regulated by the Law of Television and of On-Demand Audiovisual Services (Law 27/2007 of July 30 and subsequent amendments). Advertising on television should be easily identifiable as such, and generally cannot exceed more than 10% to 20% of each one-hour period. Advertising should be clearly separated from television programs.
- (d) **Radio:** Radio advertising is governed by the Law of Radio (Law 54/2010 of December 24 and subsequent amendments). Radio advertising must not affect the integrity of radio programs, taking into account their own breaks, duration and nature. The airing of advertised material should not occupy, on a daily basis, more than 20% of the total time of the transmission of licensed program services.
- (e) **Press:** Finally, in what concerns Press advertising (Law 2/99 of January 13 and subsequent amendments) graphic advertising, meaning any text or image that is used and for which inclusion has been paid, should be immediately identified with the word 'Publicidade' or the letters 'PUB', at the beginning of the advertisement itself. The name of the advertiser, whenever it is not evident, should also be provided.

ARP's Code of Conduct contains specific rules for internet advertising, for example in relation to Online Behavioral Advertising.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

The Advertising Code regulates the advertising practices of some specific products and industries. These include alcohol, medical treatments, medicines and medical devices, tobacco, gambling, vehicles, and education courses.

These industries are also regulated by some sector-specific regulations. For example:

- (a) **Medicines:** Decree-Law 176/2006 of August 30 and subsequent amendments, which establishes the legal framework applicable to medicines for human use, prohibits the advertising of medicines subject to medical prescription. The law also regulates the terms under which non-prescription medicines may be advertised.
- (b) **Financial products/services:** The advertising of financial products/services is supervised by the Bank of Portugal (BoP) and regulated by the Legal Regime for Financial and Credit Institutions (Decree-Law 298/92 of December 31 and subsequent amendments) and BoP's Regulation 10/2008. The regime prescribes that the bank/credit institution responsible for the advertised product must be unequivocally disclosed and that advertising must be true, updated regarding the market conditions and not omit any mandatory information as per

the advertised financial product/service. Any advertising that does not comply with the BoP's Regulations must be approved by the BoP.

- (c) **Gambling:** The advertising of gambling is regulated by the Gambling Law (Decree-Law 422/89 of December 2 and subsequent amendments). Generally it is prohibited, with the exception of advertising in connection with contests/promotions based on chance/luck or skill and chance combined.
- (d) **Tobacco:** Finally, the Legal Regime of Tobacco (Law 37/2007 of August 14 and subsequent amendments) prohibits the advertising of tobacco-related products to the general public. However, advertising tobacco-related products is authorized in publications specifically directed to professionals of the tobacco industry.

1.6 Are any government pre-approvals required?

When using advertising materials such as billboards, vending machines and other similar media, it is necessary to obtain prior authorization from the respective municipality under Law 97/88 of August 17, last amended by Decree-Law 48/2011 of April 1.

For financial products/services it is necessary to notify the BoP. This involves sending samples of all advertising materials that are intended for use to the Bank.

In the case of contests or promotions based on chance or luck, prior authorization from the Secretaria de Estado do Ministério da Administração Interna (MAI) is also required.

Therefore, not only is it necessary to comply with the specific rules for each type of advertising but also to take into consideration how said advertising will be made available.

1.7 Does the media pre-clear advertising?

Under Portuguese legislation, pre-clearance of advertising is not mandatory.

Nevertheless, ads of members of alcohol associations (ANEBE, ACIBEV and AEVP) for alcohol beverages must be submitted for pre-clearance, as well as the advertising of food and beverages addressed to children, under the agreements entered into between ARP and the associations representative of this industry. Moreover, any type of media can be submitted to ARP for prior approval. The benefit of this is that it is possible to obtain confirmation that the advertising complies with the applicable rules (as per the type, industry, and general advertising legislation described above).

1.8 How does the government enforce advertising laws? What are the potential remedies?

Advertising laws are often enforced when there are claims made by consumers or competitors. These typically are claims of non-compliance with the applicable laws. The Portuguese Consumer's General Directory is the entity responsible for supervising and applying the respective penalties, if necessary.

Additionally, ARP can also enforce advertising laws and compliance with its Code of Conduct. ARP can receive claims from its members or from non-members and can also investigate advertising on its own initiative to check compliance with the laws. ARP can also decide on the application of some penalties (only for members) or other additional sanctions, such as the removal of commercial communications or advertising that infringes ARP's Code of Conduct.

Penalties that may be applicable for a breach of the rules contained in the Advertising Code include:

- (a) a fine ranging from 1,500.00–45,000.00€ (for legal entities).
- (b) the seizure of all advertising materials used;

and, in serious infringements:

- (c) a ban on advertising activities up to a maximum of 2 years;
- (d) the prohibition on the use of any benefit given by any public entity; and, finally,
- (e) the possibility of temporary closure of facilities or establishments where the advertising activity is being executed.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor may file a complaint before the Portuguese Consumer's General Directory (which is the responsible entity for the supervision of advertising) and also before ARP. It is possible to file before both the Portuguese Consumer General Directory and ARP at the same time, for the same cause of action.

The Portuguese Consumer General Directory may seize any advertising material that infringes the Advertising Code. It may also apply sanctions and penalties for the infringement, with or without the presentation of any claim by individual members of the public or from competitors. In contrast, ARP may only act in cases where a claim has been brought to its attention, and it does not have the power to apply any sanctions.

Competitors may only file an action before the Courts in cases where the competitor filing the claim can show it has suffered damage as a result of the infringement. These cases are normally ones of unfair competition or cases of implicit advertising that may denigrate or infringe the competitor's image/product/service/trademarks.

1.10 When do consumers have a right of action? What are the potential remedies?

A consumer may bring a claim before the Portuguese Consumer's General Directory (which is the responsible entity for the supervision of advertising) and also before ARP.

In cases where the advertising in question consisted of expressly forbidden commercial practices that somehow infringed consumers' rights, consumers may file a judicial claim, in accordance with Consumer Protection Law.

Additionally, consumers have a right to be fully compensated for any damage that they have suffered.

A right of action may be exercised by:

- (a) consumers that were directly affected; or
- (b) consumers and consumer's associations even if they are not affected by the advertising in question.

Advertisers; professionals; advertising agencies and other entities which are in the advertising business, as well as holders of the advertising media used or their commissioners, may be civilly and jointly liable in general terms for any damage caused to third parties as a result of the dissemination of unlawful advertisements.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Portugal have a primary advertising self-regulation system?

Portugal has a self-regulatory advertising system which is organized by Portugal's ARP. ICAP is a self-regulatory institution that verifies that advertising complies with the Advertising Code and the Code of Conduct issued by ARP.

Additionally, ARP receives claims from members and non-members in connection with advertising that violates their rights or any other advertising rule.

When a claim or petition is received by ARP, it is delivered to the Ethics Jury. The Ethics Jury is the entity responsible for the decisions regarding ARP's Code of Conduct rules. The Ethics Jury will analyze the complaint, as well as any defence from the advertiser (for more detail on this process see question 2.3 **Error! Reference source not found.** below). Both the petition and the defence should be delivered in writing and refer to the specific advertised materials that supposedly infringe ARP's Code of Conduct and/or other general rules of advertising.

It is necessary to provide evidence to prove the infringement; however, the Ethics Jury may request additional evidence from the parties, from third parties or from ICAP's technical assistants.

All decisions of the Ethics Jury are binding on the parties.

2.2 Is there a self-regulatory advertising code? What are the key principles?

As previously mentioned, there is a Code of Conduct (the Code) issued by the ARP. The Code establishes the key principle that all advertising should be legal, decent, honest and truthful. In addition:

- (a) Advertising should comply with the values, rights and principles recognized in the Portuguese Constitution and other legislation;
- (b) All commercial communications should avoid any advertising that contains declarations, video or audio presentations that may offend the standards of decency that exist in the Portuguese culture;
- (c) Advertising should be executed in a manner and form that does not abuse consumers' trust; and should not exploit their lack of information or experience. Moreover, advertising should be truthful and should not mislead consumers;
- (d) In terms of social responsibility, advertising should respect human dignity and should not incite or refer to any kind of discriminatory, violent, illicit or anti-social behavior;
- (e) Advertising should be conceived with a sense of social and professional responsibility and should respect the principles of fair competition; and
- (f) The use of information and scientific quotes cannot be made unlawfully. Statistics should not be presented in a manner that exaggerates their validity.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The ARP may receive complaints from competitors, members and non-members, consumers, consumer associations and other interested parties. Those complaints may be in relation to the infringement of an individual's specific rights, a breach of the Code of Conduct, a breach of the Portuguese Advertising Code or an infringement of the law.

After receiving a complaint, the advertiser is invited to respond to the complaint within five working days, by presenting any evidence and/or arguments as a defense to the complaint.

The ARP is composed of a jury, divided into two sections and an appeal commission, the Ethics Jury (see question 2.1 **Error! Reference source not found.**above) that analyzes both the complaint and the response of the advertiser, in order to make a decision on the subject. The process, assuming there is no appeal, normally takes around 10–12 working days.

For consumers and consumer associations, there is no cost to bring a complaint to ICAP. It is possible to submit the complaint through an on-line form (in Portuguese), which is available on ICAP's website or by post.

For competitor complaints, there is a fee for bringing a complaint. If the complainant is a member of the ARP the fee is, at the time of writing, 850.00 euro. For non-members, the fee is 1,500.00 euro.

The ARP also provides a mediation service, in order for the parties in dispute to meet and reach agreement about a contested advertisement. Either party may initiate the mediation.

When a request is received, the other party is notified and, if both are willing, a meeting is arranged as soon as possible. If an agreement is reached, it is put in writing, signed by both parties and then, if both parties agree, published on the ARP website. If the parties fail to reach an agreement, the case is then assessed by the Ethics Jury under the normal complaints procedure.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self regulation system is effective. It is used and followed by advertisers (individuals and legal entities).

Decisions are published on the ARP's website. The purpose of publishing these decisions is to inform interested parties on how advertising should be made, how the Code should be interpreted and the view of this body in certain matters.

The three major TV stations in Portugal are members of the ARP. This keeps them informed of its decisions for advertising purposes.

The self-regulatory system is applicable to all advertising but it has been used most actively in several economic sectors, mainly for alcoholic drinks; sports; cleaning products; digital marketing; environmental benefits and telecommunication services advertising.

2.5 Are the self-regulatory system's decisions reported?

As mentioned above, these decisions are reported and disclosed to the public on the ARP's website. The purpose of this is to inform all interested parties on the decisions made. These decisions are often used by third parties as guidance for similar cases and circumstances.

The decisions are only available in Portuguese.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

According to the Code of Conduct, companies and advertisers in general should be aware of specific areas such as:

- (a) sales promotion (which applies to commercial communications for marketing proceedings and techniques used to make the products more attractive);
- (b) sponsorship;
- (c) direct marketing; and
- (d) other forms of advertising (commercial communications) that use interactive or digital means.

In terms of advertising that uses interactive or digital means, it is necessary to consider the Good Practice Guide of Digital Marketing Communications and Online Behavioral Advertising issued by ARP.

Companies using alcoholic products in advertising should be aware of the Self Regulation Code of Commercial Communications for Alcoholic Drinking, also issued by ICAP.

2.7 Are there any other self-regulatory systems that govern advertising practices in Portugal?

There are no other self-regulatory systems that govern advertising practices in Portugal.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Portugal (eg, consumer protection laws; IP laws; unfair competition laws)?

The basic laws governing advertising claims in Portugal are:

- (a) Portuguese Advertising Code (Decree-Law 330/90 of October 23);
- (b) Portuguese Consumer's Protection Law (Law 24/96 of July 31);
- (c) Portuguese Electronic Communications Law (Law 5/2004 of February 10);
- (d) Law for Personal Data and the Protection of Privacy in Electronic Communications (Law 41/2004 of August 18);
- (e) Postal Advertising Law (Law 6/99 of January 27);
- (f) Audio-text Advertising Law (Decree-Law 175/99 of May 21);
- (g) Law for Unfair Commercial Practices (Decree-Law 57/2008 of March 26);
- (h) Portuguese Industrial Property Code (Decree-Law 36/2003 of March 5);
- (i) Competition Law (Law 19/2012 of May 8);
- (j) Distance Selling Contracts (Decree-Law 24/2014 of February 14);
- (k) General Contractual Clauses (Decree-Law 446/85 of October 25);
- (l) Legal Regime for Individual Restrictive Practices of Commerce (Decree-Law 166/2013 of December 27);

- (m) Legal Regime for the Sale and Warranties of Consumer Goods (Decree-Law 67/2003);
- (n) Legal Regime for the Right to Compensation for Competition Law Infringements (Law 23/2018); and
- (o) EU Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR) (Regulation 2016/679/EU).

3.2 Is substantiation required for advertising claims?

According to the Advertising Code, any statement related to the origin, nature, composition, propriety, and acquisition or condition of goods or services advertised must be accurate and susceptible to proof, at any time before the competent authorities.

In practice this means any advertising claim requires substantiation.

Additionally, the ARP's Code of Conduct (article 12), determines that any advertising allegation, illustration and/or description must be capable of being proved by the advertiser.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Advertising should be honest; truthful, and should not mislead consumers regarding the product that is being advertised.

Objective claims regarding the product or service that is being advertised will always require substantiation. However, in the case of subjective statements (eg, puffery) where a subjective claim is made, it may be deemed admissible not to have substantiation.

A statement that someone has 'the best product' may be considered legal. However to compare that product with another from a competitor may render such statement illegal. Comparative advertising does not follow the mandatory rules (see question 3.8 below).

3.4 What are the rules governing the use of disclosures in advertising?

Under the Advertising Code, any disclosures in advertising should be true, legal, and should not mislead consumers. Also, any disclosure should be clearly visible and preferably written in the same orientation as the main message of the advertisement in a readable size.

There are specific rules for some types of products and services (see questions 5.1 and 5.2 below).

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

According to the Advertising Code, testimonial advertising should be made of personalized, genuine and provable statements. The use of non-personal statements is permitted when those statements are not made by a specially qualified person.

The ARP's Code of Conduct states, in article 18, that advertising should not represent any person, or refer to him/her, without prior authorization from that person.

For television purposes, it is mandatory that endorsements are identifiable as such, at the beginning, restart (if any) and at the end of any program.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules governing the use of product demonstrations in advertising.

However, according to the Unfair Commercial Practices Law, an insufficient demonstration of a product may be considered misleading and subject to monetary fines.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted under the terms of the Advertising Code. However, it is only admitted when it:

- (a) is not misleading;
- (b) compares goods or services that are for the same purpose or that apply to the same needs;
- (c) objectively compares one or more essential characteristics of goods or services;
- (d) does not induce confusion in the market between professionals and competitors;
- (e) does not discredit or denigrate trademarks of competitors;
- (f) does not unlawfully use the name of a competitor trademark; and
- (g) does not present a product or service as being an imitation or reproduction of a product or service whose trademark is duly registered.

ICAP's Code of Conduct also establishes rules and guidelines for comparative advertising which are similar to those in the Advertising Code.

Pursuant to the Unfair Commercial Practices Law, any commercial practice that creates confusion with any product or service; trademarks; commercial names; and other signs of a competitor is prohibited.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

According to the Advertising Code (article 16 para 2(d), (e), (f) and (g)), comparative advertising can only be made using a competitor's trademark or product if the advertising does not discredit or denigrate the competitor's trademarks (comparison of objective facts). The advertiser cannot take unfair advantage from the name of a trademark or any other distinct signs from a competitor.

It is not possible to present a good or service as being an imitation or reproduction of a good or service whose trademark or commercial name is protected.

Finally, it is not possible to make comparative advertising that may generate confusion in the market:

- (a) between professionals,
- (b) between the advertiser and a competitor, or
- (c) between other trademarks, commercial names or other distinct signs, goods or services of the advertiser and those of a competitor.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

As mentioned above, any references or claims to geographic origins of goods and services advertised must be accurate and susceptible to proof, at any time, before the competent authorities, pursuant to Article 10/2 of the Advertising Code.

Every commercial practice that contains false or in any way misleading (including its general presentation) information regarding the product or service’s origin is considered to be an unfair commercial practice, in accordance with Decree-Law 57/2008, subject to fines up to €44,891.81 for a company and €3,740.98 for an individual.

The Industrial Property Code regulates, in Chapter VIII, the protection for designations of origin and geographical indications, and the national and international registry process. This registry grants an exclusive right to oppose any third parties that suggest their product has that origin and to authorize or deny to third parties the use in any public claims of the designation of origin or geographical indication.

3.10 Are there any special rules governing product packaging?

The Portuguese Advertising Code does not have special rules governing product packaging; its general rules apply.

However, there are some additional special rules applicable to product packaging, namely those regarding price advertising (see answer 4.1 below) and labelling for foodstuffs (under Decree-Law 26/2016 of June 9 and Decree-Law 167/2006 of July 7, last amended by Decree-Law 54/2010 of May 28).

4 PRICE ADVERTISING

4.1 What are Portugal’s rules regarding price advertising?

Decree-Law (138/90 of April 26) (Regime for the Indication of Retail Prices) and Decree-Law (10/2015 of January 16) (Regime for the Commercial Practices with Price Reduction) contain provisions in connection with price advertising.

Prices should be indicated in digits, through a visible, easy and perfectly legible means using signs, labels or lists in order to adequately inform consumers.

‘Signs’ are to be used to indicate the price of a single good or service. ‘Lists’ are to be used to indicate the price of several goods or services. A ‘label’ should be used on the product packaging. Lists can only be used when the nature of the goods and services makes the use of signs and labels materially impossible or as complementary mean of price marking.

The price should be located near the product to avoid misleading consumers. The total price of the products should be made in a clear and visible manner, expressed in Portuguese coin (euro), including all applicable taxes and fees. Joint selling should indicate the total price, the number of pieces and, when possible, the acquisition of isolated pieces and the respective price of each one. Batch sales should also indicate the total price, the composition of the batch, and the price of each one of the units. Where products are offered for sale together, the total price and the number of units

must be indicated and, when the purchase of single units is allowed, the price of each unit must also be identified.

4.2 What are Portugal's rules regarding advertising 'free' products?

The self-regulatory Code of Conduct of the ARP advises that the term 'free' can only be used when the consumer does not have to pay more than the indispensable cost to respond to the commercial practice. It is possible to obtain a free product (premiums and gifts) when acquired with the purchase of another product if the cost of the product that was not free was not increased for the purpose of covering the total or part of the offer cost.

Additionally, advertising cannot mislead consumers. For example, when an advertiser refers to a certain product as 'free', if the consumer has to pay more than the indispensable cost to obtain the product, or if consumer has to pay for its delivery, packing, packaging, handling or administration charges, then that would be misleading to consumers and not permitted.

To comply with Consumer Protection Law, it is necessary to provide and disclose, by any means, to the consumer all information before the contract is entered into, including whether the product is considered a 'free' product.

4.3 What are Portugal's rules regarding sales and special offers?

According to the Regime for the Commercial Practices with Price Reduction legislation, sales can take place at any time of the year so long as the sale period, taken over the year as a whole, does not exceed 4 months.

In respect of sales, it is forbidden to use products specifically acquired for such purpose. It is assumed that products acquired or received in the commercial establishment for the first time, or in the month preceding the reduction period, have been so acquired.

Sales are subject to a trader's statement, addressed to the Portuguese Authority for Economic and Food Safety (ASAE).

Sales with price reduction (rebates) must clearly indicate:

- (a) the sale category,
- (b) the type of products,
- (c) the respective percentages of reduction and
- (d) the starting date and respective duration.

It is forbidden to sell with price reduction products which are acquired after the starting date of the sale with reduction, even if the price at which they will be sold is the same as that which is being practiced during the reduction period.

As regards benchmark prices, the price reduction must be real by reference to the price previously charged for the same product or by reference to the price to be charged after the price reduction period. The reduced price setting must be in accordance with the 'selling at a loss' prohibition framework, with the exception of sales and liquidations.

There are other regulations in this law—concerning price display in commercial establishments, trader’s obligations, product substitution and defective products—that must be complied with.

The legislation also defines sales in terms of ‘promotions’ and ‘liquidation’. Promotions can occur at any time but cannot coincide with a sales period. ‘Liquidation’ activity can only take place in situations where there has been a judicial decision, termination of commercial activity, change of commercial sector, transfer of the commercial establishment, execution of works, or damage caused by force majeure.

4.4 What are Portugal’s rules regarding rebates?

The legislation referred to in question 4.3 also applies to rebates (sales with price reductions). It is necessary to clearly indicate

- (a) the sale category,
- (b) the type of products,
- (c) the respective percentages of reduction, and
- (d) the starting date and respective duration.

It is forbidden to sell with price reduction products acquired after the starting date of the sale with reduction, even if that price will be the same as that practiced during the reduction period.

Pursuant to the Legal Regime for Individual Restrictive Practices of Commerce, it is forbidden to offer for sale or to sell certain goods to a company or consumer at a price lower than their effective purchase price, which is defined to include any applicable taxes and, where appropriate, the transportation-related fees and charges.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

There are no other key restrictions which advertisers should be aware of regarding retail advertising practices.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Under the Portuguese Advertising Code and the Codes of Conduct and guides to key practice drafted by the ARP (eg, the self-regulatory Code of Conduct, the Self-Regulation Code for Commercial Communication of Food and Beverages directed at Children and the Code of Self-Regulation for the Commercial Communication on Alcoholic Beverages—Wines and Spirits), there are specific rules for alcohol, medicines, weapons, vehicles, gambling, educational courses and tobacco. The rules relate not only to the means by which these products/services are advertised, but also the public to which they may be advertised. For example:

- (a) For alcoholic products, there are specific periods when advertising may occur.
- (b) It is forbidden to advertise medical treatments and medicines subject to medical prescription.

- (c) Advertising containing situations or suggestions of the use of vehicles that may threaten the personal safety of the user or third parties is not permitted.
- (d) It is not permissible to advertise weapons or any other objects that can be used as a weapon.

Additionally, there are restrictions in relation to advertising in schools or advertising directed at minors. The advertising of alcohol, tobacco, or pornographic material in any school, or in any publication, program or activity specially directed to minors is forbidden.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

The Unfair Commercial Practices Law states that any type of commercial conduct that may mislead consumers is forbidden. Some examples of misleading conduct include:

- (a) giving false information about the product or service being advertised;
- (b) giving incorrect information on the nature or characteristics of the product;
- (c) giving a specific advantage regarding the price;
- (d) giving false promises of a prize; and
- (e) advertising a product or service as being 'free' when the delivery of said good or service is subject to the purchase of another product.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Pursuant to the rules of the Advertising Code, any obscene language or pornographic content is prohibited in advertising addressed to any school establishment, as well as any publication, program or activities specially directed to minors.

Additionally, Decree-Law (254/76 of April 7) (Publication and commercialization of Pornographic content) determines that such establishments cannot display in their shop windows or in public places obscene products or use names, expressions or figures that may be considered as offensive to public morality. The establishments themselves cannot be installed within 300 meters of educational establishments or locations that exist for the collective use by children.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

According to ARP's self-regulatory Code of Conduct, it is specified that the advertiser's and the sponsor's identities should be evident in any advertising. This is in order to allow consumers to easily identify them and to contact them if necessary.

Additionally, under the Portuguese Consumer Protection Law, to enable the identification of the advertiser/sponsor of the advertising, consumers have a right to be duly informed about suppliers or service providers. Such information should include their name, firm, head office and telephone number.

An exception to the obligation to identify the advertiser is when the sole purpose of the advertising message is to obtain attention for future commercial communications/advertising (eg 'teaser advertisements'). However, it is necessary to identify the advertiser/sponsor in the subsequent communication.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Under the Television and Audiovisual On-Demand Services Law, product placement is only allowed in movie theaters, home movies, TV series, audiovisual on demand services, sports programs and light entertainment programs. It is not permitted to have product placement in children programs.

The content of the programs containing product placement cannot, in any event, be influenced so as to affect their respective responsibility and their editorial independence.

All programs with product placement should identify such product placement at the beginning and end of the program, and whenever they restart after breaks for advertising purposes.

The product placement cannot give unjustifiable importance to products, services or trademarks. For example, product placement should not be made where it is not justified for editorial reasons or purposes. Product placement should not be done in a way that misleads consumers as to the nature of that product or product placement.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

As explained above, for product placement purposes it is necessary that all programs with product placement should be identified as such in the beginning and in the end of the program, and whenever they restart after breaks for advertising purposes.

The Television and Audiovisual On-Demand Services Law states that for product placement purposes there are no limitations as to the transmission time.

Furthermore, for interactivity purposes, it is possible to include advertising spots in television programs which allow users to transition to an interactive environment with advertising content. However, users should be duly informed of this possibility.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Portuguese legislation does not have any additional special rules governing the use of social media for advertising purposes.

The general rules and principles on advertising explained above, including those stated in the Advertising Code, are applicable to advertising in social media. For example the principles on:

- (a) lawfulness;

- (b) identification;
- (c) truthfulness;
- (d) respect for consumer rights;
- (e) health and safety; and
- (f) the use of Portuguese language.

It is necessary to take into consideration the self-regulatory Code of Conduct of the ARP and the respective Guide of Good Practices of Digital Marketing and Online Behavioral Advertising. When an electronic communication can be directed to a consumer with a commercial purpose, all the information on the advertised product should be made explicit.

Also, advertisers should take appropriate measures to ensure that the commercial nature of the social media website is duly and clearly identified as such, and that the rules and acceptable commercial behavior (under the general rules for advertising) are respected.

Moreover, it is important to refer to some of the provisions of the Portuguese Civil, Criminal and Authorship Rights Codes, which contain some important rights and limitations to some marketing practices used in social media, eg regarding:

- (a) defamation/libel; or
- (b) the use of a person's image;
- (c) the use of third-party content or of User Generated Content, etc.

In certain situations, privacy laws and personal data protection laws, should also be taken into consideration, especially those regarding privacy in the electronic communications sector that may apply to online marketing activities.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

As per the Portuguese E-Commerce Law, the intermediary provider of a server storage service shall only be liable for the information stored, under the common rules of civil liability, where it has knowledge of an obviously illegal activity or has information of such an activity and does not act expeditiously to remove or to disable access to such information.

The service provider shall be civilly liable when it is or should have been aware of the illegal nature of the information stored on the server. The advertiser is essentially considered to be a service provider that 'hosts' or 'stores' user generated content. Therefore, the advertiser may be held responsible for advertising claims made by user generated content if it falls under one of these situations.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

We are not aware of any key court or self-regulatory decisions regarding the use of social media and user generated content. However, there are general decisions that do not specifically refer to the use of social media or user generated content, though they do involve social media sites.

In 2012, ICAP gave a decision which related to the use of several media, including social media (Facebook) for the advertising of a perfume, under a 'teaser advertisement' form. It was considered that the advertiser allowed the teaser to prevail for a long time. Consumers were potentially confused as to whether it really was an advertising campaign or if it was a real situation. ICAP's Ethics Jury considered that the advertiser infringed the applicable principles for teasers, especially regarding the trust that consumers have in advertising.

This decision confirms that the normal rules of advertising apply equally to social media.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

According to the Portuguese Advertising Code, any kind of advertising that uses any image or words of any person without their prior consent is forbidden.

Additionally, under the self-regulatory Code of Conduct of the ARP, a commercial communication should not, unless prior authorization has been obtained, describe or refer to the personal goods of any person in order to insinuate that that person has made some kind of recommendation as to the use of the product that is being advertised.

The Portuguese Civil Code defines an individual's name, picture, likeness, voice and identity as personality rights. Personality rights are subject to a restrictive protection under Portuguese legislation. Pursuant to this, a person's image cannot be exposed, reproduced or launched into commerce without that person's prior consent. Any commercialization that affects a person's honor or reputation, without their consent, is prohibited.

To use the image of a deceased person, it is necessary to require prior authorization from the living heirs of that person.

9.2 Are there situations when permission is not required?

There are no situations at present where permission is not required to use a person's image.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Under Portuguese legislation, the collection of images of historic places is subject to prior authorization from the General Directory of Cultural Patrimony.

The collection of images of historical places, for advertising purposes, is subject to a payment of a fee to the General Directory of Cultural Patrimony. The use of the collected images has to be specifically for the purpose communicated and authorized by the General Directory.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

It is permissible to use other companies' recognizable products in advertising when previously authorized to do so by such other company, or when the advertiser does not give the other company's product relevant importance.

The self-regulatory Code of Conduct of the ARP determines that it is not permitted to make an unjustified use of names, logos or trademarks of any other entity or institution. Additionally, the advertiser should not, in any case, take unfair advantage of the reputation of a name, trademark or any other element of intellectual property related to another entity, person or institution, not even to take advantage of the notoriety obtained through other marketing campaigns, without obtaining their prior authorization to do so.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Portugal which affect advertising (eg, Swedish gender equality law)?

Under Portuguese culture and legislation, advertising is forbidden if it:

- (a) affects values, principles and fundamental institutions;
- (b) negatively uses institutions, national or religious symbols or historical characters;
- (c) incites violence, or any other illegal or criminal activity;
- (d) contains any discrimination related to the race, language, territory of origin, religion or sex or content that may be offensive to human dignity;
- (e) uses any image or words of any person without their prior consent;
- (f) encourages behaviors against nature;
- (g) contains any ideas of syndical, political or religious content;
- (h) uses foreign language, even if together with Portuguese language, if the recipients are not exclusively or in majority speakers of that foreign language;
- (i) encourages any behavior that is harmful to the health and safety of consumers;
- (j) is specifically directed to minors and does not consider their psychological vulnerability; or
- (k) has minors as main participants of the advertisement, when there is no direct connection between minors and the advertised product or service.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

Although Portugal is a secular State, the population is mainly Catholic and it is advisable to take into consideration Catholic principles.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Portugal?

There is no other advice or cautions we would give to advertisers in Portugal beyond those mentioned above.

PUERTO RICO

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Puerto Rico?

Advertising in Puerto Rico is mainly regulated by statute under Title 10 (Chapter 17) of the Laws of Puerto Rico Annotated and by the Regulation against Deceptive Practices and Advertisements (RADPA) of the Department of Consumer Affairs (DACO).

Furthermore, due to its status as a Commonwealth of the United States, federal law also applies in Puerto Rico, as it does in the mainland. Federal law regulates commerce and trade (including advertising) through the Federal Trade Commission (FTC). The federal trademarks law, also known as the Lanham Act, imposes additional restrictions to advertising as well.

Certain specific advertising practices are also regulated through federal and state law, as further explained below.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

RADPA defines advertisement as any oral, written, graphic, pictorial, electronic or other manifestation, made with the purpose of offering, describing or in any other way representing a good or service or some aspect of a good or service.

Under federal regulation, 27 C.F.R. § 4.61, the term advertisement ‘includes any written or verbal statement, illustration, or depiction which is in, or calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail, whether it appears in a newspaper, magazine, trade booklet, menu, wine card, leaflet, circular, mailer, book insert, catalog, promotional material, sales pamphlet, or any written, printed, graphic, or other matter accompanying the container, representations made on cases, billboard, sign, or other outdoor display, public transit card, other periodical literature, publication, or in a radio or television broadcast, or in any other media’.

1.3 What is the basic regulatory framework for advertising regulation?

RADPA sets the basic regulatory framework in Puerto Rico. It delimits the concept of ‘advertisement’, imposes requirements to its practice in Puerto Rico, and provides the corresponding remedies and/or fines for its violation. DACO’s administrative determinations under RADPA are subject to judicial review.

Federal law is broader. Various sections of the Code of Federal Regulations (CFR) regulate advertising of alcohol, over-the-counter drugs, tobacco, supplements, food, energy savings, internet, leasing and credit facilities, pricing, sales, and telemarketing. More regulations are added periodically to account for technological developments.

The Alcohol and Tobacco Trade and Tax Bureau (TTB) specifically regulates the advertisement and labeling of alcohol and tobacco products.

The Lanham Act regulates uses of trademarks in commerce including advertisements, for possible violations of false claims, dilution and/or false comparative claims. Claims challenging registration of a trademark may be brought before the United States Patent and Trademark Office (USPTO) and claims for infringement may be brought in federal district courts.

In credit or leasing advertisements, the Truth-in-Lending Act also imposes mandatory rules of disclaimers in loan advertisements.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Yes, Puerto Rico law specifically regulates certain types of advertisement practices. For instance, the Uniform Signs and Advertisements Act of Puerto Rico of 1999 imposes restrictions to the placement of billboards and/or signs in public roads, including the prior procurement of permits in some cases.

Under federal law, telemarketing practices are specifically regulated by the FTC under the Telemarketing Sales Rule and no unsolicited or unauthorized automated voice calls ('robocalls') may be made under the Telephone Consumer Protection Act. The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 prohibits unauthorized and unsolicited email and text message spam. See also question 1.3.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Yes. Puerto Rico law regulates the advertising of:

- (a) **games of chance:** Puerto Rico law imposes upon all government agencies, public corporations, instrumentalities, advertising agencies, television stations, radio stations, newspapers, movie theaters and filmmaking companies that advertise and promote any game of chance, including the Traditional Lottery, Additional Lottery and any other games of chance, the duty of including a message to urge gamblers to do so responsibly and warn them of the risks of compulsive gambling;
- (b) **lease contracts:** a lease contract with purchase option may not declare nor imply that a specific item is available in specific quantities or terms;
- (c) **coffee:** accuracy and veracity when claiming and/or labeling a coffee brand as 'pure local Puerto Rican coffee' is required and strictly overseen;
- (d) **video games:** disclosing Electronic Safety Standards Board (ESRB) ratings is required; and
- (e) **new vehicles:** advertising must use a certain minimum size font for displaying information on the mileage performance per gallon yield, in the city as well as on the highway.

Similarly, under federal law:

- (f) **Tobacco:**
 - (i) **Advertising in print:** tobacco advertising is limited in publications to which children and adolescents are exposed to a black-on-white, text-only format;
 - (ii) **Advertising in audio format (eg on radio):** tobacco advertising is limited to words only with no music or sound effects;
 - (iii) **Advertising in video format (eg on TV):** video formats shall be limited to static black text only on a white background. Any audio with the video shall be limited to words only with no music or sound effects;
 - (iv) **Cigarette advertisements in all formats:** in addition to the above requirements, one of several warnings must appear in the advertising, such as: 'Cigarettes are addictive',

‘Tobacco smoke can harm your children’, ‘Cigarettes cause fatal lung disease’ or ‘Cigarettes cause cancer’;

- (v) **Tobacco brand-identified promotional items** such as caps and T-shirts are prohibited;
 - (vi) **Brand-name sponsorship** of sporting and other cultural events is also prohibited; and
 - (vii) **Manufacturers, distributors or retailers of tobacco products cannot offer any gift** or item (other than cigarettes or smokeless tobacco) to anyone who purchases tobacco products in consideration of the purchase, or to any person in consideration of furnishing evidence, such as credits, proofs-of-purchase, or coupons, of such a purchase.
- (g) **Alcohol:** there are special labeling and advertising requirements for alcohol, which is mainly controlled by the TTB. These products require the use of at least one of a series of warning labels on the product packaging and/or on any advertisement.
- (h) **Credit services:** under the Truth in Lending Act, the advertisement of credit services requires the following to be set out:
- (i) the expected down payment, if any;
 - (ii) the terms of repayment;
 - (iii) the rate of the finance charge expressed as an annual percentage rate; and
 - (iv) the use of the appropriate disclaimers.
- (i) **Prescription drugs:** the Food and Drug Administration (FDA) extensively regulates the advertising of prescription drug. Advertisements must not include any misleading information, and must state any side-effect the drug may cause.

1.6 Are any government pre-approvals required?

Under state law, there are pre-approvals and permits required for the placement of some signs and billboards on public roads and on historic buildings or locations. Also, during election year (every 4 years), the government may not disseminate advertisements without prior approval from the electoral commission under the Electoral Law.

Under federal law, some drug advertisements may be subject to pre-approval from the FDA.

1.7 Does the media pre-clear advertising?

No, the media does not pre-clear advertising.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The main enforcement tool of the Puerto Rico government is DACO. RADPA grants DACO’s Director the power to send out official interpretations as to what facts, acts or situations constitute deceptive practices in advertisements. He may issue notices, orders of do’s and don’ts, cease and desist opinions, and impose sanctions and administrative fines up to the maximum amount allowed by law for any breach of RADPA. The Director may also refer the offender to the Secretary of Justice for possible criminal sanctions.

The FTC enforces the advertising regulatory scheme in the federal sphere, with the exception of prescription drugs which are primarily controlled by the FDA. Remedies include the filing of lawsuits against the violators, the issuance of injunctions and the imposition of fines.

1.9 When does a competitor have a right of action? What are the potential remedies?

Competitors have a cause of action for trademark infringement against a person or entity who, in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his/her or another person's goods, services, or commercial activities. Puerto Rico trademark law mirrors its federal counterpart. As such, parties can seek judicial redress under either or both statutes.

A competitor also has a right of action to sue when a competitor alleges false claims about its or an industry-related product under the Commerce and Trade Act.

A competitor may also bring an action for false advertising under both state and federal anti-monopoly and unfair competition laws.

1.10 When do consumers have a right of action? What are the potential remedies?

If a consumer is harmed in any way by false claims and/or advertisements he/she will have a right of action against the advertiser. One course of action available is to file a complaint with DACO. If upheld, this will typically result in a sanction to the advertiser and entitle the consumer to monetary relief.

Under federal law, individuals and other consumers may file complaints with the FTC that may result in a refund should a case against a deceptive company be successful.

Additional remedies under both federal and state law are available for a disgruntled customer, including lawsuits for physical or psychological tort damages, as well as other causes of action under special laws. See also question 9.1 for the right to take action under Puerto Rico's Right of Publicity Act.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Puerto Rico have a primary advertising self-regulation system?

Puerto Rico has advertising industry associations, such as the Asociación de Agencias Publicitarias de Puerto Rico (AAPPR), and statutory regulations governing the Public Relations industry. However, a detailed, industry specific self-regulation system does not currently exist.

At federal level, the Advertising Self-Regulation Council (ASRC), administered by the Council for Better Business Bureau (CBBB), has the backing of major industry associations like the Association of National Advertisers (ANA), the American Association of Advertising Agencies (AAAA), and the American Advertising Federation (AAF), as well as the Direct Marketing Association (DMA), the Electronic Retailing Association (ERA) and the Interactive Advertising Bureau (IAB). The ASRC runs several programs and initiatives relating to self-regulation in the advertising industry. Some specific areas have their own dedicated program, such as the Electronic Self-Regulation Program (ESRP), the Children's Advertising Review Unit (CARU), the Children's Food and Beverage Advertising Initiative (CFBAI), and the Online Interest-based Accountability Program (the Accountability Program).

2.2 Is there a self-regulatory advertising code? What are the key principles?

Yes. Although Puerto Rico’s main industry association (AAPPR), does not currently have an openly accessible code for advertising, there are various national industry associations that have codes of practice or ethics. For instance, CBBB maintains a Code of Advertising which is binding upon its members. Its Basic Principles prohibit the use of deceptive or misleading advertisements and misrepresentations. An advertiser ‘should always be prepared to substantiate any claims or offers made before publication or broadcast’ and is required to present such evidence to the CBBB upon request.

Additionally, other programs operated under the CBBB have their own priorities and values. For example, CARU has its own guidelines, emphasizing the special attention advertisers must give to protecting children in light of their limited knowledge, experience, sophistication and maturity. Particularly, it encourages advertisers to adopt the view of advertising as a social tool for fostering healthy social behaviors and rejecting those that make use of social stereotypes. The ESRP has its own procedures, tailored to its particular aims, such as enhancing consumer confidence in advertising and marketing by electronic retailing, discouraging advertising and marketing in the electronic retailing industry that contain unsubstantiated claims. And so does the Accountability Program, which focuses on, among other things, transparency, safeguarding consumer data and other sensitive data, and enforcing accountability.

The AAAA has its Standards of Practice, which includes a Creative Code. The document rejects unethical competitive practices that lead to ‘financial waste’, ‘dilution of service’ and ‘diversion of manpower’, among other things.

The AAF, through its Institute for Advertising Ethics, has established its ‘Principles and Practices for Advertising Ethics’, which are based on the maxim that advertising should work toward what is best for the customer, which in turn is best for business. The eight principles can be summed up as promoting high ethical standards of honesty and transparency in advertising, as well as fairness and accountability.

Finally, the DMA publishes the ‘Direct Marketing Association Guidelines for Ethical Business Practices’, that sets standards of ethical conduct and best industry practices. This comprehensive guide covers all forms of direct marketing, ranging from general approaches for offering products to the public, to the relatively novel, and very specific, field of mobile marketing. In addition to providing general guidance to the industry, this guideline is used by the DMA’s Committee on Ethical Business Practice, and industry peer review committee, as the standard to which direct marketing promotions that are the subject of complaint to the DMA are compared.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The Puerto Rico Chamber of Commerce has a private, independent arbitration system open to disputes of commercial nature between members or between a member and a non-member.

At federal level, the ASRC provides mechanisms for individuals and legal entities to submit complaints or questions from any source involving the truth or accuracy of national advertising, or consistency with the Council’s regulations for children’s advertising in a quasi-judicial settings. The process consists of an adversary proceeding, beginning with the filing of a complaint against a national advertiser. A panel made up of members from the CBBB’s National Advertising Division (NAD) or from

CARU, as appropriate, determines the merits of the complaint and either finds no objection to the advertisement in question, or requests the advertiser to withdraw or modify it. Generally, a decision by either NAD or CARU should be made a maximum of 90 days after the initial complaint. The process can be expedited.

A panel's decision is appealable to the National Advertising Review Board (NARB). The NARB's appeal process involves the appointment of a panel of five NARB members, which will review based solely on the information presented during the NAD/CARU proceedings and meetings.

Compliance with decisions is voluntary, and they are not legally binding. However, cases and decisions can be referred to federal or state authorities and released to the media and public.

The ESRP and the Accountability Program have their own review processes, operated under the umbrella of the CBBB's NAD.

2.4 Is the self-regulation system effective? Is it widely used and followed?

No data is publicly available for Puerto Rico Chamber of Commerce arbitral system. However, the ASRC system is well known and has a history of dealings with the FTC. Renowned corporations have been involved in the use of the system too, which has resulted, in some cases, in the modification of language in an advertisement after an adverse ruling from the NAD.

2.5 Are the self-regulatory system's decisions reported?

Puerto Rico Chamber of Commerce's arbitral decisions are not published.

Final decisions made by NAD, CARU and NARB are published at least ten times each year in ASRC's Case Reports, which include the decisions and summaries of other matters pertaining to the cases that were concluded since the previous issue. These Case Reports are available to Members of the ASRC. Additionally, the ASRC issues press releases regarding new decisions, which are available on its website.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

One of the most sensitive areas in which self-regulation exists is children's advertising, which is regulated by CARU. More specifically, children's advertising in food products has become an area of special attention. The Children's Food and Beverage Advertising Initiative, (CFBAI), was created as a voluntary initiative to regulate what type of foods can be advertised to children. Also, online direct response advertising (regulated by the ERSP) focuses on some key issues, including disease treatment and prevention, weight-loss, and product-safety.

2.7 Are there any other self-regulatory systems that govern advertising practices in Puerto Rico?

None as comprehensive and well-known as the ASRC.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Puerto Rico (eg, consumer protection laws; IP laws; unfair competition laws)?

In Puerto Rico, advertising claims are governed by an amalgamation of consumer protection, intellectual property, unfair competition laws, and land use law that stem from both federal and state law. For this reason, advertising claims are governed by a varied and complex combination of administrative law and civil liability.

Puerto Rico has a long history of consumer protection laws. The government of Puerto Rico has, through DACO, issued a number of administrative regulations on advertising claims, such as RADPA. The Puerto Rico Planning Board also regulates construction and land use with respect to billboards.

More recently, intellectual property laws have evolved to regulate advertising claims. For example, Puerto Rico trademark law imposes civil liability on anyone who employs false or fraudulent descriptions, or false designations of origin in advertisements. Similarly, the Puerto Rico statute for right of self-publicity imposes civil liability upon anyone who uses the likeness of another for commercial purposes without first obtaining his or her consent.

Similarly, FTC's regulations protect consumers from deceptive practices, including deceptive comparative advertising, and unfair competition. The Lanham Act also imposes civil liability on anyone who incurs in false and/or misleading advertisements. Notably, this civil liability goes beyond the usual protection of trademark and constitutes a protection to a trademark holder against his competitors. The Federal Food, Drug, and Cosmetic Act also regulates the content of food, drugs, and cosmetics, imposing criminal liability on anyone who, inter alia, adulterates or misbrands a product in interstate commerce.

3.2 Is substantiation required for advertising claims?

In Puerto Rico, DACO requires advertisers to be in a position to sustain and prove all claims and offers before the publication of the advertising.

Similarly, the FTC requires that advertising claims, express or implied, are substantiated on a reasonable basis. FTC may obtain substantiation from advertisers by performing industry-wide research, or on a case-by-case basis by requesting information directly from individual companies.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

As discussed above, both DACO and the FTC require that all claims in an advertisement be substantiated. Further, the Lanham Act's and the Puerto Rico Trademark Act's provisions on false and/or misleading statements are broad and generally applicable to all advertisements. Thus, although general exaggerated statements regarding products are tolerated, the standards of substantiation still apply to all kinds of advertisements.

3.4 What are the rules governing the use of disclosures in advertising?

DACO requires, inter alia, that all advertisements should be written, expressed and presented in such a form as to convey the relevant information about a product free from any ambiguity that is likely to

confuse consumers. Other advertisements, such as those relating to games of chance and smoking, require disclosures as to the health issues or disorders they may cause (eg cancer, addiction to gambling, addiction to tobacco or nicotine, etc).

The FTC requires disclosures in order to prevent advertisements from being misleading. Thus, disclosures should be clear and conspicuous. In general, an advertisement is clear and conspicuous when consumers understand the disclosure in connection with the advertised product or service. Further, the FDA requires that drug advertisements contain a 'fair balance' of the benefits and risks of using the drug.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

DACO requires that all endorsements in advertisements are made truthfully and in the manner alleged in the advertisement. Advertisers may not take the declarations or representations made by the endorser out of context. Advertisers may utilize spontaneous statements made by endorsers but when they use non-spontaneous statements, advertisers are required to clearly and adequately disclose that the alleged spontaneous statement were recreated in a simulated environment. Further, for the purposes of finding advertisements to be deceptive or fraudulent, any statement made by a third party shall be regarded as being made by the advertiser.

The Federal Trade Commission Act (FTC Act) also requires that endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. The endorsement does not need to be phrased in the same words as the endorser unless expressly represented as such. Advertisers are subject to liability for false or unsubstantiated statements made through endorsements and endorsers may likewise be liable for statements they made.

3.6 What are the rules governing the use of product demonstrations in advertising?

Although Puerto Rico law does not have any specific provisions on product demonstrations, standards such as advertising substantiation require advertisers to be truthful when purportedly doing product demonstrations in advertisements.

Furthermore, the FTC Act prohibits advertisers from making misrepresentations or misleading the consumer with regard to any material quality or feature of a product. Product demonstrations are subject to the same standards as other forms of advertising and require, inter alia, that the claims in the advertisement be substantiated. For those claims that do not purport to represent qualities or features of a product, the FTC Act requires that the advertisement includes disclosures to that effect.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Yes, comparative advertising is permitted in Puerto Rico. There is no explicit statutory prohibition of such practices in this jurisdiction. However, trademark infringement and false advertising are actionable under both federal and state law.

Under the RADPA, a merchant may advertise that it offers discounts on the sale of goods and services through price comparisons or that the product that it is selling is cheaper than the one its competitor is selling, provided that the products compared are of the same brand and that the basis for comparison is clearly indicated. Disclosures must be free of ambiguity, with expression of any information

necessary and essential for the quality, guarantee, security, price, size, use or any other characteristic of the good or service so the consumers clearly understand the comparison of prices.

At federal level, the FTC has explicitly endorsed the use of truthful comparative advertising. The important caveat is the term ‘truthful’. Willful or not, creating confusion among consumers through deceitful or inaccurate advertising is one of the principal evils against which the law protects.

Comparative advertising is subject to false advertising claims by disparaged competitors. The applicable statutes for claims are thus the Lanham Act, the FTC Act and the Puerto Rico Trademark Act. In particular, trademark laws protect consumers from comparative advertisements that could cause confusion among consumers as to the nature of the goods and services offered. The important factor under both the Lanham Act and the Puerto Rico Trademark Act is the potential likelihood of confusion among the consumers that might arise from the way a competitor’s name, brand, or trademark are used.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

As previously mentioned, comparative advertising that involves the use of a competitor’s trademark is subject to possible claims under Puerto Rico and federal trademark laws. Comparative advertising that involves the use of a competitor’s copyrighted material is similarly actionable in certain circumstances. Fair use has not been a very effective defense against copyright infringement in advertisements. However, comparative advertising can also function as a defense in copyright infringement cases. The issue is thus whether the copyrighted material in a comparative advertisement fits under the recognized fair use exception.

Note: Federal law exerts exclusive jurisdiction over copyrights. As such, it pre-empts and precludes legislation at state level (including Puerto Rico) on this particular field of the law.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

As of yet, there are no special rules governing general claims relating to the denomination of geographic origin in Puerto Rico. There are, however, special provisions regarding the denomination of origin in the exportation of coffee. Act No 232-2015 provides the scope for designating a coffee as ‘made in Puerto Rico’. The Regulations Against Misleading Practices and Advertisement, Reg No 8599-2015, also expressly state that a misleading practice includes stating, selling or offering products as if they are from the geographic origin of Puerto Rico, when they are not. There are, however, certain benefits pertaining to the geographic origin of products produced and/or manufactured in Puerto Rico. Act No 14-2004 not only defines products manufactured and produced in Puerto Rico, but provides incentives for them.

3.10 Are there any special rules governing product packaging?

Puerto Rico recognizes and abides by the labelling rules and guidelines under the Code of Federal Regulations. Notwithstanding, the Regulations Against Misleading Practices and Advertisement, Reg No 8599-2015, also apply to any product imported or marketed through Puerto Rico. Act 72 of April 26, 1940, also contains provisions concerning fraudulent labelling which are within the scope of provisions provided by the Code of Federal Regulations.

4 PRICE ADVERTISING

4.1 What are Puerto Rico’s rules regarding price advertising?

In Puerto Rico, price advertising is regulated by the Monopolies and Restraint of Trade Act and by RADPA, which aim to:

- (a) control price discrimination;
- (b) promote competition;
- (c) prevent the creation of monopolies; and
- (d) protect consumers from advertisements or practices that create or tend to create a false or deceptive appearance of goods and services offered in trade.

At federal level, price advertising is regulated by the FTC under the FTC Act and through the Monopolies and Combinations in Restraint of Trade Act, which have similar goals to their Puerto Rican counterparts.

4.2 What are Puerto Rico’s rules regarding advertising ‘free’ products?

At both the state and federal level, the advertising and sale of ‘free’ products must be made with extreme care in order to avoid the possibility of consumers being misled.

With regards to the advertisement of ‘free’ products, RADPA provides that prizes and gifts may be advertised with the purchase of any good or service or if certain conditions are met, as long as:

- (a) the price of the good or service is not increased;
- (b) the merchant clearly and adequately identifies the prize or gift and discloses all the conditions and limitations imposed for purchase;
- (c) the merchant clearly and adequately discloses the value of the prize or gift; and
- (d) the prize or gift is handed to the consumer as soon as the advertised conditions are met.

The FTC’s Guides and Trade Practice Rules regulate the use of the word ‘free’ and similar representations to advertise products. When making ‘Free’, or similar offers, all the terms, conditions and obligations upon which receipt and retention of the ‘Free’ item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.

4.3 What are Puerto Rico’s rules regarding sales and special offers?

The FTC’s Guides and Trades Practice Rules also provide Guides against Deceptive Pricing, when comparing the new reduced prices with:

- (a) former prices;
- (b) retail prices;
- (c) prices suggested by manufacturers; and
- (d) other miscellaneous price comparisons.

For additional restrictions under Puerto Rico state law, please refer to the answer to question 3.7.

4.4 What are Puerto Rico’s rules regarding rebates?

RADPA provides that the final price of the item may not be advertised with the rebate if the rebate is not instantly applied to the price when the payment is made. This particular issue is primarily regulated at state level.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

(a) **Bait Advertising:** RADPA provides that to advertise or offer a given good or service as bait, consciously knowing that it is not available, to attract the consumer and attempt to sell him/her another good or service, or discouraging the purchase of an advertised good or service and offer another in substitution, are considered deceptive practices and are prohibited.

The FTC’s Guides and Trade Practice Rules also contain Guides Against Bait Advertising. These guidelines characterize bait advertising as offering to sell a product or service which the advertiser does not intend to sell. Its purpose is to switch consumers from buying the advertised merchandise in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. No advertisement of this kind should be published.

(b) **Price Discrimination:** As noted above, both Puerto Rico and federal law regulate price discrimination in order to promote competition and prevent the creation of monopolies. Any person engaged in commerce cannot directly or indirectly discriminate in price between different purchasers of commodities of the same quality if the effect of this price discrimination may be to lessen the competition or create a monopoly or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Both federal and Puerto Rico law provide limitations regarding the advertising of firearms, medicines, alcohol, tobacco, and child pornography, among other products and services. At federal level, agencies such as the FTC, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and the Federal Communications Commission (FCC) regulate these affairs. In Puerto Rico, the Legislature and DACO address these issues.

(a) **Tobacco:** The distribution of samples of cigarettes or tobacco to minors, or in places where minors are allowed to be, is prohibited. Packages of cigarettes must contain a warning of tobacco’s effects. Commercial promotion is prohibited in theaters, public parks, cinemas, and schools.

(b) **Alcohol:** Advertisements of alcohol should not intend to attract underage consumers, nor be false, misleading, or inconsistent with the approved product labels.

- (c) **Pharmaceuticals and cosmetics:** Advertisements of medicines, pills, cosmetics and drugs in any media requires prior authorization from the relevant federal agencies. Limitations regarding medicine prescriptions and labeling must be fulfilled.
- (d) **Gambling:** Advertisements of games of chance need to include a warning notifying the players about the risks of addiction.
- (e) **Firearms:** Advertisements of firearms should not be unfair or deceptive. Only individuals with license to possess them should advertise firearms, and possible buyers should have a license.
- (f) **Pornography etc:** The advertisement of child pornography is illegal. Indecency, child pornography and violence in videogames, computer games, radio, television and the movies are prohibited.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

- (a) **Telemarketing calls:** Federal law prohibits deceptive practices in telemarketing. To avoid engaging in deceptive practices, telemarketers making advertisements must disclose certain information regarding the company’s name, the fact that it is a sales call and the total cost of the goods and services that are being offered. The ‘pattern of calls’ is also relevant, as it is an abusive telemarketing practice and a violation of the Telemarketing Sales Rule to cause a telephone to ring repeatedly. In addition, the use of pre-recorded telemarketing sales calls—also known as ‘robocalls’—is illegal.
- (b) **SMS:** There is also case law finding that initiating unauthorized or unsolicited automated SMS text messages to mobile telephones or other devices constitutes a prohibited business practice.
- (c) **Spam**—unwanted commercial email—and internet hackers are also regulated.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Obscenity and prostitution are illegal under both Puerto Rico and federal law.

In Puerto Rico, the Penal Code of 2012 bans the possession, exhibition, distribution and advertising of any obscene material and the advertising of pornography as well. The exhibition of obscene pictures in public spaces is also prohibited. The agencies that regulate publicity and communications in different media retain the faculty to enact additional limitations to the transmission of advertisements containing certain obscene material.

Federal law also prohibits the advertising of any material involving sexual exploitation of minors or containing child pornography. It also prohibits any transaction involving obscene matters.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Yes, although some have been declared unconstitutional.

Under Puerto Rico statutory law, printed publications must show the name of the person or corporation that published or edited it. However, both the Puerto Rico Supreme Court and the United States Supreme Court have declared this kind of broad restrictions unconstitutional, to the extent that they limit free speech. Therefore, under RADPA, DACO's Director can request that advertising agencies provide the name and address of the person that induced it to transmit the advertisement, but he cannot request that such information appear in the advertisement.

Federal law further requires that advertisements specifically intended to promote wine, distillates, and malt beverages must include the name and address of the person responsible for the advertisement.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Yes.

From the outset, it must be noted that constitutional issues may arise against prohibitions of certain types of advertisements which contain editorial content. The Supreme Court of the United States has established that prohibiting the distribution of circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free or sold, is unconstitutional, unless the prohibition is limited or applicable to certain situations.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Yes.

Although product placement is not prohibited in Puerto Rico, there are different disclosure obligations that must be complied with by advertisers.

For instance, FCC regulations require networks and television stations to disclose paid placements and list all sponsors. The exceptions to this rule include donated products, nominal consideration in return for product placement, or promotion of realism as the purpose of the product's placement. Motion pictures (even when aired on television), cable programs, and first-run syndication programs are exempt from FCC's sponsorship disclosure rules.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

RADPA grants DACO's Secretary the power to issue written requests to every communication media, advertising agency or its equivalents for the name, residential and postal address of the producer, distributor, seller or person that induced, transmitted or published an advertisement. In case of noncompliance, the social media platform could be held liable.

Furthermore, because the FTC role in protecting consumers from unfair or deceptive practices extends to all types of sales, the provisions of Section 5 of the FTC Act apply to advertising made through the internet, wireless devices, such as cell phones, and pagers. Any rule or guideline promulgated by the

FTC that does not limit its scope to a specific medium is relevant to online activities as well. As the FTC guidelines on online advertising disclosure provides, advertising in social media should not be misleading or unfair, and advertisers should have evidence to support their claims. In other words, online advertising disclosures should be ‘clear and conspicuous’.

Similarly, the FTC has published some guidelines regarding mobile applications, with the intention of assisting developers in complying with truth-in-advertising standards and basic privacy principles. Generally speaking, these tell of the need for mobile application developers to tell the truth about their products, disclose key information, and keep user data secure.

Illegal products or services, such as child pornography, should not be advertised through any social media.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

Mere computer service providers are not considered publishers of the information they distribute, a principle that arguably extends to advertisers. The Communications Decency Act of 1996 (CDA) provides immunity from liability to a wire service provider that passively publishes information supplied by third parties. The immunity extends insofar as the computer service provider does not participate in the creation or development of the published information.

The FTC Bureau of Consumer Protection has determined that any seller is responsible for the claims made about the goods or services they advertise. Third parties could also be liable if they knowingly participate in the distribution of a deceptive or misleading advertisement. Advertising agencies or websites designers are urged to review the information used in the preparation of the advertisement. The FTC evaluates the agency’s participation in the preparation of the advertisement, and whether the agency knew or should have known that the advertisement included false or deceptive claims.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

No key court or self-regulatory decision regarding the use of social media or user-generated content has been issued under Puerto Rico law to date.

Under federal law, the CDA grants immunity to interactive computer service providers for information originated by third-party users of service. Interpreting the CDA’s provisions, courts have held that immunity afforded by the CDA is not absolute, as it may be forfeited if the site owner participates in the publication of illegal materials or invites third parties to do so.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

Until 2011, the use of an individual’s name, picture, likeness and identity in advertising was governed by case law from the Puerto Rico Supreme Court. The Court’s doctrine establishes that the right of self-image emanates from the constitutional right of privacy, which is enforceable among private parties, and that it is ‘a limit to the right of freedom of speech of the citizenship’. In 2011 the Puerto Rico

Legislature enacted the Right of Self-Publicity Act, which codified the prevailing doctrine. The statute provides that any person who uses the image of another person without his or her consent for commercial purposes is liable for damages. This means that any person or entity that uses in any way the name, voice, signature, picture or identity of a third person without authorization shall be held responsible. Given this, no advertisement shall be made depicting someone's image without his/her written authorization. In Puerto Rico the self-publicity right emanates from the civil law, while in the United States the doctrine arises from the common law.

Federal law recognizes both the rights of privacy and publicity. The right of privacy, although developed jurisprudentially, is considered a constitutional one, and has to be balanced against other compelling interests. The right of publicity grants the exclusive right to use one's identity in commerce and promotions. The Supreme Court of the United States has recognized the right of publicity to prevent third parties from unjust enrichment stemming from the unauthorized use of a person's image and identity.

9.2 Are there situations when permission is not required?

Under the Puerto Rico's Right of Publicity Act, there are four situations in which the permission of a person is not required in order to use his/her identity in an advertisement:

- (a) when the image of a person is used without commercial purposes, as in a sports event, a political expression or a in a news report;
- (b) when the individual's permission is not required (eg when the image is used as a parody);
- (c) when the image is used for educational purposes; and
- (d) when the image used is associated to an accessory person.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Yes. Any political party, candidate, or group that wishes to establish a propaganda facility, or start reusing one that is no longer in use, must solicit a permit from the Local Commission, through the Permanent Inscription Board.

In terms of commercials, any government agency that wishes to publish propaganda through public diffusion media during electoral years, must obtain prior authorization from the State Electoral Commission.

Similarly, under Puerto Rico law, any person or entity must obtain permission if they intend to use someone else's image for publicity, marketing or commercial purposes.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

The use of other company's products in advertising is not prohibited either by Puerto Rico or federal law. Such use, however, is bound by the legal constraints (eg dilution, trademark infringement) already discussed above.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Puerto Rico which affect advertising (eg Swedish gender equality law)?

There are certain rules, particular to the local culture, that affect advertising from a legal perspective. Both the Constitution of Puerto Rico and the Constitution of the United States prohibit discrimination based on sex, color, race, birth, social origin or condition, or political or religious ideas. They also provide for a complete separation of church and state. As such, Government publications are limited by these restrictions.

Additional laws that apply to private parties have also been enacted in adherence to these constitutional mandates. For instance, the Puerto Rico Act against Employment Discrimination of 1959, Law No. 100, prohibits the publication of any advertisement with discriminatory content.-The U.S. Equal Employment Opportunity Commission laws prohibit job advertisements that discourage people from applying for a job because of their sex, national origin, race, religion, disability or color.

The DACO Act provides that no agency, department, bureau, office or any subdivision of the Government of Puerto Rico should promote itself in any television program recommended for adults only, such as those portraying sexually explicit material, profane language or violence. This prohibition extends to radio programs as well. Also, under Puerto Rico law, the Government and its agencies are prohibited from publicizing their political campaign plans in any media during election years.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

No.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Puerto Rico?

None.

ROMANIA

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Romania?

Advertising in Romania is regulated by the laws, norms, decisions of the self-regulatory bodies and codes of conduct.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

Pursuant to Law No 158/2008 on misleading and comparative advertising (as amended and supplemented), 'advertising' is defined as 'any form of presentation of a commercial, industrial, crafting or liberal activity meant to promote the sale of goods or services, including immovable property, rights and liabilities'.

The Code of Advertising Practice issued by the Romanian Advertising Council, a Romanian self-regulatory body, defines 'advertising' as 'a form of commercial communication which is made known to consumers by the advertiser through mass-media, usually in exchange for payments'.

1.3 What is the basic regulatory framework for advertising regulation?

Advertising in Romania is regulated by the following main provisions:

- (a) Law No 148/2000 on advertising (as amended and supplemented);
- (b) Law No 158/2008 on misleading and comparative advertising (as amended and supplemented);
- (c) Law No 185/2013 on locating and authorizing offline advertising mechanisms and methods;
- (d) Audiovisual Law No 504/2002;
- (e) Decision No 220/2011 regarding the Regulatory Code of the Audiovisual Content;
- (f) Law No 365/2002 regarding electronic commerce (as amended and supplemented);
- (g) Implementing regulation of 20 November 2002 regarding the application of Law No 365/2002 regarding electronic commerce;
- (h) Law No 506/2004 regarding personal data processing and the protection of private life in the electronic communication sector.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Law No 506/2004 regarding personal data processing and the protection of private life in the electronic communication sector regulates the communications sent through the public electronic communication networks and through the electronic communication services. In addition, article 6 of the General Data Protection Regulation (GDPR), which has direct applicability in Romania, states that a natural person shall receive electronic communications (or any other types of communications) only upon his/hers consent. Additional provisions on commercial communications are regulated by Law No 365/2002 regarding electronic commerce. This law regulates, alongside the GDPR, that electronic communications are forbidden if a natural person did not give his/her prior consent.

Advertising through television is regulated by the Audiovisual Law No 504/2002, and also by decisions issued by the National Audiovisual Council of Romania.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

The following areas are specifically regulated by the Romanian advertising legislation:

- (a) Advertising of alcoholic beverages;
- (b) Advertising of prescription medication;
- (c) Advertising of narcotic and psychotropic substances;
- (d) Advertising of tobacco products;
- (e) Advertising for goods and products for minors; and
- (f) Advertising for guns, ammunition, explosives, pyrotechnical methods and means.

1.6 Are any government pre-approvals required?

Yes, advertising materials for medication given without prescription require prior approval from the National Agency for Medicines and Medical Devices, pursuant to Law No 148/200 regarding advertising.

1.7 Does the media pre-clear advertising?

Pre-clearance of advertising by the media is not a common practice in Romania. Pursuant to Audiovisual Law No 504/2002, the National Audiovisual Council of Romania exercises its right to control the content of programs offered by audiovisual media service providers only after the public communication of these programs.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Depending on the specifics of the legal provisions that have been breached, the following public institutions have power to enforce the advertising provisions:

- (a) National Authority for Consumer Protection;
- (b) National Audiovisual Council of Romania;
- (c) Ministry of Finance;
- (d) Competition Council;
- (e) local government authorities;
- (f) National Authority for Management and Regulation in Communications of Romania;
- (g) Ministry of Health;
- (h) Romanian Advertising Council (but only for its members); and
- (i) National Agency for Medicines and Medical Devices.

1.9 When does a competitor have a right of action? What are the potential remedies?

The applicable legislation grants a right of action to either a legal or a natural person when advertising activities performed by a competitor cause loss/damages. The potential remedies are as follows:

- (a) Banning of the advertising, if it was advertised or will be advertised;
- (b) Stopping the advertising until it is corrected;
- (c) Publishing the decision of the public authority, in whole or in part, and determining how the measures imposed by this decision are to be accomplished;
- (d) Publishing, at the expense of the offender, one or more rectification notices, with the content of the notice having been determined, along with the manner in which it should be distributed.

The competitor affected also has the right of rebuttal.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers have also a right of action when they suffer damages. The potential remedies are stated in question 1.9.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Romania have a primary advertising self-regulation system?

Yes, Romania does have a primary advertising self-regulation system, namely the Romanian Advertising Council (RAC).

2.2 Is there a self-regulatory advertising code? What are the key principles?

Yes, in Romania, there is a general self-regulatory advertising code (RAC Code) and several industry specific self-regulatory advertising codes, as follows:

- (a) Rules on Responsible Commercial Communication for Beer (BR Code);
- (b) Spirits Romania Code of Conduct (Spirits Code);
- (c) Rules for Commercial Communication for Telecom Services and Products (Telecom Code);
- (d) Principles on Responsible Advertising and Marketing Communication on Cosmetic Products (Cosmetics Code);
- (e) Best Practices in Labelling and Advertising for Food Supplements (Food Supplements Code);
- (f) Ethical code for food product advertising targeting children (Ethical food code).

The key principles are stated in the first article of the RAC Code and are the following:

- (a) Communication must be honest, true, clear and decent. Communication must avoid any element able to diminish consumers' confidence in communication in general.
- (b) Communication must not exploit the credulity, lack of experience or knowledge of consumers.
- (c) Communication must avoid any statement or representation which may mislead consumers, including by omission, suggestion, ambiguity or exaggeration, especially in terms of:

- (i) the characteristics or effects of a product, such as its nature, composition, method and date of fabrication, method of execution, field of use, efficiency and performance, quantity, geographical or commercial origin, availability, destination, technical-functional parameters, expected results due to its use or the results and the essential characteristics of tests or examinations carried on it, whether the product meets its purpose etc;
 - (ii) the value of the product and the total price paid by the consumer, as well as the method of calculating the price;
 - (iii) the terms and conditions of delivery, change, return, repair and maintenance of the product;
 - (iv) the warranty conditions;
 - (v) the advertiser's identity;
 - (vi) the industrial and intellectual property rights, such as patents, trademarks, designs and models, brand names etc;
 - (vii) compliance with the standards;
 - (viii) the environmental aspects and benefits of the product or in terms of actions undertaken by the advertiser in favor of the environment;
 - (ix) official recognition or approval, or awards such as medals, prizes and diplomas;
 - (x) its contribution in supporting a charitable, social, cultural action etc.
- (d) The design and presentation of the communication must allow it to be easily perceived visually and auditorily by the consumer. When footnotes are used, they must be of a sufficient size to be easily readable and be shown long enough to allow them to be read.
- (e) The communication must avoid any message that may be considered indecent, vulgar or repugnant in terms of the common sense and sensitivity of consumers.
- (f) The communication must not be hidden or subliminal.
- (g) The communication for a product must not suggest or incite the consumer to give up on similar products, on the grounds that they become unnecessary or improper for use.

The advertisers, the advertising agencies and media entities must ensure that advertisements are designed and presented so that they can be recognized as such.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Yes, the system is mandatory for RAC members, although it merely represents guidance and good practise for non-members.

The correct assessment of the application and compliance with the RAC Code comes under the responsibility of the Ethics Committee. The Ethics Committee takes decisions by majority vote.

Any person or legal entity or any State authority can file a complaint with the RAC. Complaints submitted to the RAC must be in writing and can be sent by fax, mail or e-mail. The RAC Office files complaints when received, and within 24 hours:

- (a) informs the Board;
- (b) contacts the party concerned by the complaint, which shall receive the text of the complaint and the respective documentation and will be asked to state its official position regarding that complaint within 48 hours as of the date of communication of the complaint;

(c) recommends that the case be solved amicably.

Any member of the RAC can refer himself a matter concerning a commercial communication. The complaint is notified to the RAC Office, which shall immediately inform the Board on the case. The Board will decide, by vote, if the Ethics Committee will be held to consider that communication.

Within 48 hours after filing the complaint, the RAC Office shall schedule the meeting of the Ethics Committee, to be held no later than four days after filing the complaint. If, within 24 hours from sending the convocation message, the Ethics Committee members do not express their availability to participate in the meeting, the RAC Office will draw lots for the five members who will complete the Ethics Committee, ensuring that there is no conflict of interest. Once it has been constituted, the parties are informed as to its structure and are invited (though not obliged) to participate at the meeting.

The RAC Office forwards the complaint and all documentation available to the members of the Ethics Committee. The members of the Ethics Committee have the obligation to maintain the confidentiality of the materials, debates and individual vote. If the gathering of additional evidence is necessary, the Ethics Committee shall contact the RAC Office, which shall act immediately and without formalities to obtain additional evidence and documents. Once this has been done, the RAC Office shall make the material available to the Ethics Committee.

At any time, the Ethics Committee can require the advertiser to provide documents to support the veracity of the data, descriptions, statements, illustrations and testimonials made in the advertisement. The advertiser must provide the information and documents requested within the time limit set by the Ethics Committee.

The Ethics Committee can resort to independent experts to evaluate the documents or hearing of the parties. Experts may be proposed by the RAC Office, the parties or members of the Ethics Committee and must be agreed/validated by both parties involved; if the parties fail to agree on an expert, then he will be appointed and approved by the Ethics Committee, avoiding any conflict of interest. If an expert has been requested to evaluate the documentation, he can be invited to the meeting of the Ethics Committee to present his report. However, he does not participate in the debates of the Ethics Committee.

If the parties are heard by the Ethics Committee, their representatives are invited in turn to present their arguments. They don't participate in the debates and the vote of the Ethics Committee.

In addition, other people, at the request of the Ethics Committee, can attend the meeting, on condition that they respect the confidentiality of the meeting and do not participate in the voting/decision making.

If the Ethics Committee considers that certain matters, others than those which arose in the complaint, may violate the Code, the Committee may, at the request of the party concerned and only if necessary, grant the party 24 hours to support with technical documents the truthfulness of the statements contained in the communication which weren't covered by the complaint. This additional technical documentation will be submitted to the RAC Office, which will immediately make it available to the Ethics Committee. The Ethics Committee will review the additional documentation and vote by email.

In the case of a complaint regarding a commercial communication modified by a decision of the RAC, it is preferable that this be decided by the same Ethics Committee, which may vote by email.

The decision of the Ethics Committee will be transmitted by the RAC Office in writing within 24 hours to the parties involved.

When the Ethics Committee decides that the communication violates the rules of the Code, the Ethics Committee will invite the party concerned to take measures so that that communication will comply with the provisions of this Code.

The period of implementation of the decision is five days. However, the Ethics Committee can require an emergency (ie in less than 5 days) implementation of its decision where the damaging effect of that advertising on consumers is major. The Ethics Committee can extend, for logistical reasons only, the deadline for implementation at the request of the party concerned.

If the matter is amicably settled, the initiator of the complaint must inform the RAC in writing that the matter is settled.

The parties concerned can not use the decisions of the Ethics Committee for advertising purposes. Press releases relating to cases examined by the Ethics Committee are delivered by the RAC Office on request and with Board approval.

The RAC Office will draw up and archive the decisions of the Ethics Committee at RAC headquarters, together with all existing documentation.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The system is effective and is followed by RAC members. Although non-binding, the decisions of the RAC's Ethics Committee serve in most cases as a basis or guidance for the decisions of the local branches of the National Fiscal Administration Agency in dealing with complaints alleging breaches of advertising legislation.

2.5 Are the self-regulatory system's decisions reported?

Yes, but they are not available to the public.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

No, the self-regulatory system covers all three aspects of the industry:

- (a) the Marketers, who invest in advertising;
- (b) the Agencies, responsible for advertising's form and content; and
- (c) the Media, transporting advertising to the audience.

The three parties collaborate directly, establish standards of activity and put in place a mechanism that ensures removal or correction of those advertising communications that do not meet these standards.

2.7 Are there any other self-regulatory systems that govern advertising practices in the Romania?

At this moment, no.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Romania (eg, consumer protection laws; IP laws; unfair competition laws)?

The following main laws govern advertising claims:

- (a) Government Ordinance No 99/2000 on the marketing of products and services on the market;
- (b) Law No 8/1996 on copyright and neighboring rights;
- (c) Law No 84/1998 on trademarks and geographical indications;
- (d) Law No 11/1991 on the repression of unfair competition;
- (e) Law No 193/2000 on unfair terms in contracts concluded between traders and consumers;
- (f) Audiovisual Law No 504/2002;
- (g) Law No 148/2000 regarding advertising (as amended and supplemented);
- (h) Law No 158/2008 on misleading and comparative advertising (as amended and supplemented);
- (i) Law No 185/2013 locating and authorizing offline advertising mechanisms and methods.

3.2 Is substantiation required for advertising claims?

There are no express provisions regulating substantiation in advertising claims; however, if claims are brought before the judicial courts, certain requirements are provided by the Romanian Code of Civil Procedure. These requirements mainly refer to the description of the application's object and the reasoning of the application.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Law No 158/2008 on misleading and comparative advertising regulates that, in case of misleading or comparative advertising, the Ministry of Finance or the National Audiovisual Council of Romania, when notified or *ex officio*, can request the trader which has carried out the advertising activities to provide all the necessary evidence in order to prove the accuracy of the indications or the presentations contained in the advertising messages, without substantiation having been requested from the complainant. Accordingly, Law No 148/2000 regarding advertising provides that the trader that performs advertising needs to be able to prove the accuracy of its statements, indications or presentations contained in the advertising messages and is bound to provide such evidence when requested by the appropriate authorities or institutions.

3.4 What are the rules governing the use of disclosures in advertising?

Disclosures are usually regulated in connection with prescription medication. Pursuant to the Norms for the evaluation and authorization of advertising for medicine for human use, any advertising material must contain at least the following information:

- (a) the recommended dose/administration schedule/specific administration instructions, if any;
- (b) the exact indications of the medicinal product according to the essential information in the summary of product characteristics;

- (c) any special warnings and precautions according to the essential information in the summary of product characteristics; and
- (d) medication contra-indications, according to the essential information in the summary of product characteristics.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

The National Audiovisual Council's Audiovisual Code provides for a general prohibition on celebrity endorsements for medicines and medical treatments. The professional categories that qualify as 'celebrities' pursuant to the code are:

- (a) public figures;
- (b) cultural, scientific, and sports personalities; and
- (c) socialites.

Moreover, some practices are established in Romania with respect to concluding endorsement agreements.

3.6 What are the rules governing the use of product demonstrations in advertising?

Law No 296/2004 on the Consumer Code states that, when placing on the market products that have an extended life cycle, the companies selling them may undertake promotional demonstrations of their use, either in public or in media.

The Consumer Code also requires companies to demonstrate the use and functioning of a product to the consumer, upon the consumer's request at the time of purchase.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Pursuant to Law No 158/2008, comparative advertising is considered legal if it:

- (a) is not misleading;
- (b) compares good and services that meet the same needs or are intended for the same purposes;
- (c) objectively compares one or more essential, relevant, verifiable and representative features of those goods or services, including the price;
- (d) does not discredit or denigrate trademarks, trade names, other distinctive signs, goods, services, activities or the situation of a competitor;
- (e) (in the case of products with a designation of origin) refers, in each case, to products of the same name;
- (f) does not take unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor or designation of origin of the competing products;
- (g) does not present goods or services as imitations or reproductions of goods or services bearing a protected trademark or trade name; and
- (h) does not create confusion between traders, between the advertiser and a competitor, or between trademarks, trade names, other distinctive signs, goods or services of the advertiser and those of a competitor.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

Pursuant to Law No 84/1998 on trademarks and geographical indications, a competitor can use another’s trade mark only where there is a prior, written agreement that grants such competitor the right to use the trademark with the trademark owner’s approval.

Law No 8/1996 on copyright and neighboring rights also states that a prior written agreement is required in order to legally use works subject to copyright.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

Pursuant to Law No 158/2008 on misleading advertising, the characteristics which are most closely considered in deciding whether advertising is considered to be misleading are:

- (a) the characteristics of the goods or services, such as:
 - (i) availability, nature, mode of execution, composition, method and date of manufacture of goods or services,
 - (ii) whether they correspond to their purpose, destination, quantity, technical-functional parameters, geographical or commercial origin,
 as a result of their use or the results and essential characteristics of tests or controls on goods or services;
- (b) the price or price calculation method and the conditions under which the goods are distributed or the services are provided;
- (c) the nature, attributions and rights of the advertiser, such as his identity and assets, the qualifications and the possession of industrial, commercial or intellectual property rights, or his prizes and distinctions.

3.10 Are there any special rules governing product packaging?

The following products are governed by special packaging and labeling rules:

- (a) meat, meat products, fish, eggs;
- (b) milk, butter;
- (c) wine and alcoholic drinks/spirits;
- (d) flour, cocoa products and chocolate;
- (e) vegetable and olive oil, mayonnaise;
- (f) honey and sugar;
- (g) fresh vegetables and fruits;
- (h) canned fruits and vegetables;
- (i) frozen fruits and vegetables;
- (j) dehydrated fruits and vegetables;
- (k) natural mineral waters, bottled water, fruit juices;
- (l) salt and vinegar;
- (m) supplements;

- (n) genetically modified organism;
- (o) eco products;
- (p) traditional food products;
- (q) geographical indications and protected designation of origin; and
- (r) food services.

4 PRICE ADVERTISING

4.1 What are Romania's rules regarding price advertising?

- (a) Romanian rules regarding price advertising are included within several pieces of legislation, as follows:
 - (i) Law No 363/2007 on combating unfair traders' practices in relation to consumers and harmonizing regulations with European consumer law;
 - (ii) Government Ordinance (GO) No 99/2000 on the trading of products and market services;
 - (iii) Government Decision (GD) No 947/2000 setting the methodology for prices indication for the products sold to consumers; and
 - (iv) Order No 194/2015 approving the Norms for publicity of medicines for human use assessment and approval.
- (b) Also, the RAC Code includes some guidelines to price advertising as follows:
 - (i) If price is mentioned in a communication, it must refer only to the product described or promoted by that communication;
 - (ii) If the period of a price offer isn't specified, then the price must be maintained throughout the length of the ad campaign.
 - (iii) Whether the payment for an offer is made in full or in by instalments, the price and the payment terms must be clearly specified in the offer, together with the mention of any additional charges (such as postage, delivery taxes etc) and, when possible, the value of these taxes.

4.2 What are Romania's rules regarding advertising 'free' products?

- (a) Under Romanian law, it is prohibited, and therefore sanctioned, to describe a product as 'free', or 'without costs' if the consumer has to bear some costs, other than the cost of participation in the promotion and transport.
- (b) The RAC Code rules that within an advertisement, an offering may be described as 'free' solely if the consumer pays no more than:
 - (i) the cost of participation in the promotion (eg the current postage, the tax of a normal rate telephone call, the normal cost of sending an email (if necessary), or the normal cost of an SMS);
 - (ii) the cost, including the incidental expenses of any trip by the consumer, if he picks up the free product.
- (c) The terms 'gratis'/'free', 'gift', 'no costs' or others alike can be used only if:

- (i) the offer doesn't imply any obligations; or
 - (ii) the only payment are the costs mentioned above; or
 - (iii) (in conjunction with the purchase of another product) the price of that other product is increased in order to fully or partially include the cost of the offer.
- (d) The costs incumbent on the consumer, others than those expressly indicated above for a 'free' offer, must be clearly specified and include any additional delivery, packing and handling charges.
- (e) If an offer is made on a product and, in order to benefit from the offer, a certain number of products must be purchased, and this information must be clearly indicated.
- (f) If an offer refers to two or more products, of which only one is free, it must be clearly indicated to the consumer which is free and which must be paid for.
- (g) A 'sample testing' mustn't be described as free if the consumer has to pay the cost of returning the goods, unless this information is clearly specified in the offer made to the consumer.
- (h) If samples or gifts are distributed without being requested during a promotion, the consumer must be clearly informed that he has no obligation to pay or return them.

4.3 What are Romania's rules regarding sales and special offers?

Any sale, regardless of its form, means of advertising and motivation must be addressed to all consumers and show, in figures, the difference between the new price and the reference price, excepting:

- (a) price comparison advertising;
- (b) ads that do not contain figures;
- (c) price announcements for the launch of a new product; and
- (d) oral announcements made exclusively in-store, for price reductions for a particular stand/aisle, for a short period of a sales day.

Price comparisons which refer to a special offer have to indicate, clearly and without doubt:

- (a) the offer end date or,
- (b) (if relevant) that the special offer refers only to available goods and services stocks, or
- (c) (if the special offer has not yet begun) the starting date of the special offer period, or
- (d) other special conditions.

4.4 What are Romania's rules regarding rebates?

GO No 99/2000 is the only enactment that deals directly with the issue of advertisements of rebates. The enactment defines several types of sales at reduced prices such as liquidations, sales, and promotions. Advertisements of such sales need to specify:

- (a) the start date of the sale;
- (b) the duration of the sale; and

- (c) the sort of merchandise up for sale under the advertised conditions (this latter condition being applicable if the liquidation is not carried out in relation to the entire merchandise stock).

Article 33 of the enactment sets out the following rules for the advertising of rebates:

- (d) the advertisement must indicate (in figures) the rebate as compared to the reference price (price comparison advertisements, advertisements that do not contain figures, but solely letters, advertisements concerning the launch of a new product, and oral advertisements broadcast in the shop are exempt from this obligation);
- (e) the advertisement may be valid only until the stocks are exhausted;
- (f) the advertisement must be legible and unequivocal;
- (g) all documents attesting to the validity of the rebate as compared to the reference price must be available for verification; and
- (h) any advertisement that is not in accordance with the price effectively charged amounts to a form of misleading advertising.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Retailers selling over the counter medicines for human use, are prohibited from including ads for promotional offers, discounts, price reductions, rebates or special prices within such medicines.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

- (a) Narcotic products (banned for public health reasons);
- (b) Occult services such as voodoo and card-reading, fortune telling and the like (banned for public order reasons);
- (c) Firearms, weapons, and ammunition (banned for social security reasons), except for the places where they are offered for sale. However, there is an exception to this strict ban with regards to weapons for hunting, sport and display, in relation to which advertising is allowed;
- (d) Prescription only (Rx) medicines, medicines without marketing authorization, and medicines which are prescribed and released within the public healthcare system (banned for public health reasons);
- (e) The advertising of OTC Medicines to general public through social media and mobile apps is prohibited;
- (f) Under the Advertising Law, the advertising of alcoholic beverages and tobacco is prohibited if it:
 - (i) is targeting minors;
 - (ii) depicts minors drinking or smoking;
 - (iii) suggests that alcoholic beverages or tobacco products have therapeutic properties or a stimulating or sedative effect or can solve personal issues;
 - (iv) gives a negative image of abstinence;

- (v) points out the alcohol content of alcoholic beverages, as a means to stimulate consumption, or creates a link between alcohol and driving;
 - (vi) (tobacco advertisements only) is not in the Romanian language;
 - (vii) is placed on public transport tickets;
 - (viii) is placed within educational units and healthcare units or within 200m from their entrances (measured from the public road); or
 - (ix) is placed in publications targeting minors, or in theaters/opera/concert halls before, during and after shows targeting minors.
- (g) Explicit advertising for alcoholic beverages is allowed only in newspapers (excepting the first and the last page of the newspaper), radio and television broadcasting, not online; and
- (h) Explicit tobacco advertising it is prohibited during programs broadcast on radio and television.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

- (a) Romanian legislation provides that misleading advertising is prohibited. In determining whether any advertising is misleading, account shall be taken of all its features, and any information it contains concerning:
- (i) the characteristic of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results envisaged and the main features of tests or controls performed upon the goods or services;
 - (ii) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided; and
 - (iii) the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property or the awards and honors.
- (b) Comparative advertising is permitted only as expressly provided (please see question 3.7 above).
- (c) Advertising must be decent, correct and be elaborated in the spirit of social responsibility, therefore it is prohibited for advertising to:
- (i) be subliminal;
 - (ii) prejudice respect for human dignity and public morals;
 - (iii) include discrimination based on race, gender, language, origin, social origin, ethnicity or nationality;
 - (iv) attack religious or political beliefs;
 - (v) harm the image, honor, dignity and private life of individuals;
 - (vi) exploit the superstitions, credulity or fear of individuals;
 - (vii) harm people's security or incite to violence;
 - (viii) encourage behavior that damages the environment; or

- (ix) promote the sale of goods or services that are produced or distributed contrary to legal provisions.
- (d) The Advertising of products and services targeting minors is prohibited if it:
 - (i) contains elements that harm them physically, morally, intellectually or mentally;
 - (ii) indirectly encourages children to buy products or services, taking advantage of their lack of experience or their credulity;
 - (iii) affects the special relationships between minors on the one hand and parents or teachers on the other; or
 - (iv) unjustifiably presents minors in dangerous situations.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Yes, the lawmakers are very strict in terms of advertising regarding sexual services, prohibiting any kind of pornographic commercial communication. Under the Audiovisual Code, advertisements destined for sex-oriented publications and movies or erotic shows may be communicated under the same regime as the so-called 18+ programs. A total ban on advertising is in place regarding erotic hotline services.

The Audiovisual Code defines an obscene audiovisual production as ‘an ensemble of images, sounds, words, gestures, or behavior that are immoral, indecent, trivial, or explicitly or implicitly sexual and which, by their significance, offend morals. Such obscene productions may be broadcast solely between 11pm and 6am’. The code further provides that commercial communications for erotic telephone conversations as well as for sexual products/services are prohibited.

However, commercial communications for erotic publications, movies, or shows may be broadcast following the conditions established for ‘18+ programs’: they will be broadcast within the midnight–6am timeframe and will be duly marked with the ‘18’ emblem.

Moreover, the Audiovisual Code provides that advertisements and teleshopping for products and treatments for sexual afflictions may be broadcast only in the 10pm–6am timeframe and that advertisement and teleshopping spots are prohibited from mentioning therapeutic indications for STDs.

Lastly, it is worth mentioning that both the Audiovisual Law and the Code on the Practice of Advertising stipulate that drinks advertisements are prohibited from implying that alcohol consumption improves sexual performance.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Yes, there are. Under the Romanian legislation, it is mandatory to identify the name of the advertiser/sponsor.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

The Audiovisual Code used to provide that product placement should be identified by specific mention that the respective program contains product placement, as well as by the symbol 'PP' (product placement) appearing on screen at the respective time. This legal obligation lapsed 6 months after the Code came into force, but has been maintained in established advertising practice, regardless of the content of the program and the distribution channel.

Also, in Romania it is common practice (although no legal provision imposing such) that advertising placement in editorial/entertainment content should be identified as such by using a mention of 'Advertisement' or 'Sponsored by' or 'Presented by'.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

No, there are not.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

- (a) The law that regulates the advertising and marketing via social media and other marketing channels is the Advertising Law No 148/2000.
- (b) Law No 158/2008 on Misleading and Comparative Advertising is also applicable, having a focus on consumer protection and the avoidance of unfair commercial practices and the legal indicators to be considered by the Romanian authorities in qualifying a commercial marketing practice as misleading or comparative advertising.
- (c) With a strong focus on EU provisions, Romania has adopted Law No 365/2002 regarding e-commerce. This law regulates the free movement of the information society services, the commercial communications, the mechanism of concluding an e-commerce agreement and the liability of the service providers in the e-commerce agreements.
- (d) Regarding the content of advertising on social media, the following legal provisions are also applicable:
 - (i) Law No 8/1996 on copyright and neighboring rights;
 - (ii) Law No 84/1998 on trademarks and geographical indications; and
 - (iii) Law No 11/1991 on the repression of unfair competition.
- (e) The General Data Protection Regulation (GDPR) regulates the protection of personal data of natural persons when advertising and performing marketing strategies, including, but not limited to, social media advertising. Government Emergency Ordinance No 34/2014 on Consumer Rights in Contracts Concluded between Consumers and Professionals regulates the consumers' withdrawal right from distance agreements.
- (f) Government Ordinance No 21/1992 on Consumers' Protection regulates consumers' rights in relation to the advertising and marketing methods developed by advertisers.

(g) Law No 506/2004 on the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector should also be considered of interest.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

Pursuant to article 18 of Law No 148/2000, the author of the content, and legal representative of the broadcast media are jointly and severally liable with the advertiser if they infringe the provisions on advertising.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

In Romania, numerous complaints regarding data protection legislation infringements have been submitted to the Romanian Data Protection Supervisory Authority. Most of the complaints concern unwanted and unsolicited marketing communications received via social media.

In one high-profile cases, a Belgian court banned Facebook from collecting personal data without prior consent and sentenced Facebook to a fine of €250,000/day of infringement.

In the last few months since the GDPR entered into force, the Romanian Data Protection Supervisory Authority has registered a total of 1,643 complaints and 102 notices.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

The following rules govern the individual’s name, picture, likeness, voice and identity in advertising:

- (a) The Romanian Civil Code (regulates the individual’s right to good name);
- (b) Law No 8/1996 on copyright and neighboring rights.

9.2 Are there situations when permission is not required?

Pursuant to article 89 of Law No 8/1996 on copyright and neighboring rights, the use of a work containing a portrait requires the consent of the person represented in such portrait, under the conditions provided by articles 73, 74 and 79 of the Romanian Civil Code. Moreover, neither the author nor the owner thereof is entitled to reproduce or use it without the consent of the successors of the represented person, for 20 years after his death, in compliance with the provisions of article 79 of the Romanian Civil Code.

Unless otherwise stipulated, consent is not necessary if the person represented in the portrait is a model by profession, or has received remuneration for posing for the portrait.

In addition, the existence of consent is presumed under article 76 of the Romanian Civil Code, when a person discloses personal information or material relating to him/herself to a natural or legal person, and the disclosing party is aware that the recipient is active in the public information industry. In this case, no written agreement is required.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Advertising materials for medication that is available without prescription require prior approval from the National Agency for Medicines and Medical Devices, pursuant to the Advertising Law No 148/200.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Pursuant to the provisions of the Audiovisual Law 504/2002, product placement is forbidden. However, by way of exception to this, product placement is permitted:

- (a) in cinematographic works, films and tv shows made for presentation in audiovisual media services, sports and entertainment programs;
- (b) if no payment is made, but only certain goods or services are provided free of charge, such as the production of props or prizes, for inclusion in the program.

The exemption does not apply to children's programs.

The placement of:

- (a) cigarettes or other tobacco products or products of economic operators whose main object of manufacture or sale is such products and
 - (b) the placing of medicinal products or medical treatments available on prescription only
- is prohibited.

Conditions regarding the implementation of this type of advertising are provided in Decision No 220/2011 on the Audiovisual Content Regulatory Code rendered by the National Audiovisual Council of Romania.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of the Romania which affect advertising (eg Swedish gender equality law)?

Advertising that damages the respect for human dignity or public morals, includes discrimination based on race, gender, language, origin, social origin, ethnicity or nationality, attacks on religious or political beliefs is strictly forbidden pursuant to Law No 148/2000 on advertising.

In a study on Romanian advertising, some preferences of Romanian consumers were identified which can influence advertising:

- (a) Advertisements targeting the elderly that evoke pleasant memories under the communist system;
- (b) Ads referring to specific Romanian foods related to religious events, celebrations and preserving recipes in the family: Such commercials can be used to promote not only food categories, but also wine, beer and mobile phones, because cooking relates to many contexts and consumer profiles. Tradition is essential for building local advertising identity;

- (c) Ads that appeal to tradition, such as the taste of childhood, the smell of fresh vegetables and the time spent with grandparents in the countryside, to highlight the connection between brand history and past consumer experience; and
- (d) Ads related to space and architecture reflecting cultural or historical criteria, displaying representative Romanian buildings, especially in Bucharest (Ceausescu's house, the Revolution Market, the tall Intercontinental Hotel, old aristocratic palaces on Victoria Street, the National Bank, the History Museum, or the Arch of Triumph).

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

As a general rule, the Law on Advertising prohibits any kind of advertising which might go against the religious convictions of some people.

Moreover, under Law No 489/2006 on religious liberty and general regime of cults, in relation to content of any advertisements containing the use of religious imagery/content, advertisers should be aware that any form, means, acts or actions of defamation and religious embezzlement, as well as the public offense to religious symbols, are prohibited.

In the audiovisual media, the Audiovisual Council is endowed with powers to act against persons infringing this rule. For example, in a case involving the use of adapted Christmas carols in a commercial related to mobile telecommunication, the Audiovisual Council ordered the company concerned to stop the communication of the commercial on the grounds that it offended religious views.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Romania?

In consideration of a rather complex legal framework, advertisers should be particularly cautious in ensuring compliance with all applicable legal provisions, depending on the nature, case and specificities of the advertisement.

Also, the practice of the RAC should be observed, preferably from the earliest stages of development of the advertising strategy.

 RUSSIA 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Russia?

Advertising is mainly regulated by Federal laws and acts of the Government and the Federal Antimonopoly Service (FAS) adopted in relation to advertising, consumer rights protection, competition protection and intellectual property.

The FAS is the main body authorized to enforce advertising regulation. It is authorized to oversee compliance with advertising legislation, including: preventing, detecting and restraining violations of Russian legislation on advertising that are committed by individuals or entities; and initiating and considering cases involving violations of the legislation.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

Advertising is thought of as information distributed by any means or in any form, addressed to an indefinite number of persons and aimed at drawing attention to the subject of the advertising, establishing or maintaining interest in the subject of the advertising and promoting it in the market. Whether or not communications directed at a defined list of people, such as marketing emails sent to a direct mailing list, are considered advertising for the purposes of Russian law will depend on the facts.

1.3 What is the basic regulatory framework for advertising regulation?

The following laws form the basic regulatory framework for advertising: Federal Law on Advertising (2006), Federal Law on Drug Commerce (2010), Fundamental Principles of Legislation for Culture (1992), Consumer Rights Protection Law (1992), Federal Law on Fundamental Guarantees of Rights of Children (1998) and Law on Mass Media (1991).

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Russian advertising law establishes special rules for the following types of the advertising:

- (a) advertising on television: the law establishes requirements regarding the duration and volume of the advertising in relation to the duration and volume of television programs and prohibits advertising on days of mourning. Television advertising is subject to strict preliminary control from the TV channel operators. Advertising on subscription and encoded TV channels is prohibited from January 1, 2015;
- (b) advertising on radio: the law establishes requirements regarding the duration and volume of the advertising in relation to the duration and volume of radio programs;
- (c) advertising in periodicals: the law establishes requirements in relation to the comparative volume of the advertising and requires that the material featured is clearly an advertisement;
- (d) advertising distributed in cinema: the law prohibits the interruption of film exhibitions in cinemas with advertising;
- (e) advertising distributed directly to the consumer via telecommunication networks (including sms and e-mail advertising, but not including Internet advertising): this type of advertising is allowed only with the prior consent of the consumer;

- (f) outdoor advertising and installation of advertising structures: Russian advertising law and local laws regulating advertisements in particular cities govern the size and placement of advertising structures and provide for specific approval procedures involving advertisers, the owners of the real estate where an advertising structure will be placed, and authorities; and
- (g) advertising on transport or with the use of transport: the law prohibits using vehicles exclusively or primarily as mobile advertising structures, including redesigning vehicles for advertising purposes, such that the vehicle completely or partially loses its intended function. It is also prohibited to use certain types of vehicles for advertising and to combine advertising on vehicles with any type of audio support.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There are several industries whose advertising practices are specifically regulated by the Federal Law on Advertising, including, the following:

- (a) alcohol advertising: alcohol advertising is strictly regulated. It is forbidden to advertise alcoholic drinks:
 - (i) in periodicals;
 - (ii) in printed media;
 - (iii) via audio and video content, including TV channels and programs, intended for minors;
 - (iv) on the internet;
 - (v) in the vicinity of establishments for schools, hospitals, spas and military organizations;
 - (vi) in all types of cultural places, libraries, planetariums, and within 150m of them;
 - (vii) via all public service vehicles; and
 - (viii) via all outdoor advertising structures such as advertising boards and posters.

All advertising for products with over 5% alcohol content is prohibited except in shops selling the product. There are also various requirements as to the content of the advertisement, for example, it is forbidden to use images of people and animals, to address advertising to minors, or to imply that alcohol may satisfy thirst.

There are also rules in relation to promotion participation which is conditional upon the purchase of alcohol products and the distribution of alcohol products/samples.

- (b) advertising of medicines, medical equipment, diagnostic and treatment methods: there are a number of restrictions related to such advertisements (eg, advertising should not address minors, refer to possible diseases, or be misleading about the necessity of visiting a doctor);
- (c) advertising of biologically active supplements (BAS) and baby food: there are a number of restrictions related to such advertisements (eg, such advertising should not suggest that the BAS is a medicine). The advertising shall be accompanied by information that the BAS is not a medicine. Baby food advertising should not declare that it is an adequate alternative for natural feeding;
- (d) tobacco advertising: pursuant to the recently adopted law on the protection of public health from the effect of tobacco smoke and consequences of tobacco consumption it is prohibited to

advertise tobacco and tobacco products. The following actions are considered tobacco advertising:

- (i) distribution of tobacco and tobacco products for free, including gifts;
 - (ii) providing discount for tobacco and tobacco products prices by any means, including issuing coupons; and
 - (iii) organization of and conducting events and promotions (including lotteries, contests and games), in which participation is conditional upon purchase of tobacco products;
- (e) credit proposal advertising: if advertising of services related to the provision and repayment of credit contains at least one condition relating to cost/value, such advertising should contain all other essential terms of the credit; and
- (f) social advertising: advertising for charities and other social initiatives: this is normally prohibited from featuring commercial branding or products, with a few exceptions, such as mentioning state authorities, charitable non-commercial organizations, and sponsors. (NB commercial sponsors may be mentioned by name only, ie, advertisements must not include their trade marks).

1.6 Are any government pre-approvals required?

As a general rule, no government pre-approvals are required. However, one exception is that the placement of advertising structures should be agreed by the authorities. Usually the main authorized body for approving placement of advertising structures is the Ministry of Internal Affairs, however, in Moscow it is the Department of Mass Media and Advertising of Moscow.

As regards additional authorizations, for example, in Moscow the placement of advertising structures should be also cleared through the Committee for Architecture and Urban Development, State Road Traffic Safety Inspectorate of Moscow, Department of Cultural Heritage of Moscow (in respect of advertising structures that are placed in the vicinity of objects of cultural heritage), Federal Guard Service (in respect of advertising structures that are placed in the vicinity of facilities which are subject to State protection), Department of Culture of Moscow (in respect of advertising structures that are placed in traffic-free zones of city significance) and the Moscow City Transport Agency (in respect of advertising structures that are placed near transport infrastructure).

1.7 Does the media pre-clear advertising?

The general rule is that media is not obliged to pre-clear advertising. However, in reality, the majority of the media conducts strict (and even excessive) control over materials intended for advertising.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The FAS has the right to initiate proceedings for violation of the advertising legislation. Upon considering such cases the antimonopoly body adopts one of the following decisions: to issue orders to eliminate violations of the advertising legislation; to bring the respective legal entity to administrative liability; or to file a case/lawsuit in the court. These decisions may be challenged in court.

1.9 When does a competitor have a right of action? What are the potential remedies?

Competitors have the right of action in the following cases:

- (a) distribution of false, inaccurate or distorted information that may cause losses for the business entity or damage to its business reputation;
- (b) incorrect comparison of the products manufactured by the economic entity with products manufactured or sold by other economic entities;
- (c) sale, exchange or other introduction into circulation of products illegally using intellectual property; and
- (d) unlawful acquisition, use or, disclosure of information constituting commercial, state or other secrets protected by law.

Settlements may be reached directly with the competitor or the matter may be decided in court.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers have a right of action when their rights and interests have been infringed as a result of improper advertising. They may either file an application to the FAS or appeal to the court with claims for damages including lost profits, for damages caused to the health of individuals and/or property of natural or legal persons, for non-pecuniary damage and/or for a request for public refutation of false advertising.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Russia have a primary advertising self-regulation system?

Russian advertising law defines self-regulatory organization in the field of advertising as a recognized association of advertisers, advertising producers, advertisement distributors and other persons established in a form of association, union or non-commercial partnership for the purpose of representing and protecting the interests of its members, developing ethical requirements in advertising and monitoring their implementation.

Currently, there are several self-regulatory organizations, not united in a single system, eg the Advertising Council of Russia, the Association of Advertisers, the International Advertising Association, the National Association of Outdoor Advertising and Information, the Union of Social Advertising Producers and the Expert Council on Advertising.

The Advertising Council of Russia is a member of the European Alliance for Advertising Standards (EASA), which unites 28 national advertising self-regulatory organizations from 26 countries.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The Russian Advertising Code (the Code) was signed on March 21, 2001 by 12 organizations including the National Association of Broadcasters, the Media Union, the Russian Book Union and the Association of Advertisers. The initiative to create the Code came from the Advertising Council of Russia (the Council). The Code was adopted by the Council with the support of media industry associations in 2003 as the first act of a self-regulation system aimed at the formation of a civilized market of advertising, development of healthy competition in the market of advertising, protection of children, prescribing

requirements for certain types of advertising, and basic responsibilities of the companies on the advertising market. The provisions of the Code are largely based on the International Code of Advertising Practice adopted by the International Chamber of Commerce and complemented with ethical standards of pre-existing rules of the customary business practice of advertising in the Russian Federation.

It established basic principles such as honesty, decency, correctness, accuracy and safety and requirements for advertising with regard to children's health and safety and provided criteria for defining slander and simulation.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Self-regulatory organizations may discipline their members according to rules set out in the self-regulatory organization's disciplinary codes, including expulsion from the self-regulatory organization. Under the rules of the disciplinary codes of self-regulatory organizations, the decision imposing a disciplinary sanction is mandatory for all members of the organization, agencies, officials and employees of the self-regulatory organization. Self-regulatory organizations do not have any authority to ensure enforcement of their decisions through state bodies.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The system of self-regulatory organizations provides guidance for its members on ethical and legal issues of advertising, represents them and protects their interests. It is built on voluntary compliance with relevant legislation by its members, as there is no effective way to enforce their decisions.

2.5 Are the self-regulatory system's decisions reported?

There are no requirements to report decisions of the self-regulatory organizations and decisions are not normally reported.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

There are the following key areas:

- (a) compliance with antitrust and advertising regulations;
- (b) compliance with ethical regulations of self-regulatory organizations;
- (c) accommodating consumers' interests; and
- (d) fair practice with regard to competitors.

2.7 Are there any other self-regulatory systems that govern advertising practices in Russia?

Not applicable.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Russia (eg, consumer protection laws; IP laws; unfair competition laws)?

The following basic laws regulate advertising and advertising claims: the Federal Law On Advertising (2006), the Federal Law On Drug Commerce (2010), the Fundamental Principles of Legislation for Culture (1992), the Consumer Rights Protection Law (1992), the Federal Law On Fundamental Guarantees of Rights of the Children (1998) and the Law On Mass Media (1991).

3.2 Is substantiation required for advertising claims?

There exist general requirements for substantiation of advertising claims. Advertising claims may be based on material evidence and written evidence, explanations of the persons involved in the case, expert opinions, expert advice, witness statements, audio and video recordings, and other documents and materials. Specific requirements are established for each type of evidence by the Civil Procedure Code.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Puffery is not specifically governed by Russian legislation. However, all advertising messages must be reliable, trustworthy and based on some public data (eg, research or awards).

3.4 What are the rules governing the use of disclosures in advertising?

Advertising law provides for mandatory disclosure of information with regard to the advertising of the certain types of the products, for example:

- (a) advertising of human milk substitutes and food for infants under 1 year old: advertising should contain information on the age limit of usage of such products and a warning about the need to consult an expert;
- (b) advertising of gambling and betting (including lotteries and prize draws): advertising should contain information about terms of the prize draw/bet and provide information about the organizer, rules of conduct, information about the amount of prize money, number of prizes or awards, the date, place and order of receiving the prizes;
- (c) advertising of securities: advertising should include the name of the issuer and information to be disclosed in accordance with the legislation of the Russian Federation on securities; and
- (d) other disclosures: there are special requirements for disclosure of information with regard to the advertising of financial and mediation services and advertising of products for remote sale.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Any type of endorsement or testimonials should be valid and reliable and supported by documents.

3.6 What are the rules governing the use of product demonstrations in advertising?

Not applicable.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is allowed when it is correct and true. If an advertisement contains phrases such as ‘the best’ or ‘one of the best’, they must be supported by relevant awards or results of relevant independent market research.

The advertiser is responsible for the accuracy of the information not only related to its own activities or products that are the subject of advertising, but also for information related to the activities or products of its competitors, which are not the object of advertising.

Comparative advertising is not allowed when it is based on non-comparable criteria or on incomplete comparison because it distorts perception of the advertised product and does not allow for an objective assessment of its properties.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

Trade marks of another company may be used only with consent of that company. Most media companies placing your advertisement may also request a copy of any trade mark certificate or license agreement.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

There are no special rules that govern claims relating to geographic origin. The main requirement is reliability/truthfulness of information.

In cases, however, where such a claim is protected by Appellation of origin of goods, which is a specific registered means of individualization of goods consisting of geographical name/its derivative, its use by an unauthorised entity, not registered as proper user, will be considered illegal even if the information on the origin of goods is true.

3.10 Are there any special rules governing product packaging?

There are no special rules governing product packaging from the point of view of advertising laws.

Any advertising information placed on the packaging should be compliant with the advertising laws.

4 PRICE ADVERTISING

4.1 What are Russia’s rules regarding price advertising?

Russian advertising legislation does not contain special or detailed rules regarding price advertising, and may be considered as a bit ambiguous in this sphere. It stipulates quite strict general rules for all types of advertising. Any advertising should meet these general requirements, be fair and reliable. Information on the cost or price of the goods, the terms of its payment, the amount of discount, sales and other conditions of purchase of the goods contained in advertising materials should correspond to the facts and should not mislead customers: otherwise such advertising may be considered as unreliable.

It should be noted that all prices shown in advertisements should be specified in Russian rubles, but in case of necessity can be additionally specified in foreign currency.

4.2 What are Russia's rules regarding advertising 'free' products?

As a general rule, 'free' products are not a separate category of products for which special rules shall be applied, so the main requirements for all types of price advertising are applicable. However, there is a prohibition with regard to some products, for example, tobacco and alcohol products.

Pursuant to the recently adopted law on the protection of public health from the effect of tobacco smoke and consequences of tobacco consumption it is prohibited to advertise tobacco and tobacco products. The following actions are considered as tobacco advertising:

- (a) distribution of tobacco and tobacco products for free, including gifts;
- (b) providing a discount for tobacco and tobacco products prices by any means, including issuance of coupons; and
- (c) organization and conducting of events (including lotteries, contests and games), in which participation is conditional upon purchase of tobacco products.

As for the alcohol products, it is prohibited to advertise entertainment event, in which participation is conditional upon of purchase of alcohol products, except for entertainment events conducted for the purpose of promotion of the alcohol products. Advertisements accompanied with sample alcoholic products are permitted, subject to requirements stipulated in Russian advertising law and only within stationary shops.

4.3 What are Russia's rules regarding sales and special offers?

The following terms should be specified in an announcement of special offers or other promotional activity with regard to the acquisition of certain goods:

- (a) timeline;
- (b) information about the organizer of the special offer;
- (c) rules; and
- (d) the number of prizes or awards, and the date, place and order of their distribution.

4.4 What are Russia's rules regarding rebates?

See questions 4.1, 4.2 and 4.3.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Not applicable.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Russian advertising legislation provides for a list of various goods and services prohibited for advertising:

- (a) tobacco;
- (b) products forbidden from manufacture and/or sale in Russia (eg, weaponry, encryption equipment, uranium and products containing uranium);
- (c) narcotic drugs and related precursors, plants;
- (d) explosives (except pyrotechnics);
- (e) human body organs and tissues (for purposes of sale);
- (f) products subject to mandatory state registration, confirmation of conformity, licensing or acquiring of permission, in case of absence of respective permissions; and
- (g) abortion services.

We will briefly run through the list of goods and services banned only for certain types of advertising:

- (a) alcohol: advertisement of alcohol is prohibited:
 - (i) in periodic print media,
 - (ii) in periodic print media for minors,
 - (iii) in audio or TV programs,
 - (iv) on public conveyances,
 - (v) by way of using advertising constructions on roofs, on buildings and so on,
 - (vi) within 100 meters of museums, libraries, children's institutions, sport and educational facilities and related places, and
 - (vii) on the internet.

Moreover, advertising of alcohol containing more than 5% alcohol is allowed in shops only. Advertising of beer and beer-based drinks on TV channels during the broadcast of sport events is allowed, and advertising in periodic print media and by way of using advertising constructions in the form of verbal mark or trade mark of the producer within 100 meters of sport facilities and related places during the broadcast of sport events will be allowed from 1 January 2019;

- (b) prescription-only medicines as well as some medical services: these may be advertised only in specialized exhibitions and conferences. Sampling promotions for medicines are prohibited;
- (c) advertising of products for military purposes: this is prohibited (however, there are certain exceptions to this rule);
- (d) advertising of security papers: it is prohibited to offer these to the public; and
- (e) advertising of gambling: partly prohibited for TV, outdoor and periodical advertising .

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Russian law regulates general types of advertising practices and provides restrictions to certain types, for example, it is forbidden:

- (a) to interrupt a video or movie in cinema facilities with advertising and/or to include advertising during a film via a ticker-tape along the bottom of the screen. However, it is common practice for cinema facilities in Russia to show commercial videos before a movie;
- (b) to use personal communication methods for advertising distribution (eg, automated calling or sending letters from a non-response mailbox). Other advertising undertaken by phone, fax or e-mail is allowed only upon prior consent of the target; or
- (c) to place advertising on transport vehicles owned by operational services, or on vehicles with a permit for transportation of dangerous goods, or to use audio advertising distributed by transport vehicles.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Russian advertising regulations provide for the general rule that advertising must not include any abuses, indecency or obscenity regarding (without limitation) gender, race, nationality, religion, state symbols, objects on the World Heritage List (whether Russian objects or not) or Russian cultural heritage list.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

According to Russian advertising law, the 'sponsor' is a person who provides funds or ensures provision of funds for the organization and/or delivery of sport, cultural or any other events; the creation and/or broadcast of television or radio programs; or for the creation and/or use of other creative products.

As a general requirement for sponsorship advertising, it is prohibited to sponsor goods the advertising of which is forbidden (for example, tobacco products). Note that advertisements for charities and other social initiatives are normally prohibited from featuring commercial branding or products, and trade marks of sponsors of such initiatives. However, the name (but not branding) of a sponsor may be indicated in advertising.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Pursuant to Russian advertising law, it is prohibited to place advertising in textbooks, manuals and other educational materials meant for the teaching of basic educational programs of elementary general, basic general, secondary general education, school record books and school notebooks.

Advertising containing information prohibited from distribution to children is prohibited in educational institutions, children's institutions, medical, spa, fitness and sports organizations, cultural institutions, institutions for recreation and rehabilitation of children, or within 100 meters of the location of such organizations.

The following is prohibited for distribution to children, namely advertising:

- (a) encouraging children to commit acts that endanger their lives and/or health, including self-harm, suicide;
- (b) encouraging use of narcotics, psychotropics and/or intoxicants, tobacco, alcohol and alcohol-containing products, beer and beverages that are based on it, to take part in gambling, prostitution, vagrancy or begging;
- (c) substantiating or justifying violence and/or cruelty, or encouraging acts of violence against people or animals;
- (d) denying family values and promoting unconventional sexual relationships, or encouraging disrespect for parents and other family members;
- (e) justifying illegal behavior;
- (f) containing foul language;
- (g) containing information of a pornographic nature; and
- (h) about minors who have suffered as a result of illegal actions, including personal data of those minors.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Russian advertising law stipulates that it does not apply to references to branding, goods, goods manufacturers or goods sellers which are seamlessly integrated in the works of science, literature or art and which do not constitute advertising information. However, if attention is drawn to a product, its merits or characteristics, this will be considered advertising of the product and as such the various rules and restrictions described above will apply. Advertisements presented as articles in periodicals should carry an 'Advertorial' statement.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There is no special regulation of advertising in social media in Russia. Advertising in social media should comply with general requirement and requirements related to advertising on the internet. That means that e-mails sent from non-response mailboxes or sent without consent of the receiving user are prohibited (see question 1.4).

Alcohol is the only type of product prohibited on the internet. However, regulation of alcohol advertising on the internet is rather uncertain in Russia. In general, any advertising of alcohol is prohibited for distribution on the internet. The FAS has given its opinion that beverages produced or distributed by a company and referred to on the official website of the manufacturer or distributor shall not be deemed advertising. That means the manufacturer or distributor may inform the users about prices and places where alcohol beverages are available for purchase. It is very likely that

communications via social media accounts are acceptable on this basis as well. However, the position on this matter is not clear and, for example, the major Russian social network VKontakte has removed all alcohol advertising since 2012.

Note that control over internet media is increasing in Russia due to the growing influence of this type of media. At the moment, bloggers who have more than 3,000 user sessions per day are recognized as media and therefore must comply with regulations governing mass media. It is believed that these amendments shall be taken into consideration when products and services are advertised by bloggers.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

Advertising published on the internet is strictly regulated in Russia. The administrator/owner of the website is primarily responsible for illegal information published by him. A website may be banned by official authorities due to infringements of advertising regulation. As regards comments posted by users/consumers on a website (eg, a customer review), the administrator/owner will not be liable for such content, provided that the consumer is identified and has not received payment or other compensation for posting the content. The major risks for the administrator/owner are related to anonymous comments, as in this case it will be responsible for those comments. When illegal advertising is placed on a website, the FAS tries to identify the advertiser. However, its main purpose is to stop distribution of illegal advertising. Therefore, it is common for them to request, and for courts to order, the owners/administrators of websites to remove infringing information published anonymously, despite not posting it themselves.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

The recent practice has been that advertising disputes related to social media have been resolved out of court.

Website content is under the control of several state authorities in Russia, such as the FAS and the Federal Supervision Agency for Information Technologies and Communications (FSAITC), which is entitled to inspect websites with respect to information placed on them and make official requests to remove information which fails to comply with Russian law. Therefore, many cases of placing illegal advertising are resolved upon the request of these authorities.

According to recent publications, Facebook and Mail.ru (one of Russian leading internet companies) came to the attention of the FAS due to alcohol or tobacco advertising on their websites.

It was also announced that Facebook was included in a list of infringing entities by the FSAITC in 2013 due to illegal information appearing on its website. The detail of this illegal information was not provided to the public. However, according to publications, it related to smoking products advertised on Facebook, which is prohibited under Russian law. However, the company fulfilled the request of FSAITC and removed this information. No adverse effects for Facebook in the form of a penalty occurred.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

An individual's name or a pseudonym may generally be used with the consent of that person by others in their advertising. However, if someone is used to portray someone else (eg, use of a celebrity's double), although not directly prohibited by the Russian law, this can lead to liability of the advertiser, eg, for misleading advertisement.

Creating an individual's image and further use of it (including his/her photographs as well as videos or works of art, in which he/she is depicted) is allowed only with the consent of the individual. After the death of an individual his/her image may be used only with the consent of the surviving spouse and children and, in their absence, with parental consent.

Advertising which uses the image of an individual without the relevant consent may be ordered to be withdrawn by a court.

If the image of the individual is available on the internet, the individual has the right to request removal of the image, as well as prevention or prohibition of further distribution.

Recordings of an individual's voice may only be used in advertising with consent of the individual except in cases where the recording was made in the course of employment. In that case, the rights to use the recording in any form belong to the employer, unless stated otherwise in the employment contract.

9.2 Are there situations when permission is not required?

With regard to the image of the individual, such consent is not required in the following cases:

- (a) Where the image is used in the public interest;
- (b) the image was obtained by taking photographs in places open to public access or at public events (meetings, congresses, conferences, concerts, performances, sports competitions and similar events), except when the person is the main object of the image; or
- (c) the individual has posed for payment.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Objects on the World Heritage List and Russian Cultural Heritage list are prohibited from usage in all advertising. Other objects of cultural and historic significance may be used, but permission of their owners may be required and is likely only to be granted in return for payment.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

It is prohibited to use recognizable products of other companies if some of the goals of the advertising are the following:

- (a) distribution of false, inaccurate or distorted information that may cause losses to the other company or damage for its business reputation; or
- (b) incorrect comparison of the other companies' products with products or goods manufactured or sold by other economic entities.

In other situations it may be acceptable to use the recognizable products of another company but it is strongly recommended to obtain the consent of the intellectual property owner before doing so.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Russia which affect advertising (eg Swedish gender equality law)?

There are no particular rules in Russia, but we would like to point out the following: the FAS warns that the issue of obscene or offensive advertising is decided by taking into account the circumstances of its location (for example, the location of the advertising structure given the proximity to cultural institutions, objects of worship and cemeteries) and the opinion of the majority of consumers of the advertisement.

We recommend conducting appropriate market research in advance.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Not applicable.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Russia?

We recommend conducting compliance checks for all advertising materials.

 SERBIA 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in the Serbia?

Advertising rules are prescribed by number of laws and regulations. In addition, there are a couple of self-regulatory documents.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

The Law on Advertising defines the advertising as 'any communication in any form that is related to business and/or professional activity and intended to encourage sale of goods and services, sale of immovable property, as well as the transfer of rights and obligations'. Therefore, there are 2 elements to determine whether the particular communication is the advertising: (a) that it is related to the business or professional activity and (b) a promotional element (intention to encourage the selling of products/services).

In addition, the same law recognizes that the rules on advertising are *mutatis mutandis* applicable to other forms of communication that do not fit the above definition, such as:

- (a) publishing of personal messages or other announcements by individuals unrelated to their business and/or professional activity;
- (b) publishing information by government bodies and/or other public authorities within the scope of their activities (such as public invitations, announcements, public campaigns, etc);
- (c) election campaigns and other promotional activities of political organisations;
- (d) publishing of information by associations, trade unions and other legal entities in the scope of activities that do not relate to sale of goods and services;
- (e) provision of information to the general public about activities related to social responsibility campaigns.

1.3 What is the basic regulatory framework for advertising regulation?

The Law on Advertising is the framework law that regulates all the important aspects of advertising, regardless of the type of advertising message or platform for the distribution of the advertisement.

However, there are a number of other laws and regulations that prescribe the advertising of particular goods/services, inter alia:

- (a) Law on Game of Chance which regulates certain aspects of game of chance advertising;
- (b) Law on Medicines and Medical Devices which regulates the advertising of medicines, including the approval procedure of promotional material for medicines and medical devices;
- (c) Law on Medical Devices, which regulates the advertising of medical devices;
- (d) Law on Protection of the Financial Services Consumers, which regulates the advertising of particular financial services provided by banks and other financial institutions;
- (e) Law on Health Protection, that, inter alia, prohibits the advertising of health services, specialized medical treatments and methods of health care;
- (f) Law on Electronic Communications, which regulates certain aspects of the advertising of telecommunication services;

- (g) Rulebook concerning the Nutrition and Health Claims on the Food Declarations, a bylaw which regulates in detail the health and nutrition claims that can be used on the food declarations.

In addition, some aspects that are important for advertising are regulated by:

- (h) Law on Consumer Protection (in particular in relation to the unfair business practice, advertising of the sell incentives etc),
- (i) Law on Commerce (in particular when it comes to the general rules related to the sell incentives and unfair business practice),
- (j) Law on E-Commerce (when it comes to the definition of the information society service provider and its responsibility for the content of the advertisement),
- (k) Law on the Protection of Competition (in relation to the anti-competitive behaviour), laws that regulates the copyright and trademark protection (especially in relation to the comparative advertising),
- (l) Law on Inspection, Law on Misdemeanours, Law on Commercial Offense and Law on Electronic Media (in relation to the proceedings and measures that could be imposed in case of violation of the rules of advertising/marketing communication),
- (m) Law on Geographical Designation etc.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Specific rules are determined depending on the following criteria:

- (a) **The type of advertising platform** (print, electronic media, outdoor and online advertising);
- (b) **The type of goods and services that are advertised** (tobacco and similar products, alcohol, game of chance, medicines and medical products, medical services, attorney services, guns and other fire arms, pornography, food for babies, diet supplements, financial services etc.);
- (c) **The manner of advertising** (in particular, rules relating to direct advertising).

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There are special regulations (or set of rules) relating to the advertising of tobacco and similar products (eg electronic cigarettes), alcohol, game of chance, medicines and medical products, medical services, attorney services, guns and other fire arms, pornography, food for babies, diet supplements, financial services, attorney services etc.

1.6 Are any government pre-approvals required?

Approval of the Serbian Agency for Medicines and Medical Devices is needed when it comes to the advertising materials concerning medicines and medical devices.

1.7 Does the media pre-clear advertising?

In practice, some media perform pre-clearance, and some not. Usually, media agencies (advertising or communication) perform such activity on behalf of their clients.

On the other hand, there are efforts within the industry to organize the self-regulatory body so that it will also perform pre-clearance services (pursuant to the industry guidelines—the Code of Marketing Communications—adopted within the Serbian branch of IAA), which will hopefully become mandatory for members of the self-regulatory body.

Therefore, at the moment, control relating to compliance of the advertising message is mostly ex-post control performed by the controlling bodies (such as Trade Inspection, Health Inspection and Regulatory Body for Electronic Media (REM)).

The exception is in relation to medicines and medical devices, where the Agency for Medicines and Medical Devices pre-approves the promotional material concerning the advertising of medicines and medical devices, which also means that, to some extent, it performs pre-clearance (in relation to compliance with the laws that regulate medicines and medical devices). See also question 10.1 in relation to clearance concerning the usage of national symbols and cultural goods.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Supervision is granted to:

- Trade Inspections;
- other inspection bodies for the advertising of particular products/services (eg Health Inspection or Sanitary Inspection);
- REM (in relation to the audio-visual commercial communication distributed via audio-visual media service providers—TV and Radio); and
- the courts (special civil litigation and misdemeanor/commercial offense proceedings).

The controlling bodies can impose:

- (a) **inspection measures** (the most important of which is the order for temporary removal of the non-compliant advertisement). Appeal can be submitted to the second instance body (competent ministry);
- (b) **measures of warning, temporary prohibition on the publication of the advertisement, revocation of license (more theoretical possibility)**: measures imposed by REM on the audio-visual media service providers (TV and Radio). The decisions of REM can be challenged before the Administrative Court;
- (c) **court order imposed in special civil litigation in relation to misleading and prohibited comparative advertising**: the courts may order a respondent to cease misleading and/or prohibited comparative advertising or may prohibit the respondent from publishing still unpublished misleading and/or prohibited comparative advertising. Appeal can be submitted to the second instance court pursuant to the general rules governing the proceedings in civil litigation;
- (d) **fine for misdemeanor/commercial offense**: the Misdemeanor Court/Commercial Court (pursuant to the Law on Advertising and other laws that regulates the special categories of products and services) may levy such level of fine as is determined by the law/s. In addition to a fine, protective measures such as prohibition of the performing of business activity for certain period can be imposed. Appeal can be submitted to the second instance Misdemeanor/Commercial Court pursuant to the general rules governing the misdemeanor/commercial offense procedure;
- (e) **special procedures for protection of consumers pursuant to the Law on Consumer Protection**—so-called ‘consumer protection dispute’, that can be resolved in out-of-court

proceedings (similar to arbitration and mediation) or before the court (pursuant to the general rules of civil litigation), as well as out-of-court proceedings initiated by the registered consumer protection associations.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor, as any other entity, has the right to file a complaint to the REM or inspection, asking the body concerned to impose the above-mentioned measures. However, it is for the controlling body to decide whether proceedings will be initiated, and whether measures will be imposed.

When it comes to misdemeanors, a competitor can file a request for the initiation of misdemeanor proceedings before a court only if it has status of ‘injured party’, i.e. if its property rights have been violated or threatened to be violated by misdemeanor. In other cases, the authorized bodies (REM, Inspection etc.) can initiate misdemeanor proceedings. In such situations, the competitor can only file a complaint to the authorized body, but the authorized body is not obligated to initiate the proceedings.

Commercial offense proceedings can be initiated exclusively by the Public Prosecutor, except in cases where the Public Prosecutor fails to initiate such proceedings or abandons the prosecution. In such cases, the injured party is authorized to initiate or continue with the proceedings.

The special litigation concerning misleading or prohibited comparative advertising can be initiated by a competitor if its right or interest is threatened or injured by misleading or prohibited comparative advertising. In such cases the competitor may ask the court to order cessation of the misleading/prohibited comparative advertising or to prohibit the publishing of misleading and/prohibited comparative advertising if it is yet to be published. The respondent has authority to appeal against such a court decision pursuant to general litigation rules. In these proceedings the plaintiff cannot ask for compensation for damage caused by the misleading/prohibited comparative advertising. Claims for damages can instead be submitted in separate proceedings pursuant to the general rules of civil litigation.

1.10 When do consumers have a right of action? What are the potential remedies?

Registered consumer protection associations, associations whose objectives relate to the protection and promotion of a certain occupation or profession, and chambers of commerce are also entitled to bring legal action against the advertiser concerning the misleading/prohibited advertising (special litigation).

A consumer could bring legal action in the same circumstances as described for competitors (with a slight difference being that a consumer can also be an ‘injured party’ if his/her personal rights are violated by misdemeanor, not only property rights).

Finally, a consumer is authorized to initiate the consumer protection dispute mechanisms in cases where his/her rights under the Law on Consumer Protection have been violated (see question 1.8).

2 SELF-REGULATORY FRAMEWORK

2.1 Does the Serbia have a primary advertising self-regulation system?

The Law on Advertising recognizes the importance of self regulation in the field of advertising. Pursuant to the Law, self-regulation shall imply a set of rules that define procedures in commercial communication and which includes advertising relating to one or more business procedures or industries, and/or professional rules, the formulation, acceptance, implementation, monitoring of

implementation, and review of which are in the competence of all participants in advertising, i.e. associations of advertisers, producers and advertising platforms and which are laid down in accordance with this law and special regulations.

However, there is still no fully implanted self-regulatory system in Serbia.

The Law on Chambers of Commerce has established so-called ‘courts of honor’ (that are operating within the Serbian Chamber of Commerce and Industry, as well as within other chambers that exist in Serbia). The court of honor has responsibility to decide on violation of good business practices and business ethics (set out in the Code of Business Ethics—a set of self-regulatory rules adopted within the Serbian Chamber of Commerce). However, it is not a true self-regulatory body in the field of advertising, given that:

- (a) it is founded by the law (not by the initiative of the industry),
- (b) the scope of its work is related not only to the violation of the good business practices in the field of advertising (it is related to the unfair business practice in general), and
- (c) it doesn’t provide pre-clearance services (which are usually offered by advertising self-regulatory bodies).

In addition, the Association for Market Communications (UEPS) that comprises media agencies (advertising and communication agencies), media outlets, advertisers (companies) and marketing professionals provides a similar protection mechanism—also known as a court of honor. This court monitors the violation of the good business practices and business ethics prescribed by Code of Business Ethics (mentioned above) and Code of Good Governance (also adopted by Serbian Chamber of Commerce). The role of the court is very similar to the court of honor within the chambers of commerce, and therefore it has similar shortcomings (i.e. extensive tasks—not only advertising and the non-existence of pre-clearance). Actually, the chamber’s mechanisms and mechanisms of UEPS overlap (same documents - Codes, similar procedure and remedies etc.). The difference from the chamber-established system is that this system is not organized by the state, i.e. it is the initiative of the industry itself, and therefore it is closer to being self-regulation.

There is an ongoing initiative of the Serbian branch of the International Advertising Association (‘IAA’) relating the founding of a self-regulatory body to provide the full range of services (including the pre-clearance of advertising) that are usual for self-regulatory systems, and that will monitor compliance with the Code of Marketing Communication (see answer 2.2 below).

2.2 Is there a self-regulatory advertising code? What are the key principles?

The most comprehensive code is the Code of Marketing Communications of the Serbian Branch of IAA which was drawn up in 2013, which is harmonized with the International Chamber of Commerce (ICC) Code concerning the marketing and advertising communication practice, and has been accepted by most of the major stake-holders (including the Chamber of Commerce, UEPS and other associations).

The Code of Marketing Communications regulates the key principles related to the advertising and marketing communications such as:

- (a) **Legality:** compliance of the communication with the applicable law;
- (b) **Decency:** communication should not offend standards of decency;
- (c) **Honesty:** the communication should be framed as not to abuse the trust of consumers or exploit their lack of experience or knowledge;

- (d) **Social responsibility;** and
- (e) **Truthfulness:** mostly in relation to the prohibition of misleading advertising.

Beside basic principles, the Code of Marketing Communications regulates:

- the rules related to the usage of scientific or technical terms,
- usage of words such as ‘free’ and ‘guaranteed’,
- proof concerning claims,
- identification of the marketing/advertising communication (in the context of prohibition of surreptitious commercial communications),
- identification of the advertiser,
- comparison,
- usage of testimonials,
- usage of portrayal or imitation of persons and references to personal property,
- exploitation of the goodwill,
- usage of imitation,
- protection of safety and health,
- special rules related to the children and minors,
- personal data protection,
- transparency of cost communications,
- unsolicited products,
- undisclosed costs, and
- environmental behavior.

The Code also contains special rules for certain types of marketing/advertising communications (such as sales promotions, sponsorship, direct marketing, digital marketing, environmental claims etc.), as well as rules related to enforcement of the Code. Although the Code prescribes the founding of the self-regulatory body which should monitor violation of code, such a body has not yet been formed.

Ultimately, the Code should be amended, taking into account that, since it was drawn up, the new Law on Advertising has been adopted, and the intention of the IAA is that code should be harmonized with the law.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

When it comes to the Court of Honor of the Serbian Chamber of Commerce, the Prosecutor of the Court of Honor receives complaints from interested parties and initiates proceedings before the Court of Honor and the respondent is the company suspected to be in violation of the Code. The Court is authorized to impose the following sanctions: Warning, Public Warning and other measures prescribed by the law). The parties can appeal such decision of the Court of Honor. Proceedings in the UEPS Court of Honor and measures imposed by it are similar.

2.4 Is the self-regulation system effective? Is it widely used and followed?

No. The self regulation system is still to be fully implemented.

2.5 Are the self-regulatory system's decisions reported?

No.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

See question 2.2.

2.7 Are there any other self-regulatory systems that govern advertising practices in the Serbia?

The Serbian branch of International Advertising Bureau (IAB) has developed the Code of Good Professional Practice in the Digital Publishing that regulates the rules in relation to various aspects of business activities, including some aspects of advertising. The Code introduces a so-called 'badge system' that guarantees compliance with the Code. Each IAB member that is holder of the badge has to publish the Council of Online Publishers' (SOIS) e-mail address for potential complaints concerning the compliance with the Code. SOIS will decide on potential violation, and can impose measures (such as a warning, revocation of the badge, exclusion from IAB membership).

In addition, the Association for the Public Communication (DSOJ) also has developed a code, but it also covers mostly the issues concerning the unfair business practice.

Finally, there is the Press Council which comprises the major print media outlets and online portals), the self-regulatory body that monitors the implementation of the Journalists Code of Ethics, and also makes decisions on violations of the code in relation to some aspects of advertising—surreptitious (unmarked native) advertising.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in the Serbia (eg, consumer protection laws; IP laws; unfair competition laws)?

See question 1.3.

3.2 Is substantiation required for advertising claims?

In general, the advertiser should be able to prove its claims, based on 'verifiable facts'.

The Law on Advertising prescribes that if an advertising message refers to opinions of certain scientists, experts or consumers, they must be confirmed, documented, updated and verifiable (Article 6 para 5 of the Law). In addition, advertisements containing claims about the health, therapeutic or nutritive characteristics of advertised goods or service (health or nutritive statement) must be based on relevant scientific or professional findings, or such characteristics or the statement has to be confirmed and approved in accordance with specific regulations (Article 58).

The Code of Marketing Communications prescribes that descriptions, claims or illustrations relating to verifiable facts in marketing communications should be capable of substantiation. Such substantiation should be readily available so that evidence can be produced upon request without delay to the self-regulatory organizations responsible for the implementation of the Code (Article 7 of the Code).

3.3 Are there certain types of advertising messages that do not require substantiation (i.e., puffery)?

The usage of exaggerated or extravagant claims in advertising messages is something that should be avoided, in the context of the general rules related to the truthfulness of the advertising message and prohibition of misleading advertising (which is one of the most important principles of the law and self-regulation). It is not strictly forbidden, but the majority of such statements are verifiable, and if they cannot be substantiated, the enforcing bodies may easily find them to be misleading advertising.

3.4 What are the rules governing the use of disclosures in advertising?

See answer 3.2 as regards substantiation. Every advertisement that contains a statement that is verifiable should be able to be substantiated with adequate information. The manner of publication and details of such information are not prescribed.

The Rulebook concerning the nutritive and health claims on food declarations prescribes a list of approved nutrition and health claims. However, it does not relate to the advertising of such products (ie it is more concerned with the information given on the food declaration, with the goal of protecting consumers).

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

The Law on Advertising does not regulate in detail the usage of testimonials and endorsements in advertising, except as part of the general rules concerning social responsibility—if an advertising message refers to the opinions of certain scientists, experts or consumers, they must be confirmed, documented, updated and verifiable (Article 6 para 5 of the Law).

The Code of Marketing Communications regulates the matter in more details, and prescribes that marketing communications should not contain or refer to any testimonial, endorsement or supportive documentation unless it is genuine, verifiable and relevant, and that, as testimonials or endorsement become obsolete or misleading through the passage of time, they should not be used.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no special rules limiting the use of product demonstrations in advertising. Therefore, the general rules of advertising are applicable (especially those related to truthfulness and misleading advertising).

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Article 14 of the Law on Advertising allows comparative advertising under certain conditions (conditions are harmonized with EU Directive 2006/114, concerning comparative and misleading advertising), namely that comparative advertising:

- (a) cannot be misleading toward consumers;
- (b) has to compare goods or services meeting the same needs or intended for the same purpose;
- (c) has to objectively compare one or more material, relevant, verifiable and representative features of those goods and services, which may be the price;
- (d) cannot discredit or denigrate the trademarks, trade names, designation of geographical origin or other distinguishing marks, goods, services, activities or circumstances of a competitor;

- (e) has to be related to products with the same designation of origin;
- (f) cannot take unfair advantage of the reputation of a competitor, trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
- (g) cannot present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name; and
- (h) cannot create confusion between the advertiser and a competitor or between the advertiser's goods or services, trademarks, trade names or other distinguishing marks and those of a competitor).

Comparative advertising which is contrary to the rules set above is treated as misdemeanor.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

In general, the Serbian Law on Trademarks prohibits the unauthorized usage of the trademarks of other entities, ie it prevents third parties from using a trademark in the course of trade without the authorization of the holder of the trademark.

However, given that the rules on comparative advertising are taken from EU Directive 2006/114, the usage of other entity's trademark should be interpreted within the meaning of the Directive, in other words, it should be allowed under the conditions prescribed by the Law on Advertising, and should not be treated as unauthorized usage of other entity's trademark. Recital 15 of the Directive explicitly states that the use of another's trade mark, trade name or other distinguishing marks 'does not breach this exclusive right in cases where it complies with the conditions laid down by this Directive, the intended target being solely to distinguish between them and thus to highlight differences objectively'.

Unfortunately, comparative advertising is not a common advertising technique in Serbian practice, and, as far as we know, there is no official position of the controlling bodies of the usage of trademarks for the purposes of comparative advertising, ie whether such usage is unauthorized or not.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Yes—there are special rules for protected geographical designations pursuant to the Law on Geographical Designation (protected designation of origin and protected geographical indication). These relate to the situation where the significant feature of the advertised product is linked with the particular geographical designation. For such products only authorized users (who have acquired the appropriate approval) are allowed to use geographical designation in advertising. However, where the geographical origin is not important to the certain product (ie the geographical designation is not protected pursuant to the Law on Geographical Designation), it may be used in advertising, provided that the rules of Law on Advertising are met (especially in relation to the misleading advertising).

Also, in relation to the usage of a national flag, coat of arms or national anthem in advertising, there are certain limitations prescribed by the Article 18 of the Law on Advertising. When it comes to the usage of the Serbian national flag, coat of arms or national anthem, the advertising should be in line with the Law on Appearance and Usage of the Coat of Arms, State Flag and National Anthem, namely that:

- (a) the national flag or coat of arms should not be changed. Exceptionally these symbols can be used as the part of other emblems, or the date or name can be written if it is prescribed by the law;
- (b) the national flag or coat of arms should not be used as a trademark, sample, model or any other sign that is used for marking of the goods and services.

In practice, the media agencies ask the competent bodies for pre-clearance of the usage of Serbian national symbols, although such obligation is not clearly prescribed (see also question 10.1).

On the other hand, the usage of the symbols of other countries or international organizations must not be unworthy, and in particular it must not be such as to mock those symbols or to offend the dignity of a foreign state or its citizens or an international organization.

3.10 Are there any special rules governing product packaging?

Yes—there are consumer protection rules related to the appearance of mandatory information about the product on the product package, especially when it comes to food and diet supplement products. The rules are mostly concerned with informing consumers as to all relevant information in connection with the product itself.

4 PRICE ADVERTISING

4.1 What are the Serbia’s rules regarding price advertising?

The most important pieces of legislation are:

- (a) Law on Advertising (misleading advertising rules, advertising of sell incentives etc.),
- (b) Law on Trade (general rules on sell incentives), and
- (c) Law on Consumer Protection (in relation to the unfair business practice).

In addition, the Code of Marketing Communications prescribes the detailed set of rules concerning the special promotions.

4.2 What are the Serbia’s rules regarding advertising ‘free’ products?

Article 16 of the Law on Advertising regulates the advertising of so called ‘sell incentives’, and, in that context, it recognizes the use of certain phrases such as ‘free’, ‘gratis’, ‘pay for one, get two’, ‘two for the price of one’ in relation to the ‘promise of the gift’. The use of such phrases is allowed only if the goods or services are already offered at a regular (current) price.

Article 6 of the Code of Marketing Communications prescribes more comprehensive rules related to the usage of word ‘free’, ‘free gift’ or ‘free offer’. It prescribes that such phrases should be used only:

- (a) where the offer involves no obligation whatsoever, or
- (b) where the only obligation is to pay shipping and handling charges, which should not exceed the cost estimated to be incurred by the marketer, or
- (c) in conjunction with the purchase of another product, provided that the price of that product has not been increased to cover all or part of the cost of the offer.

4.3 What are the Serbia’s rules regarding sales and special offers?

So-called ‘sell incentives’ are regulated by the Law on Commerce and the Law on Advertising.

- (a) The **Law on Commerce** regulates the usage of sell incentives in general. Pursuant to the Article 44 of the Law on Commerce, the offer of the sell incentives should have at least following elements (for services):
- (i) determination of the type of the incentive (discount, present, participation in the prize contest or other incentive);
 - (ii) precise and clear determination of the service which is related to the incentive;
 - (iii) period of validity of the incentive;
 - (iv) special conditions related to the exercising the right on incentive (if any);
 - (v) the costs that should be prevail on the user;
 - (vi) comparison between the regular price of the service and the price after discount (If the incentive is related to the discount);
- (b) The **Law on Advertising** regulates the advertising of the sell incentives. Article 16 of the Law on Advertising regulates the manner of advertising of the sell incentives, and prescribes the additional elements that should be finding in the advertising message that promotes the sell incentive. Namely in advertising of the sell incentive:
- (i) the advertiser shall be required to specify in the advertising message all elements contained in the offer of sales incentive in accordance with the Law on Commerce (Article 44);
 - (ii) that advertise alleged sale or apparent price discount on goods or services, volume of discount and similar shall be prohibited if the previous price has not been truthfully indicated or if the goods have been offered at the previous price over a negligibly short period
 - (iii) that advertise the preferential prices for certain categories of persons, for a certain area and a certain period of time, the category of persons, area and period for which the preferential price applies must be precisely indicated;
 - (iv) promise of gifts using the words ‘free’, ‘gratis’, ‘pay one, get two’, ‘two for the price of one’, etc shall be allowed only if the goods or services are already offered at regular (current) price;
 - (v) in cases where the prices of goods or services of different quality, or prices of goods with and without defects are compared in an advertising message, the advertising must contain an indication that the lower price is the result of lower quality and/or defect.
- (c) In addition, the **Code of Marketing Communications** dedicates a whole chapter to advertising in relation to sell incentives.
- The Code of Marketing Communications contains a detailed set of rules relating to ‘sales promotions’, including general principles (promotions should be fair and honorable toward consumers, should be designed in a way to meet reasonable consumer expectations, should be transparent, should be fair to other market participants—competitors, fulfilment of the conditions from the promotion should be prompt and efficient, participants in promotion should not disrepute the promotion) and rules related to:
- (i) the terms of offer;
 - (ii) the manner of presentation of promotion;
 - (iii) the administration of promotions;

- (iv) the safety and suitability;
- (v) the presentation to the consumers;
- (vi) the presentation to the intermediaries;
- (vii) the particular obligations of promoters;
- (viii) the particular obligations of intermediaries; and
- (ix) the responsibility of all participants in promotion.

4.4 What are the Serbia's rules regarding rebates?

The same rules apply as for other types of 'sell incentives'. Also, the advertising of discounts should be in line with the rules on misleading advertising.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

There are none other than the rules concerning sell incentives, misleading advertising and unfair business practice.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (guns, medicines etc.)?

There are numerous products/services that are prohibited from being advertised:

- (a) tobacco and tobacco products, as well as the electronic cigarettes;
- (b) alcoholic beverages (with few exceptions, depending on the percentage of alcohol (below/above 20%) and advertising platform;
- (c) prescription drugs (medicines), medicines that are issued at the expense of health insurance, medicines containing opiates or psychotropic substances, medicines for tuberculosis, medicines for sexually transmitted diseases, medicines for infectious diseases, medicines for chronic insomnia, medicines for diabetes and other metabolic diseases, and medicines without prescription, for which approval from ALIMIS is not granted;
- (d) medical services;
- (e) law services;
- (f) fire arms and military equipment, with the exception of:
 - (i) advertising for authorized traders and authorized buyers in specialized magazines and by direct marketing and
 - (ii) hunting weapons, as well as parts and ammunition for such weapons;
- (g) pornography (with few exceptions in pornographic magazines and in relation to pornographic media services); and
- (h) milk and other food for babies up to the age of 6 months, as well as equipment for the usage of such food.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

There is no prohibition of any type of advertising techniques (except direct marketing without prior consent of the recipient of the advertising message and native marketing which is not marked as advertisement).

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Pursuant to the Article 6 para 3 of the Law on Advertising, an advertising message must not contain statements or visual representations that might be considered offensive. The offensive nature of ads is assessed on case-by-case (ad hoc) basis, depending of the content of the particular ad.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

There are two set of rules regarding the identification of the sponsor/advertiser:

- (a) **Rules related to the identification that is needed for the purposes of monitoring by control bodies, and in relation to determining responsibility.** Each advertiser and advertising platform (transmitter of the advertising message) are obliged to keep a so-called 'Advertising Declaration', a document containing data that identify the advertiser and the transmitter of an advertising message, the contents of the advertising message and the planned period and advertising method, which the advertiser provides to the transmitter of an advertising message. The only exception to the need to keep an advertising declaration is in relation to the advertising message transmitter, which falls within the category of 'information society service provider' related to the online advertising. Such entity is not obliged to have the advertising declaration. However, it is obliged to provide a 'clear identification' of the advertiser, and so, even in that case, the advertiser has to identified. In addition, the Law on Consumer Protection prescribes the disclosure of the certain information related to the identity of the advertiser/trader.
- (b) **Rules related to the presentation of the advertiser's identity to consumers (recipients of the advertising message).** The Code on Marketing Communications prescribes rules concerning the identification of the advertiser. The Code clearly states that the identity of the marketer should be apparent, as well as that marketing communications, where appropriate, should include the contact information that will enable the consumer to get in touch with the marketer without difficulty. This does not apply to communications with the sole purpose of attracting attention to communication activities to follow (eg so-called 'teaser advertisements').

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Yes—native advertising has to be marked as 'advertisement'. Otherwise, it will be treated as 'surreptitious marketing', which is prohibited (Articles 12 and 13 of the Law on Advertising).

On the other hand, product placement as advertising technique is allowed via electronic media (radio and TV), under certain conditions that are harmonized with the EU Audio-visual Media Services Directive (EU Directive 2010/13).

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Native advertising must be marked as advertising. The marking of native advertising should be graphic, visual and/or audio that, depending on the advertising method, designates the character of a certain message as advertising (eg ‘paid space’, ‘advertising message’, ‘promo’ etc).

The following rules apply regarding product placement:

- (a) Product placement is allowed only in certain types of program, such as in cinematographic works, films and series made for audio-visual media services, sports programmes and light entertainment programmes (except children programs); this is also the case in situations where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a program.
- (b) Neither the content of product placement (in the case of television broadcasting), nor scheduling may in any circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider.
- (c) Product placement may not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services.
- (d) Product placement must not give undue prominence to the product in question.
- (e) Viewers must be clearly informed of the existence of product placement (programs containing product placement must be identified appropriately at the start and the end of the program, and when a program resumes after an advertising break, in order to avoid any confusion on the part of the viewer).

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

All types of advertising (print, radio, TV, online, direct marketing etc) are regulated by the general Law on Advertising. The Law doesn't contain rules designed particularly for the social networks. Such advertising technique is a type of ‘online’ advertising, and all the general rules apply to social media advertising as well.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

There are no specific rules on this particular issue, and there is no available practice concerning UGC on advertiser pages on social networks.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

There are some UGC-related decisions concerning the responsibility of media outlets for hate speech comments made by users. However, these cases were not related to advertising. However, by analogy, it could be concluded that media outlets should be responsible for any (unlawful) UGC content, including advertising-related content, regardless of the communication channel used (web

site, Facebook page of the media outlet, twitter account of media or other channel of the communication).

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

Pursuant to the Article 15 of the Law on Advertising, any advertising message that contains personally identifiable information by which the identity of a person can be determined or recognized cannot be published without the prior consent of the person to which the personally identifiable information relates. Similar rules are also prescribed by Code of Marketing Communications.

9.2 Are there situations when permission is not required?

If advertising contains personally identifiable information, prior consent is always needed.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

When it comes to the usage of monuments, historic places, and other similar cultural buildings or works, the advertiser or media agencies should acquire prior clearance (and approval) from the institutions that protect such buildings or works (eg the Institute for the Protection of Monuments on a national or local level, the Ministry Responsible for Culture etc).

10.2 Is it permissible to use other companies’ recognizable products in advertising (e.g., an actor wearing branded training shoes)?

Such is permissible only in relation to comparative advertising (see answers 3.7 and 3.8).

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of the Serbia which affect advertising (eg Swedish gender equality law)?

The Law on Prohibition of Discrimination prevents hate speech and any acts of discrimination, including the portrayal of discrimination by any means. Article 8 of the Law on Advertising clearly prescribes that advertising shall not, directly or indirectly, encourage discrimination on any grounds, particularly on the grounds of nationality, ethnic, religious or racial affiliation, sex, political or other belief, social background, economic status, culture, language, age or mental or physical disability.

In addition, Article 10 of the Law on Advertising prohibits the encouragement of harmful behaviour in advertising messages, particularly the presentation of:

- (a) scenes of violence and destruction of property and nature, except with the aim of preventing such behaviour;
- (b) scenes that may cause fear or aggression;
- (c) sexual harassment as acceptable, desirable or usual social behaviour;
- (d) minors in a sexual way, and men and women as boys or girls with the sexual attributes of adults;

- (e) encouragement or approval of actions that are prohibited by regulations on environmental protection, as well as false claims (eg by use of words such as ‘environmentally safe’, ‘environmentally harmless’, ‘eco food’, ‘organic product’ and similar words or symbols with the same meaning) that the goods or services have positive influence or are harmless regarding health or the environment.

Also, Serbia has a separate Law on Gender Equality, which, inter alia, prohibits the publication of any information that encourages the discrimination based on gender, which is also related to the advertising and promo material.

The Code of Marketing Communications (IAA) also contains provisions that prevents discrimination in advertising.

11.2 Are there any other cultural norms that should be considered (e.g. religious concerns)?

In addition to the rules relating to use of the state symbols and to cultural items, there are certain provisions relating to the use of language in the electronic media. Article 69 of the Law on Electronic Media prescribes that the provider of a media service (radio and TV) is obliged to provide that the program content is broadcast in the Serbian language. Although it is not clear whether such obligation also applies to audio-visual commercial communications (advertising) mutatis mutandis, there is a high possibility that advertisements should also be dubbed or (sub)titled in the Serbian language, i.e. be understandable to consumers (taking into account that advertisements also fall under the editorial responsibility of electronic media).

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in the Serbia?

Children (minors under the age of 12) and minors (above the age of 12 and under the age of 18) are particularly protected when it comes the advertising; and advertisers should be very cautious when it comes to advertisements intended for this particular group of consumers:

- (a) an advertising message aimed at children and minors must not abuse their inexperience, ignorance and naïveté;
- (b) an advertising message that encourages or incites behaviour which threatens minors’ and children health, physical or mental development is prohibited;
- (c) an advertising message aimed at children and minors should not present minors in hazardous situation;
- (d) an advertising message must not:
 - (i) contain a depiction of violence, which includes scenes of violence between animated characters, puppets and similar,
 - (ii) abuse their trust in certain persons, particularly parents, teachers, doctors, etc by undermining their authority and attitude, nor
 - (iii) suggest that by using the goods or the service they will gain physical, intellectual or other social advantages over other minors or that the opposite effect would result if they do not use those goods or services; and
- (e) advertising in a school, kindergarten or other institution intended for minors is not allowed, unless it serves for the protection of general interests and the interests of minors, such as child rearing, educational and sports activities.

In addition, there are special rules for the protection of children and minors in relation to the scheduling of the advertisement, in connection with the content of advertising that promotes alcohol or game of chances (especially in relation to the warning notice) etc.

The Code of Marketing Communications also contains a detailed set of rules in relation to advertising intended for children and minors.

 SINGAPORE 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Singapore?

The advertising sector in Singapore is a self-regulating system. The Advertising Standards Authority of Singapore (ASAS) oversees and regulates advertising activities in Singapore by relying on a system of guidance and voluntary compliance. There are numerous advertising guidelines which need to be adhered to, including the Singapore Code of Advertising Practice (SCAP) (which is administered by ASAS). In addition, there are specific statutes regulating the advertising of certain products and services, such as the sale of tobacco, pharmaceuticals, etc. While ASAS oversees, regulates and provides guidance to stakeholders, it stops short of being the ‘clearing house’ for approval of advertisements.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

According to the SCAP, ‘an advertisement means any form of commercial communication for any goods or services, regardless of medium used, including advertising claims on packs, labels and point of sales material’.

SCAP applies to all advertisements appearing in any form or media, including, but not limited to newspapers, television, radio, video commercials, electronic bulletin boards, digital communications in all formats, design and context, as well as non-broadcast electronic media such as computer games.

1.3 What is the basic regulatory framework for advertising regulation?

Please see question 1.1 above.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

SCAP applies to all advertisements appearing in any form or media. Please see question 1.2 above.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Yes. Refer to the table below, which provides a non-exhaustive list of products and services which are specifically regulated in Singapore:

Products/Services	Legislation
Common Betting Houses	Betting Act (Cap 21)
Common gaming houses, public gaming and public lotteries	Common Gaming Houses Act (Cap 49)
Remote gambling and remote gambling services	Remote Gambling Act 2014 (No 34 of 2014)
Financial services to members of the public	Co-Operative Societies Act (Cap 62)

through the mass media	
Endangered species	Endangered Species (Import and Export) Act 2006
Sale of organs and blood	Human Organ Transplant Act (Cap 131A)
Advertisements relating to medical skill or service	Medicines (Advertisement and Sale) Act (Cap 177)
Advertisements relating to abortion	Medicines (Advertisement and Sale) Act (Cap 177)
False or misleading advertisements relating to medicinal products	Medicines Act (Cap 176)
Advertisements which claim, indicate or suggest that the article advertised will prevent alleviate, or cure blindness, cancer, cataract, drug addiction, deafness, diabetes, epilepsy or fits, hypertension, insanity, kidney diseases, leprosy, menstrual disorders, paralysis, tuberculosis, sexual function, infertility, impotency, frigidity, conception and pregnancy	Medicines Act (Cap 176) (subject to exceptions)
Advertisements which refer to any skill or service relating to the treatment of any disease or condition affecting the human body	Medicines Act (Cap 176)
Chewing Gum, bubble gum and dental chewing gum (unless a product licence under the Medicines Act has been obtained)	Sale of Food (Prohibition of Chewing Gum) Regulations (Cap 283)

1.6 Are any government pre-approvals required?

While pre-approval of the ASAS is not mandatory, any dealings with certain controlled items entail obtaining prior approval/authorization from appropriate authorities. Below is a non-exhaustive list of such items and the relevant controlling authority:

Items	Controlling Authority
Arms and explosives; Bullet-proof clothing; Toy guns, pistols and revolvers; Weapons, spears and swords	Licensing Division Singapore Police Force
Pre-recorded cartridges and cassettes; Newspapers, books and magazines; Films, video tapes/discs, laser discs; CD-ROM and video games	Media Development Authority
Medicines; Pharmaceuticals; Poisons	Health Sciences Authority
Animals, birds and their by-products; Plants; Endangered species of wildlife; Ornamental fish; Meat	Agri-food and Veterinary Authority

and meat products; Fish and seafood products; Fruits and vegetables	
Telecommunication and radio communication equipment; Toy walkie-talkies	Infocomm Development Authority of Singapore

1.7 Does the media pre-clear advertising?

It is not mandatory to obtain clearance from ASAS prior to publishing/airing advertisements. Be that as it may, ASAS does have a mechanism through which advertisers can consult the ASAS regarding compliance with SCAP.

However, for content disseminated through certain media (as an illustration, film screenings), advertisers will need to obtain requisite clearance from the appropriate authority (for film screenings, being the Media Development Authority).

1.8 How does the government enforce advertising laws? What are the potential remedies?

Complaints can be made to ASAS that an advert doesn't comply with SCAP. ASAS consider complaints and publicise their rulings, meaning the most likely 'sanctions' include: a direction to withdraw/amend an offending advertisement; withdrawal of facilities, rights or services from parties concerned subject to legal constraints; trading sanctions; and negative PR arising from an adverse ruling being published. ASAS' rulings are not legally binding but, where the advertiser fails to amend its advertising, ASAS can contact media/publishers to request that they do not carry those, or similar, advertisements.

1.9 When does a competitor have a right of action? What are the potential remedies?

Refer to the response to paragraph 1.8 above.

1.10 When do consumers have a right of action? What are the potential remedies?

Please see question 1.8 above.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Singapore have a primary advertising self-regulation system?

Yes. Please see question 1.1 above.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Yes—the Singapore Code of Advertising Practice (SCAP). Some of the general principles enunciated in SCAP are as follows:

- (a) Advertisements should not contain anything that is illegal or might incite anyone to break the law. Nor should they appear to condone or lighten the gravity of illegal activities;
- (b) Advertisements should not contain anything that contravenes the ethical code of recognised professional bodies in Singapore;

- (c) Advertisements should not contain anything that is offensive to the standards of decency prevailing among those who are likely to be exposed to them;
- (d) Advertisements should not abuse the trust of the consumer or exploit his lack of experience, expertise or knowledge;
- (e) Advertisements should not without justifiable reason play on fear;
- (f) Advertisements should not mislead in any way by inaccuracy, ambiguity, exaggeration, omission or otherwise;
- (g) Advertisements should not show a disregard for safety;
- (h) All persons should be portrayed in a manner respectful of their dignity;
- (i) Advertisements should not exploit the natural credulity of children or the lack of experience of young people;
- (j) Advertisements should not unfairly attack or discredit other products, organizations or professions directly or by implication;
- (k) Advertisements should not make unjustifiable use of the name, initials, logo and/or trade and service marks of any firm, company or institution;
- (l) Advertisements should not take unfair advantage of another firm, person or institution's goodwill in its name, trade name or other intellectual property, or the goodwill earned by other's advertising and promotional campaigns;
- (m) Advertisements should not be so similar in general layout, copy, slogans, visual presentation, music or sound effects to other advertisements or promotions as to be likely to mislead or confuse.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

No such mechanism is available in relation to advertising complaints.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Yes, the self-regulation system has been fairly effective in Singapore, thus far. It is widely used and followed.

2.5 Are the self-regulatory system's decisions reported?

ASAS's decisions will be notified in writing only to the parties concerned.

In addition, ASAS reserves the right to publish details of the outcome of investigations that it undertakes and decisions which it issues, if other sanctions imposed by it do not turn out to be sufficiently effective.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Please see question 2.2 above.

2.7 Are there any other self-regulatory systems that govern advertising practices in Singapore?

In addition to SCAP, there are a number of other sector-specific Codes which need to be adhered to. Some of these include TV Advertising Code; Radio Advertising and Sponsorship Code; and Television Programme Sponsorship Code (administered by Media Development Authority).

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Singapore (eg, consumer protection laws; IP laws; unfair competition laws)?

Some of the sector specific laws which contain provisions relating to advertising claims in Singapore include:

- Singapore Code of Advertising Practice,
- Accountants Act,
- Architects Act,
- Banking Act,
- Betting Act,
- Broadcasting Act,
- Building Control Act,
- Casino Control Act 2006,
- Charities Act,
- Chit Funds Act,
- Co-operative Societies Act,
- Common Gaming Houses Act,
- Common Gaming Houses (Exemption) Notification,
- Companies Act,
- Consumer Protection (Fair Trading) Act,
- Consumer Protection (Trade Descriptions and Safety Requirements) Act,
- Copyright Act,
- Currency Act,
- Customs Act,
- Defamation Act,
- Dentists Act,
- Electricity Act,
- Employment Agencies Act,
- Endangered Species (Import and Export),
- Films Act,
- Finance Companies Act,
- Financial Advisers Act,
- Gas Act,
- Goods and Services Tax Act,
- Health Products Act 2007,
- Housing Developers (Control and Licensing) Act,

- Human Organ Transplant Act,
- Indecent Advertisements Act,
- Innkeepers Act,
- Insurance Act,
- Internal Security Act,
- Land Surveyors Act,
- Legal Profession Act,
- Massage Establishment Act,
- Media Development Authority of Singapore Act,
- Medical Registration Act,
- Medicines (Advertisement and Sale) Act,
- Medicines Act,
- Miscellaneous Offences (Public Order and Nuisance) Act,
- Money-Changing and Remittance Businesses Act,
- Moneylenders Act,
- National Emblems (Control of Display) Act,
- National Registration Act,
- Parliamentary Elections Act,
- Penal Code,
- Pharmacists Registration Act,
- Police Force Act,
- Presidential Elections Act,
- Private Hospitals and Medical Clinics Act,
- Private Investigation and Security Agencies Act,
- Professional Engineers Act,
- Public Utilities Act,
- Rapid Transit Systems Act,
- Road Traffic Act,
- Sale of Drugs Act,
- Sale of Food Act,
- Sale of Food (Prohibition of Chewing Gum) Regulations,
- Securities and Futures Act,
- Singapore Arms and Flag and National Anthem Act,
- Singapore Totalisator Board Act,
- Smoking (Control of Advertisements and Sale of Tobacco) Act,
- Street Works Act,
- Telecommunications Act,
- Trade Marks Act,
- Traditional Chinese Medicine Practitioners Act,
- Travel Agents Act,
- Undesirable Publications Act,
- Vandalism Act, and

- Weights and Measures Act.

3.2 Is substantiation required for advertising claims?

Yes, substantiation is required for advertising claims. SCAP as well as the aforementioned sector specific legislation set out the requirements in this regard.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

No.

3.4 What are the rules governing the use of disclosures in advertising?

Some of the general principles set out in SCAP regarding disclosures, are as follows:

- (a) Advertisements should not misuse research results or quotations from technical and scientific publications;
- (b) Statistics should not be so presented as to imply a greater validity than they really have;
- (c) Scientific terms should not be misused; and
- (d) Scientific jargon and irrelevancies should not be used to make claims which appear to have any scientific basis which they do not possess.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Some of the general principles set out in SCAP regarding the use of endorsements and testimonials, are as follows:

- (a) Advertisements should not contain or refer to any testimonials or endorsements unless it is genuine and related to the personal experience of the party who provided the testimonials or endorsements;
- (b) Testimonials or endorsements that are obsolete or otherwise no longer applicable should not be used;
- (c) Particular care ought to be taken to ensure that testimonials based on fictitious characters are not framed so as to give the impression that real people are involved; and
- (d) Testimonials or endorsements that are exceptional experiences ought not to be used.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific requirements pertaining to demonstrations in advertising, as set out in SCAP.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Yes, comparative advertising is permitted. However, the following principles need to be borne in mind:

- (a) Advertisements containing comparisons ought not to violate the principles of fair competition;

- (b) Where a comparison is made between the respective cash values or prices of goods that are not identical, the advertiser should clearly indicate that this is the case;
- (c) All comparative advertisements should be so designed that they are clear and fair, and there is no likelihood of the consumer being misled as a result of the comparison. The basis of comparison should be the same for the products being compared and the list of items used in the comparison should not be so chosen to provide an unfair advantage to the product advertised.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

As per the Trade Marks Act, a person infringes a registered trade mark if, without the consent of the proprietor of the trade mark, he uses in the course of trade a sign which is similar/identical with the trade mark in relation to goods/services which are similar/identical with those for which it is registered, and there exists a likelihood of confusion. Further, a person is deemed to have ‘used’ a sign if he uses the sign in advertising. Be that as it may, a person who applies a sign in advertising is deemed not to have used the sign if, at the time of such application or use, he does not know nor has reason to believe that the proprietor or a licensee of the registered trade mark did not consent to such application or use of the sign. Similar provisions are set out in the Copyright Act as well, although use of a trade mark in an advertisement, may fall within the ambit of ‘fair dealing’.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

Yes—the Geographical Indications Act 2014 provides for the protection of geographical indications in relation to goods, and for matters connected therewith, including, but not limited to, the use of appellations of origin.

3.10 Are there any special rules governing product packaging?

Yes—there are:

- (a) administrative labeling/product packaging requirements, eg, those issued by the Health Sciences Authority; and
- (b) statutory requirements, like those stipulated in sector-specific legislation, eg, the Medicines Act and the Food Regulations.

4 PRICE ADVERTISING

4.1 What are Singapore's rules regarding price advertising?

Some of the general principles set out in SCAP regarding the quotation of prices, are as follows:

- (a) If reference is made in an advertisement to more than one product, it should be clear to which product or version any quoted price relates;
- (b) If a product is illustrated, and a price quoted in conjunction with the illustration, advertisers ought to ensure that what is illustrated can be purchased for the price shown;
- (c) If the price quoted does not include the product in its entirety, this fact and the additional price should be stated with no less prominence than the price itself.

4.2 What are Singapore's rules regarding advertising 'free' products?

Some of the general principles set out in SCAP regarding the advertisements of 'free' products, are as follows:

- (a) Incidental costs, which will necessarily need to be incurred by the consumer in acquiring the product, ought to be clearly set out;
- (b) Advertisers should not seek to recover the cost of the product that they describe as free;
- (c) The term 'free of interest' ought not to be used if payment for a product is only deferred by the merchant.

4.3 What are Singapore's rules regarding sales and special offers?

SCAP sets out several requirements pertaining to sales and special offers. As an illustration, the term 'clearance sale' or similar expressions are not acceptable in advertisements except for an established trader.

4.4 What are Singapore's rules regarding rebates?

There are specific requirements pertaining to rebates. As an illustration, advertisements pertaining to medicinal products ought not to contain any offer for refund of money to dissatisfied users.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

SCAP sets out specific requirements regarding retail advertising. Some of the key requirements include:

- (a) Advertisements should clearly state the full name and address of the advertisers so that such information can be retained by the consumer;
- (b) The name of the advertiser should be prominently displayed at the address given in the advertisement;
- (c) Advertisements should include:
 - (i) the main characteristics of the product or service;
 - (ii) the amount and quantity of any transportation charges;
 - (iii) any Goods & Services Tax payable; a statement that goods can be returned (if applicable); and
 - (iv) any limitation to the offer and any conditions that affect its validity.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

There are several products which are banned from being sold in Singapore. It follows that advertisements enticing members of the target audience to purchase such products are also not permitted. Some of these products include cigarette lighters of pistol or revolver shape, controlled drugs and psychotropic substances and firecrackers.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

The Personal Data Protection Act, which recently came into force, sets out detailed ‘Do-not-call’ requirements and obligations which need to be adhered to. This affects telemarketing activities as well.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The Undesirable Publications Act seeks to prevent the importation, distribution or reproduction of undesirable publications and for purposes connected therewith.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

SCAP stipulates that the identity of the advertisers should always be clearly set out. Further, mail orders, direct response, exhibition, trade promotion and advertisements disseminated through online media should clearly state the permanent address of the advertiser.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

SCAP provides for special requirements which need to be adhered to with respect to the integration of advertising content and editorial content.

As an illustration, SCAP mandates that it is obligatory on the part of all advertisers to ensure that anyone who looks at content (of the nature specified above), is able to clearly identify that it is an advertisement and not editorial matter.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

The general principles stipulated in SCAP will apply to such content.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

The general principles set out in SCAP will apply to advertising through social media channels as well. In addition, stakeholders will need to ensure compliance with the provisions contained in the Electronic Transactions Act (ETA). The ETA stipulates that a ‘network service provider’ shall not be subject to any civil or criminal liability under any rule of law in respect of third-party material in the form of electronic records to which he merely provides access if such liability is founded on:

- (a) The making, publication, dissemination or distribution of such materials or any statement made in such material; or

(b) The infringement of any rights subsisting in or in relation to such material.

However, the 'network service provider' shall remain liable for or pertaining to any of the following:

- (c) Any obligation founded on contract; or
- (d) Any obligation imposed under any written law to remove, block or deny access to any material; or
- (e) Any liability under the Copyright Act in respect to infringement or unauthorized use of any performance.

In addition to the penalties or sanctions imposed by the applicable statute governing the particular transaction, any person guilty of non-compliance with the aforementioned requirement shall be liable on conviction to a fine not exceeding S\$20,000 or to imprisonment for a term not exceeding 6 months or to both.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

The responsibility for ensuring compliance with SCAP rests primarily with the advertiser. In addition, it also applies to any advertising agency or medium involved in the publication of the advertiser's message to the public.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

Most matters of this nature thus far in Singapore appear to have been settled out-of-court, and hence matters seldom go to full trial. Accordingly, comprehensive decisions are also not issued/put in the public domain.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

SCAP stipulates that advertisements ought not to make unjustifiable use of the name, picture, likeness, voice, identity and/or any other intellectual property of any person/entity.

9.2 Are there situations when permission is not required?

It is advisable to obtain express consent from the concerned person/entity.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

In Singapore, the Preservation of Monuments Act governs the preservation and protection of national monuments. The Act, however, does not impose any bar with respect to photography of the monuments. However, some places of interest are subject to certain restrictions. One such example is

the 'Singapore Flyer', for which the management has imposed certain restrictions with respect to photography for commercial use, and has made it mandatory to obtain prior permission.

In addition, there are special rules governing certain other monuments/symbols of national heritage. As an illustration, the 'Merlion' is a symbol protected under Singapore Tourism Board Act. The Act stipulates that it shall be an offence to use the 'Merlion' symbol (or make a representation which resembles it so as to cause confusion), if requisite permission for the same is not obtained from the Singapore Tourism Board.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

SCAP stipulates that advertisements should not take unfair advantage of another firm, person, or institution's goodwill in its name, trade name or other intellectual property, or goodwill earned by other's advertising and promotion campaigns.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Singapore which affect advertising (eg Swedish gender equality law)?

Singapore is a cultural melting pot with its population comprising of an incredibly diverse range of cultures, races and religions. Hence, the laws, rules and regulations attempt to foster an amiable environment which integrates all the cultures, traditions and persons of different nationalities.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Please see question 11.1 above.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Singapore?

Although the advertising sector in Singapore is self-regulating, advertisers ought to pay keen attention to the requirements stipulated in SCAP, and also ensure compliance with the plethora of laws, rules and regulations governing specific sectors/spheres of activity. Advertisers ought to coordinate with their in-house counsel and/or lawyers specializing in advertising laws, right from the time of conceptualization of the advertisement, to ensure that they do not fall foul of the law.

 SLOVAKIA 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in the Slovakia?

Advertising in Slovakia is regulated primarily by the Act on Advertising, which contains the basic regulatory framework for all forms of advertising. Other advertising rules are scattered between various laws including, in particular:

- (a) Commercial Code (unfair competition rules including misleading advertising),
- (b) Civil Code (personality and privacy protection),
- (c) Consumer Protection Act (consumer protection, unfair commercial practices),
- (d) Copyright Act (copyrights),
- (e) Trademark Act (trademarks),
- (f) Act on Designs (designs)
- (g) Data Protection Act and GDPR (personal data protection),
- (h) Act on Electronic Communications, Act on E-commerce (e-commerce),
- (i) Act on Broadcasting (radio and TV broadcasting),
- (j) Act on Digital Broadcasting (digital broadcasting),
- (k) Act on Foods (misleading labelling of food), and
- (l) Act on State Language, etc.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

The definition of advertising contained in the Advertising Act is relatively wide, and comprises all forms of commercial communication aiming to support the purchase and sale of goods and services. The Act on Advertising defines advertising as 'a notification, demonstration or other presentation in any form relating to a commercial, business or other gainful activity having the objective to support placement of products on the market'.

1.3 What is the basic regulatory framework for advertising regulation?

Basic regulatory framework for advertising in general is contained in the Act on Advertising which lays out the general principles of advertising, as well as basic requirements for the content and form of advertising. These principles and requirements are applicable to all forms of advertising, including press, digital, TV and radio advertising. A specific basic regulatory framework for TV and radio broadcasting advertising is contained in the Act on Broadcasting and Act on Digital Broadcasting.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

According to the Act on Advertising, advertisements may not be disseminated by automatic telephone call system, telefax or e-mail without the prior consent of their receiving user. Similarly, according to the Act on Electronic Communications, calling or use of automatic call and communication systems without human intervention, telefax, e-mail, including short message services, is permitted for the purposes of direct marketing only with the consent of the receiving user. Such consent must be verifiable, and the receiver must have chance to revoke such consent at any time. Nevertheless, according to the Act on Electronic Communications, consent is not necessary for direct marketing of

similar goods and services to a recipient whose contact information has been obtained in connection with a previous sale of goods or services, provided that the contact information was obtained lawfully.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Advertising practices of several industries are regulated specifically in Slovakia. In particular, specific rules apply to advertising of:

- (a) alcoholic beverages;
- (b) tobacco products;
- (c) firearms and ammunition;
- (d) medicine products (drugs);
- (e) food and baby food; and
- (f) 'energy-significant' products.

Moreover, self-regulatory rules contain specific requirements or restrictions also for advertising of:

- (g) food supplements;
- (h) lotteries; and
- (i) erotic products and services.

1.6 Are any government pre-approvals required?

There are no government pre-approvals required for any kind of advertising in Slovakia. Public control of advertising is generally exercised retrospectively. However, pre-approvals may be required for sale of certain products. For instance, it is prohibited to advertise medicaments (drugs) which are not registered in the Slovak Republic. Therefore, the medicament must be registered first, and only afterwards promoted by advertisement.

1.7 Does the media pre-clear advertising?

There are no official pre-clearance mechanisms set for the media. However, as media operators are generally responsible for the dissemination of advertising, and are bound by specific restrictions, such as product placement rules on TV and radio, they use pre-clearance of the advertisements in order to avoid breach of advertising rules.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Compliance with advertising laws is enforced in different ways. Primarily, compliance is monitored and enforced by public authorities, such as:

- (a) regional Trade Licensing Offices (advertising of alcohol, tobacco products, etc);
- (b) Ministry of Health and other national or regional public health authorities (advertising of food and non-alcoholic beverages, cosmetics, food supplements);
- (c) State Institute for Drug Control and Institute for State Control of Veterinary Biologicals and Medicaments (advertising of drugs and veterinary medicaments);
- (d) Slovak National Bank (advertising of financial services); or
- (e) Radio and TV Broadcasting Council (radio and TV advertising).

Apart from government authorities, compliance with advertising laws is enforced by the general courts, especially with respect to unfair competition rules, including misleading advertising.

Sanctions and remedies in administrative proceedings include financial penalties, the obligation to withdraw the illegal advertisement from the market and the obligation to publish the relevant decision of the supervising body in mass media.

Remedies in court proceedings include obligation to refrain from unlawful conduct, to remedy the negative consequences of unlawful conduct, compensatory damages and/or refund of the unjustified enrichment.

In certain cases, the person who breached the advertising rules can even become subject to criminal proceedings.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor has a right of action if advertising breaches unfair competition rules set forth by the Commercial Code. Unfair competition is defined as 'a conduct on the market that conflicts with good morals of competition and is capable of being detrimental to other competitors or customers'. Inter alia, the definition of unfair competition comprises:

- (a) misleading advertising,
- (b) misleading description of goods and services and
- (c) benefiting from the exploitation of a competitor's reputation.

A competitor can file a civil action and require the violator to:

- (a) refrain from unlawful conduct,
- (b) remedy the negative consequences of unlawful conduct,
- (c) pay compensatory damages and/or
- (d) refund the unjustified enrichment acquired by unfair competition conduct.

Moreover, a competitor has a right of action in case of breach of its copyrights, trademarks, designs or other reserved rights. Apart from that, the competitor may initiate administrative proceedings, for instance in case of unfair comparative advertising.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers have a similar right of action to competitors where advertising breaches the unfair competition rules set out in the Commercial Code, provided that the alleged conduct is capable of being detrimental to the consumer. Consumers may file an action (either individually or through a consumer association) and require the violator to:

- (a) refrain from unlawful conduct,
- (b) remedy the negative consequences of unlawful conduct and/or
- (c) pay compensatory damages and/or
- (d) refund the unjustified enrichment acquired by unfair competition conduct.

Apart from that, consumers have a right of action in case of breach of obligations arising from the Consumer Protection Act by the entrepreneur. They may claim adequate financial redress as well as compensation for damage.

Notwithstanding the foregoing, consumers are, in practice, mainly protected by public authorities. If the consumer suspects that advertising is in conflict with laws, he/she can initiate administrative proceedings by filing a motion with the relevant supervisory authority.

2 SELF-REGULATORY FRAMEWORK

2.1 Does the Slovakia have a primary advertising self-regulation system?

The primary self-regulation system relating to advertising in Slovakia is formed of rules set out by the Slovak Advertising Standards Council, the association which brings together organizations actively involved in the marketing communication process; from advertiser associations, advertising agencies and media to businesses, utilising promotion through advertising. The main aim of the Slovak Advertising Council is to secure and promote the dissemination of honest, appropriate, decent, legal and truthful advertising. The members of the Advertising Council are committed to comply with rules of advertising set forth in the Code of Ethics.

2.2 Is there a self-regulatory advertising code? What are the key principles?

As mentioned above, the primary self-regulation rules of advertising are contained in the Code of Ethics issued by the Slovak Advertising Standards Council. The Code of Ethics is a general regulation applicable to all forms of advertising, and contains general principles and standards of advertising as well as requirements for the advertising of specific goods and services. Although the Code of Ethics does not replace or supplement the legal regulation, its principles are generally respected by advertisers in Slovakia. Key principles of the Code of Ethics comprise legality, truthfulness, decency and transparency. The rules contained therein are more detailed than the rules contained in the Act on Advertising, thus they can often serve as an interpretation tool for legal regulation and generally as a source of good practice for the whole advertising industry.

Apart from the Code of Ethics, since 2008, the Rules for Online Advertising have been adopted by IAB Slovakia, the biggest association on the Slovak digital market, which represents leading Slovak publishers, media agencies and other important players active in online advertising in Slovakia, with the aim of establishing a single set of rules and standards for the online advertising.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Compliance with the Code of Ethics is monitored and enforced by the Arbitration Committee of the Advertising Standards Council, composed of advertising experts from different areas of advertising industry. If the Committee finds, following a complaint from any person, that a provision of the Code of Ethics has been violated by advertising, it can impose an obligation on the violator to change or to completely withdraw the infringing advertisement. All decisions of the Arbitration Committee are published on a database available online. Though the decisions of the Committee are not directly enforceable in civil proceedings, they are widely respected. In practice, the main sanction for breach of the Code of Ethics is damage to the good reputation of the advertiser and/or the advertising agency.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self-regulation system in Slovakia is generally considered to be effective. The Code of Ethics issued by Slovak Advertising Standards Council, as well as the decisions of the Arbitration Committee, are widely respected not only by the members of the Council, but by advertising professionals and

advertisers in general. Unlike some of the public authorities responsible for enforcement of mandatory advertising laws, the bodies of the Council are very flexible and provide for continuous developments in the area of advertising regulation. Members of the Arbitration Committee meet on a monthly basis and discuss all motions and complaints of third parties (most frequently individual consumers). Decisions of the Arbitration Committee are published online and are easily accessible to public.

2.5 Are the self-regulatory system's decisions reported?

The decisions of the Arbitration Committee are first delivered to the parties and then published online on the website of the Advertising Standards Council: <http://www.rpr.sk/sk/nalezky>, with the aim of ensuring predictability of future decisions and preventing repetition of the same infringements by other advertisers. It can be said that the decisions of the Arbitration Committee, together with the rules contained in the Code of Ethics, contribute significantly to the development of advertising best practices in Slovakia.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Most of the complaints addressed to the Arbitration Committee relate to traditional issues of advertising content, such as the misleading nature of advertising claims (missing or untrue information in advertising claims), offensive claims or images (in particular claims and images with sexist or vulgar content), insufficient protection of minors, etc. Key principles of advertising therefore include truthfulness, transparency, decency and protection of minors and minorities.

2.7 Are there any other self-regulatory systems that govern advertising practices in the Slovakia?

Apart from the rules contained in the Code of Ethics, which is the main source of self-regulatory rules of advertising in Slovakia, there are the Rules for Online Advertising issued by IAB Slovakia, the biggest association on the Slovak digital market, representing leading Slovak publishers, media agencies and other important players active in online advertising in Slovakia. These rules contain basic principles and rules for online advertising.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in the Slovakia (eg, consumer protection laws; IP laws; unfair competition laws)?

Advertising claims must primarily comply with the general principles and rules of advertising contained in the Act on Advertising. Apart from the rules contained in the Act on Advertising, there are numerous other rules scattered between various laws, some of which are applicable generally to all advertising whilst others apply specifically to certain types or forms of advertising.

One of the main issues in advertising is deceptive or misleading advertising claims. Protection against such practices is contained primarily in the Commercial Code, which sets out unfair competition rules and restrictions, and in the Consumer Protection Act, which is based on EU consumer protection legislation and specifies and prohibits unfair commercial practices.

Advertising claims cannot infringe third parties' IP rights; thus, the rules set out in the Trademark Act, Copyright Act and Design Act must be always complied with.

As far as the personal rights and privacy are concerned, the relevant legislation is contained in the Civil Code.

After May 2018 the protection of personal data is more crucial than ever before, so the advertising must be compliant with GDPR and Data Protection Act.

Lastly, each advertising on TV and radio must comply with the Act on Broadcasting.

3.2 Is substantiation required for advertising claims?

Substantiation is not specifically required for making advertising claims, meaning that there is no regulatory entity in charge of pre-clearing the veracity of advertising. However, consumers generally have the right to receive truthful and accurate information regarding advertised products. Even if there is no specific substantiation requirement, if a competitor or a consumer challenges the accuracy of a given claim, the advertiser must be ready to prove the accuracy of its claim by substantiation of the alleged facts. Substantiation is crucial, especially for comparative advertising claims and for advertising of specific products such as drugs or food supplements.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Apparent exaggeration is generally permitted in advertising. Based on this principle, a puffery or otherwise clearly fanciful advertising message that is clearly obvious and understood by the average consumer is acceptable without substantiation, provided there is no specific claim or factual statement relating to the properties and characteristics of the advertised product or service. For instance, the advertising claim 'best in the universe' would represent an apparent exaggeration and would be compliant with laws. On the other hand, in the case of a specific claim in a puffery advertising such as 'best for stain removal on the market', the advertiser would have to be ready to substantiate such claim, if somebody challenged the truthfulness of the claim.

3.4 What are the rules governing the use of disclosures in advertising?

There are no specific codified rules governing the use of disclosures as to the content and the format of a disclosure. Nevertheless, general principles of advertising require the advertising to be truthful and transparent. One of the means to achieve truthfulness and transparency of the advertising is a use of a fair disclosure. Such disclosure must be appropriate and sufficient to correct any false impression raised, or likely to be raised, by the advertising claim. It should have legible content in terms of font size and it should specify at least basic limitations of the key advertising claim, for instance 'available only from January till March'.

Moreover, advertising of specific products, such as drugs or baby foods, has its own rules as to the information that must be disclosed in the advertising. For example, the advertising of drugs must contain information on correct use and an explicit instruction to read the written instructions contained in the product package; and the advertising of baby foods must contain a recommendation on breastfeeding preference.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Endorsements and testimonials must primarily comply with general principles such as truthfulness and transparency. They may not be used in any manner which would likely mislead consumers. In some cases, the testimonials are restricted by law. For example, advertising of drugs cannot contain recommendations from scientists, healthcare professionals or even well-known public figures, the popularity of whom could stimulate drug consumption.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules regarding product demonstrations in advertising, therefore any demonstrations must primarily comply with general principles, including truthfulness and transparency. Considering the foregoing, the product as shown in the advertising must not appear to have qualities that it does not possess, unless such advertising is accompanied with a fair and easily visible disclosure.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted, provided that it meets requirements specified by the Act on Advertising, which is generally based on EU legislation.

In particular, comparative advertising is permitted if it:

- (a) compares goods, services or immovables (products) satisfying the same needs or determined for the same purpose,
- (b) objectively compares one or more specific, representative, material and verifiable feature of the products, including their price,
- (c) does not discredit or disparage competitors' trademarks, trade names, other distinguishing features, goods, services, activities or standing,
- (d) does not misuse the advantage of the trade mark, trade name or other distinguishing features of the competitor or the designation of the origin of the competing products,
- (e) does not represent goods or services as imitations or copies of goods or services bearing a protected trade mark or trade name,
- (f) does not create confusion between entrepreneurs, between the advertiser and the competitor, or between the trademarks, trade names, other distinguishing features, goods or services of the advertiser and the competitor, and
- (g) is not misleading.

Comparative advertising which does not comply with the above legal requirements is prohibited.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

The Slovak Trademarks Act stipulates that a trademark owner is not entitled to prevent a third party from using indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, time of production or other characteristics of the products, nor indications necessary for specifying the purpose of a product or service, especially in accessories or spare parts, provided that such use is in accordance with honest practices in industrial or commercial matters.

In general, it may be concluded that if an advertising claim complies with the comparative advertising requirements (contained in particular in the Act on Advertising) and unfair competition rules (contained, in particular, in the Commercial Code), it is permitted to use a competitor's trade mark and show a competitor's products for the purposes of the comparative advertising.

For completeness sake, it should be noted that the Commercial Code expressly prohibits offering goods or services as imitations or reproductions of third parties' products, their packaging or performances, except where they would be imitation in elements which are already functionally, technically or

aesthetically predetermined for such products, and the imitator has taken all measures which may be reasonably required from him to eliminate or at least substantially mitigate the risk of confusion.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

According to the Act on Designation of Product's Origin, anyone may demand that the designation of origin be forbidden from being used on the same or similar products and that such products are withdrawn from the market, if the conditions for use of the designation have not been met.

Moreover, there is a specific rule, contained in the Act on Advertising, relating to geographic origin in the context of comparative advertising. In particular, under the Act on Advertising, the comparative advertising of products with an indication of geographic origin is acceptable only if it compares products with the same indication of geographic origin.

3.10 Are there any special rules governing product packaging?

There are specific rules for the labelling of certain types of products, such as foodstuffs, medicaments or textile products. These rules specify which kind of information must be contained on the product package. Most of them are based on or arise directly from EU legislation.

Apart from the content requirements for certain types of products, there is a general requirement regarding the appearance of the package applicable to all kinds of products. In particular, the Commercial Code considers misleading labelling of goods and services as unfair competition conduct. 'Misleading labelling' is any labelling of goods and services which is capable of causing the erroneous presumption that the goods or services:

- (a) are from a particular country or region, or
- (b) are produced by a particular manufacturer, or
- (c) have specific characteristics or special qualities,

which they in fact don't have.

4 PRICE ADVERTISING

4.1 What are the Slovakia's rules regarding price advertising?

The rules regarding advertising involving price are contained mainly in the Consumer Protection Act, which requires a fair disclosure of the price in advertising. If the price was presented in a manner that could mislead consumers, such presentation would be considered to be misleading unfair commercial practice. In practice, the disclosure of the price must not give the impression that the price is lower than it actually is. Apart from the price itself, or the manner to calculate the price, consumers must be informed about other related costs, or at least about the fact that there may be other related costs.

As far as special discounted prices are concerned, although it is permitted to show a regular price and a lower special discounted price in advertising, such advertising would not be acceptable if the 'normal' price was not representative, the goods having never actually been sold and/or offered for sale at that price. It should be noted that sellers have a legal obligation to keep a register of prices, which can be also used as evidence in case of dispute regarding the truthfulness of discounted price offers.

4.2 What are the Slovakia's rules regarding advertising 'free' products?

Describing a product as 'gratis', 'free', 'free of charge' or with a similar term, if the consumer in fact must pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the product, is considered an unfair commercial practice, which is prohibited under Slovak laws. This restriction has been introduced into Slovak law (Consumer Protection Act) on the basis of EC Directive 2005/29 of 11 May 2005. In simple words, it is possible to advertise that a product or service is 'for free' only if the consumer indeed does not have to pay anything, except for necessary response and delivery costs.

4.3 What are the Slovakia's rules regarding sales and special offers?

The general legal framework applicable to sales of products, including discount sales and special offers, is contained in the Consumer Protection Act, which basically mirrors the EU legislation on consumer protection. The Consumer Protection Act contains a definition of unfair commercial practices and an indicative list of banned misleading and aggressive commercial practices, based on EC Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive). Generally, a commercial practice as to the disclosure of the price is regarded as misleading if such disclosure of the price, or the manner in which the price is calculated, or the existence of a specific price advantage, causes or is likely to cause a consumer to take a transactional decision that he/she would not have taken otherwise. Among the banned misleading commercial practices there is 'practice of the entrepreneur', consisting of making a false statement that a product or service will be offered only for a limited time, or that it will be offered for a limited time under certain conditions, in order to encourage the consumer to make immediate decisions, without giving the consumer an adequate time to make an informed decision.

4.4 What are the Slovakia's rules regarding rebates?

Besides the general rules contained in the Act on Advertising and the Consumer Protection Act, no specific provisions are dedicated to rebates. If a rebate is mentioned in advertising, the information must not be false or misleading. The advertisement announcing the rebate needs to be clear about all conditions under which the rebate is valid, including the period and any extra obligations that must be fulfilled.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Key restrictions of retail advertising practices may be implied from the key principles of the retail advertising, namely truthfulness and transparency.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Advertising of certain kinds of products is either banned (generally or in certain media) or very restricted. For instance, advertising of guns and ammunition is prohibited, except where the advertising is:

- (a) intended solely for the professional public in manufacturing and business with guns and ammunition,
- (b) located in shops or exhibitions specializing in sale of guns and ammunition, or

(c) contained in professional literature and professional periodicals.

Advertising of prescription medication, medication which is reimbursed based on public health insurance and medication which is not registered in Slovakia is prohibited, except where the advertising is addressed to health-care professionals and drug stores.

It is completely prohibited to advertise availability of human organs, tissues and cells with aim to offer or acquire financial gain or comparable benefits.

As far as the TV advertising is concerned, it is prohibited to advertise tobacco products and there are significant restrictions with respect to advertising of alcohol products.

Of course, it is generally prohibited to advertise any illegal products.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

There are several types of advertising practices that are specifically prohibited in Slovakia. These practices include, in particular:

- (a) dissemination of unsolicited advertising and spamming (advertising may not be disseminated by automatic telephone call system, telefax, and e-mail without the prior consent of its receiving user) and
- (b) broadcasting of hidden advertising or advertising based on subliminal perception.

Prohibited practices, in fact, also include any advertising that constitutes an unfair commercial practice, an aggressive commercial practice or represents a misleading advertising.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The Act on Advertising stipulates that advertisement must not contain anything that detracts from human dignity, offends national sentiments or religious convictions as well as any discrimination based on gender, race and social origin. Moreover, the advertisement must not encourage to or defend violence, vandalism or vulgarity.

The Act on Advertising further requires that nudity in advertising is always portrayed in a decent way, meaning that depiction of nudity cannot be profane, sexist and without a relevant context. Depending on the context, an image of a man/woman in a sexually suggestive pose as well as an image alluding to sexual activity could be regarded as unacceptable. Any visual display of nudity defaming woman/man in any way would be regarded as unacceptable.

Decency is further specifically mentioned in other laws, for instance in the Act on Broadcasting with respect to TV and radio advertising. Decency is also one of the main principles of the self-regulatory rules contained in the Code of Ethics.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

There is no general obligation to identify who the advertiser/sponsor of the advertising is. In some cases, however, the advertisers/sponsors must be identified. For instance, the Act on E-Commerce requires that e-shop operators disclose clear information about their identity and, in the event that

they are spreading a commercial communication of a third party, the identity of such third party must be disclosed as well. Another example is the Act on Broadcasting, which requires the broadcaster to clearly identify the sponsor of each fully or partially sponsored program at the beginning and at the end of such program. This requirement applies not only to traditional TV and Radio broadcasters, but also to internet broadcasters. The broadcaster has a balancing act to perform: on the one hand, the broadcaster must ensure that the sponsor is clearly and properly identified; on the other hand, the broadcaster is required to ensure that a sponsored program does not directly support the sale, purchase or lease of goods or services by a sponsor or a third party, in particular by special promotional references to those goods or services in these programs.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Slovak laws do not contain specific rules governing the means of integration of advertising content and entertainment (or editorial) content. Nevertheless, there are specific provisions in different laws which require a clear distinction between editorial content and advertising. For instance:

- (a) The Consumer Protection Act classifies the use of editorial content for advertising purposes without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial) as an unfair commercial practice, which is prohibited.
- (b) The Code of Ethics requires that, in the case that an advertisement is placed on a platform with editorial content, then such advertisement must be distinguished in such a way that it is recognizable as an advertisement **by** the average consumer. The average consumer should be able to identify also hybrid forms of advertising, including advertorials.
- (c) The Act on Broadcasting prohibits any kind of hidden media commercial communication, and requires that each commercial communication is clearly recognizable from other components of the program service.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

As mentioned above, there are no specific rules governing the means of integrating advertising content and entertainment (or editorial) content. In order to avoid a prohibited hidden advertisement or a breach of general principle of transparency, it is recommended to clearly identify the advertisement as such, for example by the words 'advertising' or 'sponsored content' in a visible place; if possible at the beginning of the advertising content.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Slovak law does not distinguish social media advertising from other forms of advertising. Therefore, the general rules of advertising, which are scattered between various laws, including those covering advertising in general, unfair competition, consumer protection or personal data protection accordingly apply to social media advertising. Similarly, the self-regulatory rules contained in the Code of Ethics issued by the Slovak Advertising Standards Council are applicable to advertising and marketing via social media as well. As mentioned above, the Rules for Online Advertising have been adopted by IAB Slovakia since 2008; however, they don't contain any specific rules for social media advertising either.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

In theory, an advertiser could be responsible for advertising claims made in user generated content, if such content was on advertiser's own website or its own social media accounts, such as its Facebook page. The advertiser is generally responsible for all the content on its web page, including misleading or otherwise unauthorized information that can qualify as advertising, because it usually has a control over the content of such web page as well as the opportunity to moderate the user generated content.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

The Arbitration Committee of the Slovak Advertising Standards Council has issued many interesting decisions in the past few years and, in fact, remains a primary source of case law in the area of advertising. Nevertheless, the decisions of the Committee mostly relate to the content of the advertisements, rather than the type of media by which they are distributed.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

Under the Civil Code, the use of an individual's name, picture, likeness, voice and identity in advertising is permitted only with the consent of such individual. Moreover, if an individual agrees to the use of his/her name, picture, likeness, voice and identity in advertising, he/she may revoke his or her permission at any time. Similarly, under the Code of Ethics, advertising may not display any living person, nor refer to any living person, unless such person has given his/her consent to such display or reference.

9.2 Are there situations when permission is not required?

Permission for use of an individual's name, picture, likeness, voice and identity is not necessary only where such use is reasonable, aimed for administrative, scientific, artistic or news-reporting purposes and does not conflict with legitimate interests of the individual. There are, however, no exemptions for use of an individual's name, picture, likeness, voice and identity for advertising purposes without that individual's permission. Nonetheless, there have been advertisements using the identity of historical personalities. After death, unauthorised use of individual's identity can only be challenged by husband/wife, children or parents of such individual.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Use of third parties' trademarks and copyright-protected work is usually subject to clearance before use in advertising. However, as far as historic places, well-known buildings or significant landscapes are concerned, there are no specific restrictions as to their display in advertising.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Except for cases specified by law or by case law (eg use of third parties' products in comparative advertising), other companies' recognizable products may not be used without their consent, as such

use might represent infringement of third-party trademarks or copyrights. Pre-clearance of rights to recognizable products is therefore generally recommended.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of the Slovakia which affect advertising (eg Swedish gender equality law)?

There are no specific rules that are particular to the culture of Slovakia which would affect advertising.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Apart from the fact that Slovakia is still a relatively conservative and traditionally religious country, there are no specific cultural norms that should be considered by advertisers before launching an advertising campaign in Slovakia.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Slovakia

A typical issue in advertising and marketing practice in Slovakia is the misleading nature of an advertisement. Under the Commercial Code, misleading advertising is advertising which misleads or could mislead a person to whom it is addressed, and which may affect the economic behaviour of such person or which harms or may harm another competitor or consumer.

According to the Code of Ethics, misleading advertising is advertising which in particular:

- (a) misleads the average consumer or significantly influences or is likely to significantly influence the economic behaviour of the average consumer in relation to the product in a manner which prevents him from making a qualified decision; or
- (b) transmits in unclear, incomprehensible, multi-meaning or inappropriate manner, information essential to the average consumer for making a qualified decision; or
- (c) uses another misleading business practice.

Both definitions of misleading advertising are quite broad. A simple potential to mislead a consumer and affect his/her economic behavior is enough to constitute a breach of the law/self-regulatory rules.

General advice to advertisers operating in the Slovakia would therefore be: Be clear; and don't try to mislead consumers!

 SOUTH AFRICA 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in South Africa?

There are numerous pieces of legislation and areas of the common law that regulate and affect advertising in South Africa. Of particular relevance are the Trade Marks Act of 1993 and Consumer Protection Act of 2008, as well as the common law remedies of passing-off and unfair competition. Self-regulation is also in place in the form of the Advertising Standards Authority of South Africa (ASA) and plays a significant role. The ASA was created in 1969 by the advertising industry itself, and the South Africa ASA Code of Advertising Practice is largely based on the British and International Codes of Advertising Practice.

It is important to state here that the ASA was liquidated by order of the High Court in October 2018, and is currently not functioning. Practitioners and advertisers however, would be mindful to remain guided by the Code of Advertising Practice as the benchmark of the *boni mores* of the community. In the absence of the regulation by the ASA, there is legislation that governs the promotion and advertising of products. These are detailed in the body of the chapter below.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

Whether a communication will be considered ‘advertising’ depends on which legal framework applies. The ASA Code is intended to cover advertising in all its diverse forms. ‘Advertisement’ is broadly defined in the ASA Code as: ‘any visual or oral communication, representation, reference or notification of any kind—

- (a) which is intended to promote the sale, leasing or use of any goods or services; or
- (b) which appeals for or promotes the support of any cause.’

1.3 What is the basic regulatory framework for advertising regulation?

The Code of Advertising Practice is the guiding document of the ASA. It is based upon the International Code of Advertising Practice but adapted to the particular circumstances of advertising in South Africa. The Code is drawn up, and amended from time to time, by the ASA with the participation of representatives of the marketing communications industry. It is supplemented by individual codes, which are determined by the various member organizations or negotiated with governmental institutions. There is also a separate Sponsorship Code that sets out the guidelines for good practice and fairness in sponsorship.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

A number of types of advertising practices are specifically regulated in South Africa and some of these are discussed below.

- (a) **Direct Marketing:** There are specific provisions in the ASA Code that regulate competitions, mail order advertising and direct marketing advertising. In the case of the latter, 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/catalogue marketing, direct response broadcasting, telephone marketing, cell phone/text message marketing and e-mail marketing.

- (b) **Text messages:** The Wireless Application Service Providers' Association (WASPA) has a Code of Conduct which 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. All marketing SMS messages must have a 'STOP' command allowing a person who sends a reply SMS back with the word 'STOP' in it, to opt out of further SMS communications. Enforcement of WASPA's Code & Advertising Rules is achieved by a quasi-judicial system that consists of a procedure for lodging and responding to complaints. Adherence to the Code and the Advertising rules is mandatory for all providers operating in South Africa.
- (c) **Broadcasting:** The Broadcasting Complaints Commission of South Africa (BCCSA) provides a forum to object to the content of television and radio broadcasts. The BCCSA is an independent judicial tribunal that adjudicates complaints of non-compliance with the Broadcasting Code. The Independent Communications Authority of South Africa (ICASA) is tasked with regulating the telecommunications, broadcasting and postal industries in the public interest. The Authority is mandated to receive complaints from the public about services provided by telecommunications, broadcasting and postal licensees.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

A number of particular industries and types of products are specifically regulated, either through specific laws or through specific provisions in the ASA Code. These include, but are not limited to, alcohol, anti-perspirants, antiseptics, germicides, disinfectants, charitable causes, collectibles and commemorative items, competitions, cosmetics, educational courses, financial advertising, franchise schemes, furniture, hair products, imported products, inclusive tours, mail order advertising, motor vehicle advertising, property advertising, food advertising (in particular to children), pet food, slimming, smoking deterrents, standards and research bodies, agriculture, toothpastes and similar goods, water diviners and mobile phones. Some of these are discussed more fully below:

- (a) 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.
- (b) The SA 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.
- (c) 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 labeling of such products.
- (d) The Liquor Act of 2003 restricts false and misleading advertising of liquor, as well as advertising that is meant to target minors. The ASA Code also has an appendix dealing with the advertisement of alcoholic products.
- (e) 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.

1.6 Are any government pre-approvals required?

Pre-approval is generally not required with the exception of advertisements for certain industries. For example, advertisements for stock remedies must conform to the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act of 1947 and must be submitted to the Department of Agriculture for approval.

1.7 Does the media pre-clear advertising?

There is no mandatory pre-clearance of advertisements by the media, although the South African Broadcasting Association will not accept an infomercial for broadcast unless it has been pre-cleared. As the primary responsibility for compliance with the ASA Code lies with the advertising practitioner, clearance is voluntary and regulated internally. Law firms specializing in advertising law may be approached to give an opinion as to whether the advertising material conforms to the ASA Code and legal principles generally.

The Association for Communication and Advertising (ACA) also conducts a voluntary advisory service on the ASA Code. It provides independent advice to any ACA member that needs to ensure that its television advertising—particularly problematic advertisements—conforms to the Code.

In the case of an adverse ruling by the ASA, it may also, as a sanction, order the advertiser to submit the amended advertisement, or indeed all of its advertising for a limited period, to the ACA Advisory Service for pre-clearance.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The manner in which government enforces advertising laws depends on which law applies. A government body or department is generally specifically empowered to exercise control over the advertising of particular products and that would include the ability to issue directives for advertising/packaging to be withdrawn or amended within a specific timeframe. For example, the Foodstuffs, Cosmetics and Disinfectants Act of 1972 empowers the Director-General of the Department of Health to authorize certain employees of that department to act as inspectors in terms of the Act. The Agricultural Product Standards Act of 1990 has similar provisions.

Certain Acts, such as the Consumer Protection Act, also envisage penalties in the form of fines/imprisonment for those who fall foul of its provisions.

1.9 When does a competitor have a right of action? What are the potential remedies?

In terms of the ASA Code, a competitor complaint may be lodged by or on behalf of a commercial entity or individual with a commercial interest concerning compliance with the ASA Code by a commercial entity (ie, in the event of alleged non-compliance). Competitor complaints are subject to a non-refundable filing fee before the complaint will be considered.

The ASA Directorate, Advertising Industry Tribunal and/or Final Appeal Committee may impose the following sanctions where an advertisement is found to be in breach of the ASA Code:

- (a) withdrawal of an advertisement in its current format;
- (b) directing the advertiser to submit the proposed amendment, original advertisement and relevant ASA ruling to the ACA Advisory Service for pre-publication advice;

- (c) directing the respondent 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);
- (d) adverse publicity, including the publication of the names of defaulters;
- (e) ordering the respondent to publish a summarized version of the ruling in all or some of the media in which the advertising complained of appeared or media considered appropriate by the ASA and the cost of such publication will be for the respondent; or
- (f) referral to a disciplinary hearing.

In theory, a competitor could also approach the High Court for an interdict against a competitor if their advertising amounted to unlawful competition. What constitutes 'unlawful competition' is determined with reference to the boni mores, or good business practices. The ASA Code is, it is submitted, a good reflection of those practices in advertising.

1.10 When do consumers have a right of action? What are the potential remedies?

A consumer complaint may be lodged by a member of the public or by entities or organizations regarding consumer-related matters concerning compliance with the ASA Code by an advertisement or advertiser and the remedies are the same as those set out above. Consumer complaints are dealt with free of charge.

If the advertising falls foul of the Consumer Protection Act, a consumer may lodge a complaint with the National Consumer Commission.

Consumers may also file complaints with the Broadcasting Complaints Commission of South Africa (BCCSA) if the matter concerns content on a television or radio broadcasts 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.

2 SELF-REGULATORY FRAMEWORK

2.1 Does South Africa have a primary advertising self-regulation system?

South Africa has a very successful system of advertising self-regulation which manifests itself in the form of the ASA, discussed in detail above. The ASA Code covers virtually all forms of advertising, including traditional radio, television and print advertisements, but also 'point-of-sale' materials, 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.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The key principles of the ASA Code are as follows:

- (a) All advertisements should be legal, decent, honest and truthful.
- (b) All advertisements should be prepared with a sense of responsibility to the consumer.
- (c) All advertisements should conform to the principles of fair competition in business.

- (d) No advertisement should bring advertising into disrepute or reduce confidence in advertising as a service to industry and to the public.

The ASA Code also has provisions relating to various specific topics, for example, advertising to children, fear in advertising, comparative advertising, offensiveness, disparagement, legality, taking advantage of another's advertising goodwill and imitation.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The ASA Directorate, Advertising Industry Tribunal and/or Final Appeal Committee may impose the following sanctions where an advertisement is found to be in breach of the ASA Code:

- (a) withdrawal of an advertisement in its current format;
- (b) directing the advertiser to submit the proposed amendment, original advertisement and relevant ASA ruling to the ACA Advisory Service for pre-publication advice;
- (c) directing the respondent 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);
- (d) adverse publicity, including the publication of the names of defaulters;
- (e) ordering the respondent to publish a summarized version of the ruling in all or some of the media in which the advertising complained of appeared or media considered appropriate by the ASA and the cost of such publication will be for the respondent; or
- (f) referral to a disciplinary hearing.

Once a ruling has been given by the ASA, it is the complainant's responsibility to monitor whether or not the ruling has been adhered to. Should the respondent ignore a ruling, the complainant may lodge a breach complaint with the ASA. If the respondent still fails 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 not accept future advertising from the advertiser. The ASA is not empowered to enforce its rulings beyond this, but nothing in the Code prevents an aggrieved party from approaching the High Court for relief.

2.4 Is the self-regulation system effective? Is it widely used and followed?

This is an effective system and it is widely used. The ASA Code is generally adhered to and the complaints procedure is used by both competitors and consumers. Respondents also tend to comply with orders from the ASA. In recent years, the high price of the filing fee for a competitor complaint has dissuaded some competitors from using the system, however.

2.5 Are the self-regulatory system's decisions reported?

The ASA's 20 most recent decisions can be accessed on its website at www.asasa.org.za. However, to have full access to the searchable database of all ASA rulings, it is necessary to register and pay a membership fee.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

In addition to the basic regulatory framework of the ASA and relevant legislation discussed above, being a Constitutional democracy, advertising should not be at odds with the provisions of the Constitution and Bill of Rights. Consumer protection principles are also important. The Consumer Protection Act of 2008 prohibits, for example, misleading trade descriptions and false or misleading representations concerning goods and services.

2.7 Are there any other self-regulatory systems that govern advertising practices in South Africa?

Certain industry bodies have codes of practice which include provisions relating to advertising. It is therefore necessary to have regard to the rules and regulations of the relevant industry of concern. The ASA Code is, however, the over-arching code of practice insofar as advertising is concerned.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in South Africa (eg, consumer protection laws; IP laws; unfair competition laws)?

(a) **ASA Code:** The advertising industry is mainly self-regulated and advertising content is governed by the provisions of the ASA Code established by the ASA. Only members of the ASA are obliged to adhere to the Code. However, most advertisers, advertising agencies and media sources that carry advertising are members of the ASA.

The definition of an ‘advertisement’ in the ASA Code is very broad and includes the labeling and packaging of products.

The Code of Ethics and Standards of Practice of the Direct Marketing Association (DMASA Code), which deals with direct market advertising, also forms part of the ASA Code.

(b) **Consumer Protection Act:** The Consumer Protection Act (CPA) guarantees the right to fair and responsible marketing. The CPA prohibits marketing that is fraudulent, false, misleading or discriminatory. The CPA also strictly regulates certain types of marketing, such as bait marketing, negative option marketing and direct marketing.

(c) **Labeling Regulations:** The Labeling and Advertising of Foodstuffs Regulations, that were enacted in terms of the Foodstuffs, Cosmetics and Disinfectants Act, set out strict requirements relating to the labeling of foodstuffs in South Africa.

(d) **Other:**

(i) The Copyright Act prohibits the unauthorized reproduction of a copyright work, including in advertising.

(ii) The Trade Marks Act prohibits the unauthorized use, in the course of trade, by a third party, of a mark that is identical or confusingly similar to a registered trade mark, in relation to identical or similar goods or services to which the registered trade mark extends.

(iii) At common law, passing-off, which is a form of unlawful competition, is prohibited. A person may not misrepresent to the public that his product is that of another, or is

associated with another, by, for example, using a similar packaging to that of the other person.

3.2 Is substantiation required for advertising claims?

The ASA Code requires that, before advertising is published, advertisers must have documentary evidence to support all claims that are capable of objective substantiation. Such documentary evidence must be up to date, current, and have market relevance.

If survey data is used as documentary evidence, then it is required that:

- (a) the survey must emanate from an entity approved by, or acceptable to, the Southern African Market Research Association; and
- (b) 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.

Other types of documentary evidence must emanate from or be evaluated by a person/entity, which is independent, credible, and an expert in the particular field to which the claims relate and be acceptable to the ASA.

Finally, claims based on research conducted by publications must clearly state the source in advertising.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

The ASA Code only requires 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 judgments, 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 which is capable of being objectively assessed in the light of generally accepted standards.

Hyperbole, obvious untruths, harmless parody or exaggerations, intended to catch the eye or to amuse, are permissible provided that they are clearly seen as humorous or hyperbolic and are not likely to be understood as making literal claims for the advertised product.

3.4 What are the rules governing the use of disclosures in advertising?

Offers to consumers, by way of direct market advertising, must contain all the information that may be necessary for a reasonable consumer or business to make an informed purchase decision.

Generally, the following details must be disclosed:

- (a) the exact nature of the product or service that is offered;
- (b) the price, including all additional charges, such as delivery or handling costs;
- (c) any other order-related charges, for example, handling charges or services charges;

- (d) the terms of payment;
- (e) any obligations on the consumer upon placing an order;
- (f) delivery arrangements, including shipping terms and delivery times;
- (g) penalties for late payment;
- (h) return and cancellation policies and procedures;
- (i) substitution policies;
- (j) guarantees and warranties; and
- (k) the contact details of the advertiser.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

The ASA Code states that:

- (a) Advertisements may not contain or refer to any testimonial or endorsement unless it is genuine and related to the personal experience over a reasonable period of the person giving it.
- (b) Testimonials may not contain any statement or implication contravening the provisions of the ASA Code and should not be misleading.

Testimonials should not contain any claims to efficacy which cannot justifiably be attributed to the use of the product, and any specific or measurable results claimed should be fairly presented. Where 'before' and 'after' claims are made, they should be capable of substantiation, expressed and illustrated in such a way as to permit a fair comparison to be made.

3.6 What are the rules governing the use of product demonstrations in advertising?

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.

Furthermore, marketers should avoid 'undercover' or 'word-of-mouth' marketing initiatives that encourage a consumer or business to believe, incorrectly, that the representatives of that marketer are acting independently and without compensation.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

The ASA Code provides that comparative advertising is permitted provided that:

- (a) all legal requirements are adhered to (specifically the Trade Marks Act that protects against trade mark infringement);
- (b) only facts capable of substantiation are used;
- (c) one or more material, relevant, objectively determinable and verifiable claims must be made;
- (d) the claims are not misleading or confusing;
- (e) it does not infringe the advertising goodwill of another or disparage another;

- (f) the facts or criteria used are fairly chosen;
- (g) products or services compared must have the same or similar characteristics and purposes; and
- (h) the advertiser accepts responsibility for the accuracy of the research and claims.

The guiding principle in all comparisons is that products and/or services should be promoted on their own merits, and not on the demerits of competitive products.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor’s trade mark or products may be used)?

Previously, South African courts held that comparative advertising constitutes direct trade mark infringement. Recent case law, however, has changed this position. Use of a trade mark in comparative advertising does not constitute ‘trade mark use’ as required for direct trade mark infringement in the Trade Marks Act.

Only in circumstances where comparative advertising causes confusion or deception or otherwise jeopardizes the essential function of a trade mark will it constitute trade mark infringement.

Comparative advertising may, however, also constitute other forms of trade mark infringement, if 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 trade mark.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

Yes. The CPA defines a trade description as being, inter alia, the place or country or origin of any goods. As the CPA prohibits the application of a false trade description to goods, this implies that claims such as ‘made in South Africa’ must not be false or misleading. Furthermore, the Foodstuffs, Cosmetics & Disinfectants Act makes it a criminal offence to apply a false or misleading description to goods in relation to their origin.

In terms of the Labelling and Advertising Regulations under the Foodstuffs, Cosmetics & Disinfectants Act, the country of origin of a foodstuff must be indicated on the label of the product. The regulations are strict about the terms that may be used, such as ‘Produced in...’, ‘Processed in...’, ‘Manufactured in...’, ‘Made in...’ and ‘Packed in...’. The Regulations to the CPA provide for similar labelling requirements for textiles, leather goods, clothing, footwear, products that are made with genetically modified organisms or produced using genetic modification, and meat products.

3.10 Are there any special rules governing product packaging?

Yes—the labelling and advertising of food products is regulated by the Foodstuffs, Cosmetics & Disinfectants Act, its Labelling and Advertising Regulations and the Agricultural Products Standards Act and its Regulations.

4 PRICE ADVERTISING

4.1 What are South Africa's rules regarding price advertising?

In general, a retailer may not advertise any goods for sale without displaying the full price at which those goods are offered for sale. The sale price should include all necessary or incidental costs, for example VAT. The price must be applied or affixed to the goods, or in physical relation to the goods, and must also be displayed in all advertising material relating to those goods. The currency of the price must be expressed in South African Rand.

A supplier may not require a consumer to pay a price for any goods or service that is higher than the price at which those goods or services are advertised. If more than one price is simultaneously displayed on a product, the supplier may not require a consumer to pay a price higher than the lowest of the prices that are displayed on that product.

4.2 What are South Africa's rules regarding advertising 'free' products?

Advertisements that offer 'free' goods must indicate that such goods are only received subject to purchase.

Products may not be described as 'free' if there are any costs to the consumer, in addition to the actual cost of any delivery, freight or postage.

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 he will not be able to recover immediately and directly 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, imposition packaging and handling charges, or inflating actual delivery costs.

4.3 What are South Africa's rules regarding sales and special offers?

Retailers may advertise specific discounts or price comparisons in relation to their products, provided that sufficient documentary substantiation of the price reduction is available on request. Furthermore, a specific discount or price reduction may not be advertised for a period of longer than three months.

Goods and services may be advertised at special sale prices, provided that sufficient documentary substantiation of the price reduction is available on request. Furthermore, there are limitations on the period that sale advertising that contains price comparisons may run.

4.4 What are South Africa's rules regarding rebates?

The CPA provides that a person may not promote, offer, supply, agree to supply or induce a consumer to accept any goods or services, on the representation that the consumer will receive a rebate, commission or other benefit if:

- (a) the consumer subsequently provides to the supplier the names of consumers or otherwise assists the supplier to supply goods or services to other consumer; or
- (b) that rebate, commission or other benefit is contingent upon an event occurring after the consumer agrees to the transaction.

Those provisions do not, however, apply to franchise agreements.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

If an advertiser claims that the price of his goods or services is lower than those of competitors, his advertising must comply with the strict requirements in the ASA Code relating to comparative advertising.

The CPA provides that a supplier may not advertise any goods or services at a specified price in a manner that may result in consumers being misled or deceived regarding the availability of those goods or services, at that advertised price.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

(a) The Tobacco Products Control Act prohibits the advertising and promotion of tobacco products through any direct or indirect means.

(b) The Code of Commercial Communication of the Association for Responsible Alcohol Use sets out specific requirements for the advertising of alcohol beverages. Alcohol advertising may not be directed at persons under the age of 18 years.

There are proposed amendments to the Liquor Act and the Liquor Products Act that call for a ban on the advertising and promotion of alcohol products, and a raising of the legal drinking age from 18 to 21. These laws are not yet passed through Parliament but may be adopted in the near future.

(c) In terms of the regulations promulgated under the Medicines and Related Substances Act, prescription medication may not be advertised to the general public. Prescription medication may be advertised only to medical practitioners, dentists, veterinarians and pharmacists.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

A supplier may not market goods or services to a consumer, on the basis that the goods or services will automatically be supplied to the consumer, unless the consumer declines such offer. An agreement concluded on that basis will be void. This form of marketing is known as negative option marketing. It follows, therefore, that a consumer must have the option to accept or decline the offer of any goods or services, before such goods or services are supplied.

The ASA Code prohibits advertising that:

(a) attacks, discredits or disparages other products, services, advertisers or advertisements, either directly or indirectly;

(b) takes unfair advantage of the advertising goodwill of another advertisement or advertiser; or

(c) imitates an existing local or international advertisement.

The ASA Code also sets out strict requirements for comparative advertising.

The DMASA Code sets out criteria that deals with direct marketing.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The ASA Code provides that advertising may not offend against good taste or decency or be offensive to public or sectoral values and sensitivities, unless the advertising is reasonable and justifiable. Furthermore, advertisements may not contain anything that is likely to cause serious or wide-spread or sectoral offence.

The following is deemed to be unacceptable advertising:

- (a) advertisements that, without justifiable reason, play on fear;
- (b) advertisements that contain any material that may lead or lend support to, or which condones, acts of violence, including gender-based violence;
- (c) advertisements that contain any material that may lead or lend support to, or which condones, criminal or illegal activities;
- (d) advertisements that unfairly discriminate; and
- (e) advertising containing gender stereotyping or negative gender portrayal.

Furthermore, in advertising, children may not be portrayed as sexually appealing, provocative, or in any manner that involves any form of sexual innuendo.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

There is no requirement that the advertising clearly indicates who the advertiser is. It is a requirement that sponsorship and all related communications be clear and accurate to all persons and organizations involved in a sponsorship covering any rights or privileges granted to a sponsor, but there is no specific requirement that advertising 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 organization may not be visibly used or displayed during the event.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

In terms of the Independent Broadcasting Authority (Advertising, Infomercials and Program 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 program transmitted by it and product placement in programming other than news and current affairs shall be subordinate to the content of the program material.

In terms of Section 55 of the Electronic Communications Act of 2005, all broadcasting service licensees must adhere to the ASA Code. Product placement as a means of advertising would therefore also be subject to the ASA Code.

The ASA Code stipulates that advertisements should be clearly distinguishable as such, whatever their form and whatever the medium used. When an advertisement appears in a medium which contains news, editorial or program matter, it should be so designed, produced and presented that it will be readily recognized as an advertisement.

In print media, wherever there is any possibility of confusion, the material in question should be headed conspicuously with the words 'advertisement' or 'advertisement supplement' should be boxed in or otherwise distinguished from surrounding or accompanying editorial matter.

In electronic media, particular care should be taken to clearly distinguish between program content and advertising. Where there is a possibility of confusion, advertising should be clearly identified in a manner acceptable to the ASA.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no special requirements or obligations in this regard. In addition, as far as we are aware, there have, to date, been no complaints lodged in South Africa, with the ASA or any other body, on the basis of product placement.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Currently, South Africa has no legislation that relates specifically to social media. As such, the guidelines for advertising and marketing through social media have to be drawn from a variety of peripheral sources. The CPA contains a number of provisions relating to marketing, including a number of general standards for marketing of goods or services.

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.

Furthermore, the ASA Code and the DMASA Code 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.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

The CPA, ASA Code and other advertising related legislation currently makes no explicit provision for advertising claims made in user-generated content. However, a recent court judgment dealt with malicious statements that were made on an organization's Facebook page. The court held that the owner of the page had to exercise control over its Facebook wall. The judgment implies that the owner

of a Facebook page must monitor posts on its wall. As such, if an advertiser is aware of false or malicious statements on its Facebook page, it would have to take steps to rectify the situation.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

South African law pertaining to advertising and marketing in a social media and user generated context is currently still quite underdeveloped. There have been no specific judgments or rulings that relate specifically to advertising and marketing through social media platforms. However, in general, there has 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. The South African courts have clearly recognized 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.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

A person's right to identity falls under the umbrella of personality rights and, as the name suggests, protects a person's uniqueness or that part of individuality that distinguishes that person from others. In *O'Keeffe v Argus Printing and Publishing Co Ltd* it was held that the unauthorized publication of a person's name and likeness in an advertisement is prohibited. In that case, the use of a person's photograph and name for advertising purposes, without their consent, was deemed to constitute offensive conduct by the user.

In *Julia Basetsana Kumalo v Cycle Lab (Pty) Limited* a photograph was taken of a celebrity (the plaintiff) whilst she was shopping at the defendant's store. The defendant subsequently displayed the photograph in a magazine and in brochure advertisements for its store, without permission from the plaintiff. The court found that the defendant's unauthorized use of the plaintiff's image in the advertisement was wrongful and infringed her right to identity. The court confirmed that a person's right to identity is infringed if an element of that person's identity is used to create the false impression that he supports or endorses the advertised product or service.

The CPA's regulations also contain provisions that relate to use of a person's image in the context of promotional competitions (sweepstakes). The regulations state that a rule which requires a winner to permit the use of their image in marketing material or to participate in any marketing activity or be present at a prize draw will be invalid unless the winner is given the opportunity to decline such use or participation.

South Africa recently adopted data protection legislation, although it is not yet in force. In terms of that legislation, a person's image constitutes personal information—which may only be processed in accordance with the relevant principles.

9.2 Are there situations when permission is not required?

There are certain instances when the use of an individual's identity, without such individual's authorization or consent, might not constitute an infringement of personality rights. If someone attends a public event and is photographed as part of the crowd, one can argue that publication of that photograph will be allowed. However, if the person is featured prominently and the photograph is used for commercial purposes, such use might be unlawful.

The South African courts also allow a degree of criticism of public figures, such as politicians and celebrities. They have also held that the use of an altered image of such figures might not be wrongful in certain circumstances.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

In terms of the Regulations to the National Heritage Resources Act 25 of 1999, any person wishing to make and/or use an image of a national heritage site or part of a national heritage site, either in two or three dimensional versions, for the purposes of advertising or promoting, must apply for a permit with the South African Heritage Resources Agency.

Pre-clearance must be obtained for infomercials (direct response commercials). An infomercial clearance certificate is required by Broadcasters and is issued by an authorized entity such as the ACA or the ASA. The certificate must include details of the infomercial, the relevant Broadcaster's flight code, the length of the infomercial and the dates and times on which it will be aired.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

The unauthorized use in advertising of another's intellectual property, including trade marks and works of copyright, with the aim of gaining undue benefit by causing confusion in the trade, is not legal and is contrary to the ASA Code.

Advertisements may not take advantage of the advertising goodwill relating to the trade name or symbol of the product or service of another, or the advertising goodwill relating to another party's advertising campaign or advertising property, without that party's prior written permission.

In relation to comparative advertising, the use of another's trade mark is acceptable only if it complies with the relevant provisions of the Trade Marks Act 194 of 1993, in other words, there is no infringement of trade mark rights.

Incidental or background use of another's trade mark, in a manner that is unlikely to cause confusion, may be acceptable.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of South Africa which affect advertising (eg Swedish gender equality law)?

Advertising may not be offensive to public or sectoral values and sensitivities, and no gender stereotyping or negative gender portrayal is permitted, unless the advertising is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. These principles are upheld by the Constitution and the Bill of Rights.

Advocacy advertising, where a controversial issue, such as racial or gender inequality is raised, is protected by the ASA Code if it involves issues within the areas of public policy and practice.

Freedom of expression and association is recognized and the ASA recognizes that the hypothetical, reasonable consumer is not hyper-sensitive nor hyper-critical. Advertisements are 'judged' in the context of an open and democratic society where consideration is given to the context, medium, likely audience, the nature of the product or service, degree of social concern, and public interest.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

With its diverse culture, South Africa has varying cultural norms, depending on race, gender and religion. An example of conflicting cultural norms within South Africa is the continued practice of polygamous marriages in a cultural context of mainly monogamous marriages. In light of concerns surrounding the spread of HIV/AIDS, monogamous relationships are positively reflected in advertising, and polygamous relationships are discouraged.

South Africa has legalized gay marriages but despite this, 'gay lifestyles' are not often portrayed in every day advertising.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in South Africa?

Marketers must be aware that the ASA Code no longer has an appendix specifically dealing with marketing of health-related products.

The Code of Marketing Practice, which is deemed to form part of the Medicines and Related Substances Act, sets out the requirements relating to the marketing and promotion of health products.

SPAIN

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Spain?

Advertising in Spain is regulated by a number of different laws. The General Advertising Act (Law 34/1988 of 11 November) and the Unfair Competition Act (Law 3/1991 of 10 January) govern general advertising law. In addition, there are specific laws regulating certain industry sectors, for example, the consumer sector is governed by the Consumer Protection Act, or the Data Protection Act. The advertisement of tobacco, alcohol, food, gambling, therapeutic goods and services also have specific regulation.

Minors are specifically protected by advertising law.

In Spain, there is no legally-backed advertising regulator. Instead, there is a private self-regulatory organization called Autocontrol.

There are also self-regulatory codes for the following:

- (a) infant diet products;
- (b) gambling activities;
- (c) dating services;
- (d) children's toys;
- (e) environmental arguments in commercial advertising;
- (f) wine;
- (g) medicines;
- (h) non-prescription medicines;
- (i) generic medicines
- (j) enteral nutrition products;
- (k) health care technology companies;
- (l) interactive software products(videogames);
- (m) food advertising aimed at children;
- (n) trade marks;
- (o) spirits;
- (p) brewers;
- (q) cinema;
- (r) cosmetics and perfumes;
- (s) bottled water; and
- (t) fundraising activities

1.2 What types of communications are considered to be 'advertising'? How is this determined?

Under Article 2 of the General Advertising Act, 'advertising is any form of communication made by a natural or legal person, public or private, in the exercise of a trade, business, craft or profession in order to promote directly or indirectly the contracting of real or personal property, services, rights and obligations.'

1.3 What is the basic regulatory framework for advertising regulation?

The main sources relating to advertising in Spain are:

- (a) the General Advertising Act (Law 34/1988 of 11 November);
- (b) the Unfair Competition Act (Law 3/1991 of 10 January); and
- (c) the General Audio-Visual Communication Act (Law 7/2010, of 31 March).

In addition, there are special regulations covering specific requirements for certain products (eg, food, alcoholic beverages, tobacco and drugs), advertising in particular media (eg, television) and advertisements directed at certain target audiences (eg, children or adolescents).

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)? If so, please identify them, and briefly summarize the laws that apply.

- (a) **Television and radio advertising** is specifically regulated by the General Audio-Visual Communications Act (Law 7/2010, of 31 March):
 - (i) Service providers of audio-visual media, whether radio, television and related interactive services, have the right to broadcast advertising. Service providers of television broadcasting can exercise this right by issuing 12 minutes of advertising per hour.
 - (ii) Both the advertisements on television and teleshopping must be clearly differentiated from programs by acoustic and optical signs according to the general criteria established by the competent audiovisual authority. The sound level of advertising messages cannot exceed the average level of the previous program.
 - (iii) Television advertisements should respect the integrity of the program in which it is inserted.
 - (iv) The broadcasting of TV films (excluding series, serials and documentaries), and television news programs may be interrupted once for each scheduled period of thirty minutes.
 - (v) No television advertising or teleshopping should be inserted during religious services.
- (b) **Commercial communications by electronic means** (eg e-mail, messaging services apps such as WhatsApp, etc) are regulated by Law 34/2002 on information and e-commerce society services:
 - (i) E-mails and any other kind of electronic message with advertising content or a commercial purpose must avoid being sent to any user who has not expressly agreed to receive such information, unless his/her data was collected due to a previous business relationship.
 - (ii) In any case, companies must provide users an easy and free procedure to get data removed at any time.
 - (iii) Any commercial communication must comply with the information required by law.

1.5 **Are there certain industries whose advertising practices are specifically regulated (advertising practices are specifically regulated (eg, drug advertising)? If so, please identify them and briefly summarize the laws that apply.**

The following industries are specifically regulated:

- (a) **Alcohol:** The General Advertising Law and Audio-Visual Communication Act prohibits advertising of alcoholic beverages:
- (i) with an alcohol content exceeding 20% on television;
 - (ii) with an alcohol content exceeding 20% in places where its sale and consumption are prohibited;
 - (iii) with an alcohol content of less than 20% when broadcast on television outside 8.30pm-6am, unless such advertising forms an indivisible part of the broadcast content; and
 - (iv) that promotes irresponsible consumption or consumption associated with enhanced physical performance, social success or health.

In addition, Spanish alcohol producers in the beer, wine and spirits sectors have established their own self-regulatory codes.

- (b) **Tobacco:** The Tobacco Act (Law 42/2010, dated 30 December) prohibits sponsorship, advertising and promotion of tobacco products in any media and any medium. The Tobacco Act also prohibits activities that directly or indirectly aim to promote tobacco products. Broadcasting of programs or images featuring people smoking or showing trade marks, trade names or signs associated with tobacco products is prohibited in any media. However, the law provides for exceptions in the case of promotions in specialised tobacco shops. Exceptions also apply to publications addressed to professionals involved in the trade of tobacco, presentations of the products to professionals and publications published or printed outside the EU that are not principally intended for the European market. Advertisers should not, under any circumstances, address tobacco promotions to minors.
- (c) **Therapeutic goods and services:** The Royal Decree 1907/1996 on advertising and promotion of products, activities and services with intended health purposes establishes a series of restrictions and bans relating to advertising products, materials, substances, energies or methods that are announced and presented as useful for diagnosis, prevention or treatment of diseases, weight loss change or correction of physical or psychological conditions or physiological and other alleged health purposes. Any product, material, substance, energy or method that claims preventive, diagnostic or therapeutic purposes must meet the claims being promised and are subject to authorisations or controls according to the General Health Law and the Medicines Act. Among other things, the following are prohibited:
- (i) claims that promise guaranteed relief or healing;
 - (ii) claims relating to permits, approvals and controls of the health authorities in other countries;
 - (iii) testimonials from health professionals, celebrities or people well-known to the public, or real or supposed patients as a means of inducing consumption or use;
 - (iv) suggestion or indication that use or consumption of the product enhances physical, psychological, sexual or sporting performance;

- (v) use of the term 'natural' as a characteristic related to preventative or therapeutic purposes;
 - (vi) claims that the product replaces the use of legally recognised medicines or medical devices;
 - (vii) claims that substitute consultation or intervention by health-care professionals; and
 - (viii) claims of specific preventive or therapeutic effects that are not supported by sufficient technical or scientific evidence.
- (d) **Food:** Spanish legislation contains a series of regulations on food safety and nutrition as well as on health claims made in advertising. The main regulations are set out in the Royal Decree 1334/1999 on labelling, presentation and advertising of foodstuff and Law 17/2011 on food safety and nutrition. The presentation and advertising of food must not mislead consumers as to:
- (i) the product's characteristics;
 - (ii) the product's properties or effects;
 - (iii) any 'special' characteristics (when possessed by all similar products); and
 - (iv) products' preventive, therapeutic or healing properties.
- (e) **Gambling:** Game operators must have an authorisation certificate. This certificate should authorise the game operator's advertising, sponsorship or promotion. The main regulation is in the Gambling Act 13/2011, which is completed by regional regulation for activities limited to the territory of one single region (Autonomous Community). The Code of Conduct on Advertising of Gambling Activities imposes additional rules on game operators. Under the code, game operators must meet the principles of veracity, legality and loyalty. The game operator's advertising must also stress the need for social responsibility and ensure the protection of minors;
- (f) **Lotteries:** Only the state lottery and betting societies can run national lotteries. However, the Government can authorise the management and marketing of lottery games provided the lotteries:
- (i) are conducted by non-profit entities with charitable purposes;
 - (ii) are of sporadic nature; and
 - (iii) comply with the legal requirements.
- The licensing process differs from the proceedings established for other gambling activities.
- (g) **Financial services:** Advertising of financial investments and banking products or services is also regulated by specific legal provisions whose compliance is supervised by the financial market authorities (Banco de España, which is Central Spanish Bank, and the 'CNMV', the competent body for the financial market and stock exchange). Financial services advertising is regulated in Ministerial Decree 1718/2010 of 11 June, on regulation and control of banking products and services.
- (h) **Medicines:** advertising of medicines is highly regulated and monitored by the Health Administrations (national and regional). Royal Decree 1416/1994, which enacts EC Directive

92/28 into Spanish national law, is the main legislation, complemented by the Medicines Act (RDL 1/2015).

When advertising non-prescription medicines, advertisers should not target children or seek to distribute such products.

1.6 Are any government pre-approvals required?

Generally, there is no requirement for registration, authorization or licensing for advertising. However, an exception is made for the advertising of gambling activities and advertising of medicinal products.

In the first case, the game operator should obtain a general authorization from the National Gaming Commission empowering him to develop advertising activities, sponsorship or promotion of gambling.

In the second case, the authorization will be granted by the health authorities of the autonomous region where the advertising should be shown.

In relation to advertising on commercial television, the General Manager of the Second Television Authority may determine advertising categories which require prior approval before being broadcasted. Using these powers, the Second Authority pre-approves advertisements targeted at minors, advertisements with sexual content or sexual innuendo and other sensitive topics.

1.7 Does the media pre-clear advertising?

In general, there are no legal requirements for clearance of advertising before publication or broadcast, although advertising of health products and services are subject to controls under the General Health Law.

Autocontrol offers a 'copy advice service' which is a tool that offers a technical opinion on the legal and ethical correctness of a specific advertisement before it is launched to the public.

Advertisers are not obliged to follow Autocontrol's advice and the advice provided is not binding. This means that when a complaint is made against the approved advertising, Autocontrol is not bound by the opinion issued in the copy advice and is free to adopt a decision contrary to the one given by the copy advice service.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The Government ministries and those of the autonomous regions are entitled to judge the commercial acts and behavior identified as infringements under the Consumer Protection Act regime. Penalties for such infringements range from a nominal fine to a fine of 600,000 euro.

In addition to the legal sanctions, the infringing advertiser may also be obliged to put the party making the claim back to the position they would have been in 'but for' the offending act/behavior, without prejudice to compensation for any damages caused. Where the advertiser does not compensate the claiming consumers for the damages caused, the consumers are entitled to sue the company in the civil courts.

On top of this, advertising relating to goods or services with specific regulation (medicines, food, gambling, etc) is supervised by the competent authorities in the respective areas, which means that special (national and/or regional) administrations may control and make decisions about the contents and continuation of particular advertising activities, including the imposition of penalties on advertisers in some cases.

1.9 When does a competitor have a right of action? What are the potential remedies?

A competitor could initiate an action regarding illegal advertising in two ways:

- (a) **Civil order:** The most appropriate procedure against illegal advertising is a civil claim by the affected competitor. This claim can be done before any competent national court. Commercial and mercantile courts will handle the claims concerning unfair competition and advertising.

Article 32 of the Unfair Competition Act refers to actions that may be interposed against acts of unfair competition and illegal advertising and, therefore, the court could impose the following measures:

- (i) declare the illegality of the act;
- (ii) stop the unfair conduct or ban their future reiteration and agree the prohibition of this conduct;
- (iii) remove the effects of the unfair act;
- (iv) rectify misleading, incorrect or false information;
- (v) establish compensation for damages caused by the unfair act, if intent or gross negligence are involved;
- (vi) damages/compensation pursuant to a finding of unjust enrichment (only applies when the unfair act infringes a legal position covered by an exclusive right); and
- (vii) in verdicts that anticipate actions envisaged in the first four points, the court may order the publication of the verdict, or even a rectifying statement.

- (b) **criminal order:** Criminal proceedings are possible when a crime takes place. Advertisers can face up to one year's imprisonment if they make false allegations which may cause serious harm to consumers. However, in relation to potential actions competitors can take this is an unlikely option.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers and users, defined by the Consumer Protection Act as any natural person who is acting for purposes which are outside his or her trade business or profession, may exercise legal actions seeking: a declaration of disloyalty; cessation of unfair conduct; prohibition of the implementation or future repetition; removal of its effects; and the rectification of misleading, incorrect or false information.

In addition, any person or entity whose economic interests are directly affected or threatened by illegal advertising in the market is entitled to take civil action under the Unfair Competition Act (civil proceeding).

2 SELF-REGULATORY FRAMEWORK

2.1 Does Spain have a primary advertising self-regulation system?

In Spain, the regulator for advertising is not established by statute. There is a private advertising self-regulatory organization called Autocontrol (www.autocontrol.es). Autocontrol is a non-profit self-regulatory organization. It is composed of: the main advertisers, agencies and media (TV, press, outdoor, radio and internet); and the main advertising industry associations.

Autocontrol manages the advertising self-regulatory system relying on three key instruments:

- (a) the Code of Conduct;
- (b) an independent body (Autocontrol's Advertising Jury (the Jury) that resolves controversies and complaints; and
- (c) a legal and technical team, composed of experts on law and advertising ethics, in charge of handling legal requests, answering prior consultations or issuing Copy Advice reports on advertisements or advertising projects; creating reports on legal and ethical issues related to commercial communications.

Autocontrol also handles mediation services relating data protection legal issues, and technical and legal queries from advertisers (members or not) on digital advertising, technology and data protection, eg, on the use of cookies, issuing consulting reports (the Cookie Advice Service, the Web Advice Service).

The Jury's decisions must be complied with by members and those non-members who expressly accept the competence of the Jury. Its decisions tend to be conservative and are only binding on members of Autocontrol. The civil courts generally adhere to these decisions.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Autocontrol has two main codes, which cover commercial communications of all products/services in all media:

- (a) **General Code of Advertising Practice:** Autocontrol's Code of Advertising Practice was approved in December 1996 and last updated in April 2011. The rules on ethics apply to all advertising communication activities which, directly or indirectly encourage the trading of goods or services or promote trade marks or trade names, whatever the medium used. The main principles are that advertising must be:
 - (i) legal (advertising shall respect current legislation and, especially, all values, rights and principles recognized under the Spanish Constitution);
 - (ii) fair (advertising shall never constitute a means to abuse the good faith of the consumer); and
 - (iii) truthful (advertising shall not be misleading).
- (b) **Ethical Code of 'Confianza Online':** Confianza Online is an association established in 2003, which acts as a private self-regulation system for the interactive advertising and e-commerce industries. Its primary aim is to build the trust of internet users by providing businesses and organizations with the 'Confianza Online' Trust Mark to be displayed on their websites.

These codes are based upon the prevailing international codes. They represent an updated interpretation of basic and general principles applicable to commercial communications.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Autocontrol's out-of-court dispute settlement system is the only private Spanish mechanism that has been incorporated by the European Commission into the European Consumer Centres Network (ECC Net) (formerly European Extra-Judicial Network (EEJ Net)). This extrajudicial dispute resolution body relies on three key instruments: an Advertising Code of Conduct; the Jury, in charge of applying the aforementioned code; and a set of regulations governing the operations of the Jury. The Jury is the

independent out-of-court body in charge of adjudicating on complaints submitted on advertising issues. Its decisions are binding on Autocontrol's members. The Jury is fully composed of independent lay experts. All the Jury's decisions are clearly reasoned and are published in Autocontrol's monthly newsletter and on its website. The procedural rules governing the Jury's adjudication activity are clearly established in the Jury's rules, which are publicly available on Autocontrol's website.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Between July 1996 and January 2017, Autocontrol handled over 4,000 cases. Around 33% of these cases were resolved through mediation or acceptance of the dispute within five days. All complaints are resolved quickly (in around 14 days) when compared with the average duration of cases passing through the courts (which is around one year).

In 2017, around 68% of all complaints received by Autocontrol were submitted by consumers and consumer organizations and 18.5% were intra-industry complaints. The rest were complaints submitted by Spanish statutory authorities.

2.5 Are the self-regulatory system's decisions reported?

Each decision by the Jury is published in Autocontrol's monthly newsletter, on its website, or through other means of communication by Autocontrol. The advertiser complies with the decision in 95% of the cases.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

The most important principle is truthfulness. Misleading advertising captures all advertising that in any way induces or may induce erroneous conclusions in users where such advertising relates to the characteristics of goods, activities or services; the price, legal and financial conditions of purchase; the use and delivery of the products; or the performance of the services and after-sales services.

The principle of respect for legality means that advertising must respect current legislation and, especially, all values, rights and principles recognized under the Spanish Constitution. Moreover, advertising should not incite violence or illegal behavior. Other important principles include the principle of respect for others and human dignity. For example, at no time should a competitor be mentioned in reference to his personal circumstances or his company's circumstances. Discriminatory advertising based on race, nationality, religion, sex or sexual orientation must be avoided and comparisons between a product's own activity, services or establishment and those of others must be based on essential and similar characteristics. Such comparative advertising must always be truthful and must not be expressed in disdainful or denigrating terms.

Commercial messages targeted at children must be handled extremely carefully. They must not exploit the natural ingenuity, immaturity, inexperience or credulity of children or adolescents, nor must they take advantage of their sense of loyalty, or contain declarations or visual presentations that might damage them mentally, morally or physically.

2.7 Are there any other self-regulatory systems that govern advertising practices in Spain?

Autocontrol is the only self-regulatory system responsible for governing advertising in Spain.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Spain (eg, consumer protection laws; IP laws; unfair competition laws)?

The basic laws governing advertising claims in Spain are:

- (a) **the General Advertising Act** (Law 34/1988 of 11 November): Advertising shall be governed by this Act, by the Unfair Competition Act and by the special rules regulating certain advertising activities;
- (b) **the Unfair Competition Act** (Law 3/1991 of 10 January): The object of this Act is the protection of competition for the benefit of all those who participate in the market and, to this end it prohibits acts of unfair competition, including unlawful advertising in the terms laid down in the General Advertising Act;
- (c) **the General Audio-visual Communication Act** (Law 7/2010, of 31 March): The law sets out several rules on content and mode of operation for the players in the sector;
- (d) **the Consumer Protection Act** (Royal Decree 1/2007 of 16 November): The Consumer Protection Act applies to the relationships and contracts entered into between consumers and businessmen or companies;
- (e) **the Data Protection Act** (Law 15/1999 of 13 December): This law is intended to guarantee and protect the public liberties and fundamental rights of natural persons and, in particular, their personal and family privacy with regard to the processing of personal data. Since 25 May 2018 the GDPR applies in Spain and a new Data Protection Act is in approval process; however, the previous law is still applicable if the provision complies with the GDPR; and
- (f) **the Intellectual Property Act** (Law 1/1996 of 12 April): This law governs copyright, which is the right of authors of literary, artistic or scientific works, in Spain.

3.2 Is substantiation required for advertising claims?

Advertisers must be able to substantiate claims if requested to do so or in case of a complaint. The substantiation must be based on objective, true and demonstrable facts.

Where there are objective and verifiable claims with references to tests, studies or any technical, statistic or scientific data, the advertiser, who bears the burden of proof, must be able to demonstrate the veracity and accuracy of the claims by providing the referenced test, study or data.

In the absence of evidence that weakens or contradicts the provided studies, as a general rule there should be no reason to assume a violation of the veracity principle.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)? If so, please explain.

Generally, in Spain, all types of advertising messages should be substantiated.

Spanish law has no definition of 'puffery'. Nevertheless, the doctrine of puffery defines it as praise of concrete and verifiable aspects that has an element of truth and is not taken seriously by the audience. When the message excludes others' products or services, the exaggeration doctrine does not apply.

There have been some cases where Autocontrol has been asked to decide whether the defense of puffery, as claimed by an advertiser, should be upheld. Rejecting the interpretation of the advertising based on literalness, Autocontrol has established that advertising should be analysed according to the overall message transmitted to the recipient. If such analysis leads to a conclusion that the overall meaning of the advertisement transmits a credible message about the properties of the product and the consequences of its consumption, the advertisement shall not be deemed misleading.

3.4 What are the rules governing the use of disclosures in advertising?

In order to analyze whether the advertising message is misleading or not, the message has to be interpreted from the perspective of an average, normally informed and reasonably observant consumer.

In accordance with the veracity principle, the advertiser has the obligation to make every effort to ensure that all messages included in the advertisement are understandable to the average consumer and to prevent the prominent messages from obscuring the main message to the consumer.

For this purpose, disclaimers and footnotes can be used to disclose any information that is relevant to the advertised offer.

Advertising referencing a test, study or any technical, statistic or scientific data must disclose the natural or legal person who has carried out the study and the state of its completion.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

In Spain, there are no general legal provisions regarding testimonials used in advertising, except in relation to the advertising of health products and advertising targeted at children. However, Autocontrol's Code of Advertising Practice contains provision on testimonials.

The basic principle is that recommendations or testimonials included in advertising must be truthful. When advertising includes recommendations and/or testimonials, that is, assertions from parties not connected to the advertiser and who are not acting as spokesmen for the advertiser, whether they are paid or not, advertising shall be truthful.

Testimonials shall be used only with the permission in writing of those giving them. The advertiser shall be able to prove the truth of the testimonial. Furthermore, if such testimonials include statements on objective and verifiable characteristics of the product (or a competitor's products), the advertiser must be able to prove the veracity and accuracy of the statement included in the testimonial.

3.6 What are the rules governing the use of product demonstrations in advertising?

In general, advertising depicting or demonstrating product performance should not be misleading and must reflect the real life use and experience the consumer or user would have with the product. Specifically, the Medical Devices Act (Royal Decree 1591/2009, 16th October) establishes under Article 41 that products not complying with the provisions of this Royal Decree may be demonstrated at fairs and exhibitions provided that a sufficiently visible sign is placed on the products themselves (or with them) clearly indicating that the products cannot be on the market or put into service until compliance is established. Such demonstrations can never involve the use of these products on patients.

Commercial communications about products especially aimed at minors, such as toys, should not be misleading about their characteristics (eg size), their safety, nor about the capacity and aptitudes necessary for the minor to use them without causing harm to him/herself. It is forbidden to include in

any advertisement a direct exhortation to children to buy advertised products or to persuade their parents or other adults to buy advertised products for them.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted in Spain but is subject to a stringent legal regime to protect both the interests of consumers and the interests of the competitor. Advertisements can explicitly or implicitly allude to and/or identify competitors.

According to Article 10 of the Unfair Competition Act, comparative advertising is allowed if:

- (a) it compares goods or services that meet the same needs or are intended for the same purpose;
- (b) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
- (c) regarding products with protected designation of origin or geographical indication, it relates in each case to products with the same designation;
- (d) it does not present goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name; and
- (e) the comparison does not contravene the provisions on misleading actions, denigration, and exploitation of a reputation or confusion of the consumers.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Advertising shall not contain, either explicitly or implicitly, any reference to distinctive signs of another advertiser, other than in legal or conventionally permitted cases or in the case of acceptable comparative advertising.

Advertisements must not imitate the general outline, text, slogan, distinctive signs, visual presentation, music, or sound effects of other national or foreign advertisements, even if they have come to an end where they have been protected by industrial or intellectual property rights.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

With the exception of geographical origins registered and protected as Geographical Indications, there are no other general legal provisions. Nevertheless, providing wrong information about the origin of goods or services and making false claims can be considered as misleading advertising and/or unfair competition.

3.10 Are there any special rules governing product packaging?

Yes—many categories of products (eg food, tobacco, alcoholic drinks, medicines, toys) have special regulations regarding labeling and packaging.

4 PRICE ADVERTISING

4.1 What are Spain's rules regarding price advertising?

In general, the prices of goods can be advertised freely as long as they do not infringe the Unfair Competition Act and the Retail Act. However, it is forbidden to sell at a loss, except if the product is about to deteriorate or the business is to be closed.

Any claim relating to the price of the advertised product or service must be true. If the advertising refers to the price of a product or service, this should include the full final price, including taxes, and specifying, where applicable, any charges and discounts that apply to the offer as well as any additional costs passed on to the customer. It is considered unfair to advertise goods at certain price to attract consumers' attention, when the goods advertised are not available or were available in insignificant quantities or for a very short period of time.

In all other cases where, due to the nature of the goods or services, no exact price or amount of additional costs can be specified, the advertising should include a basis of calculation or an estimated amount to allow the customer to check the price.

4.2 What are Spain's rules regarding advertising 'free' products?

In Spain, the promotion of sales with accompanying gifts is perfectly legal, but is subject to certain rules.

Article 32 of the Retail Act regulates these types of sales. The first section establishes that where the purpose is promoting sales, another product, free service, or a specially reduced price can be offered to the consumer, either automatically or by way of entry into a lottery or contest. If the gift consists of entry into a lottery, the applicable regulations have to be observed and the authorization of the Spanish Gaming Board is required.

Unlike liquidation sales or regular sales, the retailer does not need any justification to provide gifts other than a simple desire to increase sales. The types of gifts and promotional offerings vary widely. For example, 'two for one' offers, bonuses, vouchers offering a future discount, or bonus points that allow the customer to obtain free goods in the future, are all common.

Regardless of any regulations made by the autonomous regions in Spain, the gift must always be provided within three months of the moment when the consumer fulfils the condition of the promotion (usually the purchase).

Any gift that has been offered on the packaging of the product must also be available for at least three months from the end of the promotion.

There are some local laws in the Spanish autonomous regions that regulate sales offering gifts, bonuses or discounts, but there are very few material rules that impact upon these types of sales.

Specific regulations apply to particular types of goods. For example, it is prohibited to offer any kind of promotional gifts in the medicinal and pharmaceutical sectors.

As a consequence of EC Directive 2005/29, it is considered to be a misleading commercial practice and, thus, to be unfair, to describe a product as 'gratis', 'free', 'without charge' or similar 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 item.

4.3 What are Spain's rules regarding sales and special offers?

Under the Spanish Retail Act, certain sales activities are distinguished, namely, seasonal sales, end of line sales and liquidation sales:

- (a) **Seasonal sales:** Seasonal sales may take place in 'seasonal periods' of greater commercial interest to each merchant. The duration of each sales period is decided by each merchant;
- (b) **End of line sales:** Products are considered suitable for end of line sales if their market value appears to be significantly decreased because of deterioration, defect, disuse or obsolescence of the product. It is necessary for 'end of line' sales to be advertised as such or as a 'sale of surplus stock'; and
- (c) **Liquidation sales:** These sales can take place only in exceptional circumstances with the object being to dispense with stock of certain products that are advertised as being liquidated. They take place either as a result of a judicial or administrative decision, or on the initiative of a retailer. Advertising of liquidation sales must indicate the cause of such sale.

4.4 What are Spain's rules regarding rebates?

Under the Spanish Consumer Act, consumers have the right to withdraw from the purchases within 14 days. This period expires 14 days after the day the consumer received the goods. However, if this period expires on a non-working day, the deadline is extended until the next working day.

The consumer can choose to withdraw from the order for any reason within this timeframe. To exercise the right of withdrawal, the consumer must unequivocally inform the trader of the decision to withdraw from the purchase. This is possible, for example, by adding a written statement to the goods that you are returning by post, or by sending a fax or e-mail. It is not enough to just send the goods back.

The trader must give a refund within 14 days from receipt of the withdrawal notification, but can delay refunding if he/she has not received the goods back or evidence that the consumer has sent them back.

As regards purchases in bricks and mortar shops, refunds are only compulsory in case of fault or defect in the purchased goods. However, the practice of offering a refund is widely extended.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

According to the Retail Act, 'special sales' include distance selling, automatic sales, mobile market selling and selling by public auction. 'Special sales' are subject to specific regulations.

Sales that are achieved without the simultaneous physical presence of the purchaser and vendor are considered distance selling. All proposals made in such sales must unequivocally state that they constitute a commercial offer.

As a general rule, the products on sale need to be presented separately from the non-discounted goods.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

According to the General Audio-Visual Communication Act, TV advertising of the following products and services is prohibited:

- (a) advertising of cigarettes and other tobacco products as well as advertising of tobacco manufacturers;
- (b) advertising of medicine and health products other than as expressly regulated in the Medicine Laws;
- (c) advertising of alcoholic beverages with an alcohol content of over 20 per cent;
- (d) broadcasting advertising of alcoholic beverages outside the time slot between 8.30pm and 6am and when such advertising is targeted at children or promotes irresponsible consumption or consumption associated with enhanced physical performance, social success and health;
- (e) advertising encouraging behavior prejudicial to the environment or prejudicial to the safety of persons; and
- (f) commercial communications of a political nature, except during an election campaign.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

The Unfair Competition Act establishes rules that mean certain deceptive business practices, the omission or concealment of necessary information, and aggressive commercial practices are unfair. Examples include:

- (a) false and deceptive advertising practices to lure customers;
- (b) deceptive practices on the characteristics of goods and services, their availability and after-sales services; and
- (c) covert advertising practices.

Furthermore, aggressive practices such as the following are prohibited:

- (d) personal visits to a customer's home ignoring his or her request to leave the house or not return to it;
 telephone spam and unsolicited commercial communications via e-mail, fax or other remote means of communication (sending such communications disguising or concealing identity of the sender is prohibited); and
- (e) creating the false impression that the consumer has already won, will win, or will win provided a particular act is performed, a prize or other equivalent benefit, when in fact either there is no prize or other equivalent benefit, or taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

In addition to the provisions of the General Advertising Act regarding unlawful advertising, the General Audio-Visual Communication Act contains further restrictions and prohibitions regarding TV advertising. These prohibit any commercial communication that violates human dignity or encourages discrimination by reason of sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation as well as any advertising that uses the image of women in a degrading and discriminatory way.

The authorities of the competent autonomous region will judge the commercial acts and behavior identified as infringements under the General Audio-visual Communication Act. Very serious infringements will be sanctioned with fines of 500,001 euro to 1,000,000 euro. Serious infringements will be sanctioned with fines of 100,001 euro to 500,000 euro. Minor infringements will be sanctioned with fines of up to 100,000 euro.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

According to Article 20.1 of the Spanish Act of Information Society Services ‘the advertiser must always be identifiable, so that recipients can recognize and contact it without difficulty. For these purposes, the advertiser/owner shall inform its recipients, in a clear, direct and easily accessible way, his name or company name, address for legal purposes as well as his e-mail address and any other information that allows direct and effective communication.’

Failure to comply with the provisions of Article 20 for commercial communications, promotional offers and contests, qualifies as a minor infringement. For committing such an infringement, a fine of up to 30,000 euro will be imposed.

In addition to the trademark legal provisions that may be applicable, it is considered unfair to promote a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by that same manufacturer when it is not.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Editorial content is not expressly regulated but is undoubtedly advertising under the definition in the General Advertising Act (‘Any form of communication made by natural, legal, public or private person in the exercise of its commercial, business, handicraft or professional activities that aims at direct or indirect promotion of moveable or immovable goods, services, rights or obligations.’)

In that sense, the law is clear when it states that ‘including communications to promote a good or service as information in the media, ... without making clear in the content or by images or sounds clearly identifiable for consumer or user that this is advertising content’ is considered misleading advertising. Furthermore, the law states that ‘commercial communications by electronic means shall be clearly identifiable as such’.

Consequently, the average consumer or user must be able to easily identify advertising content and distinguish them from other content.

Finally, according to the Unfair Competition Act, it is considered as misleading advertising to use editorial content in the media to promote a product where a trader has paid for the promotion, without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

In the case of TV advertising, the General Audio-Visual Communication Act requires that any type of content that, when broadcast, could confuse the viewer about its actors or characters must permanently include, in a way that is clearly legible, the word ‘advertising’.

In the case of commercial communications sent by electronic means, the communications must include at the outset of such communication, either ‘advertising’ or ‘advertisement’.

In addition, when the advertisement is included in the form of ‘product placement’, an indication that the content constitutes advertising must be included.

Finally, regarding the new phenomenon of bloggers and any other sort of so-called ‘influencers’, the Spanish law requires the term ‘advertising’ or ‘ad’ to be included when it is part of a campaign. However, it is not always easy to discern when it is a real recommendation from a specific person who has no personal interest in the product or service, and when it is surreptitious advertising.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

According to Article 8 of the Spanish Act of Information Society Services and Electronic Commerce, the use of social media for advertising must be decent, honest and truthful. It should never be a means to abuse the good faith of its recipients. It must not include content that undermines the dignity of the recipient, or be discriminatory (by reason of nationality, race, sex, sexual orientation, religious or political beliefs, or any other circumstances, personal or social), or incite the commission of unlawful acts.

If a particular service of the information society violates or may violate the above principles, the competent authorities for protection, in the exercise of their legally assigned functions, may take the necessary measures to ensure that the service is interrupted or to remove the infringing data.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

According to Article 13.1 of the Spanish Act of Information Society Services and Electronic Commerce, (E-Commerce Act) the service provider is subject to civil, penal and public law.

In general, the service provider is responsible for the content of its websites, unless its participation falls within any of the exemptions regulated in Articles 15–17 of the E-Commerce Act (hosting, caching, mere conduit). Following the principles of EC Directive 2000/31, the limitation of liability also includes the obligation on the exempted provider, upon obtaining actual knowledge or awareness of illegal activities, to expeditiously remove or disable access to the information concerned.

Also, there is no exception of responsibility as the advertisements are placed by contractual partners of Facebook or users of the website. Therefore, Facebook, for example, may not argue successfully that they did not have knowledge of the content of the advertisement.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

The Provincial Court of Madrid (in a judgement of 15 September 2017) declared Groupon Spain to be jointly liable of copyright infringement concerning sales made in its market place by a third party. The Court considered that Groupon's participation was not limited to actions of technical nature.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

In accordance with Article 7.6 of the civil protection of the right to honor, personal and family privacy and image Act (Law 1/1982 of May), it is illegal to use the name, voice or image of a person for advertising or commercial purposes (or purposes of a similar nature) without the consent of the individual. In some cases it is not necessary to obtain consent if the individual is a celebrity and the pictures are taken during a public event.

It is not necessary to get written consent. It is sufficient to get such consent verbally from the individual who will appear in the advertising. The actor may receive a payment for the use of his name, voice, likeness, image or identity.

9.2 Are there situations when permission is not required?

Permission is not required, when:

- (a) reproducing or publishing images of persons in public office or of a public reputation where the image is captured during a public event;
- (b) using a caricature of such persons, in accordance with 'social use'; or
- (c) the image of a particular person appears as merely incidental in the context of a public event.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are special rules governing advertising at certain historical places. Such rules are specific to each location and are regulated by municipal ordinances. For example, the Municipal Ordinance of Advertising for Madrid (Ordenanza Municipal sobre Publicidad para Madrid, de 30 de septiembre de 2009). According to Article 1.1, this Ordinance is intended to regulate outdoor advertising activities.

The following activities are expressly forbidden:

- (a) advertising through posters, stickers, labels projections and performances;
- (b) placing signs featuring trade names, badges, logos, places, products, promotions on public roads and road signs; and
- (c) distribution or delivery of brochures, advertisements, stickers or any other kind of advertising product.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

No. This advertising would be deemed misleading in Spain on the grounds that it is likely to confuse the consumer. Trading practices deemed to be unfair include comparative advertising, which, in its factual context, and taking into account of all its features and circumstances, creates confusion, including a likelihood of association with any goods or services, trade marks, trade names or other distinguishing marks of a competitor, provided that they are likely to affect the economic behavior of consumers and users

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Spain which affect advertising (eg, Swedish gender equality law)?

The following rules have elements which also affect advertising:

- (a) **the Effective Equality between Men and Women Act** (Law 03/2007 of 22 March). Advertising that involves discriminatory conduct shall be deemed unlawful, in accordance with the provisions of the General Advertising Act; and
- (b) **the Animal Protection Act** (Law 11/2003 of 24 November). The filming of scenes containing animals involving cruelty, abuse, death or suffering for the purposes of cinema, television or for advertising purposes, must in all cases, without exception, be a simulation and require prior authorisation from the competent authority, prior to their filming, of the competent organ of the Regional Administration.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

There are limitations regarding the use of certain religious themes, images, symbols, or figures in a way that may be harmful to reputation. The same rule applies to the protection of language, culture and famous symbols of Spain.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Spain?

According to Article 1 of the General Advertising Act, all advertising is governed by the General Advertising Law, Unfair Competition Law and special rules that regulate certain advertising activities. The advertising of certain materials or products is regulated by special advertising regimes respecting the rights and public freedoms established in the Spanish Constitution. These regulations provide special guarantees for any party affected by illegal advertising.

For example, electoral law provides certain limitations on campaign advertising, eg, if the campaign period has ended, it is not possible to perform additional campaign activities or events.

Another example is in relation to extras that appear in advertising. The Statute of Workers' Rights (Royal Decree 1/1995 of 24 March) applies as well as those that apply in each autonomous region, so it is important to consider other legislation that may apply to advertising.

SWEDEN

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Sweden?

Advertising is primarily regulated by the Swedish Marketing Practices Act (MPA) and other marketing legislation such as the Swedish Act on Name and Image in Advertising.

The marketing legislation is supplemented by various statutory consumer protection laws. There are also provisions relevant for advertising found in sector specific legislation relating to among others alcohol, tobacco, lotteries, consumer credits and media specific legislation relating to radio and television etc.

In addition, there is intellectual property and data protection legislation.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

Marketing, which includes ‘advertising’, is defined as ‘any measures in the course of a business commercial message which are intended to promote the sale of and access to products including a trader’s actions, omissions or other measures or behavior before, during or after sale or delivery of products to consumers or traders’.

To qualify as a commercial message the communication must have a commercial purpose and a pure commercial subject. Attempts to pass commercial messages as editorial content, such as advertorials or native advertising practices, have been ruled unlawful by the Swedish Market Court.

1.3 What is the basic regulatory framework for advertising regulation?

The MPA, which implemented the Unfair Commercial Practices Directive and applies to both ‘business to consumer’ and ‘business to business’ marketing activities, is the primary legislation of interest. Moreover, the MPA is supplemented by a so-called black list (Annex 1 to the Unfair Commercial Practices Directive), which includes examples of practices that are always considered unfair and in breach of the MPA.

The statutory acts are in many cases supplemented by non-binding, but explanatory, guidelines from the Swedish Consumer Ombudsman or other governmental bodies.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Some advertising practices are subject to specific laws which govern their advertising and/or they have particular specific provisions that supplement the MPA. Whilst not exhaustive, the following list sets out the main additional provisions:

- (a) TV advertising targeting children under the age of 12 is banned in commercials broadcasted under Swedish licenses;
- (b) As a general rule, unsolicited advertising must not be sent through electronic mail (such as emails and text messages) without a consumer’s prior consent; and
- (c) Direct marketing should not be addressed to children under the age of 16. Direct marketing in general should not be sent to anyone who has declined such marketing.

1.5 **Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?**

There are several industries that are subject to specific laws which govern their advertising and/or they have particular specific provisions that supplement the MPA. Below are some of the main ones, but the list is not exhaustive.

- (a) **Alcohol:** The Swedish Alcohol Act states that all marketing of alcoholic beverages (ie spirits, wines and beers with more than 2.25% alcohol) to consumers must be particularly moderate and is not allowed to encourage the consumption of alcohol or be obtrusive. As a consequence, the opportunities for outdoor marketing (such as billboards) are very limited.

Alcoholic beverages as free gifts or prizes are not allowed. Moreover, advertising must not target or portray children or young people under the age of 25. There is also a total ban on the advertising of alcoholic beverages in radio and television commercials broadcasted under Swedish licenses. Further, companies mainly occupied with manufacturing or selling alcohol must not sponsor a TV or radio program.

Commercial advertisements in periodical publications are allowed for alcoholic beverages that contains less than 15% alcohol. However, the advertisement must be moderate and include information about the risks that are connected with alcohol consumption.

- (b) **Tobacco:** Tobacco products must include pre-defined warning labels and product information on packages. Advertising of tobacco products is only permitted in certain periodical publications, and at premises where such products may be legally sold provided that the advertisement is not visible from outside the premises.

When allowed, advertising of tobacco products to consumers must be carried out with special care. In particular advertising must not be obtrusive or encourage the use of tobacco products.

Tobacco products must not be advertised in radio or TV commercials broadcasted under Swedish licenses. There are also further restrictions on sponsorship activities.

- (c) **Pharmaceuticals:** Advertising of prescription-only pharmaceuticals to consumers is prohibited.

Advertising is subsequently restricted to pharmaceuticals sold without prescription and must mainly relate to illnesses that the consumer is presumed capable of diagnosing themselves. Other indications shall specifically identify that they require medical treatment or other contact with health or medical personnel. A basic requirement is that the information refers to indications and dosages that are authorized by the Swedish Medical Products Agency.

- (d) **Lotteries:** Organizing a lottery (which, by definition, includes sweepstakes or other contests and games where the outcome is determined primarily by chance) generally requires a license. Promotion of participation in unlawful lotteries is illegal. However, as of 1 January 2019, lotteries for which participation does not require a stake/cost for participants will not require a license and will, accordingly, be lawful. Marketing a lottery must be done with moderation and must adhere to general rules of the MPA.

- (e) **Consumer credit:** Under the Swedish Consumer Credits Act the advertising of credit to consumers must contain the effective rates and the credit cost. There are also rules on the

amount to be paid in cash. Extenders of credit must comply with generally accepted market and credit practices.

1.6 Are any government pre-approvals required?

Not applicable.

1.7 Does the media pre-clear advertising?

Not applicable.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Within its supervising powers the Swedish Consumer Ombudsman may prohibit advertisers from continuing with unfair marketing practices subject to conditional fines. It may also order advertisers to provide material information to consumers.

If an advertiser does not accept the prohibition or order, the Swedish Consumer Ombudsman may bring legal action before the Swedish Market Court. Further sanctions include injunctions subject to conditional fines and, in severe cases, market disruption charges (SEK 10,000–10,000,000).

1.9 When does a competitor have a right of action? What are the potential remedies?

Any competitor affected by the marketing in question has a right of action under the MPA. The potential remedies are injunctions subject to conditional fines and damages in case of negligent or intentional breaches of the MPA.

1.10 When do consumers have a right of action? What are the potential remedies?

Groups of consumers, but not individuals, have a right of action under the MPA. The potential remedies are injunctions subject to conditional fines and damages in the cases of negligent or intentional breaches of the MPA.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Sweden have a primary advertising self-regulation system?

There are several sector-specific self-regulation systems (such as the Alcohol Suppliers Examiner and the Direct Marketing Body etc), but the primary and general system is the Advertising Ombudsman. The Advertising Ombudsman, amongst other roles, reviews whether advertising is compliant with the Advertising and Marketing Communication Practice from the International Chamber of Commerce (the ICC Code). Individuals, companies and other organizations can file complaints to the Advertising Ombudsman. In cases of general public interest, the Advertising Ombudsman may initiate its own investigation without a complaint.

Complaints about pure religious or political (ie non-commercial) content will not be assessed.

2.2 Is there a self-regulatory advertising code? What are the key principles?

As above, the Advertising Ombudsman enforces the ICC Codes which applies to all media. The objectives of the ICC Code are to:

- (a) demonstrate responsibility and good practice;
- (b) enhance overall public confidence in marketing communications;
- (c) respect privacy and consumer preferences;
- (d) ensure special responsibility as regards marketing communications and children/young people;
- (e) safeguard the freedom of expression of those engaged in marketing communications; and
- (f) provide effective practical and flexible solutions; to minimize the need for further regulation.

In addition to general provisions on issues such as decency, social responsibility, truthfulness, substantiation, comparisons, safety and health and data protection, the ICC Code has specific chapters in relation to sales promotions, sponsorship, direct marketing, digital media and environmental claims.

The Advertising Ombudsman supplements the ICC Code article on social responsibility with additional requirements relating to gender discrimination in advertising.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The Advertising Ombudsman cannot impose any sanctions. Decisions by the Advertising Ombudsman can be challenged before the Advertising Ombudsman Jury. The Advertising Ombudsman may also refer unprecedented or complex issues directly to the jury.

2.4 Is the self-regulation system effective? Is it widely used and followed?

As far as known there is no research or accurate data on how effective the system is, but our view is that the system serves its purpose and that major advertisers follow the decisions.

2.5 Are the self-regulatory system's decisions reported?

The Advertising Ombudsman's decisions are published on its website and usually reported by media covering business and trade matters.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

The Advertising Ombudsman has a general focus and companies should be aware of all aspects of the ICC Code.

2.7 Are there any other self-regulatory systems that govern advertising practices in Sweden?

The Alcohol Suppliers Examiner, which assesses alcohol advertising in light of the recommendations on advertising for alcoholic and low alcohol beverages issued by the Brewers of Sweden, the Association of Swedish Advertisers and Swedish Spirits & Wine Suppliers.

Moreover, the Direct Marketing Body tries to influence direct marketing in light of the Swedish Direct Marketing Association's Rules.

There are additional self-regulation bodies for, among others, health claims in food advertising and medicinal products.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Sweden (eg, consumer protection laws; IP laws; unfair competition laws)?

The MPA is the most relevant law that governs advertising claim in Sweden, but the Swedish Act on Name and Image in Advertising may, in some cases, also be applicable. In addition, the statutory intellectual property laws such as the Swedish Copyright Act and the Swedish Trademarks Act will normally have to be considered.

Moreover, statutory consumer protection laws such as the Swedish Consumer Sales Act or the Swedish Consumer Services Act will apply for the sales of goods or provision of services to consumers. In the case of distance sales or sales outside a trader's normal premises, other legislation on distance selling as well as e-commerce could apply.

3.2 Is substantiation required for advertising claims?

Yes. According to the MPA all marketing must, as a general rule, be in accordance with good marketing practices and otherwise be fair to consumers and businesses. Marketing shall be trustworthy and not misleading. A trader must be able to prove all claims made in advertising and will also bear the burden of proof. As such, evidence for substantiation must be retained for all claims.

Marketing that is not in accordance with good marketing practices is considered unfair if the practice in question has a material impact on the consumer's or trader's ability to make a transactional decision.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Swedish case law is rather strict on puffery, but obvious and typical overstatements that consumers cannot conceive as a literal statement should not require substantiation.

3.4 What are the rules governing the use of disclosures in advertising?

The MPA provides that all marketing and other commercial messages shall be formulated and presented in such a way that it is clear that it is a matter of marketing.

As a general rule the party responsible for the advertising must also be clearly indicated. In the case of well-known brands, use of a trade mark may suffice in this regard. However, in the case of mere teasers such indication is not necessary.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

You may only refer to an endorsement/testimonial in your own advertising if you can substantiate that the endorsement/testimonial is correct and fair. For instance, misleading or deceiving communications, such as portraying a person as doctor etc, when that person is not an actual doctor, could be challenged under the MPA.

Also, as mentioned above, marketing must be identified and the advertiser must be identified.

3.6 What are the rules governing the use of product demonstrations in advertising?

No specific rules exist, but general rules in the MPA apply.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

The EU Directive 2006/114/EC concerning Misleading and Comparative Advertising has been implemented in Sweden. Comparative advertising is permitted provided that the comparison adheres to the eight requirements of that Directive.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Provided that the criteria for permitted use of comparative advertising apply there are no special restrictions under trademark law. For products, please see question 10.2.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

All marketing for commercial purposes must be done in accordance with the MPA and can thus not be misleading. Hence, in relation to marketing a product with geographical origin, advertising that misleads with regard to the product's geographic origin may breach the MPA. Misleading claims about where a product is manufactured may also breach the MPA. This applies, for example, when 'made in Sweden' is used on a product that is wholly or mainly manufactured abroad.

3.10 Are there any special rules governing product packaging?

According to the MPA, a trader may not, in its marketing of products, use imitations of packaging that may mislead the consumer into believing that the product has a connection with a known and distinctive product packaging of another trader. However, this does not apply to packaging where the design is primarily used to make the product functional.

Regulation (2018:1462) on Producer Responsibility for Packaging primarily governs the design of packaging in order to limit its use for environmental reasons.

In addition, the statutory intellectual property laws, such as the Swedish Copyright Act, the Swedish Trademarks Act and the Swedish Design Protection Act, may also have to be considered.

4 PRICE ADVERTISING

4.1 What are Sweden's rules regarding price advertising?

In addition to the requirements of Unfair Commercial Practices Directive, prices must be presented in accordance with the Swedish Price Indication Act. As a general rule, price indications for goods must include details of the price and unit price of the goods, as well as VAT.

4.2 What are Sweden's rules regarding advertising 'free' products?

Terms like 'free', 'for free', 'SEK 0' and similar are, according to Swedish case law, not acceptable and considered to be misleading when the consumer is expected to do something in return, eg to purchase something. It should be mentioned that under point 20 of Annex 1 to the Unfair Commercial

Practices Directive it is unfair to describe a product as 'gratis', 'free', 'without charge' or similar 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 item.

As an exception to the rule described above, use of the term 'på köpet', (which roughly means 'in the bargain'), is permitted when a buyer is offered a larger quantity of goods at the same price. For example, the term can be used when two products are offered for the same price that one product would normally cost.

The term 'without extra cost' can be used in combined offers when a premium is offered, provided that the premium is really awarded without any extra cost to the consumer.

4.3 What are Sweden's rules regarding sales and special offers?

- (a) **Special offers:** The general rules of the MPA apply, which mean that advertisers must present all material information surrounding an offer. The former Swedish Marketing Practices Act 1995, however, specified that promotional offers should contain clear information on the terms and conditions for participation in the promotional offer, the nature and value of the promotional offer, and time limits or any other limitations applicable to the promotional offer. Such information should still be relevant and constitute 'material information'. Accordingly, the presentation of a promotional offer must not be misleading; and the marketing must contain clear information on all relevant terms and conditions in order to evaluate the value of the promotion. In general, the offer should contain information on:
- (i) how to accept and use the offer, whether there is an obligation to purchase, and if so the minimum quantity/value;
 - (ii) the value of the main goods that must be purchased;
 - (iii) the value of the premium and a description of the premium;
 - (iv) time limits, and other key limitations for the addressee, such as that the promotion is only open to certain customers (for instance only open to holders of a certain card), that only one entry per household is allowed, etc;
 - (v) the value of coupons that can be converted into cash;
 - (vi) any additional fees such as postage or delivery fees;
 - (vii) payment and delivery terms; and
 - (viii) the full name and address of the promoter.
- (b) **Sales:** The MPA includes specific provisions on when use of the terms 'sales', 'clearance sales', and 'final clearance sales due to bankruptcy' will be acceptable.
- (i) **Sales:** The term 'sale' can be used when goods from the ordinary stock are sold at a substantially lower price and for a limited period of time. This means that use of the term 'sale' in connection with the sale of goods that are purchased exclusively for the campaign is not allowed. The provision also prohibits the use of 'perpetual sales' as a means of marketing.
 - (ii) **Clearance sales:** In order to prevent the use of clearance sales that last for an extended period of time and where the stock is continuously renewed, the MPA contains a specific prohibition on the use of the term 'clearance sales' and similar.

The terms 'clearance sale', 'final clearance sale', 'closing-down sale' and similar may only be used in the marketing of final sales of the whole or a well-defined part of the ordinary stock of a business, and only if the sale lasts for a limited period of time and at considerably lower prices than normally. There are no specific limits related to the time that a clearance sale is allowed to last (this has to be decided on a case by case basis depending on the specific sale).

In this context point 15 of Annex 1 to the Unfair Commercial Practices Directive must also be considered, which deems it unfair to claim that the trader is about to cease trading or move premises when he is not.

- (iii) **Final clearance sales due to bankruptcy:** The right to use the term 'bankruptcy' in connection with sales is reserved for bankruptcy estates. As a final clearance sale by the bankruptcy estate generally lasts only for a limited period of time it might indicate that the sale is at especially favorable terms. Therefore use by anyone else of the term 'bankruptcy' in marketing is regarded as misleading and in violation of the MPA. This means that a business that has purchased a stock of goods from a bankruptcy estate with the intention to later sell it on is not allowed to describe the sale as a 'final clearance sale due to bankruptcy' in its marketing material.

4.4 What are Sweden's rules regarding rebates?

A rebate or discount is a reduction from the price that the advertiser normally charges. Discounts are allowed in Sweden on condition that they are presented clearly and are not misleading. For instance, the presentation of a discount offer must clearly indicate the value of the discount and present other material information.

Precedent shows that discounts must be temporary reductions of the price of a product or service. If the discount is used for a longer period of time there is a risk that the discounted price will be considered to be the normal price which makes the use of the term 'discount' misleading.

When presenting an offer, the advertiser must be careful not to mix discounts with other premiums in a way that could mislead the consumer as to the value of the various parts of the offer.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

In addition to general marketing regulation, the MPA provides that if a promotion involves an invitation to purchase, then the following information must be given to the consumer:

- (a) the main characteristics of the product, to an extent appropriate to the medium and the product;
- (b) the price as established by the Swedish Price Indication Act. As a general rule, price indications for goods must include details of the price and unit price of the goods, as well as VAT;
- (c) the geographical address and identity of the trader;
- (d) the arrangements for payment, delivery, performance and the complaint handling policy if they depart from what is customary in the relevant branch of business; and
- (e) the rights of withdrawal and cancellation of a purchase as prescribed by law.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

The advertising of products that are not consistent with other regulations will be considered a breach of the MPA. Furthermore, it is illegal to state or otherwise create the impression that a product can legally be sold when it cannot. This probably also includes services (point 9 of Annex 1 to the Unfair Commercial Practices Directive).

Moreover, there are further restrictions in relation to specific products, including the following restrictions:

- (a) Tobacco products may only advertised in certain periodicals;
- (b) Neither alcohol nor tobacco products may be advertised in radio or TV commercials broadcast under Swedish licenses; and
- (c) Pharmaceuticals sold only on prescription must not be advertised to consumers.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

As per the Audio-Visual Media Service Directive, subliminal techniques are prohibited in audiovisual commercial communications.

Aggressive practices may be considered a breach of the MPA.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Indecency or obscenity issues do not fall under the statutory regulation of the MPA, but the supervision of the Advertising Ombudsman under the ICC Code applies.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

As already mentioned, save for mere teasers, there must be a clear indication who is responsible for the advertising. In the case of well-known brands, use of a trade mark may suffice in this regard.

Sponsorship of a radio or TV program is subject to certain limitations. According to the Swedish Radio and Television Act, information that a program is financed by an entity other than the broadcaster must be provided at the beginning as well as at the end of the program.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

General marketing rules apply, meaning that all commercial communications/messages that involve advertising must be identified as marketing regardless of the way or manner they are presented.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

General marketing rules apply, meaning that all commercial communications/messages that involve advertising must be identified as marketing regardless of the way or manner they are presented.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

General Swedish marketing rules, such as the MPA, apply in full to social media.

The obligation under the MPA to identify a communication/message that involves advertising as marketing means among other things that traders must not falsely create the impression that they are not acting for purposes related to their trade and it must also be made clear if a private individual (such as a blogger) has received payment or other benefits for promoting a product or service. A trader will be obligated to inform the private individual of the duty to disclose receipt of such payments or benefits.

The Nordic Consumer Ombudsmen is of the opinion that messages to Facebook's inbox and timeline (profile) fall within the definition of an electronic message, which requires prior consent from the user accordingly.

Moreover, a Facebook user can also receive messages on Facebook under his or her 'News Feed'. These messages may include 'status updates' from traders whom the user has 'liked'. A user may also receive messages indicating that the user's friends 'like' a particular trader, information received because one of the user's friends has 'shared' information about a trader, or messages indicating that a friend has participated in a competition. It is uncertain whether such messages from traders appearing under 'News Feed' fall within the definition of electronic mail. Until greater clarity has been achieved on this matter, the Nordic Consumer Ombudsmen have established that such communications would be considered 'other unsolicited communications' and that recipients must subsequently be able to opt out of receiving advertising through the 'News Feed'.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

Responsibility will depend on the circumstances, but advertisers will generally be liable for actions on a social media site managed by the advertiser. For instance, advertisers may have a responsibility under the General Data Protection Regulation (GDPR) to erase personal data, or under the Swedish Bulletin Boards Act to erase offensive statements or references to copyright infringing content.

On the other hand, it is unlikely that advertisers will be held responsible for statements or actions that fall outside of their control or that are not caused, directly or indirectly, by the advertiser. However, if an advertiser invites to such statements (eg as part of a contest or similar) or somehow uses or refers to such statements, it would most likely trigger liability under marketing or intellectual property legislation.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

The Advertising Ombudsman has dealt with so-called native advertising. The Advertising Ombudsman considered a paid article constituted advertising which, in a positive and uncritical manner, described a company's services and also explained how to use the services. The article had been incorporated with other content on a newspaper's website without being identified as marketing. Therefore, the Advertising Ombudsman found that this violated the ICC Code's rules on disclosure of advertising.

On 31 January 2018, the Swedish Patent and Market Court held an influencer liable for breaching the MPA by failing to clearly identify one blog post and one Instagram as marketing as well as the company responsible for the marketing (*Swedish Consumer Ombudsman v Alexandra Media Sweden AB*, Case PMD 11949-16). The judgment is pending appeal.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

An advertiser is not allowed to use the name, the portrait or any other identifiable sign of a living person in advertising or commercial communication unless the advertiser has proper consent from that person.

9.2 Are there situations when permission is not required?

In relation to advertising or other commercial use permission is always mandatory.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are restrictions on the commercial use of State crests, State flags or other State emblems or State guarantee designations in trademarks or other distinguishing marks for products or services, without due authorization. Also, use of the insignia from certain organizations (such as the Red Cross) may be prohibited. Moreover, there are restrictions on the use of the Swedish flag.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

This question raises concerns primarily from a copyright, trademark and product placement perspective. General concern under the MPA, such as issues with reputation parasitism etc, should also be considered.

- (a) **Copyright issues:** Copyright protected products may be used subject to derogations in the Swedish Copyrights Act. For instance, the Swedish Copyrights Act provides that anyone is entitled to use, by means of a film or a television program or picture, works of fine arts (such as furniture), if the exploitation made of the work is incidental in relation to the contents of the film or the television program. In practice this means that in order for this limitation to

copyright to apply, the product must be used in the background or only to a limited extent. However, such exploitation may only take place if the advertising includes an original sample that has been put on the market by the right holder or with his consent.

For other products than fine art, copyright holders consent may be necessary. This needs to be examined on a case-by-case basis.

- (b) **Trademark issues:** The use of products with other companies' trademarks which appear only as a normal part of the scene or in the background of advertising should normally not be considered as being used within the meaning of the Swedish Trademarks Act in that permission from the trade mark holder is required. However, this needs to be examined on a case-by-case basis.
- (c) **Product placement issues:** The Swedish Radio and Televisions Act includes restrictions on product placement in films and TV programs that are not advertising. For instance, programs that are not commercial advertising may not improperly promote commercial interests and certain products like alcohol and tobacco cannot be used for product placement.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Sweden which affect advertising (eg, Swedish gender equality law)?

Gender discriminatory, cultural and religious advertising concerns do not fall under the statutory rules of the MPA, but the supervision of the Advertising Ombudsman under the ICC Code apply which means commercial communications relating to such content may be assessed.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

No, but please refer to question 11.1 above.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Sweden?

- (a) **Privacy issues:** Advertisers must adhere to the GDPR when personal data is processed in connection with marketing. GDPR applies to those processors of personal data who are established within the European Union, or who offer services or goods to data subjects situate in the European Union, or who supervise data subjects' behaviors in the European Union. The GDPR is supplemented by the provisions of the Swedish Data Protection Act.

It is advisable to collect consent for the data processing if the data controller has no legitimate interest in such processing. Such consent must be a freely given, specific, informed and unambiguous indication from the data subject. One way to ensure that the consent is a freely given, specific, informed and unambiguous indication is to clearly describe the collection of the personal data, ie what data, purpose etc, and then ask the consumer to tick a box confirming that he/she consents to such processing of the personal data. The data controller must also provide information as to how long the personal data will be retained and about the data subject's rights under the GDPR. The data controller is required to specify the personal data that will be processed, for what purpose and for how long etc.

Moreover, if a website includes cookies the user must be informed about and accept their use. It may be sufficient to have gained informed consent, meaning that the user is informed of the cookies and continues to use the website without taking steps to stop the storage of cookies.

The data controller cannot transfer personal data to a third country if that country does not have an adequate level of protection for personal data. If a country is recognized as having an adequate level of protection, the transfer may only be conducted in specific situations or, occasionally, if 'appropriate safeguards' are taken. 'Appropriate safeguards' are the following:

- (i) for a business group with companies in several different countries, it is possible to regulate their processing of personal data in Binding Corporate Rules approved by the Swedish Data Protection Authority (or any other EU supervisory authority);
- (ii) the EU Commission has approved certain Standard Contractual Clauses regarding data protection and imposes certain obligations on both the data controller and the data processor;
- (iii) if a business joins an approved Code of Conduct or Approved Certification mechanism, it may be permitted to transfer personal data to countries outside the EU/EEA; or
- (iv) a business may obtain the Swedish Data Protection Authority's permission for transfer to non-EU/EEA countries.

Additionally, it is recommended that a privacy policy is adopted and referred to in the terms and conditions, which should be accessible from the home page of the website as well as the particular page where personal data is entered. The policy should be clear and easy to read, and include, for example, information on cookies, what kind of personal data is collected, what it is used for, how long it is stored, how one may be granted access to collected personal data concerning oneself etc.

- (b) **Advertising to children:** Sweden has a strict view on advertising to minors (ie people under the age of 18), as is illustrated by the ban on advertising that targets children under the age of 12 during TV programs broadcast under a Swedish license.

Furthermore, the Swedish Consumer Ombudsman has challenged the marketing practices of an online fashion and dress-up games community for girls, where it, inter alia, successfully argued that the practice of sending direct e-mail to users under the age 16—without securing their guardian's consent—was a breach of the MPA. Certain direct encouragements to purchase (eg 'Buy here', 'Buy now' and similar statements) were also considered aggressive marketing in the context in which they were presented and therefore illegal.

- (c) **Telemarketing:** As of 1 September 2018, a binding agreement between a trader and a consumer pursuant to telemarketing is subject to a written agreement.

 SWITZERLAND 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Switzerland?

Rules regulating advertising are spread through a number of different statutes. Basic legal and regulatory conditions for advertising are set by laws that regulate commerce in general. Most relevant are laws protecting trademarks, works of authorship, privacy, and fair competition. Further, some statutes contain specific rules on advertising to address risks associated with the advertising of products and services such as alcohol, tobacco, pharmaceuticals, certain foodstuffs, financial services, lotteries and gambling. Media-specific advertising regulation is currently limited to linear TV and radio. A currently discussed draft Federal Act on Electronic Media would likely extend the scope of advertising regulation to (other) media supported by public funds (service-public media) irrespective of the form of distribution. In addition, advertisers and the press are subject to industry-specific self-regulation (see question 2).

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

Each of the industry-specific statutes, the laws regulating advertising in TV and radio, and self-regulatory codes of conduct provide their own distinct definition of advertising. For example, the Federal Act on Radio and Television treats as advertising any communication that is publicly broadcast as part of a TV or radio program, the purpose of which is to encourage the conclusion of transactions concerning goods or services. Communications aimed at promoting the brand or image of the advertiser are considered sponsorship and are subject to different rules (see question 6).

1.3 What is the basic regulatory framework for advertising regulation?

Advertising is protected by the constitutional rights of the freedom of expression and the freedom to engage in commerce. Several statutes, however, limit these constitutional rights and freedoms. Some of the most important ones are the Federal Act on Unfair Competition, the Federal Act on the Protection of Trademarks and Indications of Source, the Federal Act on Radio and Television (potentially to be replaced by the new Federal Act on Electronic Media), and the Federal Act on Data Protection. See also the self-regulatory framework discussed at question 2.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Advertising on (linear) TV and radio (and potentially, in the future, through other media subject to a broadcasting fee participation under the Federal Act on Electronic Media) is specifically regulated, some of the most important rules being the following:

- (a) Generally, advertising must be clearly separated from the actual TV or radio program (or, potentially in the future, from editorial content on other media) and must be clearly identifiable as such. Sponsorships and product placements (considered a form of sponsorship), however, may be inserted into programs. The sponsor must be clearly identified; sponsorship and product placements must not encourage the conclusion of transactions concerning goods and services, but must instead be aimed at promoting the image or brand of the sponsor.
- (b) Advertising of tobacco products, certain alcoholic beverages and certain therapeutic products is prohibited.
- (c) Programs for children and (for now) religious programs must not be interrupted by advertising. Further, advertising which is aimed at minors or in which minors appear must

neither exploit their lack of life experience nor harm them in their physical or mental development.

- (d) Swiss broadcasting law distinguishes licensed broadcasters/channels from broadcasters/channels which are merely required to register with the Swiss Federal Office of Communications. Licensed channels benefit from financial contributions (a form of state aid) and preferred access to signal distribution networks. Licensed broadcasters/channels are, however, subject to stricter rules on advertising. For example, licensed broadcasters/channels are subject to restrictions on the amount and duration of advertising. For such broadcasters/channels as well as for non-licensed channels that can be received abroad, advertising must not occupy more than 15 per cent of the daily programming or 20 per cent of any particular hour of programming. The proposed new law on electronic media would extend the scope of the advertising regulation and the programming requirements to other media.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There are several industries whose advertising practices are specifically regulated, particularly the food, pharmaceuticals, alcohol and tobacco industries.

- (a) **Food:** Advertising for foodstuffs is regulated mainly by the Federal Act on Foodstuffs and Utility Articles and the related Ordinance setting out implementing regulations for this statute. The Act prohibits deceptive or misleading advertising or presentation of foodstuffs, while goods that are not foodstuffs must not be named or advertised in a manner that leads to confusion with foodstuffs. The rules also provide, for example, that all information relating to a food product, in particular the characteristics that it is claimed to have, must be true and that the advertising, presentation and packaging of foodstuffs must not mislead the consumer.
- (b) **Medicinal products and medical devices:** The Federal Act on Medicinal Products and Medical Devices ('Therapeutic Products Act') and the Federal Ordinance on Advertising of Pharmaceuticals regulate advertising practices in the pharmaceuticals industry as well as in the medical device and supplies industries. The Therapeutic Products Act prohibits, for example, misleading advertising, advertising that is contrary to public order and morality, advertising that may encourage consumers to make excessive, abusive or inappropriate use of medicinal products or advertising of medicinal products which are not approved for the Swiss market.
- (c) **Alcohol:** The Federal Alcohol Act, the Ordinance on the Federal Act on Foodstuffs and Utility Articles, and the Federal Act and the Ordinance on Radio and Television (to be replaced by a Federal Act on Electronic Media) contain specific rules on advertising for alcoholic beverages. For example, the current law prohibits the advertising on (linear) TV and radio of spirits; TV and radio advertisements of beer and wine are allowed but subject, in particular, to the following rules:
- (i) the advertisement must not be addressed specifically to minors;
 - (ii) no person who is or appears to be a minor must be shown in the advertisement consuming or appearing to consume alcoholic beverages;
 - (iii) no person must be shown in the advertisement consuming alcoholic beverages whilst driving a vehicle;
 - (iv) it must not be claimed that alcohol has any therapeutic qualities or is a means of solving personal problems; and

- (v) advertising of alcoholic beverages must not encourage excessive consumption of alcohol.
- (d) **Tobacco:** The Federal Tobacco Ordinance contains specific rules on tobacco advertising. In particular, this Ordinance prohibits advertising of tobacco products if the advertisement is specifically directed at minors, notably if shown in places which are frequented mainly by minors or in publications addressed to minors (see also question 5.1). A new Tobacco Products Act (set to enter into force in 2022 and replacing the Federal Tobacco Ordinance) will cover all tobacco products and nicotine-containing e-cigarettes and, as far as advertisement is concerned, e-cigarettes without nicotine. Under the new Tobacco Products Act, advertising must not contain any false, inaccurate or incorrect information about the health effects of the product. Moreover, the Tobacco Products Act will ban certain forms of previously tolerated advertising if minors (under the age of 18) are particularly exposed to them, such as advertising in free newspapers or online (except on sites where access is charged or reserved for adults).
- (e) **TV and radio:** Further, as mentioned above (in question 1.4), the Federal Act on Radio and Television prohibits advertisements for tobacco products on TV and radio. The proposed new Federal Act on Electronic Media would potentially extend such regulation to other media.

1.6 Are any government pre-approvals required?

Under the Federal Ordinance on Advertising of Pharmaceuticals, a pre-approval from the Swiss Agency for Therapeutic Products (Swissmedic) is required for ads for certain categories of pharmaceuticals in certain media. This includes ads in print media, on the internet and through electronic displays as well as through audiovisual media (TV, radio and movie theatres) for sleeping drugs, sedatives, laxatives and anorectics with a potential for abuse and addiction.

Apart from that, Federal law generally does not require any government pre-approvals for advertising or promotional activities. Some Cantonal and municipal laws, however, require a pre-approval for some types of outdoor advertising, in particular for advertising and promotional activities on public property and/or filming and photographing in public spaces for commercial reasons.

The Federal Alcohol Administration (FAA) allows advertisements for alcoholic beverages to be voluntarily submitted for clearance. The FAA's approval or rejection is binding upon the advertiser, but decisions denying clearance can be appealed to the Federal Administrative Court and ultimately to the Federal Supreme Court.

Some authorities, for example the Swiss Federal Office of Communications (which enforces TV and radio advertising laws), give non-binding, non-prejudicial advice in voluntary, informal consultations if asked to do so by publishers or external lawyers.

1.7 Does the media pre-clear advertising?

Media or media agencies must pre-clear advertising themselves, or through their external lawyers. There is no industry-wide joint pre-clearing body.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The industry-specific laws mentioned above, for example the Federal Act on Foodstuffs and Utility Articles and the laws regulating advertising on radio and TV (and, in the future, potentially through other media offers), do not provide for a private cause of action. They are enforced by government agencies on their own initiative or upon notice by private parties.

Other laws, for example the Federal Law on Data Protection and the Federal Law on Unfair Competition, provide both for private causes of action and for government (administrative or criminal) enforcement.

In the case of trademark or copyright infringement, only the owner or exclusive licensee of the respective exclusive right has a right of action.

Each applicable statute provides for different remedies. Typical remedies in government enforcement of, for example, advertising on radio and TV (and potentially soon through other forms of media as well), would be the disgorgement of profits stemming from the illegal advertising or the implementation of compliance programs going forward. Some statutes also provide for criminal sanctions.

For example, some violations of the Federal Act on Foodstuffs and Utility Articles, the new Tobacco Products Act or the Federal Act on Unfair Competition are criminal offences. The competent prosecutors will take criminal enforcement measures if so demanded by the competent regulatory agency, the injured individual or, in some circumstances, on their own initiative. Potential sanctions are monetary fines (in case of violations of the Federal Act on Foodstuffs and Utility Articles, for example, up to CHF 40,000), disgorgement of profits, or imprisonment (in the case of the Federal Act on Unfair Competition, for up to three years).

1.9 When does a competitor have a right of action? What are the potential remedies?

Most relevant are the private causes of action provided in the Trademark Act, the Copyright Act, and the Federal Act on Unfair Competition.

To the extent that the competitor is the owner or exclusive licensee of the trademark or work of authorship that the competitor asserts is infringed by the advertisement, the competitor has standing in a trademark or copyright infringement action. Further, competitors have standing to claim infringements of the Federal Act on Unfair Competition if the advertisement is false or misleading and threatens the business or the economic interests of the competitor.

In actions for trademark or copyright infringement or for unfair competition, potential remedies are preliminary or permanent injunctions, money damages (including the disgorgement of profits), and impoundment of infringing articles, as well as costs and attorney fees. Typical injunctions would prohibit a threatened infringement or order the defendant to cease and desist from an ongoing infringement.

1.10 When do consumers have a right of action? What are the potential remedies?

If the advertisement infringes the Federal Act on Unfair Competition, a consumer has a right of action if his or her economic interests are threatened. Further, a consumer has standing if he or she is the owner or exclusive licensee of the trademark or work of authorship that the advertisement infringes. The same remedies as those available to competitors are available to consumers, thus preliminary or permanent injunctions, money damages (including the disgorgement of profits), impoundment, as well as costs and attorney fees.

A right of action also exists if advertising practices violate the personality rights of consumers, in particular in connection with data protection laws. If data processing violates their personality rights, consumers may in particular request that data processing be stopped, that no data be disclosed to third parties, and/or that the personal data be corrected or destroyed. Some statutes grant consumer protection organizations and federal agencies (eg the Swiss Federal Institute of Intellectual Property) standing in civil proceedings and the right to file a criminal complaint (ie in cases of deceptive or misleading use of indications of geographic origin).

2 SELF-REGULATORY FRAMEWORK

2.1 Does Switzerland have a primary advertising self-regulation system?

The primary self-regulatory organization for the advertising industry is the Swiss Commission of Fairness (‘Commission’). The Commission is a neutral and independent institution of the communication industry, in which consumers, representatives of the media and advertisers are equally represented.

Anyone (including competitors and consumers) may file a complaint with the Commission if he or she thinks that a commercial communication is unfair and infringes the Commission’s Basic Principles on Fairness in Commercial Communication (‘Basic Principles’, see question 2.2) or the ICC Consolidated Code of Advertising and Marketing Communications Practice (‘ICC Code’). The only available remedy, however, is a declaration by the Commission that the commercial communication in question infringed the Basic Principles or the ICC Code, and the publication of the respective decision.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The Basic Principles that the Commission publishes and enforces (see question 2.1) set out rules regarding the protection of personality rights, data protection, comparative advertising, reproduction of the advertisements of others, lotteries, guaranteed acceptance of returned products, gender discrimination, separation of editorial material from commercial communications, and direct marketing. In addition, the Commission applies the ICC Code. Additional self-regulatory advertising rules may apply, depending on the industry, product, service, claim and form of advertising.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Complaints filed with the Commission (see question 2.1), other than those brought by competitors, are free of charge. The complaint must state the reasons why a certain advertisement is unfair, preferably indicating also the article of the Basic Principles or the ICC Code that the advertisement is claimed to infringe.

The Commission will notify the person responsible for the advertisement and allow that person to respond to the complaint within a period set by the Commission. Subsequently, one of the three chambers of the Commission will render its decision. Each party may request a rehearing by the Commission en banc, which will then affirm or reverse the decision.

2.4 Is the self-regulation system effective? Is it widely used and followed?

In 2017 the Commission rendered 82 decisions. In around 55% of the cases the Commission decided in favor of the complainant. 13 complainants requested a rehearing by the Commission en banc. The Basic Principles and the Commission’s work are widely accepted in the industry.

2.5 Are the self-regulatory system’s decisions reported?

In earlier days, the Commission only published decisions that it deemed to be of public interest or where the purpose of publication was to sanction the infringer. Nowadays the Commission publishes on its webpage (www.lauterkeit.ch), after expiration of the period for a request for rehearing en banc, all decisions rendered by one of its three chambers. However, the names of the parties are not published, except where the Commission’s purpose in publishing the decision is to sanction the infringer.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Most of the complaints in 2017 dealt with the violation of the rules regarding gender discrimination (sexism), aggressive selling methods, the definition of ‘commercial communication’ and the scope of application of the self-regulatory rules.

- (a) **Gender discrimination:** An advertisement infringes the article of the Basic Principles that prohibits gender discrimination if it builds on gender stereotypes or otherwise questions the equality of men and women.
- (b) **Aggressive selling methods:** An advertisement is considered aggressive and therefore unfair if it is addressed to consumers who have previously opted out from receiving commercial communications.
- (c) **‘Commercial communication’:** ‘Commercial communication’ comprises any measures taken by competitors or third parties, which systematically influence the attitudes of a majority of persons towards certain goods, works, services or business relationships for the purpose of concluding or preventing a legal transaction.
- (d) **Application of self-regulatory rules:** The purpose of the Basic Principles is to respect fair business practices in commercial communication and thus to build public confidence in commercial communication. Commercial communication should be lawful, truthful as well as non-discriminatory, and comply with the principle of good faith in business transactions. In its first decision on native advertising in 2018, the Commission found a video posted on a media company’s website to violate the separation principle, which requires a clear distinction between content and advertising. The video dealt with allegedly questionable ingredients in traditional cosmetic products and was paid for by a cosmetics company. Although the video was marked with the words ‘sponsored’ (in French: Sponsorisé) above the short introductory text, there was no corresponding reference in the video itself. Viewers had to close the respective overlay window in order to watch the video. This was not sufficiently identifying the video as advertising. In addition, the Commission found the term ‘sponsored’ to be misleading in this context, since the video qualified as an ad appearing as editorial content rather than an editorial contribution financed by a sponsor.

2.7 Are there any other self-regulatory systems that govern advertising practices in Switzerland?

Not applicable, besides individual sector-specific industry rules for certain products, services, claims and types of advertising (eg sponsorship by pharmaceutical companies, advertising in financial industries).

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Switzerland (eg, consumer protection laws; IP laws; unfair competition laws)?

One of the basic statutes governing advertising in Switzerland is the Federal Act on Unfair Competition. According to this statute, advertising claims must not be false, misleading or violate by other means the basic principles of good faith in business relationships. The statute specifically prohibits false or misleading statements about the essential characteristics, benefits, risks, composition, method or date of manufacture, fitness for a particular purpose, quantity, specification or geographical origin of the goods or services in question.

Other relevant basic laws applicable to advertising are the Trademark Act, the Copyright Act, the Data Protection Act, the Federal Law on Lotteries and Commercial Betting (to be replaced by the new Federal Gambling Act in 2019), and the Penal Code.

3.2 Is substantiation required for advertising claims?

The Federal Act on Unfair Competition prohibits false, misleading or unnecessarily disparaging statements.

In actions for unfair competition, the claimant will have to prove all necessary elements of the cause of action, in particular showing that the advertisement makes false claims or that it creates an overall impression that misleads the consumer. The court may, however, require the advertiser (defendant) to prove statements of facts contained in the advertisement if it deems such burden-shifting fair and reasonable, considering the legitimate interests of the advertiser (defendant) and the claimant.

Contrary to the general rule on the burden of proof, the user of an indication of geographic origin must prove that the claim for such origin is correct.

In the (self-regulatory) complaints procedure before the Swiss Commission of Fairness (see question 2) the burden to substantiate the advertising claims rests solely on the defendant.

To mitigate the risk of competitor actions advertisers should, where appropriate (depending on the level of the risk) add a disclaimer to an advertising claim.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Only statements of facts can be proved false or true, if challenged. Therefore, non-factual statements and obvious exaggerations (puffery) do not need substantiation.

It should be noted, however, that non-factual statements can still infringe the Federal Act on Unfair Competition. Depending on the overall impression created by the advertisement, they may be deemed misleading or unnecessarily degrading (as indeed may factual statements).

3.4 What are the rules governing the use of disclosures in advertising?

Disclosures such as the use of ‘small print’ and on-screen disclaimers must be true and clear (ie not misleading). No specific rules apply with regard to the size of such disclosures. However, the principle of clarity, as set out in the Federal Act on Unfair Competition, may require that, for example, an on-screen disclaimer is displayed in a manner that allows consumers to read and understand the disclaimer.

Also, size requirements will apply for information about a non-purchase route to participate in competitions. The disclosures must be in such size and format that make it clear to consumers that the non-purchase route is an equivalent method of participation (ie offers the same chances of success). Other size requirements may apply for claims and disclaimers in ads for particular products and services (eg pharmaceuticals).

Further, the existence of sponsorship (including product placements) of TV and radio programs must be disclosed, and specific rules apply to the insertion of the identification of a sponsor (see questions 1.4 and 7.2). Those rules may be extended to other forms of media under the proposed new Federal Act on Electronic Media.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Endorsements and testimonials must be true and justified by the experience of their authors. Furthermore, a testimonial may only be used if the author agrees with such use. Further restrictions apply in particular in the food and pharmaceuticals industries. Testimonials that say, for example, that a pharmaceutical product has a guaranteed effect are prohibited. In addition, health-related

information on food packages must not be presented as recommendations from doctors or other medical professionals.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules governing the use of product demonstrations in advertising. It is noteworthy that, for now, any product demonstration, which is part of a teleshopping or similar program and lasts longer than 60 seconds, must be clearly identified throughout the program as 'Advertisement'.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted but some restrictions apply. The Federal Act on Unfair Competition prohibits comparisons of products, works, achievements or prices in an incorrect, misleading, unnecessarily disparaging or imitating way. The meaning of 'incorrect' and 'misleading' are fairly obvious. The other two concepts require further explanation.

A comparison can be disparaging if it is incorrect or misleading, or if it uses degrading value judgments. The question whether the advertisement is unnecessarily disparaging can only be decided based on the facts of the particular case.

The purpose of the prohibition on 'imitating' in comparative advertising is to avoid the exploitation of a competitor's reputation, either by creating a likelihood of confusion between products or by creating an image transfer (for the notion of 'image transfer', see also question 10.2.).

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

The Copyright Act provides for the protection of the rights of authors of literary and artistic works and the protection of the rights of performers, producers of phonograms and audiovisual fixations and broadcasting organizations. The unauthorized reproduction or distribution of copyrighted pictures as part of comparative advertisements may provoke copyright litigation, in particular where the owner or exclusive licensee of the asserted copyright is a competitor.

Trademark law gives the trademark owner the exclusive right to use the trademark as a source identifier for his or her goods or services. It is noteworthy that Swiss trademark law only prohibits confusion as to origin, and not as to sponsorship or endorsement. Confusion as to sponsorship or endorsement, however, may be actionable as unfair trade practices under the Federal Act on Unfair Competition.

The use of a competitor's trademark in comparative advertising is generally permitted, as the competitor's mark is not used to identify the source of the advertised products or services. The unfair competition law restrictions described under question 3.1 and 3.7 must, however, be respected in any case.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Since 1 January 2017, Swiss statutory law has set out the requirements to be fulfilled in order to use geographic claims (whether Swiss or foreign) for products, services and in advertising on the Swiss market or as part of a registered trademark. The law distinguishes between natural products (eg crops and mineral water), foodstuffs and industrial products (all other products):

- (a) **Natural products:** The geographic origin for natural products is defined by their place of extraction or harvest.
- (b) **Foodstuffs:** To claim a particular origin for foodstuffs, at least 80% of the raw material weight must come from the designated place and the processing providing the essential characteristics must have occurred in the same place.
- (c) **Industrial products:** For industrial goods linked to a certain geographical origin, at least 60% of their manufacturing costs must have occurred in that place. In addition to the core manufacturing, the costs for research and development or standardized quality assurance and certification may be included in the calculation, whereas packaging, marketing and customer service costs are deemed irrelevant. Additionally, the activity giving the product its essential characteristics (eg the assembly of a watch), as well as at least one essential manufacturing step, must have taken place in the designated place. Services (eg financial services or medical treatment) can only profit from a geographic claim if the provider has a registered office and an effective administration center in the respective country. Indications of source in advertising apply to all products and services shown.

Swiss law allows claiming a geographic origin for particular activities rather than the entire product, eg 'Swiss design', 'US Research'.

Any person whose right to an indication of source is infringed or threatened may file a claim with a civil court under the Trademark Act, and request, eg, an injunction, information on the origin and quantity of items, the recipients of any such items and the extent of distribution. The plaintiff may bring actions for damages, satisfaction and handing over of profits. Swiss law grants standing to certain professional and trade associations, consumer protection organizations, the Federal Institute of Intellectual Property and the Cantons.

The use of incorrect indications of source may be punished by a custodial sentence of up to five years or a monetary penalty.

Particular requirements apply for the use of the Swiss coat of arms, flags and other emblems as well as official signs of the Swiss Federation and of the Cantons, the communes and other public authorities recognized under Swiss law (Federal Act on the Protection of the Swiss Coat of Arms and Other Public Signs).

3.10 Are there any special rules governing product packaging?

Based on general advertising law (Federal Act on Unfair Competition), any commercial information, whether on a product packaging or in advertising, must not mislead customers by obscuring the quantity of goods, works or services. Sector-specific regulations provide for particular rules on product information and packaging labels, eg for pharmaceuticals, foodstuffs and utility articles, tobacco products and e-cigarettes as well as alcoholic beverages. Packaging of foodstuffs must not deceive the customers as to the manufacture, composition, condition, method of production, storage life, country of production, origin of the raw materials or components, particular effects or special value of the product. The new Tobacco Products Act will most likely require health warnings for certain tobacco and other products.

4 PRICE ADVERTISING

4.1 What are Switzerland's rules regarding price advertising?

If prices or price ranges are used in advertisements, companies have to disclose the prices that effectively have to be paid. Price comparisons are allowed if the advertised and the competitive goods

or services were or will be offered at this price immediately before or after the dissemination of the advertisement. Price comparison is prohibited if the comparison is incorrect, misleading or unnecessarily disparaging.

4.2 What are Switzerland's rules regarding advertising 'free' products?

Products must not be advertised as 'free' if in fact they are not. This follows from the basic principle that advertisements must not be false or misleading (see question 3.1). In addition, the Federal Act on Unfair Competition prohibits the use of samples that confuse or deceive customers as to the real value of an offer; for example, if the overall price of the package has been raised to cover the cost of including the 'free' component.

The use of 'free' products in promotional campaigns is generally permitted. However, it is prohibited to advertise alcoholic beverages and tobacco products by giving free samples to minors. Also, the use of samples of pharmaceutical products in promotional campaigns is subject to specific regulation.

4.3 What are Switzerland's rules regarding sales and special offers?

Sales and special offers must never be misleading, ie they must clearly and unambiguously state the conditions under which consumers are eligible for price reductions, premiums or gifts.

The Federal Act on Unfair Competition provides that it is prohibited to repeatedly offer products below cost price, or to stress such offers in advertisements and thereby mislead customers about the productivity of their own company or of a competitor.

4.4 What are Switzerland's rules regarding rebates?

The general rules of the Federal Act on Unfair Competition apply. In particular, this means that advertising with rebates must not be misleading.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Online providers domiciled abroad with a registered office or a branch in Switzerland may be subject to Swiss rules on advertising and price claims. The Swiss regulator considers online providers domiciled abroad to fall within the scope of Swiss advertising laws if their internet presence clearly targets consumers domiciled in Switzerland (eg with a '.ch' domain name and/or with a visible special focus on Swiss customers)—which is subject to interpretation.

All retail offers on the Swiss market indicating prices need to disclose the actual prices to be paid in Swiss francs, including public levies, copyright fees, early disposal fees and other surcharges of any kind that cannot be freely selected. A foreign currency may be indicated in addition. Shipping costs must either be included in the price or, at least, accessible, eg through a link for online stores. At least one free payment method customary in Switzerland must be available (eg credit card).

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Yes, there are products that may not be advertised in certain circumstances. For example, the advertising of alcoholic spirits is prohibited in areas surrounding public buildings, on public transport, at sport events, and at events or in places frequented mainly by minors. Advertising of tobacco

products is (currently) prohibited at sports events, in places frequented mainly by minors, on teaching materials or other publications addressed to minors, and on toys.

On radio and TV (and in the future potentially through other media), advertising of the following products is prohibited:

- (a) tobacco products;
- (b) alcoholic spirits;
- (c) certain medicinal products and medical devices; and
- (d) sales offerings for all therapeutic products and medical treatments.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Sales methods that are considered particularly aggressive are generally prohibited for all products. Sales-promotion trips or door-to-door selling are considered aggressive sales methods if the customer is limited in or deprived of his freedom to choose whether or not to buy; for example, where customers are hassled or insulted.

Furthermore, consumers appearing in a directory are entitled to state clearly therein that they do not wish to receive advertisements from third parties and that their data may not be used for advertising. Companies infringe the Federal Act on Unfair Competition if they ignore such opting-out by a consumer.

The same statute also prohibits the unsolicited sending of mass emails and other commercial communication disseminated via electronic communication networks. Generally, prior consent by the consumer is needed in relation to such 'mass advertising.' Further, a company sending such communications needs to indicate its name and contact information and provide a free-of-charge and simple opt-out (unsubscribe) option in each communication. Consent is deemed given if the consumer provided his or her contact information in connection with a prior transaction, did not opt-out from receiving commercial communications from that company, and the commercial communication informs the customer about similar products and services that may also be of interest to the consumer.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

All radio and television programs (including any advertisements broadcast alongside them) must respect fundamental rights. In particular, all broadcast material must respect human dignity and not be discriminatory, contribute to racial hatred, endanger public morals, nor glorify or trivialize violence.

Further, the Federal Act on Radio and Television provides that broadcasters must ensure that minors are not confronted with programs which jeopardize their physical, mental, moral or social development. Broadcasters have to take measures to mitigate these risks, in particular through the choice of the time of the day at which the program is broadcast or by informing the public (eg by a signal displayed before the program starts or throughout the program) that the program is not suitable for minors. These rules may be extended to other media offers under the proposed Federal Act on Electronic Media.

Advertising of medicinal products and medical devices is unlawful if it is contrary to public order and morality or if it may incite consumers to an excessive, abusive or inappropriate use of those medicinal products.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

If radio or TV programs are sponsored in whole or in part, the sponsors must be named at the beginning or the end of each program. Sponsored programs must be identified as such. In particular, the sponsor's name, company logo or other symbols, products and services may be used for this purpose. Each mention of the sponsor must establish a clear relationship between the sponsor and the program. During the transmission of a television program, the sponsorship may be briefly mentioned again (as an insert). One insert per sponsor is permitted every ten minutes, but inserts are not permitted in children's programs. These rules may be extended to other media offers under the proposed Federal Act on Electronic Media.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Radio and TV advertising must generally be inserted in blocks (commercial breaks) and clearly separated from the editorial part of the program by a special acoustic or optical identification signal. In television, the term 'advertising' in the relevant national language must be used as part of the optical identification signal. Teleshopping and similar programs which last longer than 60 seconds must be clearly and recognizably identified as 'Advertisement'. Unless teleshopping and similar programs on the radio are clearly identifiable as such, they must not last longer than 60 seconds. These rules may be extended to other media offers under the proposed Federal Act on Electronic Media.

Product placements, sponsorships and the integration of branded content are permissible under the rules applying to sponsorship and product placements (see question 7.2.).

According to the Swiss Commission of Fairness, native advertising, whether on linear TV or online, needs to be clearly identified as advertising in order to comply with the general requirement for separation of advertising and content (see question 2.6). Other than the general separation requirements, Swiss law does not have specific legal requirements for native advertising through online media.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

In contrast to advertisements, product placements and sponsorships must not directly encourage the conclusion of transactions relating to products or services. Products and services must be naturally integrated into the program and must not be given undue prominence.

Clear reference must be made to product placements at the start and end of the broadcast and after each commercial break. A single reference suffices for product placements, production aids (prop placement) and prizes of a low value of up to CHF 5000.

Product placement is not permitted in children's programs, documentary films or religious broadcasts, unless the sponsor merely provides goods or services of low value free of charge, in particular as production aids (props) or prizes, and does not provide any additional remuneration.

These requirements may be extended to other media offers under the proposed Federal Act on Electronic Media.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There is no statute that specifically governs advertising in social media. The legal and regulatory conditions for advertising described elsewhere in this chapter also apply to social media advertising.

Since social media advertising typically involves the collection and use of personal data relating to the network's users, privacy laws will apply. Of relevance are the Federal Act on Data Protection and the Ordinance relating to this statute. Personal data (data about an identified or identifiable person) may be collected, stored or otherwise used or processed only according to certain basic principles. Most relevant are the following:

- (a) **principle of lawfulness:** personal data must not be collected or used in unlawful ways (eg no collection by illegal hacking);
- (b) **principle of purpose specification:** the purpose for which the personal data is collected and used must be specified at the time of collection, evident from the circumstances, or provided for by law;
- (c) **principle of transparency:** the collection and the purpose of the collection and use of the personal data must be recognizable for the person concerned; and
- (d) **principle of fairness and proportionality:** personal data must be processed in good faith and only as long as and to the extent necessary for the specified purpose.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

Advertisers may be responsible and liable for user generated content if they offer a platform for such content and actively control the content. If the advertiser does not or cannot actively control the hosted user generated content, a court can still grant injunctive relief, forcing the advertiser to remove illegal content (see, for further details, question 8.3.).

Also, if companies pay somebody to disseminate—as user generated content—positive or misleading information about the products of the company (eg payment for a favorable product review), such behavior can constitute an unfair trade practice actionable under the Federal Act on Unfair Competition.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

On 14 January 2013, the Federal Supreme Court rendered a judgment concerning libelous statements made by a blogger. The blog was hosted by a newspaper on a blog platform that allowed third parties to post user generated content. The court held that the author of the blog and the newspaper had to remove the blog article as it infringed personality rights. The court further required the blogger and the newspaper to pay costs and attorneys' fees.

Although a hosting provider does not and typically cannot actively control the dissemination of user generated content, it is likely that a court will order hosting providers to take down libelous or otherwise illegal user generated content hosted by the provider. At the same time, the Supreme Court made it clear that this only applies to injunctive relief (takedown) and does not concern the question of whether the hosting provider is in any way responsible or liable for the dissemination of the libelous content.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

All aspects of the personality, such as an individual's name, picture, likeness, voice or identity, are protected by law. As a general rule, people must always be asked for their consent to the use of their name, voice, likeness or other parts of their personality in commercial communication.

It is noteworthy, however, that the personality right is not in any way a property right, but rather protects a person's dignity, honor and right to self-determination. Unlike some common law jurisdictions, Swiss law does not provide a right of publicity.

9.2 Are there situations when permission is not required?

Not every use of an individual's picture is prohibited. As long as a person is not identifiable, permission will not be required. For example, generally no permission is required from persons that are captured as part of the scene or background in pictures taken on the street or on public property and who are therefore not the main focus of the picture (ie not the most prominent subject matter). But even in such cases advertisers must be careful, in particular where persons may still be identifiable and are shown in an unfavorable context.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

See question 1.6.

Filming and photographing in public spaces for commercial reasons and using public space for advertising may be subject to permit requirements.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

The use of other companies' recognizable products in advertisements is generally permitted. Some restrictions apply.

The use of another company's products must not infringe trademark laws. It is therefore generally not recommended to use protected trademarks of other companies' products. However, not every use of another company's trademark in advertising is prohibited. If a trademark is merely used as a design element and not as a source identifier for the advertised products, such purely decorative use will often be permitted.

The use of another company's product may, furthermore, be prohibited under the Federal Act on Unfair Competition. This statute prohibits the exploitation of the reputation of another company's products. Exploitation of reputation takes place when a customer transfers his appreciation for product A of manufacturer A to product B of manufacturer B ('image transfer'). The use of other companies' products in advertisements should therefore always be discreet and not be aimed at transferring an image. If a competitor's product is merely in the background of the advertisement, such a use will normally be permitted.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Switzerland which affect advertising (eg Swedish gender equality law)?

It is worth mentioning that the Basic Principles on Fairness in Commercial Communication of the Swiss Commission of Fairness (see question 2) state that advertising must not be discriminatory. Advertisers should therefore not use gender stereotypes or claims that discriminate on the basis of race or religion.

Otherwise, no special concerns need to be pointed out.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

No special concerns need to be mentioned.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Switzerland?

Not applicable.

TURKEY

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Turkey?

There are two main regulations in Turkey setting out the principles of advertisements. These are

- (a) the Law on the Protection of the Consumer No 6502 (Consumer Law) and
- (b) the Regulation on Commercial Advertisements and Unfair Practices No 29232 (Advertising Regulation).

In addition, there are special laws and regulations with regards to specific products, such as medicinal products, alcoholic products or tobacco products.

The Law on Principles of Radio and Television Broadcasts No 6112 (Turkish Broadcasting Law) also regulates the advertisements broadcast via TV, radio and on demand services.

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

The Advertising Regulation defines commercial advertisements as ‘announcements published by advertisers in all and any channels, aiming to promote the sale or rent of goods or services, and to inform or convince the target audience, in connection with trade, business, craftsmanship or occupation, by means of commercial communication carried out in written, visual, auditory and other similar media’. Thus, every kind of commercial communication is determined as an advertisement.

1.3 What is the basic regulatory framework for advertising regulation?

Although there are a variety of regulations by which certain products and services are regulated, the Consumer Law constitutes the general framework of advertising together with the Turkish Commercial Code and Turkish Broadcasting Law. Furthermore, the details concerning the principles of advertising are set out in the Advertising Regulation.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

There are some specific types of advertising regulated in the Advertising Regulation including the following examples:

- (a) **Direct selling and teleshopping advertisements which propose sales transactions to be conducted at the address of the viewer** must clearly and accurately define the advertised product or service, together with its price. Moreover, in such advertisements, a clear return policy should be offered, together with contact information of the advertiser, to the target audience so that the consumer knows that he/she has a right of withdrawal in relation to the purchased product or service. Direct selling advertisements should be clear and not misleading to the consumer. The sales price of the product or service and the withdrawal right of the consumer should be mentioned in the advertisement.
- (b) A **hidden advertisement** is an advertisement which is not explicitly identified to the consumer as an advertisement, but there is an advertising purpose in it. Hidden advertisements are prohibited, as the consumer is caught unprepared, without the knowledge that it is an advertisement.

- (c) **Testimonial advertising** refers to advertisements in which the claims are supported by statements of real or legal persons. Such ads should not include testimonial statements that are not based on the experience, knowledge or research results of the referred person, institution or organization, and the statements should be true and actual.
- (d) **Advertisements intended for children, or potentially having an impact upon children, or featuring child actors** should:
- (i) not involve any expression or image which will negatively affect the physical, mental, moral, psychological or social development skills of children;
 - (ii) not involve elements giving rise to unreal expectations among children or making it difficult for children to differentiate between the reality and fiction, in consideration of the characteristics of the children included in the target group;
 - (iii) not involve messages implying that possession or use of a particular product alone will provide a child with physical, social or psychological advantages in comparison with other children of the same age, or that possession of a product will produce a contrary effect;
 - (iv) not involve any expression or image which may put children in a dangerous position, or encourage them to communicate with foreigners or to enter dangerous places;
 - (v) not involve elements of violence which are likely to be imitated by children;
 - (vi) not involve images of children playing with tools, equipment or objects which may pose danger to the children themselves or their surrounding social communities;
 - (vii) not involve elements aimed at corrupting, changing or disparaging positive social, cultural and moral behaviors;
 - (viii) not involve expressions or visual presentations aimed to abuse children's trust in their parents, teachers and such other persons;
 - (ix) not involve elements which will weaken or eliminate parents' and teachers' authority, responsibility or judgment abilities;
 - (x) not abuse parents' sensitivities towards their children, such as affection, compassion and emotional attachment;
 - (xi) not directly encourage children to persuade their parents or third parties to purchase a particular commodity or service;
 - (xii) not involve expressions implying that children are required to enter into some kind of agreement so that they can acquire a particular commodity or service;
 - (xiii) not imply that the commodity or service concerned is affordable by any family;
 - (xiv) not involve expressions such as 'only' or 'just' used with price information in a manner creating the perception that the demanded price is low;
 - (xv) not understate the skills required to make use of the relevant goods or services;
 - (xvi) in cases where additional materials are needed to use the relevant goods, or some other materials are needed to attain the displayed or defined result, involve elements clearly expressing this situation;
 - (xvii) involve reminder symbols and warnings enabling the necessary measures to be taken for goods or services which are likely to be harmful to the children's and their surrounding communities' health if no measure is taken.

In addition, advertisements and practices with regard to distance contracts must not include purchase invitations which are directly aimed at children.

- (e) **Environmental advertisements** are advertisements which relate to environmental issues and/or have environmental claims (eg carbon free). They should not abuse the consumers' lack of knowledge on these matters and if scientific claims are used, they should be approved by academic institutions.
- (f) Under Law No 6563 on the Regulation of Electronic Commerce, '**electronic commercial messages**' include short message services with trade purposes, which may only be sent to non-merchant/non-craftsman recipients upon their prior consent that may be obtained in writing or through any means of electronic communication. These commercial communications, the contents of which should be in accordance with the consent obtained, must also provide contact information ensuring the identification of the service provider. As recipients have the right to opt out from receiving such messages, service providers are held responsible for making sure that the recipients are notified of this right free of charge, and that commercial messages are stopped within three days of the recipient's opt-out request.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

- (a) The advertising of **products which have a direct impact on human health**, such as pharmaceutical products or medical devices, is strictly regulated under Turkish Law. Pharmaceutical advertising to consumers is banned. As for medical devices, the Medical Device Regulation provides that medical devices which serve for personal use can be advertised; however, those medical devices which serve for the use of health care professionals and those the price of which is reimbursed by the Social Security Institute cannot be advertised.
- (b) Advertising of **tobacco products and alcoholic beverages** is prohibited under the Law on Prevention of Damages of Tobacco Products and the Omnibus Law No 6487 on Amendment of Some Laws and Decree Law No 375.
- (c) Advertisements of **food and dietary supplements** are also regulated in detail by both the Turkish Broadcasting Law and the Regulation on Products Sold with Health Claims. Under the Turkish Broadcasting Law, it is forbidden to advertise food supplements with health claims that would lead the target audience to perceive these products as pharmaceutical products that have a medicinal or therapeutic effect. Health claims are otherwise not forbidden for food supplements; however, official permission for displaying an advertisement containing health claims must be obtained from the Ministry of Health. Testimonials or comparative advertising are not permitted with regard to food and dietary supplements. In addition, for foods and food supplements, there are provisions in the Broadcasting Law and Food Law concerning correct labelling and prohibiting the misleading of the consumers with labels and advertisements.
- (d) As regards restrictions on advertisement of **food/beverages not recommended for excessive consumption**, recent amendments have been made to the Regulation on Procedures and Principles of Broadcasting Service. While the amendments primarily relate to restrictions on advertisement of food/beverages not recommended for excessive consumption during/in conjunction with children's programs; there are also provisions requiring written warnings to be run in the advertisements of specified foods during programs other than children's programs. Pursuant to this Regulation, food and beverages have been divided into the following three categories as provided by the Food and Beverages List, which has been prepared by the Ministry of Health:

- (i) *Red category:* Advertisement during children’s programs NOT allowed; allowed for other programs only if the food/beverage ad is broadcast with written legible warnings in the form of a flowing tape at the bottom of the screen, containing statements encouraging regular and balanced nutrition.
- (ii) *Orange category:* Advertisement during children’s programs allowed if certain specific criteria are satisfied,
- (iii) *Green category:* Advertisement is allowed in all cases.

1.6 Are any government pre-approvals required?

In Turkey, there is no governmental pre-approval system for advertisements. The only pre-approval mechanism is set out in Article 13 of Law No 1262 on Pharmaceuticals and Medical Preparations, where it is stipulated that advertisements of prescribed medicines can be published only in medical magazines directed to health professionals (not consumers) with the pre-approval of Turkish Ministry of Health.

1.7 Does the media pre-clear advertising?

No—there is no legal obligation for media corporations to pre-clear advertisements, however in our experience is the case that most media corporations seek a brief pre-clearance through their legal counsels before the advertisement is aired, in order to be compliant with the broadcasting principles issued by the Radio and Television Supreme Council (RTUK) as well as the Advertisement Board.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The competent authority for the enforcement of advertising laws in Turkey is the Advertisement Board incorporated under Turkish Ministry of Industry and Trade’s General Directorate of Protection of Consumers and Market Surveillance. The Advertisement Board meets periodically to review advertisements that are claimed to violate the laws, and to impose penalties when necessary.

The Advertisement Board may review claims either upon receiving a complaint or ex officio. Complaints to the Advertisement Board should be filed in writing. The Advertisement Board may also seek additional information, either from the parties or from other institutions such as RTUK or the relevant ministries.

The potential remedies are classified into three main groups:

- (a) temporary or permanent cessation of broadcast of the advertisement;
- (b) correction of the advertisement through the same media; and
- (c) administrative monetary fine.

By Article 77/12 of the Consumer Law, the Advertisement Board may apply those remedies separately or in conjunction where necessary. If the same infringement is repeated in the same year, the administrative monetary fine can be multiplied up to ten times.

It is possible to appeal the decisions of the Advertisement Board before the Administrative Courts within 30 days of the date of notification of the decision. However, filing a lawsuit against the decision of the Advertisement Board does not affect the enforceability of the decision.

Similarly, RTUK may also impose a sanction against the media service providers if and when the broadcasting of such advertisement is in breach of the Turkish Broadcasting Law or the Regulation on

Procedures and Principles of Media Services (the Broadcasting Regulation). RTUK is authorized to impose either an administrative warning or monetary fine (if the violation continues after warning) corresponding to 1–3% of the gross commercial communication income of the media institution for the previous month.

If the violation arises from non-compliance with some of the broadcasting principles, ie independence of Turkish Republic and Atatürk's principles, or supporting discrimination, terrorism, violence etc, then RTUK may directly impose a monetary fine on the broadcasting institution without any preceding warning; this fine corresponds to 2–5% of the gross commercial communication income of the media institution for the previous month.

1.9 When does a competitor have a right of action? What are the potential remedies?

A company has the right to file a court action when a competitor's advertisement constitutes unfair competition or trademark infringement.

The legal actions which can be brought for unfair competition are:

- (a) a declaratory action: where the company will request from the Court a determination that the acts of the competitor constitute unfair competition;
- (b) a court action to prevent the act which amounts to unfair competition: such court action is preferred when the act is continuing as at the date of the court action; and
- (c) a compensation action: with such court action, a company suffering from unfair competition created by the advertisements of a competitor can request compensation to cover all of its material and immaterial damages. This type of court action can be filed together with or separately from the other 2 mentioned above.

As for trademark infringement cases, where a company's trademark is used in a third party's advertisement without permission (either by making association with the trademark or defaming the trademark), the injured party is entitled to:

- (a) file a trademark infringement action and claim cease and elimination of the infringement; as well as
- (b) claim compensation for material and moral damages.

For both unfair competition and trademark infringement actions, a preliminary injunction request can be filed either before filing the substantive action or together with the substantive action.

1.10 When do consumers have a right of action? What are the potential remedies?

In Turkey, there are specialized 'consumer courts' constituted under the Consumer Law where consumers can pursue legal remedies in cases of disputes arising from consumer transactions, such as product liability actions. There are also Arbitral Commissions for Consumers in each district which are authorized to resolve consumer claims with a value under two thousand Turkish liras. In cases where a consumer is supplied with a defective product or service, or suffers damage because of a product or service as a result of a misleading advertisement, the consumer can apply before the Arbitral Commission or Consumer Court—depending on the monetary amount of the dispute—and claim:

- (a) a refund of the product or service's amount; or

- (b) a replacement of the product or re-provision of the service or free of charge repair, if possible. If the matter goes to the Consumer Court, the consumer is also entitled to claim compensation for damages.

Although not a very common remedy in practice, a consumer can also file a separate compensation for damages-to a misleading advertisement before the authorized civil courts.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Turkey have a primary advertising self-regulation system?

The primary advertising self-regulatory body in Turkey is the Advertising Self-Regulatory Board (ROK). Since its foundation in 1994, ROK has been requesting the correction of advertisements it finds to be in violation of the International Code of Advertising Practice. The decisions or statements of ROK are not legally binding and there is no obligation for advertisers to comply with its decisions. However, these decisions are still binding for its members since they are announced to the public and the members (consisting of advertising agencies and media service providers) are committed to comply with the decisions. In other words, the non-fulfillment of the requirements in ROK decisions will directly affect the credibility and the reputation of the advertiser within society and the sector.

ROK's main aims are:

- (a) To ensure that marketing communications adhere with rules that are based on international standards; to provide for the progression of standards and increase awareness of self regulation; and
- (b) To remove or amend advertisements that breach the rules without the need for recourse to the judicial system.

ROK members consist of advertising agencies, Turkish Association of Advertising Agencies, advertisers, media members from TV, outdoor media, internet and radio, academics and lawyers.

2.2 Is there a self-regulatory advertising code? What are the key principles?

ROK has adopted the International Chamber of Commerce Code of Advertising and Marketing Communication Practice. The key principles of the Code are decency, honesty and truthfulness.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Yes—The following parties may file an application before ROK: consumers, consumer and environmental institutions and related vocational organizations, competitors and advertising agencies. The applications are made to the Head of the Committee. Applications must be made in writing, the violated provision must be explicitly specified with its Article number and a copy of the advertisement attached to the application.

Applications to ROK will primarily be evaluated by the Chairman of the Committee and he/she shall determine the method by which the dispute should be resolved.

ROK meetings take place monthly. Decisions are adopted by a simple majority of the participants of the meeting, with the Chairman having the deciding vote in the case of deadlock. In the event that the parties of the dispute are members of the Advertising Self-Regulatory Board, they are not allowed to participate in the discussions and decision-making process. Once the Executive Committee or the Advertising Self-Regulatory Board has reviewed a file and come to a decision:

- (a) it informs the parties about its opinion. If the advertisement has been found to be misleading, the advertiser or the advertising agency is requested to correct the advertisement or terminate its broadcast; and
- (b) the advertiser is expected to correct or terminate the broadcast of the advertisement within 2 working days. If the advertisement is not corrected or its broadcast is not terminated, the media institutions concerned will be informed in writing and they shall be requested to terminate the broadcast of the advertisement.

The authority to determine whether a correction conforms with the decision lies with the Executive Committee. The corrected advertisement may not be broadcast without having obtained the approval of the Executive Committee.

Objections to the decision shall not stop the implementation of the decision. The parties have to abide by the decision until the objection has been assessed and a decision made.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The system of ROK is effective; however, it is not widely-used among advertisers. As the decisions of the Advertisement Board are legally binding and legally enforceable (as opposed to voluntary enforcement of the decisions), advertisers usually choose to apply before the Advertisement Board rather than ROK. That said, corporate and prestigious advertising firms see the importance of self-regulatory systems to create an auto-control in the sector and thus continue to abide with ROK. From a legal point of view, it is in the interests of advertisers to use ROK as a self-controlling agent, as this would decrease the sanctions imposed by the Advertisement Board.

It is important to note that the decisions of ROK are not legally binding, but they are ethically (and professionally) binding in the sector so they are respected by all the member advertisers.

2.5 Are the self-regulatory system's decisions reported?

The self regulatory system's decisions are not reported.. The decisions can be objected before the Executive Committee, but the system does not offer any right of appeal against the decisions.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Advertising companies which are members of ROK must abide with its decisions and comply with the principles governed by ROK. In practice, member advertising companies are co-operative and they set out the fundamental principles of the sector. It should be also be underlined that ROK gives great importance to misleading advertisements and member companies must be aware of such sensitivity.

2.7 Are there any other self-regulatory systems that govern advertising practices in Turkey?

No, there is no other self-regulatory system in Turkey.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Turkey (eg, consumer protection laws; IP laws; unfair competition laws)?

As explained above, in Turkey there is no specific and complete law devoted only to advertising. There are, however, various provisions in different laws and regulations which govern advertising claims.

The Consumer Law, being the main law regulating the general principles of the advertisements, states that the advertisements must be in compliance with the applicable laws, the general principles determined by the Advertisement Board, general ethics, public order, individual rights and the principle of good faith. Moreover, the same law stipulates that no advertisement, announcements or implied advertisement that is deceptive or misleads the consumer, or abuses his lack of experience or knowledge shall be allowed. More or less the same rules appear in the Advertising Regulation as well.

One other main rule regulating advertising claims can be found in the Turkish Commercial Law, where sample cases of unfair competition are set out. Examples described as unfair competition related to advertisements are:

- (a) comparing itself, its goods, business products, activities, prices with others, their goods, business products or prices in a misleading way;
- (b) defaming its competitors or profiting from its competitor's reputation;
- (c) making false statements regarding honors, diplomas or awards or using titles or symbols in a misleading way;
- (d) creating confusion with the businesses or business products or activities of others; and
- (e) misleading customers by hiding the qualifications, benefits and/or dangers of one's products or activities.

As mentioned above, the Industrial Property Law No 6769 stipulates that using a third party's trademark in advertising material without the knowledge and permission of the trademark owner amounts to trademark infringement.

Apart from the above, if the advertisement violates personality rights, including the right to privacy, then, under Articles 24 and 25 of Turkish Civil Code, the injured parties are entitled to take civil legal action for determination and stopping of the violation the violation as well as to claim both material and moral compensation if they suffered damages.

3.2 Is substantiation required for advertising claims?

By Article 61/6 of the Consumer Law and Article 9 of the Advertising Regulation, an advertiser is required to prove any material claims featured in its advertisements. Advertisements where material claims are not proven are generally evaluated by the Advertisement Board to be 'misleading advertisements'.

Article 7/8 of the Advertising Regulation prohibits advertisements from misrepresenting research findings or quotations from technical scientific publications. By this article, statistics should not be presented in a way to produce results different to the actual ones, and scientific terminology must not be used in a misleading manner. Inappropriate scientific expressions and scientific terminology that present claims as if they have a scientific basis that does not exist in reality must not be used in advertisements.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

No. There are no specific cases where substantiation is not required for the advertising messages. In other words, it is not possible to say that advertisers are allowed to puff up their products or to make vague claims about their products and services, as the Advertisement Board is very strict on this. For example, the Advertisement Board is very alert to the use of superlative (eg the 'best', 'newest', 'cleanest', 'freshest') statements, and usually issues fines on the basis that all claims and assertions in ads must be based on 'scientific works' or 'test results' taken from certain institutions such as state universities or internationally accredited labs or scientific centers.

3.4 What are the rules governing the use of disclosures in advertising?

Under Turkish Law, disclosure is needed in order to ensure that the advertisement is true and not misleading and to provide enough evidence to back up the claims. Advertisers are obliged to make sure that their advertisements are fully understandable by the average consumer. In this respect, there should not be any potentially misleading implied claims or other misleading information in the advertisements.

In Turkey, disclosures are commonly made via subtitles, footnotes, scrolling texts or links, depending on the nature of the advertisement. No matter what the method of disclosure is, advertisers should make sure that consumers can easily and effectively understand the message and access the disclosed information. For example, if the disclosure is made via subtitles or scrolling text, the Advertising Regulation sets out that the subtitles should be at pre-determined sizes depending on the media, and should flow at a reasonable speed so as to be easily followed by consumers. By Article 18 of the Advertising Regulation, footnotes and subtitles should be kept at a minimum, and should not contradict the main message of the advertisement.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

The above-mentioned regulations permit the use of endorsements and testimonials in advertisements, subject to certain rules. By Article 16 of the Advertising Regulation, advertisements including endorsements and testimonials should not include statements that are not based on the experience, knowledge or research results of the referred person, institution or organization, and the statements should be true and actual. The same article also states that if the endorsements or testimonials lose their validity for certain reasons, they should not be used in advertisements.

As is the case in many other jurisdictions, the use of celebrities as part of marketing strategy is a common practice in Turkey, and celebrity ads constitute the most common type of ads making use of endorsements and testimonials.

3.6 What are the rules governing the use of product demonstrations in advertising?

Most importantly, product demonstrations in advertisements must reflect the truth and must not be misleading. If the price is mentioned, it should be the actual current market price.

General rules mentioned above are also applicable to product demonstrations in ads.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is permitted in Turkey under Article 61/5 of the Consumer Law. By Article 8 of the Advertising Regulation, comparative advertisements are only allowed if:

- (a) they are not misleading;
- (b) they do not give rise to unfair competition;
- (c) the compared goods or services are of the same nature, and they meet the same requests and needs;
- (d) an aspect providing benefits to the consumers is compared;
- (e) there is an objective comparison of one or more tangible, essential, verifiable and characteristic features (including the price) of the relevant goods or services with the compared goods or services;
- (f) objective and measurable arguments based on numeric data can be proved by tests, reports or such other documents;
- (g) they do not disparage, defame or disgrace a rival's intellectual and industrial property rights, trade name, company name, other distinctive marks, goods, services, activities or other properties;
- (h) the goods or services are procured from the same geographical region in cases where the goods or services are of a known origin; and
- (i) such advertisements do not give rise to confusion between the advertiser and a rival of the advertiser, the said rival's trademarks, trade name, company name, other distinctive marks, goods or services.

Under the Advertising Regulation, it is permissible to mention the rivals' names, trademarks, logos or other distinctive marks or statements as well as their trade names or company names. However, this provision does not come into force until 1 January 2019.

On the other hand, the use of testimonials by real persons or institutions in comparative advertisements is not allowed.

Regardless of their nature, comparative advertisements are not permissible for food supplements.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

Once the relevant provision of the Advertising Regulation comes into force (See question 3.7), the use of a competitor's trademark or products will be allowed. However, under the Industrial Property Law, if the use of a competitor's trademark in a comparative advertisement does not comply with the fair principles applied for comparative advertisements, this would constitute trademark infringement. Besides, it may also constitute unfair competition under the Turkish Commercial Code (see questions 3.1. and 3.7 above).

As regards copyright matters, the relevant law is the Law on Intellectual and Artistic Works (the Copyright Law). If the work of a third party is used without permission in a comparative ad, then this will constitute copyright infringement, regardless of whether the competitor's trademark was used or not. In such cases, under Articles 67-71 of the Copyright Law, the owner of the work is entitled to file a copyright infringement action and claim:

- (a) prevention and cease of the infringement, as well as

- (b) copyright compensation, which corresponds to up to 3x the royalty amount (if the parties had entered into an agreement and agreed on a current market value as royalty amount), and, in addition,
- (c) compensation for his/her moral damages.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

Under the Turkish Food Codex Regulation on Labeling and Provision of Food Information to Consumers, food labels should not be misleading in any way. Article 9 of this Regulation specifies ‘country of origin’ as one of the pieces of mandatory information that should be stated in Turkish. The country name should be provided to the consumer on the labelling without any abbreviations.

Under Article 31 of the Regulation, if the country of origin of the foodstuff is different to the country of origin of the primary ingredient of the foodstuff, then the producer should either disclose the country of origin of the primary ingredient or that the country of origin of the primary ingredient is different than that of the foodstuff.

Finally, the same Article stipulates that stating the name or address of the producer is not sufficient to be regarded as a country of origin notification to the consumer.

3.10 Are there any special rules governing product packaging?

Turkish Consumer Law incorporates extensive legislation with regard to product packaging.

The formal requirements and content of price markings are regulated under the Regulation of Price Marking.

With respect to food labelling, the main legislative instruments are: the Turkish Food Codex Regulation on Labelling and Provision of Food Information to Consumers and the Turkish Food Codex Regulation on Nutrition Information and Health Claims.

In addition, there are specific regulations as regards the packaging and labelling requirements of various products, such as cosmetics and human medicinal products.

4 PRICE ADVERTISING

4.1 What are Turkey’s rules regarding price advertising?

The main principle regarding price advertising is truthfulness. Under Article 13 of the Advertising Regulation, when mentioning the price of the product in an advertisement, the true and accurate value of the product inclusive of all taxes must be included.

In direct sales, where the sale/purchase transactions take place at the address of the customer, the sale price must be provided within the advertisement, along with an accurate definition of the product or service. It is important to note that advertisement of a product with a price must not mislead customers into believing it to be a free product. Also, if there potential for different prices for the product, such differences must be clearly portrayed in the advertisement.

4.2 What are Turkey's rules regarding advertising 'free' products?

Free products are usually regarded as campaigns under Turkish Law. Thus, advertisements of free products must comply with the general advertising rules as mentioned above.

Under the Advertising Regulation and the decisions given by the Advertisement Board, the commitments offered in advertisements to consumers must be real and true. There should not be any discrepancy between the free product advertised and the free product received. Further, the conditions/details of those commitments must be included in the advertisement in an efficient way for the consumers to become fully aware. Transparency should always be the top priority of advertisers and advertisers should fulfill the commitments they undertake in their advertisements.

4.3 What are Turkey's rules regarding sales and special offers?

Under the Consumer Law and Advertising Regulation, sales and special offers are also regarded as campaigns and so the law as stated in answer 4.2 will also apply.

4.4 What are Turkey's rules regarding rebates?

The Advertising Regulation sets out the principles regarding the rebates. Under Article 14 of the Advertising Regulation, in advertisements or announcements made to promote the rebate offered due to shop opening, closing or moving, or simply due to season endings, the advertiser should indicate the start and end dates of the rebate period, and, if the discounted goods or services are limited to a certain amount, such amount should be explicitly specified.

Moreover, discounted sales advertisements should not contain any statements or images which will mislead consumers by creating confusion about which goods or services are subject to the discounted sales or the discount amount to be applied, or which will create the impression that a higher rate of discount has been applied.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

The Advertisement Board gives utmost importance to the subtitles used in advertisements. Under the Advertising Regulation, information having a fundamental role during the consumer's decision-making process must be provided to customers for a sufficient period of time and in a manner that ensures that the terms and conditions of the advertised offer can be read.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Under the Regulation on Promotion of Medicinal Products for Human Use, medicinal products cannot be advertised in any way, via any channel. However, there is a discrepancy within the relevant legislation, as the Broadcasting Regulation states that commercial communication for medicinal products and medical treatments available only on prescription is not allowed. This Regulation also stipulates that during advertisements for medical products and medical treatments which are not subject to prescription, a statement that they are authorised for sale without prescription and the ingredients should be displayed in visible and readable text on screen, or orally stated in radio

broadcasting. We are of the opinion that, as the Regulation on Promotion of Medicinal Products for Human Use is an individual regulation merely for medicinal products, it should prevail. In practice, none of the pharmaceutical companies choose to advertise their non-prescribed products.

Further, all tobacco and alcoholic beverage products are also strictly banned from being advertised in any media to consumers.

Moreover, the advertising of explosives, drugs and any other dangerous or addictive products via any channel is prohibited.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Hidden advertising, subliminal advertising, misleading advertising and defamatory advertising are prohibited (see question 1.4 above).

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Article 5 of the Advertising Regulation underlines that advertisements cannot be indecent or contrary to general moral values. Likewise, advertisements must not include immoral statements or visuals, pornographic material and/or sexually abusive content. Fear and superstitious beliefs must not be used in an abusive manner and advertisements must not include content about patients, children, older people and disabled people, in a manner aimed at taking advantage of society's common sense of mercy. Last but not least, the before/after visuals of patients cannot be included in advertisements.

In addition to this, Article 8 of the Broadcasting Regulation states that any radio, television or on-demand broadcasts shall not have obscene character; similarly, Article 8/1(a) of the Law on Internet Broadcasts No 5651 prohibits broadcasts of an obscene character.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

The Advertising Regulation sets out the rules of sponsorship in radio, TV and on demand broadcasts.

Besides that, there is no specific rule regarding the inclusion of the name of the advertiser/sponsor in the advertisement. If there is a campaign supported by a sponsor, then its name is mentioned due to the sponsorship agreement between the parties. However, it is not a legal requirement to mention the name of the advertiser in the advertisement. Rather, advertisements must include all the necessary information regarding the advertised product/service.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Integrating advertising content with editorial content is possible under two options: product placement and band advertising:

- (a) **Product placement:** Under Article 14 of the Broadcasting Regulation, product placement applications may be allowed in cinema films, films made for television, series, sports programs and light entertainment programs. Product placement applications may also be allowed in radio broadcasts. Consumers must be informed of product placement at the beginning and end of the program in which the product placement shall be applied and when the program resumes after each advertising break, the statement 'There is a product placement in this program' must be displayed. Within radio broadcasts, this statement is made orally with the same procedure. The product embedded within the program by product placement should be used in such a natural manner as if it is part of the program. In general, product placement should not prejudice the program integrity and there should not be any exaggeration in the placement.
- (b) **Band advertising:** Under Article 10/b of the Broadcasting Regulation, during band advertisements, the band advertisement logo which can be found in the annexes of the Regulation shall be displayed. Band advertisements must not occupy more than 20% of the total screen area during broadcasts. In order to prevent the distortion of the integrity, value, effectiveness and message of the program, spots and mini-spots, band advertisement techniques shall not be broadcast with sound. Band advertisements should be displayed for a maximum of 10 seconds for each insertion. It is prohibited to feature band advertisements in children's programs and news programs.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Under the Advertising Regulation, regardless of the manner or the channel of the advertisement, it should be clearly understood by customers that an advertisement is an 'advertisement'. Hidden advertisements are forbidden.

During product placement and band advertisements, consumers must be aware of the fact that such acts constitute an advertisement (see answer 7.1).

In addition, advertorials must also include a statement or logo stating that such broadcast is an advertisement. Moreover, all advertorials must comply with the key principles set out above and should not mislead the consumer.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Advertising through social media is not specifically regulated under Turkish legislation. However, all the above-mentioned rules apply for advertisements via social media.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

There is no specific regulation regarding the liability regime of user generated contents. However, under Article 5 of the Law on Internet Broadcasts No 5651, hosting (service) providers such as Facebook are not responsible for controlling the content or investigating whether there has been

unlawful activity. However, once they have been notified of illegal content, they are held responsible for removing such content from their broadcast.

As for content providers, they are fully responsible for their content; however, under Article 4/2 of the Law on Internet Broadcasts, they are not also liable for third parties' content on the website.

Moreover, under Article 9 of the Internet Law, an individual is entitled to request that the content provider or the service provider remove any infringing content on the internet that violates his/her rights. If he/she cannot get a satisfactory response, then he/she is entitled to apply before the authorized criminal court of peace to ask for the removal of the infringing content from the relevant website and broadcast his/her response statement against this infringement.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

No.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

An individual's name, picture, or voice etc constitutes personal information, subject to personal rights and protected by both Turkish Constitution and Civil Code. As such information is directly linked to the identity of the individual, it can be used only with the explicit prior consent of the individual. Under Article 24 of the Turkish Civil Code, persons whose personal rights are used without just cause or right are entitled to request determination and cease of such use from the courts, and can also claim for compensation if he/she suffered damages.

Further, with regard to advertisements published via the internet, Article 9/A of the Law on Internet Broadcasts No 5651 also regulates that, should there be a violation of privacy of an individual via an internet broadcast, then he/she is entitled to apply before the Telecommunications Directorate in Turkey and request a ban of access to this content.

Moreover, infringing the right of privacy may also give rise to criminal liability, and infringing parties may be sanctioned with 1-3 years' imprisonment under Article 134 of the Turkish Criminal Code. Moreover, if the privacy of an individual is infringed by way of recording the voices or videos of an individual, the sanctions stipulated in the same provision will be increased.

In order to avoid the aforementioned liabilities, the consent of the individuals concerned must be obtained if such personal elements will be used.

9.2 Are there situations when permission is not required?

If an individual's personally identifiable information is used solely for advertising purposes, then such information can only be used with the consent of the individual. There is an exception in Article 24/2 of the Turkish Civil Law, whereby disclosing personal information without consent does not constitute infringement if such personal information:

- (a) holds a considerable importance for the public interest;

- (b) is of the utmost important because of a superior private interest; or
- (c) is disclosed because of a right or authorization given by the law.

However, it is generally accepted that advertisements do not fall into the scope of the exceptions listed above.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

As mentioned above, advertisers do not have to obtain pre-clearance from any authority. However, there are permissions to be granted in certain circumstances eg from the Ministry of Culture when using historic places or from the Ministry of Health when using public hospitals. If a public domain (a park or a public building) is to be used in an advertisement, official permission from the relevant municipality is required.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

It is not permitted to use other companies' branded products in comparative advertising (see question 3.7 above). However, it would be possible to use third parties' products in product placement when broadcasting via TV or radio (see question 7.1 above).

It is also possible to use other companies' recognizable products in advertisements or campaigns, where an exclusive business-related consent has been given by the other company or there is a special marketing agreement between the two companies.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Turkey which affect advertising (eg Swedish gender equality law)?

Obscenity is not welcomed in any way in Turkish culture. Furthermore, all broadcasts including advertisements provided via any kind of channel must respect the Turkish family structure and Turkish general customs and moral values.

Another delicate issue is the use of the Turkish Flag. Under the Turkish Flag Law and Law on Elections and Electoral Rolls, it is prohibited to use the Turkish Flag for advertising and propaganda purposes.

In addition to the above, religion is a very sensitive issue in Turkey; consequently, advertisements should not abuse any religious elements.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Religion is an important and respected value in Turkey. The use of religious elements (eg mosques or the visions of Prophet Muhammad) is not welcomed in advertisements and so it is advisable for advertisers to refrain from using any religious elements in advertisements in Turkey.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Turkey?

Nothing other than the aspects mentioned above.

UKRAINE

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Ukraine?

Advertising is mostly regulated by laws and regulations adopted at the state level, which cover advertisement placement, timing, content, etc. The Advertising Law is the principal source of regulation of advertising activity in Ukraine, covering both general regulation of advertising and advertising in specific industries (tobacco, alcohol, drugs, financial services, securities, construction, employment and weapons). Outdoor advertisement placement may be partially regulated at the local level. Moreover, duly ratified advertisement-related international treaties take precedence over local regulations (eg, the European Convention on Transfrontier Television).

A self-regulatory framework is constantly developing but so far it remains too weak to significantly influence the advertising legal framework. For more information please see below.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

'Advertising' is defined broadly and covers most types of communication. It is defined as 'information about a person or a product (goods, works, services, securities, intellectual property rights) that is distributed in any form and in any manner and is designed to create and maintain the awareness and interest of advertising consumer with respect to such person or product'. All advertising must be clearly distinguished from other information, for example by using the heading 'advertising'.

1.3 What is the basic regulatory framework for advertising regulation?

The basic regulatory framework for advertising regulation includes both the special Advertising Law and general laws related to the promotion and marketing of persons and products.

Unfair advertising (covering both misleading and comparative advertising) is mainly regulated by the Unfair Competition Law.

There are also several specific laws aimed at the regulation of advertising in the particular industries (eg, the Gambling Prohibition Law and the laws on pharmaceuticals).

Intellectual property laws, the Consumer Protection Law and the Personal Data Protection Law also form part of advertising regulation, even though they are not advertising-specific regulation.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The Advertising Law provides for the specific regulation of certain types of advertising. Specifically, the Advertising Law provides for relatively extensive regulation on advertising of services that are rendered via electronic means of communication (eg, text message advertising, e-mail, online, etc).

The Advertising Law is also the basic law for the regulation of outdoor and indoor adverts placement. However, cities with a population of more than a million and cities attractive to tourists usually adopt local rules for outdoor advertising placement in addition to the Advertising Law and master rules for outdoor advertisement placement approved by the Government.

In addition to the Advertising Law, TV and radio advertising is also regulated by the Television and Broadcasting Law.

Regardless of the medium used, unfair advertising, including comparative ads, is mainly regulated by the Unfair Competition Law.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Ukraine is not a completely 'dark' market but there are industries for which advertising is heavily regulated. Notable examples include:

- (a) **drugs, medical equipment and related activities:** generally, only drugs, medical equipment and methods for preventing, diagnosing and curing diseases ('Selected Medical Products') are permitted to be advertised which:
 - (i) are duly licensed by the Ministry of Health; and
 - (ii) do not require prescription or are not black-listed. The Advertising Law establishes specific requirements to the content of Selected Medical Products advertising and a long list of prohibited advertisement practices;
- (b) **alcohol:** most of the applicable provisions of the Advertising Law establish various limitations, but it is still possible to advertise alcoholic beverages on TV, radio and in printed media. Advertisements of alcoholic beverage-related trademarks is also allowed in connection with sponsorship of television and radio programs, theatre and concerts, sporting and other events (except for events mostly dedicated to persons under 18). However, the sponsorship rules in this area are not particularly clear and must be carefully observed;
- (c) **tobacco:** most forms of tobacco advertising are prohibited, including Internet and sponsorship;
- (d) **financial services:** advertising of financial services is only permitted if an appropriate license has been obtained from the state authorities for rendering such services. Advertising of trademarks and names of service providers is an exception to this rule. The Advertising Law also provides for specific requirements with respect to the content of such advertising;
- (e) **employment services:** employment-related advertising must be gender-friendly and not discriminatory. Violation of statutory requirements may result in the imposition of fines; and
- (f) **securities:** the Advertising Law provides for separate lists of what amounts to advertising of securities & stock exchange and what does not. There are strict regulations on who may advertise certain securities & stock exchange products. The content of such advertisements shall comply with the relevant statutory requirements.

1.6 Are any government pre-approvals required?

No government pre-approvals are required.

Optional pre-approval of advertising materials is available from the Anti-monopoly Committee.

1.7 Does the media pre-clear advertising?

To meet the requirements of the Advertising Law, the media usually pre-clears advertising for those business activities/products that are subject to mandatory state certification, permit or licensing requirements for their production or distribution. Due to the broad extent of this requirement, the media pre-clearance procedure usually involves the review of constituent and other basic corporate documents of the advertiser to check whether any certification/permits/licenses are required and available for the relevant activity or products.

Another important aspect of the pre-clearance procedure is the availability and/or registration status (if necessary) of intellectual property rights (such as trademarks and copyright).

1.8 How does the government enforce advertising laws? What are the potential remedies?

There are several state agencies that enforce advertising laws, depending on the industry/area:

- (a) the State Service of Ukraine for Food Safety and Consumer Protection mostly enforces advertising laws from a consumer rights protection standpoint;
- (b) the Anti-monopoly Committee of Ukraine (AMCU) enforces with respect to unfair advertising;
- (c) the National Television and Radio Broadcasting Council of Ukraine also covers enforcement of advertising laws when it comes to television and radio broadcasting companies;
- (d) the Ministry of Finance of Ukraine is involved in the enforcement of advertising of state securities;
- (e) the National Securities and Stock Market Commission is entitled to enforce advertising laws with respect to stock markets;
- (f) the Ministry of Regional Development, Construction, Housing and Utilities of Ukraine enforces advertising laws relating to the construction of residential houses;
- (g) the State Service of Ukraine on Labor Issues is engaged in enforcement of advertising laws related to vacancies (employment); and
- (h) the State Service of Ukraine for Food Safety and Consumer Protection, the Anti-monopoly Committee of Ukraine, and the National Television and Radio Broadcasting Council of Ukraine are the main enforcement agencies in the advertising industry.

Generally, the state agencies all have the same set of remedies to enforce advertising laws. In particular, they have the power to:

- demand that advertisers and advertisement producers/distributors eliminate violation of the advertising laws;
- issue binding orders to the same effect;
- cease advertisement distribution;
- bring lawsuits seeking the retraction of inaccurate advertising; and
- impose fines discussed immediately below.

A fine may amount to five times the value of the distributed/produced advertisement for each instance of violation. A violation committed repeatedly during the same year doubles the amount of the fine applicable to such violation. Save for special fines for unfair advertising, imposing the fines at issue is currently the exclusive jurisdiction of the State Service of Ukraine for Food Safety and Consumer Protection. The remaining state agencies listed above can report the fact of violation of advertising laws to the Service which then investigates and decides whether a fine should be imposed.

For unfair and comparative advertising, the fine may amount to up to 5% of the offender's turnover for the year preceding the year when the fine is imposed, for each such violation.

1.9 When does a competitor have a right of action? What are the potential remedies?

Generally, competitors do not have a right of action or specific remedies. Nevertheless, unfair advertising complaints filed with the AMCU are the most widespread course of action for competitors. AMCU may impose a fine that may be up to 5% of the offender's turnover. Alternatively, or in addition to the fine, the AMCU may oblige the offender (mostly advertisers) to terminate the violating advertisement.

Alleged violations of TV/radio advertising laws are usually reported to the National Television and Radio Broadcasting Council of Ukraine. The scope of potential remedies is outlined above. The given remedies may be implemented against both advertiser and advertisement distributor, depending on the merits.

Alternatively, competitors may bring a lawsuit against a violation of Advertising Law and advertising-related laws and seek the withdrawal of an advertisement.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers are specifically entitled to seek damages, including moral damages, suffered by them due to unfair advertising. However, this remedy is rarely enforced. In the vast majority of cases, consumers complain to the State Service of Ukraine for Food Safety and Consumer Protection, which then decides on the issue in accordance with general procedure stipulated by the Advertising Law and special Procedure on Imposing Fines for Violation of Advertising Laws. Without prejudice to other remedies outlined above in question 1.8, fines and termination of the violating advertisements are the most widespread remedies implemented by the Service. Most often, advertisers are sanctioned by the Service but the advertisement distributor can be also sanctioned for violation of advertisement distribution and placement requirements.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Ukraine have a primary advertising self-regulation system?

No overarching advertising self-regulation system is in place in Ukraine. The existing associations of advertisement market players are either fragmentary, ie focused on the regulation of advertising in specific industries (eg, TV and radio or brewing), or are not yet perceived as powerhouses that can authoritatively drive the development of the advertising industry in Ukraine.

2.2 Is there a self-regulatory advertising code? What are the key principles?

There is no primary self-regulatory advertising code in Ukraine.

It is worth mentioning that the Ukrainian advertisement Makers Union, one of the numerous associations of market players, encourages compliance with the Consolidated ICC Code of Advertising and Marketing. However, this suggestion is rarely followed in practice.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

No, this is not yet available in Ukraine.

2.4 Is the self-regulation system effective? Is it widely used and followed?

In certain instances, the existing mechanisms of some of the self-regulatory bodies has proven to be an effective tool for the regulation of advertising in addition to state-imposed laws (eg, the temporary Independent Expert Council on Mass-Media Activity during Elections or the Agreement on the Self-Regulation System of Commercial Communications of the Companies of the Brewing Industry of Ukraine).

2.5 Are the self-regulatory system's decisions reported?

No, not yet in Ukraine.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

There is a certain trend towards creating a self-regulatory system for each area of business (see question 2.7 below). The establishment of a self-regulatory system for each specific area is usually driven by business associations and NGOs. Such industry-specific systems are mostly based on general principles applicable to advertising, ie, legitimacy, accurateness, truthfulness and the avoidance of consumer harm.

2.7 Are there any other self-regulatory systems that govern advertising practices in Ukraine?

- (a) **Outdoor Advertising:** The Outdoor Advertising Association of Ukraine approved a Code of Principles of its Members in 2003. In addition to the requirements of the Advertising Laws, the Code imposes obligations on the members of the association with respect to outdoor advertising. The Code does not contain an extensive dispute resolution/claims consideration mechanism.
- (b) **Brewing:** At the beginning of 2012, the brewing industry rolled out its self-regulatory system for commercial communications. The system addresses voluntary restrictions pertaining to beer advertising and promotion, the establishment of the Ethics Committee as an independent body of the system and the creation of a claim processing mechanism and sanctions.
- (c) **Confectionery, food-concentrate goods and coffee:** In December 2013, the Union of Producers of Confectionary, Food-Concentrates and Starch Industries of Ukraine approved the Professional Ethics Rules on Competition in the market of confectionery, food-concentrate goods and coffee. The Rules set out the requirements of advertising and promoting the industry-related goods, listed prohibited practices and established a self-regulatory body and a general claims consideration mechanism. The Rules have been approved by the AMCU.
- (d) **Pharmaceuticals and drugs:** The self-regulatory framework in the pharmaceutical and drugs industries is currently comprised of:

- (i) the Code of Marketing Practices for the Pharmaceutical Manufacturers and their Representative Offices developed by European Business Association (EBA) and signed by pharmaceutical companies who are members of EBA (2004);
- (ii) The Ethics Code of Ukrainian Doctors (2009);
- (iii) the Ethics Code of Pharmaceutical Professionals of Ukraine (2010); and
- (iv) the IFPMA Code of Pharmaceutical Marketing Practices (applicable to the IFPMA members operating in Ukraine).

The Good Practices of Drugs Promotions were approved by the Ministry of Health of Ukraine in November 2013 and revoked about one month afterwards. It is still expected that the Good Practices of Drugs Promotions will be approved as soon as the reasons for their revocation are eliminated.

- (e) **Mobile marketing:** The Code of Mobile Marketing was signed by the main mobile operators: an impressive list of market players. The Code describes principles, conditions and procedures for mobile marketing. Specifically, the Code sets out requirements with respect to consumer choice and registration, consumer-related communication, termination of participation in a marketing event, as well as limitations. Claims on violation of the Code are considered under a separate special procedure approved by the Ukrainian Direct Marketing Association. Code-breakers can be black-listed or the Association can address the advertising violation to the relevant controlling authorities or make the fact of the violation publicly available.
- (f) **Television:** The Television Industry Committee (TIC) is a professional association represented by 4 major TV groups and a 5th TV channel, as well as media agencies. Its strategy on self regulation includes the development of self-regulation instruments for TV and advertising markets. So far, the TIC has not elaborated and approved an industry-specific self-regulatory mechanism.

In addition, generally:

- (g) **Gender discrimination:** The Standards of Non-Discrimination Because of Gender in Advertising were adopted on the forum of public professional organizations and approved by Ukrainian Marketing Association in 2011. The Standards provide for criteria to distinguish non-discriminatory ads from discriminatory, regulates disciplinary proceedings related to consideration of discriminatory because of gender advertising cases.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Ukraine (eg, consumer protection laws; IP laws; unfair competition laws)?

The basic law governing advertising claims in Ukraine is the Advertising Law. It provides for both general and industry specific requirements to claims. The Advertising Law provides that the following general principles shall apply in respect of any claims about a product: legitimacy, accurateness, truthfulness and no consumer harm.

Claims relating to drugs, tobacco, alcohol, food products, weapons, financial services, employment, securities and construction are regulated in greater detail (see question 3.2 below). In addition to the Advertising Law, claims are generally addressed under the Consumer Protection Law, the Unfair

Competition Law, the Safety and Quality of Food Products Law and various industry specific regulations.

3.2 Is substantiation required for advertising claims?

In general, under the applicable Ukrainian laws, companies do not need to substantiate their claims. However, certain industries are required to substantiate their claims. Examples include:

- (a) **drugs and medicine:** every drug or medicine advertisement should have the following:
 - (i) a reminder that it is necessary to consult a doctor before using the product;
 - (ii) a recommendation to read the drug insert; and
 - (iii) a statement that 'self-treatment may be dangerous for your health';
- (b) **alcohol and tobacco:** these adverts shall state the following:
 - (i) 'Smoking may cause cancer'; or
 - (ii) 'Significant consumption of alcohol is dangerous for your health'.
- (c) **financial services:** advertisements of banking, insurance or investment services shall be accompanied with information on the relevant license, its number and date and the state authority that issued the license;
- (d) **employment:** the text of an advertisement should contain a note that the person that provided a service related to facilitating the job search may not charge a fee; and
- (e) **securities and stock exchange:** the Advertising Law contains quite an extensive list of substantiation required for this industry. In general, advertisements shall specify the license details of the trader or any other person offering the relevant services.

In addition to the foregoing requirements of the Advertising Law, other industry specific rules are found in the applicable regulations.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

As specified above, the applicable laws in general do not require any substantiation except for the specific industries. At the same time, government agencies expect the company to be in the position to prove the accuracy, truthfulness and non-deceptive nature of any and all advertising claims without exception, including puffery. In the absence of any substantiation, certain agencies may consider such a claim false and, therefore, as violating the applicable laws.

3.4 What are the rules governing the use of disclosures in advertising?

There are no general rules governing the use of disclosures in Ukraine. Only the general requirements of the Advertising Law and the other applicable laws and regulations apply. In particular, advertisements shall contain accurate, full and non-deceptive information.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

There are no specific rules regulating endorsements and testimonials in advertising in Ukraine. At the same time, some laws, including the Advertising Law, specifically prohibit the use of endorsements and testimonials in advertising medicine, certain food products, tobacco and alcohol.

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no rules governing the use of demonstrations in advertising in Ukraine. The general requirements established by the Advertising Law, the Unfair Competition Law and the Consumer Protection Law that may be applicable are that the demonstration shall not be deceptive, inaccurate or mislead a client as to the actual function and end-use of the advertised product.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising is not prohibited in Ukraine.

Under Ukrainian laws, comparative advertising is allowed if:

- (a) the information on the comparative products, services or goods is substantiated with evidence; and
- (b) the information is accurate, objective and useful for the consumers.

Additional rules are established in respect of specific industries. In particular, the Advertising Law prohibits comparisons of drugs and medicine with other drugs and medicine with the view of increasing the advertising effect.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

The applicable laws only establish a general requirement that advertisements shall comply with the requirements of copyright legislation. There are no special copyright or trademark rules that specifically impact comparative advertising.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

There are no special rules governing claims relating to the geographic origin of the product. Only the general requirements of the Advertising Law and the other applicable laws and regulations apply. In particular, that advertisements shall contain accurate, full and non-deceptive information.

Such claims should also comply with the provisions of competition law, in particular, restrictions of unfair competition practice. Distribution of incorrect or false information regarding the origin of the product, its manufacturer, seller, method of manufacturing, etc may constitute one of the forms of unfair competition, namely dissemination of misleading information (Article 15-1 of the Unfair Competition Law).

3.10 Are there any special rules governing product packaging?

The Advertising Law has no special rules governing product packaging, except for:

- (a) The information regarding the product or its manufacturer placed on the product or its packaging is not considered an advertising.
- (b) A prohibition on the use of images of:
 - (i) tobacco products,

- (ii) trademarks and other intellectual property rights objects under which the tobacco products are manufactured, or
- (iii) the process of smoking on the packaging of any other products that are not related to consumption of tobacco products.

The packaging and information on it must correspond to the requirements of Consumer Protection Law, the Unfair Competition Law, the Safety and Quality of Food Products Law, laws on protection of intellectual property rights, and various industry specific laws and regulations, including Technical Regulations applicable to certain types of products. The requirements may include, eg, the following:

- (a) obligatory marking of the food products with Ukrainian language (Article 39 the Safety and Quality of Food Products Law);
- (b) the packaging and/or marking of a medical device shall be such as to allow for the distinguishing between sterile and non-sterile devices that are similar or identical (item 13 of Section II of the Technical Regulations for Medical Devices, approved by the Resolution of the Cabinet of Ministers of Ukraine No 753 dated 2 October 2013); and
- (c) use of the product packaging shall not violate the provisions of competition legislation, in particular those that prohibit such form of unfair competition as use of names, trade names, trade marks, advertising materials, appearance of the packaging of the goods or periodicals, or other identifiers without the authorization (consent) of the business entity that has started using such or similar designations in its commercial activity earlier, where such unauthorized use causes or may cause confusion with the activities of such business entity (Article 4 of the Unfair Competition Law).

4 PRICE ADVERTISING

4.1 What are Ukraine's rules regarding price advertising?

According to the local rules on price advertising, prices shall be disclosed in local currency only. Other rules address information on the price. In particular, the law requires that the information on pricing in advertising materials be accurate and appropriate.

4.2 What are Ukraine's rules regarding advertising 'free' products?

There are no specific rules that would prohibit or allow advertising 'free' products in Ukraine. At the same time, certain local tax regulations may have an impact on advertising 'free' products. On this basis, 'free' products are usually sold for a 'coin' (ie 0.01 Hryvnia).

4.3 What are Ukraine's rules regarding sales and special offers?

The concept of sales/discounts is defined in the Ukrainian law as the 'temporary decrease in the product price offered to consumers'.

There are specific rules on when and how the terms 'sale', 'discount' and 'clearance' may be used. In general, they are allowed under the following conditions:

- (a) if they are applied to a product sold by the entity offering the promotion and, in case of clearance, if it applies to all products available or for a limited period of time only;

- (b) the time of such a promotion shall be limited; and
- (c) the promotional price shall be lower than the initial price of the product.

4.4 What are Ukraine's rules regarding rebates?

The applicable legislation does not regulate and does not use the concept of 'rebate' in Ukraine. Only some limited elements of this concept may be found in the regulation of sales/discounts.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

There are no other key restrictions for advertisers to be aware of regarding retail advertising.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

It is prohibited to advertise:

- (a) prescription-based medicine and drugs blacklisted by the state authorities;
- (b) performance enhancing substances and/or methods of their use in sports;
- (c) healing of large audiences; and
- (d) new prophylactic, diagnostic and rehabilitating methods and medicine that are under development and have not been permitted for use yet.

Furthermore, it is prohibited to:

- (a) mention prescription-based drugs, as well as medical equipment or prophylactic, diagnostic and healing methods that require special knowledge and training while sponsoring television/radio programs; and
- (b) telemarket drugs, medical equipment, prophylactic, diagnostic and healing that require special knowledge and training.

Save for minor exemptions applicable to tobacco industry professionals, tobacco goods cannot be advertised in an extensive list of media. It comprises TV and radio, including new media, outdoor and indoor advertising, printed media, advertising in transport, during mass events and on the Internet. Sponsoring of tobacco goods/trademarks is expressly prohibited.

Furthermore, advertising alcoholic beverages/trademarks is subject to prohibition in certain media.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

We are not aware of any such prohibitions. Ukrainian advertising market is driven by the principle that everything is permitted except what is specifically regulated or prohibited.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The Public Morals Protection Law is the primary legislation on the issues of indecency and obscenity. Production and distribution of products of obscene nature, including advertising, is unconditionally

prohibited. Production and distribution of products of erotic and sexual nature, as well as products that contain elements of violence and cruelty, including advertising, is subject to statutory restrictions (eg, children-related restrictions).

The Law provides for an extensive list of prohibited subjects ranging from the propaganda of war, (neo-)Nazi ideology and the denigration of human dignity to the propaganda of drug/alcohol consumption, smoking and other unhealthy habits.

Since the abolition of the National Expert Committee of Ukraine on the Protection of Public Morals in 2015 there has been no special authority aimed at enforcement of the Public Morals Protection Law. A number of state bodies are responsible for enforcement of this law in different areas pursuant to their competence. For example, the National Television and Radio Broadcasting Council of Ukraine observes compliance of the broadcasters with the requirements of this Law in broadcasting activity, including advertising. The powers of the Council comprise, inter alia, monitoring general compliance, inspections of TV and radio broadcasting companies, consideration of complaints, issuing warnings or imposing fines, and challenging the relevant licenses.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Hidden advertising is strictly prohibited in Ukraine. This notwithstanding, the Ukrainian Advertising Law does not establish specific requirements regarding the identification of an advertiser.

In respect of sponsorship, as a general rule, it must be very evident that a particular person/company is a sponsor. Specifically, the use of words 'sponsored by', 'the sponsor of X is Y', etc should be used by the sponsored entity and the sponsor. There is a degree of flexibility in the interpretation of the laws, particularly in relation to certain advertising that is not expressly addressed in the laws. This leads to uncertainty and, therefore, local controlling authorities may have a certain degree of discretion in implementing the relevant requirements and identifying specific marketing activities.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

Generally speaking, there are no special rules governing the integration of advertising content into the entertainment content. Branded content is largely regarded as hidden advertising. Only a limited amount of advertising practices are branded content-friendly. For instance, a TV show generally may feature the name/trade name/trademark of an alcoholic beverage producer, but with no sound or voice-over.

Furthermore, the transmission/retransmission of adverts integrated into TV programs and broadcasts of foreign TV and radio organizations which are transmitted/retransmitted in Ukraine is only permitted if the relevant Ukrainian legal entity has paid for the transmission/retransmission of such adverts. Also, it is generally prohibited for the providers of programming services to place adverts within TV programs and broadcasts of foreign TV and radio organizations.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Where any commercial communication (informative, opinion, editorial) is used for enhancing consumer awareness of a certain advertisement or its products, ‘advertising’ or ‘advertorial’ disclosures must be used.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Advertising on the Internet (including in social media) is regulated in the same manner as offline advertising.

The Advertising Law establishes specific requirements regarding the promotion of services via means of electronic communication (telecommunications), which arguably includes advertising on the internet/in social media. Such advertising should describe in detail:

- (a) the content of the service;
- (b) its cost;
- (c) age or other limitations; and
- (d) the name and address of the service provider. According to recent court practice, such legal requirements can be applied to goods-related services (eg pizza delivery service), but such court decisions remain uncertain.

Additionally, the Consumer Protection Law addresses ‘remote’ entry into an agreement (which, inter alia, covers the information society in general and the internet in particular). Specifically, the Law establishes a number of ‘must have’ requirements to the scope of information delivered to a consumer, including the major characteristics of a product and its price.

While advertising products in social media, the unfair competition laws must also be observed.

Finally, any advertisements, including those in social media, should be clearly identified, eg, by the language ‘advertisement’, ‘on a commercial basis’, ‘sponsored content’, etc.’

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

User generated content may fall under the definition of ‘advertising’ and, therefore, be a part of an advertisement in social media. Therefore, such content must be carefully monitored by the advertiser to ensure compliance with Ukrainian advertising laws (eg, its legality, accuracy, trustworthiness, non-infringements of public ethics or morals, no discriminating statements, etc). In addition, the advertiser may use a photograph or the name of the relevant user only with the user’s written consent.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

Ukrainian court practice on social media advertising is not developed.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

The Ukrainian legislation prohibits the use of a picture (image) or name of a person in advertising materials without the prior written consent of that person. The use of likeness, voice and identity are not addressed in the advertising legislation.

9.2 Are there situations when permission is not required?

There are no situations in advertising when the permission from an individual is not required for using his/her name and picture in advertising materials.

At the same time, under Ukrainian legislation, permission to use a person's picture is not required if:

- (a) such a person sat for the picture and was paid for doing so;
- (b) the picture/video was openly taken in the street, at a meeting, conference, event or in other public places; or
- (c) it is used to protect such a person.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

We are not aware of any such specific rules.

Additionally, please see question 1.5 with regards to drugs, medical equipment and related activity, financial services and construction.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Generally, it is not permissible to use other companies' recognizable products in advertising unless this was permitted by the rights holder. Moreover, such advertising practice may fall under the definition of unfair competition (ie unlawful use of advertising materials, packaging exterior and other commercial designations, copying the appearance of goods of the other producers / competitors).

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Ukraine which affect advertising (eg Swedish gender equality law)?

The Public Morals Protection Law defines public morals quite broadly. It is defined as a system of ethical standards and rules of conduct that are established within society based on traditional moral and cultural values, the sense of values, honor, dignity, public duty, conscience and truth. This leaves a lot of room for broad interpretation by the relevant controlling authorities. Currently, advertising

in Ukraine tends to be more sensitive to ethical and religious issues and to a lesser extent to gender issues. However, in recent years more attention has been paid by the Ukrainian authorities to advertising with sexual connotations that can be considered discrimination due to gender. In this respect, the Commissioner for Human Rights of the Parliament of Ukraine and the National Television and Radio Broadcasting Council of Ukraine have recently taken action to stop distribution of certain advertisements that violated gender non-discrimination laws and standards. Also gender equality requirements are established for the advertising of employment services (see question 1.5).

Additionally, please also see question 5.3 above.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

There are no specific cultural norms that affect advertising in Ukraine. Advertising tactics are entirely discretionary and are not limited by the cultural norms existing in Ukraine.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Ukraine?

Local clearance of advertising products/claims within international advertising campaigns cannot be underestimated due to the impressive attention of controlling authorities to unfair advertising and an increasing volume of fines imposed on market players.

Although there are industries where advertising is heavily regulated, Ukrainian laws are generally liberal (see question 5.2) and Ukrainian consumers are currently well-disposed to new advertising products.

 UNITED ARAB EMIRATES 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in the UAE?

All media institutions creating audio, visual, print and digital content in the UAE's mainland and free zones must comply with the standards for media content contained in Federal Law No 15 of 1980 Concerning Press and Publications (1980 Law).

The 1980 Law sets national standards for media content and requires all local mass media institutions operating in the UAE to abide by them. These include:

- (a) The person of the President of the Republic or the rulers of the Emirates may not be criticized.
- (b) Any material which includes an incitement to be, and is, harmful to Islam or the system of Government in the country, or harms the country's interests or the basic systems on which its society is founded shall be prohibited.
- (c) Material containing shameful information on the person of the President of an Arab, Muslim country or a country with friendly ties may not be published. Material which may threaten the ties of the UAE with Arab, Muslim or friendly countries shall also be prohibited.
- (d) Material which causes an injustice to Arabs or constitutes a misrepresentation of Arab civilization or heritage may not be published.
- (e) News, photographs and comments relating to the secrets of the private or family life of individuals may not be published, even if they correct, and even if they intended to harm them. No secret that may harm the reputation of a person, his/her wealth, commercial reputation or the material intended to threaten a person, force him to pay money or offer a service to others or to deprive that person from freedom to work should be divulged.
- (f) Forged or fabricated documents, or documents which are falsely attributed to others, may not be published, and presenting incorrect news with an evil intent is forbidden.
- (g) Newsletters, or advertisements may not include expressions, photographs, or drawings that are in violation of public morals or which may confuse the public.
- (h) Slandering the work of a public official, a person having a public prosecution function, or a person who is in charge of a public service is not allowed.

Since 1980, there have been various other laws and resolutions passed that apply to media content (including advertising) although many contain content regulations that are similar in nature to, or expand on the scope of, the 1980 Law.

1.2 What is the basic regulatory framework for advertising regulation?

At the Federal Level, Federal Law No11 of 2016 appoints the National Media Council (NMC), which is the federal government body entrusted to oversee and undertake media affairs in the United Arab Emirates on the mainland and in free zones. In addition, under the Internet Access Management (IAM) policy, the Telecommunications Regulatory Authority (TRA) has a right to block content that can be classified as offensive or inappropriate, as per the listed categories within IAM itself. The key categories are:

- (a) pornography, nudity and vice;
- (b) offences against the UAE and the public order;
- (c) supporting criminal acts and skills;
- (d) drugs;

- (e) medical and pharmaceutical practices in violation of the laws;
- (f) infringement of intellectual property rights;
- (g) discrimination, racism and contempt of religion;
- (h) gambling; and
- (i) terrorism.

Local free zone authorities in media free zones contribute to the development of the media scene in the UAE, and each has limited regulatory authority over the entities that are set up under their authority. They include:

- (a) Dubai Creative Clusters Authority—Dubai;
- (b) Media Zone Authority—Abu Dhabi;
- (c) Department of Culture & Information—Sharjah; and
- (d) Fujairah Culture and Media Authority.

1.3 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

There are not, although the NMC issued guidelines in 2018 that emphasize the way in which digital media should comply with the various media laws.

1.4 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

All specialised advertising, such as that related to medicine, drugs, food, promotional campaigns, special offers, real estate or universities and educational institutions, must obtain prior approvals from the competent authorities.

1.5 What types of communications are considered to be ‘advertising’? How is this determined?

There are no clear guidelines in this regard. It would be determined on a case-by-case basis.

1.6 Are any government pre-approvals required?

Pre-approvals are required for advertising undertaken in the Education and Healthcare sectors, and should be obtained from the relevant authorities in each case. It is always prudent to check current regulations, as advertising for food and cosmetics may also require approvals, although this is not being undertaken at the moment.

1.7 Does the media pre-clear advertising?

There are no clear industry standards for media outlets to follow. Some will require copies of approvals for those sectors that require approval (most particularly healthcare, as this is a well-regulated area). However, some media outlets prefer to rely on the fact that the onus for compliance rests with the advertisers themselves.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Legal action would ordinarily be taken by the NMC. Note that the NMC is a reactive authority rather than a proactive one; and tends to take action after receipt of a complaint.

Content that is carried on social media or online may give rise to a right for the TRA to block the content, or take down the website or social media account.

For advertising that is carried on digital channels, it is prudent to note that extremely inappropriate content (such as content insulting to Islam, or containing pornographic material) may subject the author, brand and media outlet to prosecution under the CyberCrimes Law. The penalties under this law are severe, and extend to large fines, jail time and deportation.

1.9 When does a competitor have a right of action? What are the potential remedies?

This would have to be considered on a case-by-case basis. However, if the matter was reported to the NMC, then they may levy fines on the advertiser, or the media outlet that carries the advertising.

1.10 When do consumers have a right of action? What are the potential remedies?

As above.

2 SELF-REGULATORY FRAMEWORK

2.1 Does the UAE have a primary advertising self-regulation system?

In the UAE there is no established self-regulating body. However, the very recently established Advertising Business Group (ABG), which includes companies such as Mars, P&G, Facebook and Google, aims to encourage responsible advertising among advertisers, agencies and the media in the Middle East.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The ABG has implemented a Code, which focuses on correct representations and ethical matters. The Code is new and as yet no complaints have been processed.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

ABG has a dispute committee—again, as they have not yet received a complaint, we do not know the manner in which it will operate in practice.

2.4 Is the self-regulation system effective? Is it widely used and followed?

It is still in its early days.

2.5 Are the self-regulatory system's decisions reported?

Yes—the rulings by the ABG disputes committee will be reported on the website.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

There are none.

2.7 Are there any other self-regulatory systems that govern advertising practices in the UAE?

There are none.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in the UAE (eg, consumer protection laws; IP laws; unfair competition laws)?

In addition to the 1980 Law and IAM, the following basic laws and their respective applicable provisions can be held to apply to advertising claims:

- (a) The National Media Council Resolution No 35 of 2012 on the Standards of Media Advertisements (Advertising Resolution) states that advertisements should not contain any incorrect or misleading claims and should not intend to exaggerate or claim uniqueness, inspire contempt of competitors or do any other thing which may lead to the suspicion of fraud or deception. Advertisements should be real and unexaggerated and should not lead to create any confusion of whatsoever way with other names, products or activities.

In addition, and by way of clarity, the Advertising Guidelines that were released by the NMC in 2018 state that ‘The advertisement should not include or contain false or misleading claims, or is intended to exaggerate, claim exclusiveness, despise competitors and all that involve fraud and deception.’

- (b) In addition, Article 5 of the Advertising Guidelines requires that the language of all advertisements shall:
- (i) not be ambiguous, obscure or void of any clear indications;
 - (ii) not include any false or misleading claims, resort to exaggeration and/or intimidation, claim to be unique by disrespecting competitors nor resort to fraud or deception;
 - (iii) not include images that are falsified or imitated or images that violate intellectual property rights of others;
 - (iv) not lead to confusion or ambiguity with other products or activities;
 - (v) include the spoken Emirati dialect or the classic Arabic language; and
 - (vi) clearly identify the advertiser.
- (c) Federal Law No 24 of 2006 (Consumer Protection Law) provides that suppliers may not display, offer, promote or advertise any counterfeit, spoiled or misleading goods or services that would harm the interests or health of consumers during normal use.
- (d) Cabinet Resolution No 12 of 2007 (Consumer Protection Regulations) provides that any person shall be prohibited from advertising any commodity or service in a way that may mislead or deceive the consumer.
- (e) Federal Law No 18 of 1993 (Commercial Transactions Law) provides that a trader may not resort to fraud and cheating when marketing his goods, nor may he spread or publish false particulars that are prejudicial to the interests of another competitor trader.
- (f) Federal Ministerial Decree No 26 of 1984 (Suppression of Fraud Executive Regulations) provides that a trader may not declare incorrect or publish false information concerning the origin, description or importance of goods or make false representation as to rank, medal or reward or resort to any other tactic that would confuse or mislead the public.

In addition, the Suppression of Fraud Executive Regulation addresses commercial statements whether made directly or indirectly, providing that such statements ‘must be accurate in all respects whether placed on products, shops, inside shops or on packaging, invoices, and correspondence, advertising material or other things used to offer good to the public’.

Note that the Suppression of Fraud Executive Regulation is a new law and does not yet have its operative regulations in place.

3.2 Is substantiation required for advertising claims?

No, although it might be required as evidence if a claim is made.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Not relevant.

3.4 What are the rules governing the use of disclosures in advertising?

There are no specific laws in place.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

These are complex in relation to education and healthcare and should be checked on a case-by-case basis.

3.6 What are the rules governing the use of product demonstrations in advertising?

As with all advertising, it must be fair and accurate .

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

The position in the UAE is that comparative advertising is lawful provided that such advertising does not amount to unfair competition, and does not contravene provisions of the advertising regulations (see below) or the relevant legislation related to the protection of consumers or the prevention of fraud or the protection of intellectual property rights.

Under the Advertising Resolution, comparative advertising cannot be done in a manner that 'contempts' competitors, but is otherwise allowed. There is a very subjective element to this provision of the law.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

There is no specific law regulating comparative advertising, but the provisions of Federal Law No 37 of 1992 Concerning Trademarks prohibit the use of registered trademarks. As a result, it can be argued that using a competitor's trademark with the aim of comparing products could be interpreted as unlawful use. That being said, this type of action would be uncommon.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

There are none.

3.10 Are there any special rules governing product packaging?

There are extensive regulations that will apply to particular classes of products (clothing, cosmetics, electronics and the like) and these should be addressed on a case-by-case basis.

4 PRICE ADVERTISING

4.1 What are the UAE's rules regarding price advertising?

According to the Consumer Protection Law, businesses must ensure that advertising or labelling is not misleading, and items offered for sale must be priced accurately. The consumer should be offered an item at the advertised price, and any entity that contravenes these laws can be reported to the relevant department in the Emirate.

4.2 What are the UAE's rules regarding advertising 'free' products?

Please see question 4.3 regarding giveaways and sales.

4.3 What are the UAE's rules regarding sales and special offers?

In the UAE, sales promotions, including sales as well as competitions and prize draws (prize campaigns, sweepstakes, raffles, and instant prizes, etc), are regulated on an emirate-by-emirate level in each of the seven emirates that make up the UAE.

In most Emirates, the respective Department of Economic Development (DED) requires entities planning sales promotions or giveaways to first obtain a permit.

The process for obtaining a sales promotion permit from the DED is straight-forward, and can usually be completed within a week or so. Information on the proposed promotion, such as its general nature, the nature, quantity and value of any prizes, and the period over which the promotion will be run, needs to be submitted to the authority, along with a copy of the organiser's trade licence and premises lease, an application form for the permit, and the official fee.

Official fees are relatively modest and can vary depending on aspects such as the duration of the promotion, the value of any prizes and the extent of any advertising.

4.4 What are the UAE's rules regarding rebates?

In the UAE, care must be taken in creating rebate schemes, as there is a robust regulatory environment surrounding fraud, bribery and money laundering.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

There are none.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

The content of an advertisement must:

- (a) not include obscene photos or words;
- (b) not promote acts of sorcery or astrological predictions;
- (c) not advertise alcoholic beverages or narcotic substances in any way, whether directly or indirectly; and
- (d) not advertise tobacco or smoking of any kind or method, nor any related goods and services.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

There are none.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Content of this nature would not be tolerated. The laws and regulations forbid it and the social mores of the region would mean that it would likely fail to find a publisher willing to carry the material.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

N/A

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

The NMC has made repeated efforts to ensure clarity on this point—the identity of advertising must be clear, and advertising should be kept separate from editorial content.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

In addition, the NMC has released guidelines regarding the manner in which the application of the above laws and regulations should be undertaken, particularly in social media. They have determined that #ad or #paid_ad are the appropriate labels.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

Social media influencers who run any online business activities, including e-commerce, publishing and selling of print, video, and audio material, as well as advertising or promoting brands, need to obtain an e-media license from the NMC.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

This is conceivable in some circumstances. Whilst it would have to be addressed on a case-by-case basis in many instances, it is clear under the CyberCrimes Law that authors, brands and media outlets can all be held liable for content that is considered to be highly undesirable under that law (amongst other material, this would be content such as pornography, obscenity, gambling and the like).

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

There are none.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

It is imperative that individuals have approved such usage and that is evidenced in writing.

9.2 Are there situations when permission is not required?

This would not be wise.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

It is not acceptable to use the name 'Dubai' and related geographical descriptors without consent. An example may be the use of 'Dubai's Best...' or 'Dubai's Favorite...'

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

This would be acceptable, as long as the products were not held in contempt or otherwise in contravention of other laws.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of the UAE which affect advertising (eg Swedish gender equality law)?

Please see previous answers—the importance of respectful dialogue cannot be underestimated. The UAE has a culture that does not condone the denigration of others and this should be carefully considered in advertising.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Islam is the cultural and religious norm of the UAE—denigration of any of the Abrahamic religions would not be tolerated and any insult to Islam is not acceptable. In addition, the standards of Islam should be respected—nudity, profanity, sexual innuendo, gambling and alcohol are all areas that are not acceptable to consumers, and could lead to prosecution.

It is also important to show respect for the government of the UAE and its friendly nations.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in the UAE?

It is easy to be overly cautious when trying to analyze the legal landscape for advertisers in the UAE. Whilst caution is prudent, many entities do tend to over-censor their content.

In addition, content that refers to cultural or religious issues should be checked with local practitioners as it is rare for foreign lawyers to understand the social intricacies.

 UNITED KINGDOM 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in the United Kingdom?

There are four principal areas of law and regulation that regulate advertising in the UK:

- (a) **Consumer protection laws**, particularly the Consumer Protection Regulations 2008 (CPRs), Consumer Rights Act 2015 and other legislation, such as the Data Protection Act 2018.
- (b) **Intellectual property laws**, particularly copyright and trade mark law, which impact upon creative treatments and the use of third-party trade marks in comparative advertising.
- (c) **Sector specific laws** that impinge upon advertising for particular goods or services, such as financial services, gambling, tobacco and alcohol.
- (d) Finally, there is a particularly significant role in the UK system for **self-regulation**. The main regulator is the Advertising Standards Authority (ASA); but there also other bodies, such as the Portman Group, which governs naming, packaging and promotion of products, event sponsorship and point of sale materials in the alcohol sector; and The Phone-paid Services Authority, which governs premium rate telephony services.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

There are few definitions of 'advertising', but the EU Comparative Advertising Directive defines an advertisement as 'the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations'. When the ASA extended its remit to cover claims on brand's own websites, they distinguished between 'editorial' and 'advertising' as 'editorial' is specifically excluded from the ASA's remit.

1.3 What is the basic regulatory framework for advertising regulation?

There are two main advertising codes. The Broadcast Committee of Advertising Practice (BCAP), writes the BCAP Code for television and radio advertising. The Committee of Advertising Practice (CAP) writes the CAP Code for other forms of advertising, including press; posters or Out-of-Home; online advertising and social media; brand owners' websites; and sales promotions, including competitions and free prize draws. The Committees are comprised of organizations representing advertisers, agencies, media owners and the clearance bodies. The Codes are enforced by the ASA.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Yes, premium rate services (PRS). PRS are goods and services that consumers can buy by charging the cost to their phone bill or pre-pay contract (eg, via telephone or text messages). The Phone-paid Services Authority (PSA) regulates PRS according to its Code of Practice, which is approved by Ofcom (the statutory regulator). The ASA also requires broadcast advertisers to comply with the PSA Code.

Nearly all PRS providers must first register with PSA before carrying out any of these services. Exceptions to registration are updated from time to time and, at the time of writing, include providers who only offer PRS via app stores. When the PSA grants an exemption, it publishes a notification on its website.

If required to register with the PSA, a PRS provider must comply with its Code of Practice. The basis of the PSA Code is that service content is fair, lawful, and does not cause harm or offence. PRS

providers are also required to respect consumer privacy and be upfront about the services they offer and the cost. The PSA Code sets out the outcomes expected by the PSA and the rules with which providers must comply. To assist PRS providers, the PSA also publish non-binding Guidance to accompany the PSA Code, divided into service types. For example, Guidance is available on issues such as gambling, competitions and in-app purchases.

Promotional material must contain the name and contact details of the PRS provider, including a UK non-premium rate telephone number.

The BCAP Code also requires advertisements for PRS to alert their audience when a call of at least 5 minutes is normally involved, and provides that advertisements for live PRS must not appeal to people under 18, unless the PSA has given express consent to do so.

The BCAP Code also includes specific rules governing advertisements that include a PRS. These principally mirror the rules set out in the PSA Code, but they specifically state that if a PRS service costs 50 pence or more per call, it is important that clear pricing information is given to consumers. The BCAP Code also requires the identity of the service provider to be included in the advertisement.

1.5 **Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?**

Several industries are subject to specific laws governing their advertising, and/or have specific provisions in the CAP and BCAP Codes. These are the main ones, but the list is not exhaustive.

- (a) **Alcohol:** Both the CAP and BCAP Codes contain detailed provisions, including: requirements as to the age of people appearing in alcohol adverts; prohibiting a link between alcohol and sexual or social success or the success of a social event; or linking alcohol with particular activities such as the work place, operating machinery, driving or water sports.
- (b) **Tobacco:** All forms of tobacco advertising are prohibited.
- (c) **Medicines:** Prescription Only Medicines (POM) are heavily regulated, and can only be advertised directly to medical professionals. Over-the-Counter (OTC) medicines can be advertised to consumers, subject to certain controls. Advertising for cosmetics, food supplements and medical devices that allege to prevent, treat or diagnose a disease, illness or adverse condition risk being caught by the definition of a medicine because of their claims, rather than their ingredients.
- (d) **Food and Drink:** Concern about obesity, particularly in children, has driven scheduling restrictions in the BCAP Code for foods which are high in Fat, Sugar and Salt (HFSS). The CAP Code, which regulates non-broadcast advertising, also contains media placement restrictions for HFSS product advertisements. The European Regulation concerning Nutrition and Health Claims Made on Foods prohibits nutrition and health claims in foods unless these appear on a list approved by the European Food Safety Authority.
- (e) **Automotive:** As well as the specific provisions of the CAP and BCAP Codes, car manufacturers need to be mindful of the provisions concerning environmental claims, particularly for 'tail pipe' emissions, as well as the provisions of the Passenger Car (Fuel Consumption and CO2 Emissions Information) Regulations 2001 (and its amending 2004 and 2013 Regulations).
- (f) **Gambling:** As well as complying with specific provisions of the CAP and BCAP Codes, gambling operators must be mindful of their license obligations, failing which their operating licenses could be revoked by the Gambling Commission and they would have to cease operating, or face criminal sanctions.

1.6 Are any government pre-approvals required?

There are no government pre-approvals required for individual advertisements, but there are legal requirements laid down in various statutes and regulations that specific types of advertising must contain certain pre-approved warnings or disclaimers in order to be lawful, particularly in the financial services sector. Advertisements for consumer credit and for mortgages, for example, must contain specified warnings and information. These deal with issues such as typical interest rates; warnings that investments can go down as well as up; and that consumers may be at risk of losing their homes if mortgage repayments are not maintained. In addition, there are provisions in the CAP and BCAP Codes that must be observed.

1.7 Does the media pre-clear advertising?

All television commercials are pre-cleared by a central body called 'Clearcast', which is owned and funded by the television stations. The broadcasters have an obligation under their government granted broadcasting licenses to ensure that all advertising is compliant with the BCAP Code and the applicable legislation. The television stations will therefore not accept a commercial for broadcast without Clearcast's approval. This approval will normally be obtained at script stage, and then again once the Final-Cut is ready for broadcast. Clearcast approval does not affect the ability of the ASA to uphold any subsequent complaint, but the ASA will consult Clearcast to obtain their explanation for approving the commercial.

The Radio Advertising Clearance Centre (RACC) operates a similar system for radio commercials.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Generally speaking, government agencies will only enforce advertising laws if the self-regulatory system has failed to work, if there is a lacuna in the self-regulatory system, or if there is a serious issue of consumer detriment. Agencies which may intervene are as follows:

- (a) **The Office of Communications (Ofcom)** will intervene if a broadcaster is in breach of the sponsorship or programming codes, for example by allowing an HFSS food advertiser to sponsor a program of appeal to the under 16s. Ofcom has imposed large fines for breaches of the codes around premium rate phone line competitions.
- (b) **The Medicines Healthcare Regulatory Agency (MHRA)** can intervene if medicinal claims are made for products which are not licensed medicines.
- (c) **The Competition and Markets Authority (CMA)** (which replaced the Office of Fair Trading (OFT) in April 2014) may intervene when advertisers make unsubstantiated claims despite adverse adjudications by the ASA, or make misleading price or savings claims to consumers. It will also conduct investigations and enforcement activity on its own initiative, including against marketing that is misleading or aggressive under the CPRs. The CMA will usually seek to negotiate undertakings from advertisers in the first instance, so that court action is not required. If, however, no such undertakings can be obtained, the CMA may bring criminal proceedings and if successful, these will result in fines and occasionally even imprisonment for the individuals responsible. In June 2018, the CMA commenced enforcement action against a number of hotel booking sites following concerns that they were in breach of consumer law. The CMA also referred the issue to the ASA to investigate whether price guarantees had misled customers.
- (d) **Local government Trading Standards Departments** also play an important role in the enforcement of advertising laws, particularly in relation to price advertising to consumers. They will bring criminal proceedings in the Magistrates Court, who have the power to impose prison sentences of up to six months (or 12 months if convicted of more than one

offence), and/or an unlimited fine. With the demise of the OFT, which was previously the 'back stop' regulator for the ASA, Trading Standards will have a more important role in fulfilling that function.

- (e) **The Information Commissioner's Office (ICO)** will take action against organizations who do not comply with data protection requirements. For example, in June 2018 British Telecommunications plc (BT) was fined £77,000 after it sent almost five million nuisance emails to customers. The ICO found that BT did not have customers' consent to send direct marketing emails, in breach of the Privacy and Electronic Communications Regulations (2003).

1.9 When does a competitor have a right of action? What are the potential remedies?

Generally speaking, competitors in the UK have tended to rely on complaints to the ASA as their main means of redress. When the Unfair Commercial Practices Directive was implemented in the UK as the Consumer Protection Regulations 2008 (CPRs), this was done without a specific right of action for competitors.

If the competitor is named in an advertisement, it may be able to bring proceedings for trade mark infringement. In addition, or sometimes as an alternative, a competitor may be able to bring an action under the tort of 'malicious falsehood'. The claimant will need to be able to show that it was identified by the relevant statement or claim; that the claim was not merely misleading, but actually false; and that the respondent knew the claim was false or was reckless about its falsity. The claimant will also need to show that this has caused him damage.

If a claim succeeds in trade mark infringement or malicious falsehood, the claimant may be entitled to damages (or an account of profits) and an order for the respondent to cease and desist from the relevant advertising. Orders for corrective advertising are also now becoming a more common feature of the English legal system, although still relatively unusual.

A competitor may also bring a 'private prosecution' if it believes that its competitor is in breach of the criminal law. If successful, the defendant will face a fine and a costs award. Again, these are relatively unusual, and at the time of writing we only know of one case, but such cases may become more common as companies try to achieve a level playing field at a time when the regulatory bodies and the ASA are relatively short of funds, and have to prioritize what they see as the most important cases.

1.10 When do consumers have a right of action? What are the potential remedies?

In addition to the right to complain to the various regulators and ombudsmen, consumers may have direct rights of action against traders.

From 1 October 2014, the Consumer Protection (Amendment) Regulations 2014 (2014 Regulations) provided consumers with a direct right of redress against traders who have engaged in misleading or aggressive practices, contrary to the CPRs. Remedies include the right to unwind the contract; the right to a discount; and the right to damages. Consumers will need to show that the trader engaged in a prohibited practice which caused the consumer to take a decision he would not have otherwise taken, eg, to buy a product or pay a certain amount.

Consumers can also enforce rights under Data Protection Act 2018 (DPA 2018). The DPA 2018 provides for fines of up to €20 million or 4% of the organisation's total annual worldwide turnover. However, fines of this level are likely only to be issued where an organization has committed a serious breach of its data protection obligations.

Consumers can also make 'subject access requests', requiring data controllers to provide information about the data held about them. Consumers can also complain to the regulator, the Information Commissioner, who can then bring enforcement action against a data controller.

In certain regulated industries, such as the legal and financial industries, consumers have a right to complain to various ombudsmen, eg, the Financial Ombudsman Service. This includes cases where insufficient or misleading information is given in advertising materials. Many of these ombudsmen have powers to award compensation to consumers.

2 SELF-REGULATORY FRAMEWORK

2.1 Does the United Kingdom have a primary advertising self-regulation system?

The ASA is the UK's independent self-regulatory body. It was set up by the advertising industry in 1962 to police the rules set out in the Code written by the Committee of Advertising Practice (CAP). Compliance with the CAP (non-broadcast) and BCAP (broadcast) Codes is binding on all advertisers, agencies and media owners pursuant to the membership obligations of their respective trade associations, but also applies to any organization that is not a member of one of those bodies.

The ASA is responsible for handling complaints about broadcast and non-broadcast advertising. These complaints may come from any source, including consumers, competitors, charities, trading standards officers or non-governmental organizations. The ASA also monitors compliance based on its own activity and research. The ASA has no legal statutory powers, but does have a legal backstop provided by the National Trading Standards Board and Ofcom (for broadcast advertising only) in the event that an advertiser repeatedly disregards its rulings.

Ofcom is the regulator for all UK broadcast media. Although it has delegated a large proportion of its responsibilities for broadcast advertising regulation to the ASA, Ofcom retains statutory authority and operates in a co-regulatory relationship with the ASA.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The CAP and BCAP Codes stress that all marketing communications be legal, decent, honest and truthful. They should also be prepared with a sense of responsibility to consumers and society as a whole, respecting the principles of fair competition.

The Codes should be applied in spirit, as well as by the letter. Advertisers have a responsibility not bring advertising into disrepute. For example, the online gambling company, Paddy Power, was censured for an advertisement that coincided with both the Oscars' award ceremony and the start of the trial of Oscar Pistorius for the murder of his girlfriend, which featured his face superimposed on an Oscar statuette, and the headline 'It's Oscar time. Money back if he walks.' This ad garnered more complaints than any other in the history of the self-regulatory system.

The Codes require advertisers to deal fairly with consumers and not mislead them by exaggerating the performance, value and capability of a product, or by omitting material information.

The Codes urge advertisers to have the written permission of members of the public before they portray them in non-broadcast advertising, and require them to do so for broadcast advertising. According to the Codes, members of the Royal Family should not be shown or mentioned in marketing communications without express permission.

Advertisements must not cause harm or widespread offence against generally accepted social, moral or culture standards. They should not contain material that is likely to encourage behavior that

prejudices health and safety or encourages violence, crime, anti-social behavior or disrespect to the environment. Advertisements must not cause the audience unjustifiable distress, especially with regard to those under the age of 18, containing nothing that could cause them social, mental, physical or moral harm.

Both the CAP and BCAP Codes reflect the principle that advertising and editorial must generally be kept separate and that advertising should be readily recognizable as such, whether by visual or aural representations, or through the use of the appropriate disclosures.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The ASA considers complaints from all sources. Just a single complaint can trigger an investigation. The ASA can start an investigation itself thanks to its monitoring and review system.

Some investigations are informally resolved if the advertiser immediately accepts the concern raised by the ASA and agrees to amend its advertising. Otherwise, the ASA Executive will conduct an investigation, sometimes with expert assistance, and produce a Draft Recommendation for complaints that are formally investigated, with a final adjudication being made by the ASA Council.

Advertisers can request an Independent Review of the adjudication if the adjudication itself was significantly flawed or if there was a substantial flaw in the process, but the decision whether to accept the recommendation of the Independent Reviewer ultimately remains with the Council.

The ASA's main sanction is negative publicity, which it achieves by publishing its adjudications on its website every Wednesday. It cannot impose fines, but its other sanctions include the imposition of pre-vetting requirements; referral to the Trading Standards authorities or Ofcom; and issuing 'ad alerts' to media owners warning them not publish certain advertisements in breach of the Code. In the context of online advertising, the ASA can remove a marketer's paid-for search advertisements when those advertisements directly link to a page on the marketer's own website that hosts marketing communications that are in breach of the CAP Code. The ASA can also conduct its own paid search campaign drawing attention to non-compliant advertisers.

Clearcast and the RACC will withdraw clearance for a broadcast advertisement if a complaint is upheld by the ASA. The ASA can also refer a broadcaster to Ofcom if there is a serious failure to comply with the BCAP Code or if it persistently continues to do so. Ofcom can sanction, reprimand and ultimately revoke a broadcaster's license.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Broadcasters' licenses hold the condition that they must comply with the BCAP Code. Therefore, the ASA and Ofcom between them have significant powers over broadcasting advertisements.

While the ASA does have legal backstop and can refer misleading non-broadcast advertisers to Trading Standards, in practice, based on the sanctions available, this is very rarely necessary.

In the overwhelming majority of cases, advertisers willingly comply with the self-regulatory system and remove offending advertisements.

Increasingly, the ASA will seek to engage positively with advertisers in order to resolve complaints informally where possible, to avoid a formal investigation.

2.5 Are the self-regulatory system's decisions reported?

The ASA publishes its adjudications on a weekly basis on its website. They remain online for five years, and may be searched easily by the public. The stories are often picked up and reported in the media, providing further adverse publicity for offending marketing communicators.

The ASA also maintains a list of advertisers who continue to make non-compliant claims online, usually on their own websites, despite repeated requests for changes to their communications.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

The key principle of advertising regulation across all media is that advertising must not be misleading. The burden of proof is on advertisers to be able to substantiate all claims at the moment of their broadcast or publication. The ability of consumers to identify advertising messages is also critical.

Since March 2011, the CAP Code has also applied to marketing communications by companies and organizations on their own websites and in other non-paid-for online space, such as Facebook and Twitter. To come within this remit, such marketing communications must be directly connected with the supply or transfer of goods, services, opportunities and gifts, or consist of direct solicitations of donations by charities etc as part of their own fund-raising activities.

Those parts of a company's own website or social media that are not marketing communications remain outside the ASA's remit, such as editorial content, news or public relations material, corporate reports, investor reports and heritage advertising.

2.7 Are there any other self-regulatory systems that govern advertising practices in the United Kingdom?

Certain industries/sectors have regulatory bodies and codes applying to advertising practices, including codes for the mobile phone industry (Mobile Marketing Association), premium rate telephone lines (Phone-paid Services Authority), alcohol (Portman Group) and direct marketing (Data & Marketing Association). Other organizations are also involved in the application of the CAP Code, such as the Cinema Advertising Association.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in the United Kingdom (eg, consumer protection laws; IP laws; unfair competition laws)?

The primary piece of consumer protection legislation in the UK is the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). From 1 October 2014, consumers have new private rights of direct redress against traders who commit aggressive or misleading practices pursuant to the Consumer Protection (Amendments) Regulations 2014 (2014 Regulations). Now, if a trader carries out a misleading (or aggressive) practice, a consumer will be able to unwind the contract (as if it had never existed) and get his or her money back, or receive a discount on sums paid. The CAP and BCAP Codes, and the ASA in its adjudications, aim to enforce advertising practices that are consistent with the CPRs. In addition, the CMA and Trading Standards Authorities both have power to investigate and enforce against advertisers/traders in breach of the CPRs.

Consumers will have recourse under the 2014 Regulations against the trader with whom they contract, but not others such as manufacturers or advertisers. Nonetheless, if a producer engages in a misleading (or aggressive) commercial practice of which the trader could reasonably have been

expected to be aware, a consumer may be able to take action against the trader. For example, if a clothing manufacturer undertakes a high profile advertising campaign claiming its products are 'pure cashmere' and the retailer knows this to be untrue but continues to sell the clothing, the retailer may be liable to the consumer. The retailer might equally be subject to a consumer claim if it conducts its own campaign based on manufacturer claims that it knows or suspects may be false.

To bring an action against a trader, a consumer has to demonstrate that the misleading act or aggressive practice was a significant factor in his or her decision, as an 'average' consumer, to enter into the contract or to pay the trader.

As well as consumer protection laws, data protection laws are very important in relation to advertisers dealing with consumers. Trade mark law and the law of 'passing off' (similar to continental unfair competition law) is very important in the context of comparative advertising; and it will often be important to consider copyright law during the creation of advertising, particularly for parodies.

3.2 Is substantiation required for advertising claims?

Advertisers must ensure that they hold documentary evidence to prove all claims that are capable of objective substantiation, whether direct or implied, before submitting marketing communications for publication.

In the absence of adequate substantiation, the ASA may regard a claim as being misleading and therefore in breach of the CAP/BCAP Code.

If a comparison or comparative claim is made (eg, 'best selling'), the advertiser must hold evidence that relates to both its own product and that of its competitor.

The ASA is not very clear about the general standard of proof required for substantiation. However, there are detailed rules for claims relating to health, beauty and slimming products. For example, the level of substantiation required for a 'break through' claim for a cosmetics product will be very high, requiring a body of evidence of specific types.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Both the CPRs and the CAP and BCAP Codes state that obvious exaggerations (ie, puffery) are allowed. These are claims that the average consumer who sees the claim is unlikely to take literally. These claims do not require substantiation, but must not materially mislead and must not make any implied claims that are capable of objective substantiation.

For example, in 2017, the ASA considered whether or not a claim that a consumer would receive 'a few extra quid' when selling a car privately rather than through a second-hand dealer was 'puffery', or whether it needed to be substantiated. The ASA held that this phrase would not be taken literally by the consumer as an expectation of the likely size of the price difference. Instead, it simply indicated that selling a car privately would generally result in a higher sale price, but that this was often more time consuming. (*We Buy Any Car Ltd*, 14 June 2017).

However, in another adjudication in 2018, the ASA ruled that a company's claim to be 'The Leading Trademark Registration Service' was misleading and was not mere puffery. The ASA held that customers would understand this to mean that the company had registered more trademarks than any other business, which was not the case (*Trade Mark Eagle Ltd*, 21 February 2018). Then, in October 2018, the ASA rejected a complaint against a television commercial marking the 250th

anniversary of Lloyds Bank, concluding that the phrases 'Yesterday, today, and tomorrow we have been and always will be by your side' and 'by your side for over 250 years' were mere advertising puffery, and not intended to be taken literally.

3.4 What are the rules governing the use of disclosures in advertising?

Advertisements must state significant limitations and qualifications. The way this should be done will vary according to the context.

Any qualification, such as a disclaimer or 'small print', can clarify or expand upon the main claim, but must not contradict it.

Any disclaimer or other qualification or clarification must be expressed clearly and legibly. The exact requirements will depend on a number of factors, such as the medium in which the main claim appears. There are also timing requirements for on-screen disclaimers during television commercials (ie, minimum timeframes during which the text must be shown on screen).

Footnotes should be clearly visible to a normal-sighted person reading the advertisement once, from a reasonable distance and at reasonable speed.

Disclosures now play a key part of advertising on social media platforms, and this is discussed in more detail in section 8 below.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Testimonials and endorsements must relate to the advertised product or service.

Advertisers must hold documentary evidence that a testimonial or endorsement is genuine (unless obviously fictitious), and hold contact details for the person who gave it. Factual claims within testimonials must not mislead. Advertisements generally should not feature a testimonial without permission, but exceptions may be made for accurate statements taken from published sources.

Marketing communications must not falsely claim that the advertiser, or other entity referred to in the marketing communication, is a signatory to a code of conduct, and must not claim (or imply) that they are endorsed by the ASA or CAP.

Advertisements must not use the Royal Arms, Emblems or Royal Warrants without prior permission from the Lord Chamberlain's office.

Testimonials and endorsements by celebrities using social media must make clear whether they are paid for or part of an overall commercial arrangement with an advertiser (see section 8 for further discussion on this subject).

3.6 What are the rules governing the use of product demonstrations in advertising?

The usual principles about misleading acts and omissions will apply to product demonstrations. Products must normally work as shown and as described.

Advertisements must not mislead consumers by exaggerating the capability or performance of a product, for example by showing it doing things it cannot actually do.

If additional purchases or equipment will be required in order to make the product work, or to appear as they are shown in the demonstration, this must be made clear (for example, 'batteries not included').

During a demonstration, it is important to ensure that the advertisement does not present rights given to consumers in law as a distinctive feature of the marketer's offer. Also, advertisers must not suggest that their claims are universally accepted if a significant division of informed (or scientific opinion) exists.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

As in the rest of the EU, the rules on comparative advertising in the UK are derived from the Comparative Advertising Directive (EU Directive 2006/114/EC). Comparative advertising is therefore permissible in the UK, subject to certain conditions:

- (a) in particular, comparisons must not mislead, and must compare products meeting the same need or which are intended for the same purpose, but they must not give the advertiser an artificial advantage;
- (b) the advertisement must objectively compare one or more material, relevant, verifiable and representative features of those goods and services, which may include the price; and
- (c) advertisements must not discredit or denigrate or take unfair advantage of the trade marks, goods, services, activities or circumstances etc of the competitor; and must not take unfair advantage of the designation of origin of competing product(s).

Unqualified superlative claims may be treated as comparative claims against all competing products.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

If an advertiser uses a third-party trade mark in a comparative advertisement, other than as is permissible in order to fairly and legitimately compare two or more goods or services, the third party may have a claim for trade mark infringement against the advertiser. Furthermore, depending on the circumstances, the third party may be able to bring a claim for defamation, trade libel, malicious falsehood, copyright infringement and/or passing off. If any of these claims are made out successfully, this could result in an injunction and/or claim for damages.

The requirements for the legitimate use of a third-party trade mark in comparative advertising are derived from the Comparative Advertising Directive and also reflected in the CAP and BCAP Codes. The key consideration is that the advertisement objectively compares one or more material, relevant, verifiable and representative features of the products. In practice, most disputes center on whether the advertiser can substantiate its claimed advantage.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

Where a product has special protection in the form of a registered 'designation of origin' (eg feta cheese), the CAP Code requires advertisers to compare such products only with other products with the same designation.

Otherwise, the usual rules regarding misleading advertising apply to such 'made in' claims. For example, in 2011, the ASA ruled that an advertisement which centered on the French heritage of a

particular brand of beer created the misleading impression that it was produced in France (*Heineken UK Ltd*, 13 August 2011).

The ASA has also taken action in relation to advertisements which imply that the trader is based in the UK when in fact they are based elsewhere. For example, in 2017, the ASA held that the claim that certain services were ‘designed by a UK in-house team’ misleadingly implied that the trader was based in the UK, when in fact they were based in the US (*Logo Design Guarantee*, 20 September 2017).

3.10 Are there any special rules governing product packaging?

Generally speaking, misleading claims on packaging will be dealt with under CPRs. Special considerations apply in particular sectors, eg alcohol. In the cosmetics sector, care must be taken to avoid claims on packaging that could amount to an unauthorized medicinal claim and therefore breach the criminal law.

Product packaging falls outside the scope of the CAP Code; however, if such packaging is visible in an advertisement, then the CAP Code will apply to the use of that packaging in the advertisement.

4 PRICE ADVERTISING

4.1 What are the United Kingdom’s rules regarding price advertising?

The CPRs apply to all displays of pricing in communications giving pricing information. They prohibit traders from making misleading acts or omissions that cause or are likely to cause the average consumer to take a ‘transactional decision’ they would not otherwise have taken. For example, giving misleading information (or misleadingly omitting to give information) about the price or calculation of the price—even if they cannot be calculated in advance). See also the Guidance for Traders on Pricing Practices, issued by the Chartered Trading Standards Institute (CTSi) in 2016 (CTSi Guidance), referenced in question 4.3 below.

There are also ‘blacklisted practices’ (ie, automatically unfair even without affecting a transactional decision), namely:

- (a) ‘bait’ or ‘bait and switch’ advertising;
- (b) falsely stating that a product will only be available for a very limited time; or
- (c) giving materially inaccurate information about market conditions.

There is also legislation in specific industry areas including: distance selling, consumer credit, estate agents, and package holidays and flights—and specialist advice should be taken on an individual basis. The Price Marking Order 2004 is also relevant.

4.2 What are the United Kingdom’s rules regarding advertising ‘free’ products?

It is a blacklisted practice under the CPRs to describe a product as ‘free’ 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 item.

The CAP and BCAP Codes broadly mirror this rule and also provide that where receipt of the free product is conditional on purchasing another product, the price of that product may not be increased above its normal cost (and its quality must not be lower than normal).

If traders offer packages of products, they must not describe any elements of that package as free if the consumer has no choice about the elements included in the package. In limited circumstances, if a feature has recently been added to a package and is not intrinsic to the package, it may be described as free. In all cases, specific legal advice is recommended.

4.3 What are the United Kingdom's rules regarding sales and special offers?

Detailed guidance about the application of the CPR's rules on price advertising is contained in the CTSi Guidance. This adopts the same principles-based approach that underpins the CPRs.

The CTSi Guidance revamped the rules on the use of 'reference prices' when making a savings claim. Traders must now ensure that the 'average consumer' would not consider the savings claim to be misleading or unfair. Despite this ambiguity, the Guidance provides a useful steer in the form of the following 5 questions:

- (a) How long was the product on sale at the higher price compared to the period for which the price comparison is made?
- (b) How many, where and what type of outlets will the price comparison be used in compared to those at which the product was on sale at the higher price?
- (c) How recently was the higher price offered compared to when the price comparison is being made?
- (d) Where products are only in demand for short periods each year, are you making price comparisons with out-of-season reference prices?
- (e) Were significant sales made at the higher price prior to the price comparison being made, or was there any reasonable expectation that consumers would purchase the product at the higher price?

The CTSi Guidance also revisited the previous '10% rule' for general savings claims. Previously, the guidance stated that if a trader wanted to make a general savings claim such as 'save up to 50%', then that saving needed to apply to at least 10% of the range of products on offer. Under the CTSi Guidance, the maximum saving must apply to a 'significant proportion' of the range of goods on offer and represent the true overall picture of the price promotion. It also states that 'up to' and 'from' claims must be shown clearly and prominently.

When using 'reference prices' to make savings claims, traders must ensure that the 'average consumer' would not consider the savings claim to be misleading or unfair. Traders should apply a 1:1 ratio at most, so if the higher price applied for one month, the comparison should be used for no more than one month.

4.4 What are the United Kingdom's rules regarding rebates?

In the UK, this is known as 'cashback'. There are no specific rules governing the promotion of products by offering cashback, but it will be considered to be a sales promotion and therefore all the usual rules regarding significant conditions being made known etc apply (see Section 8 of the CAP Code and related 'Help Notes'). For example, it should be clear what is needed to qualify to receive the cashback and also what form the cashback take (eg cash, or merely a voucher that can only be redeemed in particular stores). All the other usual rules contained in the CPRs and the CAP and BCAP Codes should be followed.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

The information set out above is a very brief summary of the CTSi Guidance, which should be referred to in full, as well as the relevant sections and the Help Notes of the CAP and BCAP Codes.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

(a) **Broadcast advertisements** for the following goods/services are completely prohibited:

- (i) breath-testing devices;
- (ii) guns/offensive weapons or gun clubs;
- (iii) prostitution and sexual massage services;
- (iv) obscene material (see question 5.3 below);
- (v) products for the treatment of alcohol or illegal-substance dependence;
- (vi) some types of religious and faith-based advertising;
- (vii) some types of home working schemes;
- (viii) escort agencies (TV only);
- (ix) political advertising;
- (x) teleshopping for certain medicinal or veterinary products or medical treatment for humans or animals;
- (xi) the acquisition or disposal of units in collective investment schemes not authorized or recognized by the Financial Conduct Authority, without the prior approval of BCAP; and
- (xii) R18-rated materials (as classified by The British Board of Film Classification, which are works featuring consenting sex or strong fetish material involving adults) (radio only).

(b) **Broadcast and non-broadcast media:** all forms of advertising are prohibited for the following:

- (i) betting systems and products that facilitate winning a game of chance;
- (ii) pyramid selling schemes;
- (iii) infant formula;
- (iv) prescription only medicines; and
- (v) tobacco products (and some associated non-tobacco products eg, rolling papers and filters).

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

The following are specifically prohibited:

- (a) subliminal techniques are prohibited in audiovisual commercial communications;
- (b) claiming that a product can facilitate winning in a game of chance;
- (c) claiming that the advertiser's job or livelihood is in jeopardy if the consumer does not buy the product;
- (d) presentations in advertisements for medical products by doctors, dentists, veterinary surgeons, pharmaceutical chemists, nurses, midwives and the like, if these imply professional advice or recommendation; and
- (e) there are many restrictions on advertising to children, for example, encouraging children to use pestering power.

Other sectors also contain detailed rules that govern particular practices. For example:

- (f) alcohol advertising must not link alcohol to sexual success or show actors who appear to be under 25 years old;
- (g) gambling advertising must not suggest that gambling can be a solution for financial problems;
- (h) automotive advertising must not show cars being driven recklessly or at excessive speed.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The Obscene Publications Act 1959 makes it a criminal offence to publish, or possess with the view to publishing for gain, an article which, taken as a whole, has the effect of tending to deprave or corrupt persons who are likely to read, see or hear the matter contained within. Case law has shown that the article must have a morally corrupting effect rather than merely shock or disgust readers. There are two main defenses to the offence: innocent publication/possession; and public interest.

The Indecent Displays (Controls) Act 1981 makes it an offence to display or cause or permit to be displayed any indecent matter in, or so as to be visible from, any public place. The offence does not include matter included in a television program service, in films screened in licensed cinemas or in art galleries or museums visible only from within the gallery or museum.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Broadcasters must adhere to the Ofcom Broadcasting Code (Ofcom Code) when entering sponsorship arrangements. Sponsorship of TV programs must be clearly identified by means of a sponsorship credit that makes clear the identity of the sponsor.

Broadcasters must also ensure that editorial content is distinct from advertising and surreptitious advertising is prohibited.

Advertisers must comply with the CAP Code, which states that marketing communications must be obviously identifiable as such. The BCAP Code goes further and states that advertisements must be obviously distinguishable from editorial content and that the audience should be able to quickly recognize the message as an advertisement.

The CPRs also require advertisers to disclose if an advertiser is paying for editorial content or advertorials, and that advertisers must not mislead the public by any act of omission, so identification of the advertiser may be necessary, depending on the context.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

The Ofcom Code covers 'linear' broadcast television, in addition to issues concerning sponsorship and product placement. Ofcom is also responsible for the regulation of Video on Demand ('VOD') services, however it has designated the ASA as its co-regulator to take responsibility for advertising appearing in VOD services.

The Ofcom Code states that in general, products, services and trade marks must not be promoted in programming and that no undue prominence may be given in programming to such things.

The Ofcom Code also deals with product placement and sponsorship, ensuring that editorial content remains distinct from advertising, preserving the broadcasters' editorial independence and control over programming.

Product placement (including a reference to a product, service or trade mark in a program for a commercial purpose and in return for consideration) is prohibited in the UK, except in specific genres, such as films, sports programs and light entertainment programs. Product placement is prohibited in news, religious, current affairs and children's programs.

Product placement is prohibited for cigarettes and other tobacco products; prescription only medicines; alcoholic drinks; HFSS food or drinks; gambling; infant formula; all medicinal products; electronic or smokeless cigarettes; and any product or service prohibited from television advertising.

Programs that contain product placement and which were produced or commissioned by the provider or the program services, must clearly signal such product placement by means of a universal neutral logo (the product placement 'P' in the UK).

To the extent that a 'blogger' or 'vlogger' is paid to produce content for an advertiser, and that advertiser has any form of editorial control over such content, then the Codes will apply to such content. The CAP Code may also apply if such video content is placed on a channel falling within the ASA's remit.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Unsolicited e-mail marketing communications must be obviously identifiable as such without the need to open them, eg, from the subject line.

Marketing communications must not falsely claim or imply that the marketer is acting as a consumer or for purposes outside its trade, business, craft or profession; marketing communications must make clear their commercial intent, if that is not obvious from the context. This is a requirement of the CAP Code, but is, in addition, also one of the practices banned under the CPRs as being always unfair.

Both advertisers and publishers must make clear that advertorials are marketing communications; for example, by heading them 'advertisement feature'. However, 'advertorial' is quite narrowly

defined, with two additional elements: an advertorial is an advertisement feature, announcement or promotion, the content of which is controlled by the marketer, not the publisher; and that is disseminated in exchange for a payment or other reciprocal arrangement.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There are no special legal rules governing advertising via social media, but the CMA has been active in enforcing the CPRs in relation to social media. It is also important to note that the ASA has jurisdiction over marketing communications made in online non-paid-for space, including both advertisers' own websites and social media platforms, such as Twitter and Facebook etc. It will also cover situations where advertisers use consumers or celebrities to promote their products via those consumers'/celebrities' personal social media accounts. The ASA's remit applies if their 2-stage test is satisfied:

- (a) Has there been a payment of money or money's worth to the influencer; and
- (b) Has the advertiser exercised any kind of editorial control over the content or scheduling of a post?

In response to the growth of advertising content on such social media platforms, the ASA has published numerous guidance notes advising brands and celebrities how to comply with the CAP Code. The ASA has also been active in enforcing the CAP Code in relation to these advertisements.

The most pertinent of the 'usual' rules that have particular importance in the social media arena is the requirement that adverts must be clearly identifiable as such. For example, in 2018 the ASA ruled that an Instagram post by an influencer promoting a watch brand was not obviously identifiable as a marketing communication (*Daniel Wellington*, 25 July 2018).

Advertisers also need to ensure that they do not inadvertently breach the CPR blacklisted practice of 'falsely claiming or creating the impression that they are not acting for purposes related to their business' or 'falsely representing oneself as a consumer'. This applies both to the advertiser's own personnel (eg, their social media manager or copywriter) as well as where an advertiser has paid a celebrity, blogger or other person to promote their product via their own personal social media accounts. The ASA's approach to best practice in relation to such advertisements has evolved in recent years. Previously, the safest way to achieve such disclosure was through a hashtag, such as '#ad'. However, at the date of writing, the ASA is conducting a review of the rules relating to paid-for influencer and native advertising, meaning that the current guidelines are subject to change.

At present, however, the ASA's approach is to assess the marketing communication as whole. The ASA will consider whether the images and/or wording used in a social media post are in the same style as the celebrity's or influencer's usual posts. Marketing communications that are very similar to their usual posts in terms of tone will likely require a clearer disclaimer that they are marketing communications.

In relation to vlogs, advertisers and vloggers should consider the timing of their disclosure. The ASA advises vloggers that they should ensure that consumers are aware they will be watching an advertisement before they watch it. For example, in 2014, the ASA took action in relation to videos created by vloggers in partnership with a brand, on the basis that the videos did not make the commercial intent clear prior to consumer engagement (*Mondelez*, 28 November 2014).

Special care must also be taken in relation to advertisements targeting under-12s. The ASA's guidance advises marketers to ensure that disclosures clearly identify the marketer, are prominent enough to stand out, and appear as the advertisement is activated or before if possible.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

If an advertiser 'adopts and incorporates' user-generated content (UGC) on its website or into its social media space, then the advertiser will become responsible for that UGC and all the usual advertising rules will apply. The key issues for advertisers to think about if they want to make use of UGC are therefore as follows:

- (a) Is the advertiser soliciting UGC? If so, is the advertiser encouraging promotional-type UGC to be made, such as unqualified praise of a product?
- (b) Is the advertiser moderating UGC? If posts are pre-moderated before being posted, then the UGC will certainly be the advertiser's responsibility. Post-moderation is more of a grey area.
- (c) Is the advertiser editing or making UGC more prominent than it would otherwise be? If so, the UGC will more likely be the advertiser's responsibility.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

Although there have not been any prosecutions concerning social media advertising, there has been enforcement activity of a legal nature.

In 2012, the OFT took action against Groupon, who were found to have run promotions on an unfair basis and to have engaged in 'astroturfing', allowing the posting of comments from an employee posing as a consumer.

In 2016, the CMA investigated Social Chain, a social media company which had used the social media accounts of high-profile individuals to promote films, games and mobile apps. The CMA concluded that consumers would have found it difficult to distinguish between the usual posts from such individuals and posts which contained marketing content.

In April 2017, the ASA upheld a complaint that an Instagram post by a beauty blogger was not obviously identifiable as an advertisement. The ASA found that, whilst the image and use of the brand's Instagram handle differentiated the posts from the blogger's usual content, it was not sufficiently clear that these were marketing communications (*Nomad Choice Pty Ltd t/a Flat Tummy Tea*, 5 April 2017).

In another ruling in October 2017, the ASA ruled against a reality TV star who had promoted on her Snapchat story. Although the individual had been the face of the brand for two years and regularly posted content referring to the brand, the ASA ruled that such posts would not be obviously identifiable as marketing communications to new Snapchat users (*Diamond Whites*, 25 October 2017).

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

In the UK, there is no absolute right to protect 'personality rights', ie, the right to commercially exploit an individual's name, picture, likeness or voice. Celebrities may be able to do so, if they can make out a case under the tort of 'passing off', but both celebrities and private individuals may also be able to make a complaint to the ASA by reference to the CAP or BCAP Code.

In non-broadcast advertising, the CAP Code urges advertisers not to refer to living individuals, whether famous or not, subject to the exceptions below. In broadcast advertising, unauthorized depictions of or references to living individuals are prohibited, again, subject to the narrow exceptions described below.

The law of passing off was updated in 2002 in a case brought by the racing driver, Eddie Irvine, against the talk radio station, TalkSport. He was able to establish the three elements of the tort. First, he showed that he had 'goodwill', because he earned money from product endorsements and advertising. Second, he proved that people who saw a piece of marketing that purported to show him listening to TalkSport radio would be understood to be an endorsement by him of that station. Third, he has suffered damage by the lost license fees. This is now the leading case in this area, and will be cited by celebrities who have been referred to in advertising without consent. By way of example, in 2015, pop star Rihanna successfully sued Topshop under the English tort of passing off for using her image on a t-shirt without her permission.

Finally, there is also a role for data protection law, even for the private citizen. In one case, the courts required a local authority to pay compensation to a disabled girl. The Council had permission to use a photograph of the girl to promote their services for the disabled in the borough. However, when the photograph was later used to promote services for people with HIV Aids, the processing of her personal data was then unfair.

9.2 Are there situations when permission is not required?

Use of members of the public in a crowd scene or in a public place may be acceptable without permission. For celebrities and members of the Royal Family, references that accurately reflect the contents of a book, an article or a film may be acceptable without permission; as may references containing nothing inconsistent with the celebrity's views, provided there is no implied endorsement.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are a number of potential areas which may be governed by further rules or which may require third party permission. The following is a non-exhaustive list:

- (a) identifiable possessions or private dwellings;
- (b) uniforms (eg, police and army uniforms);
- (c) coins, bank notes and postage stamps;
- (d) the Queen's image generally, and images of other members of the Royal Family, and royal warrants, crests and emblems;

- (e) identifiable third parties (including, but not only, celebrities);
- (f) third party quotes;
- (g) some vehicles or parts of vehicles can be protected as a trade mark, such a radiator grilles, as well as the more obvious badges etc and therefore should be checked;
- (h) the scouting logos and symbols; and
- (i) the red cross/red crescent symbols.

However, it is generally low risk to use the Union Jack flag, provided such use does not mislead eg, about the origin of the product, and it is not used in a way which is offensive.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

It is often permissible to use other companies' recognizable products in advertising, provided the third party product is mass produced (for example, not one-off couture clothing) and the third-party trade mark is merely incidental or referential, used as an indication of origin, rather than implying an endorsement, or trying to leverage the reputation of the third-party mark.

The risk is likely to be significantly higher if the third party's product is shown in a way which could create the misleading impression that the third-party brand/trademark featured endorses, has authorized or is officially associated with the advertiser, advertised product, advertising campaign, etc.

The risk is also likely to be high if the item is shown in a negative or denigratory way, eg showing a third party branded vehicle which has broken down.

It is also important to avoid references to third parties that might give rise to an infringement of their copyright or design rights.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of the United Kingdom which affect advertising (eg Swedish gender equality law)?

The CAP Code states that marketing communications must not use the Royal Arms or Emblems without prior permission from the Lord Chamberlain's office. References to a Royal Warrant should be checked with the Royal Warrant Holders' Association.

Members of the Royal Family should not normally be shown or mentioned in a marketing communication. However, Royal images may be used to advertise material such as a book, article or film about a member of the Royal Family.

As in many other countries, there is increasing concern about the portrayal of women in advertising. Sometimes this is focused upon the depiction of women as sexual objects, and sometimes about sexualisation of young women, often in advertising for lingerie etc. Other concerns are raised about the portrayal of women involving unachievable, idealist images through the use of post-production enhancements. In 2018, the ASA launched a consultation on sexual stereotyping in advertising, and is currently consulting on a new rule prohibiting harmful stereotyping, and also on some detailed guidance to accompany the new rule.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

The CAP and BCAP Codes have very general principles stating that advertising must not cause widespread harm and offence. These principles have been applied widely by the ASA across a range of issues, reflecting the fact that UK is a modern, liberal, multi-cultural democracy. Non-governmental organizations representing the interests of minority groups will often take the opportunity created by an advertisement to promote their particular aspect of the equality agenda. Their complaints are not always upheld by the ASA, but there will still be a significant amount of negative press coverage.

In recent years, for example, there have been complaints about the portrayal of gypsies in advertising for a television show, 'My Big Fat Gypsy Wedding'; about a kiss between a gay couple in a TV commercial for Heinz mayonnaise; and about transgender men in a commercial for Paddy Power.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in the United Kingdom?

Generally speaking, most issues concerning advertising compliance will be dealt with by the ASA. If an advertisement is investigated by the ASA, it is essential to 'front load' the defense. If an informal resolution is not appropriate, advertisers must make the best possible submission, with the requisite substantiation. If the Executive submits a Draft Recommendation to the Council with an upheld recommendation that will usually be followed. In practice, it is then very difficult to have that decision reviewed.

 UNITED STATES OF AMERICA 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in the United States of America?

On a national level, advertising in the United States is primarily regulated by the Federal Trade Commission (FTC), an independent federal agency created in 1914. The FTC's Divisions of Advertising and Marketing Practices within its Bureau of Consumer Protection are tasked with protecting United States consumers from unfair or deceptive advertising and marketing practices. Advertising and/or labeling claims for particular products may also be subject to oversight from other federal agencies.

Advertising is also regulated at the state level. All fifty states, the District of Columbia, and the territories of Puerto Rico, Guam and the United States Virgin Islands have Consumer Protection bureaus within their State Attorneys General Offices, which regulate advertising and marketing practices within the state. Often, state regulation can be more restrictive than at the federal level.

Under various federal and state laws, the competitors of an advertiser, as well as consumers (either individually or as a class), have the right to bring claims based on injury caused by false or deceptive advertising.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

Advertising is quite broadly defined in the United States, although what exactly constitutes 'commercial speech' is often unclear. Most communications from an advertiser are likely to be considered by a court, regulator, or self-regulatory body to be advertising, including print, broadcast, out-of-home, telemarketing, direct mail, packaging, online, mobile, as well as certain public relations, branded entertainment, and social media campaigns, including through social media platforms such as Facebook, Twitter, and Pinterest. There is not one simple test for determining whether a communication is 'advertising' or 'commercial speech', but some of the factors to be considered include the source of the communication, the content being disseminated, the intent of the communication and the intended audience.

1.3 What is the basic regulatory framework for advertising regulation?

According to the FTC Act, advertising must be truthful and not deceptive, and advertisers must have proper and sufficient evidence to support claims prior to making them. In addition, advertising cannot be unfair, which is generally understood to mean that it cannot present an unreasonable and unavoidable risk of harm to consumers.

When evaluating advertising, the FTC will view an advertisement from the point of view of the 'reasonable consumer'. The test is whether the advertising is likely to mislead a consumer acting reasonably under the circumstances. Even if advertising misleads only a small number of 'reasonable consumers', it may still be viewed as deceptive. When advertising is targeted to a specific audience, the FTC will determine its effect on reasonable members of that group. The FTC considers the overall context of an advertisement—words, phrases, and pictures, as well as both the implied and express claims made by the advertisement—to determine the common sense 'net impression' it conveys to reasonable consumers.

Advertising must also comply with laws and regulations that apply to the marketing of specialized products and for particular audiences, as well as with state and local consumer protection and advertising laws and regulations.

The FTC works to prevent deceptive advertising practices by conducting its own investigations as well as periodically joining with other law enforcement agencies to monitor for deceptive advertising claims.

1.4 **Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?**

There are a number of advertising and marketing practices that are specifically regulated. These include:

- (a) **Commercial Emailing:** Emails sent by advertisers to consumers to advertise or promote products or services are regulated by the CAN-SPAM Act, a law that establishes requirements for commercial messages;
- (b) **Text Message Marketing:** Federal law prohibits sending a commercial text message using an automatic telephone dialing system unless the advertiser has received prior 'express written consent' that is signed by the recipient;
- (c) **Telemarketing:** Telephone marketing must comply with the FTC's Telemarketing Sales Rule and the Federal Communications Commission (FCC)'s Telephone Consumer Protection Act, both of which help to protect consumers from fraudulent telemarketing calls, as well as the Telephone Order Merchandise Rule and the 900 Number Rule;
- (d) **Sweepstakes and Contests:** Advertising that includes a call to action to enter a prize promotion must include certain material information about the promotion in the advertisement, such as eligibility restrictions, end dates, prize information, odds, and where to go for the full official rules.

1.5 **Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?**

There are a number of industries whose advertising practices are specifically regulated. For example, the alcoholic beverage, clothing and textiles, dietary supplements, and prescription and over-the-counter drugs are each specifically regulated.

- (a) **Alcoholic beverages:** The Department of the Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB) has jurisdiction over alcohol beverage products that may have deceptive or misleading labeling and/or advertising. In addition, each state has very specific rules relating to the marketing of alcoholic beverages.
- (b) **Clothing and textiles:** The labeling and advertising of textiles and clothing are governed by federal statutes and regulations enforced by the FTC, including the Wool Products Act, the Fur Products Labeling Act, the Textile Fiber Products Identification Act, and the Care Labeling Rule, as well as various state laws and regulations.
- (c) **Consumer financial products:** The Consumer Financial Protection Bureau (CFPB) has oversight for advertising and marketing for financial products for consumers including credit card marketing, mortgage or student loan advertising, etc. In many cases this jurisdiction is shared with the Federal Trade Commission.

- (d) **Dietary supplements, drugs and health products:** The advertising and labeling of dietary supplements and other health products is regulated by Food and Drug Administration (FDA) and the FTC. The FDA also regulates prescription and over-the-counter drugs, as well as cosmetics and many foods.
- (e) **Pesticides:** Claims for pesticides are subject to rules and review by the Environmental Protection Agency (EPA).

1.6 Are any government pre-approvals required?

In general, advertising in the United States does not require government pre-approval. There are a few exceptions to this rule, however (for example, certain prescription drug advertising, alcoholic beverage labelling and promotional materials, and promotions involving dairy products).

1.7 Does the media pre-clear advertising?

In the United States, the broadcast television networks (as well as their cable affiliates and certain other cable networks) require that all advertising that will run on their channels be pre-approved by their advertising clearance departments, which use specific and proprietary rules, guidelines, and standards to evaluate the proposed advertising. Certain other media also require pre-clearance of advertising placements.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The FTC is the main regulatory body tasked with enforcing advertising laws in the United States, and does this through a variety of monitoring and enforcement activities that often result in orders of voluntary compliance. The FTC can also bring non-compliant advertisers to court. Remedies in an action brought by the FTC vary depending on the nature of the complaint but can include cease and desist orders regarding the advertising in question, civil penalties, restitution, disgorgement of profits, and orders to run corrective advertising to fix any misinformation stemming from the original advertisement.

In addition, state Attorneys General, local prosecutors, and other authorities enforce state and local laws on advertising.

Congress has given other government agencies the authority to investigate advertising by airlines, banks, insurance companies, common carriers, prescription drug manufacturers, and companies that sell securities and commodities. An example of such an agency is the Consumer Financial Protection Bureau, which regulates advertising practices in the consumer financial services marketplace.

1.9 When does a competitor have a right of action? What are the potential remedies?

False advertising claims can be brought in federal or state court by any competitor who has suffered damages from false advertising. Remedies commonly include injunctions to stop the advertisement, monetary damages and corrective advertising.

1.10 When do consumers have a right of action? What are the potential remedies?

State laws vary as to whether or not, and the extent to which, consumers have rights of action against advertisers. Complaints against advertising at the consumer level can also aggregate into a class action

lawsuit. Consumer class actions tend to focus on monetary damages and injunctions as remedies, though corrective advertising can be requested.

2 SELF-REGULATORY FRAMEWORK

2.1 Does the United States of America have a primary advertising self-regulation system?

The primary self-regulatory system for advertising in the United States is the Advertising Self-Regulatory Council (ASRC), which establishes the policies and procedures for advertising industry self-regulation. ASRC operates several different self-regulatory programs:

- (a) NAD provides a forum whereby competitors can challenge each other's advertising claims. In addition, NAD on its own or at the urging of a consumer or consumer advocacy group can also review advertising claims;
- (b) the Children's Advertising Review Unit (CARU) monitors advertising directed to children and enforces a set of self-regulatory principles;
- (c) the Electronic Retailing Self-Regulation Program (ERSP) was founded to monitor and challenge advertising claims that arise in the area of direct-response marketing, which typically involves marketing that solicits an immediate purchase or contact with the seller;
- (d) the National Advertising Review Board (NARB) is the appellate arm for cases before NAD and CARU, providing an opportunity for advertisers (and sometimes challengers) to question a decision made by a self-regulatory body; and
- (e) the Online Interest-Based Advertising Accountability Program (Accountability Program) provides oversight and enforcement of certain published principles related to the use of behavioral marketing techniques.

The self-regulatory system is administered by the Council of Better Business Bureaus.

There are various other industry-specific self-regulatory organizations that monitor and enforce their own codes, such as:

- (f) the Children's Food & Beverage Advertising Initiative (CFBAI), which administers a program with the major U.S. food companies to promote healthier food and beverage choices in advertising directed towards children ages twelve and under;
- (g) the motion picture (Motion Picture Association of America), music recording (Record Industry Association of America), and electronic game (Entertainment Software Association) industries, which have each implemented a self-regulatory system that rates or labels products;
- (h) the Distilled Spirits Council of the United States, the Beer Institute, and the Wine Institute, which have promulgated guidelines to address concerns about underage exposure to alcohol marketing and to limit where alcohol advertising and marketing may appear; and
- (i) PhRMA administers a self-regulatory program involving the direct to consumer advertising of prescription drugs.

2.2 Is there a self-regulatory advertising code? What are the key principles?

NAD and ERSP do not have 'codes' in the traditional sense. They operate under procedures that govern the way a challenge is handled and general principles of truth in advertising apply.

CARU, on the other hand, has a Code that goes well beyond general principles of deception for advertising primarily directed to children under the age of 12. Key aspects of the CARU Code include:

- (a) guidelines on taking steps to avoid the ‘blurring’ of advertising and editorial/program content;
- (b) guidelines on the use of premiums, clubs, and sweepstakes and contests;
- (c) guidelines on how to avoid overly-pressured sales language and how to handle online solicitations;
- (d) guidelines on avoiding blurring of the line between fantasy and reality;
- (e) guidelines on depictions of unsafe and or inappropriate behavior or situations in advertising; and
- (f) data collection guidelines that correspond generally with the federal law governing the collection and use of personally identifying information (PII) from children.

The Accountability Program has seven basic principles that generally promote transparency in connection with behavioral advertising and provision of consumer choice with regard to opting out of receiving targeted advertisements.

The CFBAI standards set certain nutritional thresholds for foods advertised to children. Members of the CFBAI (the standards only apply to member companies) ‘pledge’ certain commitments in accordance with those nutritional standards that make sense in light of their particular offering. Thus, quick-serve restaurants can set goals that are different than snack food manufacturers or carbonated beverage manufacturers.

The entertainment industry self-regulatory codes tend to focus on ratings and ensuring that parents have the ability to control the content that their children access.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

The most important self-regulatory body is NAD. By its very essence, it is a dispute resolution mechanism. The procedure in an NAD challenge generally follows a set pattern:

- (a) A challenge is filed. If filed by a company, there is a filing fee that varies by the size of the challenging company’s annual U.S. revenues and whether it is a member of the CBBB.
- (b) NAD determines whether it will take the case. NAD will reject cases that do not relate to ‘national’ advertising, were permanently discontinued prior to the challenge, involve political advertising, or relate to a matter currently being litigated in court or that is already subject to a regulatory order. Once approved, NAD will open the case and send the challenge to the advertiser.
- (c) The advertiser then has the opportunity to reply to the challenge, and, thereafter, each party has the opportunity for one additional written submission.
- (d) A meeting with NAD is possible, but it is not required. Parties meet separately with NAD.
- (e) The NAD will issue a written decision summarizing the issues, the arguments of the parties, and NAD’s findings and recommendations.
- (f) The advertiser is permitted within 5 business days to provide a statement that will accompany the decision, which generally is announced about a week later.

Failure of an advertiser to participate (or agree to abide by NAD's recommendations) may result in referral of the matter to the FTC (or another regulatory body if, due to the subject matter, it is more appropriate at another agency).

If the advertiser is unhappy with the outcome, it can appeal NAD's decision to the NARB. Challengers can appeal, but it is subject to review and approval by the General Counsel of the Council of Better Business Bureaus. If a decision is appealed, the NARB will convene a panel of third-party advertising industry representatives. The parties can submit briefs based only on the record as developed at NAD, and there is a meeting at which the advertiser and challenger each makes a short presentation.

ERSP and CARU have their own procedures.

2.4 Is the self-regulation system effective? Is it widely used and followed?

There is a very high degree of compliance and participation in these self-regulatory programs. Generally, legitimate advertising disputes are resolved in a reasonably quick and efficient manner and because there is a high degree of compliance, the self-regulatory process is generally considered to be effective.

2.5 Are the self-regulatory system's decisions reported?

Upon completion of an NAD, ERSP, or CARU case, the body will publish a written decision. The decision presents the challenger's and the advertiser's arguments comprehensively before presenting the resolution. There are approximately 100 cases per year. The cases are archived in electronic form on the ASRC Web site, and they are accessible by subscription. They also publish press releases about each case, and those can be reviewed without a subscription.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

The burden of proof in an NAD case is on the advertiser to demonstrate that the advertising claims at issue are substantiated or that there is a reasonable basis supporting the claims at issue.

Another key aspect of NAD practice is that if an advertiser presents a test that purports to substantiate a claim, especially if it is an industry-standard test, the burden tends to shift to the challenger to prove that there is a better test that disproves the claim.

The advertiser or challenger is free to submit consumer testing to demonstrate the presence or absence of any implied claims. In the absence of any reliable consumer testing, NAD reserves the right to use its own judgment in evaluating whether a particular implied claim is made.

Finally, NAD's mission encompasses a sense of responsibility toward the advertising industry generally. Consequently, one is more likely to see a case that argues that a claim 'disparages' a competitor at NAD than one would in a civil action for false advertising.

2.7 Are there any other self-regulatory systems that govern advertising practices in United States of America?

See above.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in United States of America (eg, consumer protection laws; IP laws; unfair competition laws)?

Advertising and marketing in the United States is heavily regulated by federal, state, and local law, as well as by various self-regulatory organizations. Below are some key examples of the laws governing advertising practices in the United States:

- (a) **Federal Laws:** While there are numerous advertising laws, including statutes prohibiting deceptive practices, as well as statutes governing specific marketing practices, two of the main examples are:
 - (i) **FTC Act:** The FTC Act is a federal law prohibiting ‘unfair or deceptive acts or practices’, and
 - (ii) **Lanham Act:** The Lanham Act is the federal false advertising statute, which provides the key federal cause of action for competitors;
 - (iii) **Other Federal Laws:** Congress has also passed specific laws regulating various advertising or marketing practices. These laws typically vest enforcement authority in the Federal Trade Commission and often call upon the FTC to draft additional regulatory guidance.
- (b) **State Laws:** Each state also regulates advertising, both with general consumer protection statutes (many modeled after the FTC Act), and with statutes regulating specific practices (such as the administration of sweepstakes and contests or sale pricing);
- (c) **Local Laws:** 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.

Advertising can also implicate many other 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.

3.2 Is substantiation required for advertising claims?

The general rule is that advertisers must have proof for the claims that they make in advertising, before those claims are disseminated.

Further, an advertiser must have a ‘reasonable basis’ for any claims that it makes in its advertising. In order to determine whether an advertiser has a ‘reasonable basis’ for its claims, the following factors are considered:

- (a) the type of claim,
- (b) the product,
- (c) the consequences of a false claim,
- (d) the benefits of a truthful claim,
- (e) the cost of developing substantiation, and
- (f) the level of substantiation that experts in the field would agree is reasonable.

An advertiser's claim must match its substantiation. For example, when dealing with health and safety claims, environmental marketing claims or certain product performance claims, the FTC typically requires 'competent and reliable scientific evidence'. The gold standard for competent and reliable scientific evidence is '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'. In some cases, one well-conducted study or other scientific research may satisfy the standard.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Substantiation is not required for puffery. Puffery is generally understood to be an obviously exaggerated representation that is not objectively provable and that ordinary consumers do not take seriously. Factors to be considered when determining whether a statement is puffery include whether:

- (a) the representations concern general matters that cannot be proven or disproved,
- (b) the statements are distinguishable from representations that are measurable, or
- (c) the wording uses expressions of opinion that will be discounted by consumers.

Whether a statement may be puffery may be determined by the context in which the statement is used.

3.4 What are the rules governing the use of disclosures in advertising?

According to the FTC, if a disclosure is required in order to prevent a claim from being misleading, the disclosure should be 'clear and conspicuous,' and disclosures should qualify, but not contradict, the claims being made. When determining whether a disclosure is 'clear and conspicuous,' the FTC looks at:

- (a) placement of the disclosure in the advertisement;
- (b) proximity to the claim it is qualifying;
- (c) prominence of the disclosure;
- (d) whether the disclosure is unavoidable;
- (e) whether other elements of the advertising may distract attention;
- (f) whether the disclosure needs to be repeated in order to be effective;
- (g) whether audio is in adequate volume and cadence;
- (h) whether visual disclosures appear for a sufficient duration; or
- (i) whether the language is understandable to the intended audience.

Some state and local laws also give specific more specific requirements for disclosures. Television networks also have rules regarding disclosures.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

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 organizational endorsements and testimonials in advertising. They do not have the force of law.

An endorsement is 'any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions,

beliefs, findings, or experience of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.’ Endorsements must be truthful, non-deceptive, and be substantiated by the advertiser. In addition, any connection between the endorser and the advertiser, which might materially affect the weight or credibility of the endorsement (in other words, a relationship not reasonably expected by the audience), should be disclosed.

Certain industries also have specific rules about the use of endorsements and testimonials in advertising.

3.6 What are the rules governing the use of product demonstrations in advertising?

If a product’s performance is shown in advertising, the general rule is that the demonstration must be real, without any special effects. The advertiser must also be able to substantiate that the performance shown reflects the performance that consumers can typically expect. It is generally deceptive to use an undisclosed mock-up of product performance and 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 dramatization may also be permissible, when the fact of the dramatization is disclosed, so long as the dramatization accurately reflects product performance.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

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. Comparative advertisements must be truthful, not deceptive and non-misleading and, if an advertiser chooses to compare dissimilar products, it has the obligation to clearly delineate the nature and limitations of the comparison and disclose material differences between the products.

3.8 Are there any special copyright or trademark rules that may impact comparative advertising (eg, whether the use of a competitor’s trademark or products may be used)?

Under the Lanham Act, the fair use doctrine protects certain uses of trademarks from infringement claims. This means that, in a truthful comparative advertisement, an advertiser may, in certain instances, 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 make false or misleading claims about a competitor (and/or its products or services) could put the advertiser at risk of liability under the Lanham Act.

Similarly, under US copyright laws, the fair use doctrine should also often allow advertisers to use competitors’ packaging in comparative advertising.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

The FTC provides business guidance and a policy statement for domestic origin claims such as ‘Made in USA’ or similar (including ‘Manufactured in US’, ‘Built in USA’, or use of Americana imagery). The FTC requires that a product labeled as ‘Made in USA’ must be ‘all or substantially all’ of US origin and also finally processed in the United States. When considering whether a product is ‘all or virtually all’ of domestic origin, the FTC looks at the cost of goods sold, including direct manufacturing costs, manufacturing overhead costs, and the cost of inputs/ingredients. In other words, it is not sufficient simply to have some manufacturing processes in the US to support such a claim, but the analysis must include assessment of the product components’ origin and costs as a part of the whole. If a company cannot meet this exacting standard to support an unqualified ‘Made in USA’ claim, a qualified claim may be considered.

California has a separate ‘Made in USA’ law, which is similar but not identical to the federal standard. In addition, many states have laws relating to claiming products are made in the state generally (such as ‘Made in California’) or with regards to specific products (eg, Florida oranges, Vermont maple syrup).

3.10 Are there any special rules governing product packaging?

There are many laws and regulations regarding specific product packaging, including food, drugs, cosmetics, medical devices, durable infant and toddler products, appliances, automobile parts, batteries containing cadmium or lead electrodes, carpets, chemicals, hazardous household chemicals, pesticides, mattresses, jewelry, tobacco products, and electronic goods.

Under the Fair Packaging and Labeling Act, consumer commodities must be labeled to disclose:

- (a) net contents,
- (b) identity of the commodity, and
- (c) name and place of business of the manufacturer, packer or distributor.

There are additional state laws and regulations, and additional detail can be found through the Office of Weights and Measures of the National Institute of Standards and Technology.

Country of origin marking regulations issued by Customs and Border Protection apply to every article of foreign origin imported into the United States.

4 PRICE ADVERTISING

4.1 What are United States’ rules regarding price advertising?

There is no single federal law regarding price advertising. At the federal level, price advertising must comply with the FTC’s general requirements that advertising be truthful and non-deceptive, and that advertisements cannot be unfair. Additional laws may apply to advertisements for free or discounted goods, specialized products such as consumer leases, credit, 900 telephone numbers, and products sold through mail order or telephone sales.

In addition to the FTC’s general prohibition on unfair and deceptive advertisements, every state has consumer protection laws that govern advertisements running in that state. Specific price advertising rules generally fall under state law and vary by state.

4.2 What are United States' rules regarding advertising 'free' products?

FTC guidance regarding the use of the word 'free' says:

'When making 'Free' or similar offers all the terms, conditions and obligations upon which receipt and retention of the 'Free' item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.'

All of the terms, conditions and obligations should appear 'in close conjunction with the offer of 'Free' merchandise or service'. According to the FTC, disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer, is not regarded as making disclosure at the outset.

In addition, according to the FTC, a single size of a product or a single kind of service should not be advertised with a 'Free' offer in a trade area for more than 6 months in any 12-month period. At least 30 days should elapse before another such offer is promoted in the same trade area. No more than three such offers should be made in the same area in any 12-month period. In such period, the offeror's sale in that area of the product in the size promoted with a 'Free' offer should not exceed 50% of the total volume of his sales of the product, in the same size, in the area.

In addition to FTC guidance, states have laws and regulations on the use of 'free' offers.

4.3 What are United States' rules regarding sales and special offers?

There is no single federal law regarding price advertising. At the federal level, price advertising must comply with the FTC's general requirements that advertising be truthful and non-deceptive, and that advertisements cannot be unfair. Additional laws may apply to advertisements for specialized products like consumer leases, credit, 900 telephone numbers, and products sold through mail order or telephone sales.

In addition to the FTC's general prohibition on unfair and deceptive advertisements, states and municipalities have general consumer protection laws, as well as specific requirements, that govern the advertisements running in that state.

4.4 What are United States' rules regarding rebates?

The United States' rules regarding rebates are the same as for sales and special offers (see answer to question 4.3). Typically, advertisers must clearly and conspicuously disclose that the rebate is a 'mail-in' rebate, if that is the case, as well as disclosing other material offer terms. Some states also prohibit certain types of statements in connection with rebate offers, such as what the 'cost' of the product is after a mail-in rebate is applied.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

Advertisers are generally required to have a sufficient supply of advertised products in order to meet reasonably anticipated demand. Some states also have rules regarding rain check requirements.

Additional state and federal laws may apply to advertisements for specialized products like consumer leases, credit, 900 telephone numbers, and products sold through mail order or telephone sales.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

There are a number of federal and state regulations that prohibit certain products from being advertised. For example, tobacco advertising is highly regulated by both the FTC and FDA. Federal cigarette labeling and advertising laws prohibit television or radio advertising featuring cigarettes or cigarillos. Under the federal Comprehensive Smokeless Tobacco Health Education Act of 1986, advertising of smokeless tobacco products over any form of electronic communication within the jurisdiction of the FCC is strictly prohibited.

Broadcast and cable television networks' guidelines prohibit or restrict commercials based on several factors, including taste, safety, and controversial issues. For example, two of the nation's largest cable television providers have banned firearm and ammunition advertising. Additionally, the television networks have prohibited advertising for over-the-counter drugs, medical and health products featuring medical professionals or actors who portray health professionals.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

There are no broad types of advertising practices that are prohibited outright; however medium- and industry-specific laws and regulations impose certain restrictions, limitations, and disclosure requirements on various advertising practices.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Federal law, as enforced by the FCC, prohibits the dissemination of indecent or obscene material over broadcast media, such as broadcast radio and broadcast television.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

In addition to the general requirement that any connection between an endorser and an advertiser that might materially affect the weight or credibility of the endorsement be disclosed, the FCC's laws and rules also require that, when money or other consideration for the airing of program material has been received by or promised to a broadcast station, its employees or others, the station must broadcast full disclosure of that fact at the time of the airing of the material, and identify who provided or promised to provide the consideration. This disclosure requirement also applies to the broadcast of musical selections for consideration (so-called 'payola') and the airing of certain video news releases. In the case of advertisements for commercial products or services, it is generally sufficient for a station to announce the sponsor's corporate or trade name, or the name of the sponsor's product (where it is clear that the mention of the product constitutes a sponsorship identification).

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

The term ‘branded content’ has been applied to a variety of marketing efforts in which a brand uses a film, television show, video game, or other entertainment property as a vehicle to market to consumers. One of the initial questions that must be resolved in connection with a branded content project is whether the content can be considered ‘commercial speech’ (and thus subject to false advertising (and other laws) governing advertising), or whether the content is editorial in nature. As discussed above, drawing the line between commercial and non-commercial speech is not always easy, especially where the speech in question serves multiple purposes, some of them commercial, and others non-commercial.

If the content is, in fact, commercial speech, the implications can be significant. Not only might the FTC say that disclosures are necessary to ensure that the relationship between sponsored content and an advertiser is transparent, but the advertiser might also be required to vet all claims and clear all third party rights implicated in the content.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

According to the FTC, they are concerned when ‘the line between advertising and programming may be blurred, and consumers would be deceived absent a disclosure clarifying that a communication is an advertisement.’

For example, the FTC has said that disclosure is required if consumers would be led to believe that an advertising feature in a newspaper is really part of a newspaper’s editorial content. The FTC has also found that it is potentially a deceptive practice when Internet search engines fail to clearly and conspicuously disclose when search results are ‘paid placements’ or ‘paid inclusions’ rather than objective search results based on relevancy alone.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There is no single federal or state law that governs specifically the use of social media generally for advertising purposes. The FTC Endorsement Guides specifically address the use of endorsements and testimonials in the social media context, including the use of social media influencers. In addition, individual regulatory agencies, such as the SEC, FINRA, and FDA have issued rules and guidance that govern the use of social media for advertising purposes by their respective industries.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser’s Facebook page)?

Whether an advertiser is responsible for advertising claims made in user generated content (UGC) is going to depend on a number of factors, including the level of responsibility that the advertiser has for the creation of the content. Section 230 of the Communications Decency Act (‘CDA’) provides some protection for advertisers for consumer-provided content online, although there is still some

uncertainty about the breadth of the protection provided. The NAD generally takes a more restrictive view, and is more likely to hold an advertiser responsible for user generated content.

It is unclear the extent to which the FTC would argue that, under Section 5 of the FTC Act, an advertiser is responsible for claims that consumers independently make on an advertiser's website. But, as a general matter, the FTC Endorsement Guides provide that: 'Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers. Endorsers also may be liable for statements made in the course of their endorsements.'

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

One of the first cases involving user generated content was *Doctor's Associates Inc. v QIP Holders*. Here, Subway filed a lawsuit against Quiznos stemming from the 'Quiznos v Subways Ad Challenge' in which Quiznos solicited videos from users depicting that Quiznos' sandwiches have more meat than Subway's sandwiches. The lawsuit claimed that by airing the winning video from the Quiznos contest, Quiznos had engaged in false and misleading advertising under the Lanham Act. In denying Quiznos' motion for summary judgment, the court found that Quiznos was a provider of an interactive computer service, but declined to decide whether the UGC videos at issue were 'provided' by Quiznos or by a third party (a requirement for CDA immunity). The court determined that it was a question of fact as to whether Quiznos was actively responsible for the creation of the UGC. Finally, in 2010, following the court's denial of its motion for summary judgment, Quiznos agreed to settle the dispute.

Cole Haan received a warning letter from the FTC regarding a contest the brand sponsored on Pinterest. In its 'Wandering Sole' promotion, Cole Haan instructed participants to create boards on Pinterest titled 'Wandering Sole.' Participants were required to post 5 images of Cole Haan shoes to their boards along with 5 images of the participants' 'favorite places to wander'. Participants were also required to 'tag' each pin with the hashtag '#WanderingSole.' The participant with the most creative entry was eligible to win a \$1,000 shopping spree. The FTC argued that the 'Wandering Sole' contest violated the FTC Endorsement Guides (and therefore Section 5 of the FTC Act) because the contest rules did not require participants to properly disclose that they were incentivized by the \$1,000 shopping spree to post images of Cole Haan products (essentially turning each participant into a Cole Haan endorser). The FTC claimed that the #WanderingSole hashtag did not adequately communicate the material connection between participants and Cole Haan.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

In the United States, the right of publicity protects against unauthorized commercial use of a person's name, likeness, or other elements of a person's persona.

The right of publicity is largely protected by state common or statutory law. Under certain states' laws, a written release is necessary whenever a person's name, picture, likeness or voice is used in advertising or promotion (eg, paid media insertion or speech promoting the sale of goods or services) or for any purposes of trade (eg, products and merchandise). Not all states recognize the right of publicity specifically. For example, some states enforce the right under their privacy laws and, in

others, the right of publicity is enforced through unfair competition statutes. In addition, some states provide protection for a period after death. Protection of an individual's identity may also be provided by under the federal Lanham Act.

9.2 Are there situations when permission is not required?

Use of an individual's identity in connection with truthful advertising may, in certain instances, be protected by the First Amendment. For example, it is generally permissible for a media organization to accurately advertise the content of the media and for a retailer to accurately advertise its wares.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

There are a variety of materials for which an advertiser will generally need to secure permission before using them in advertising, including identifiable individuals and copyrighted works (such as music or artwork). In addition, there are various statutes which provide specific protection, including a prohibition on unauthorized use of Olympic trademarks.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

There is no general prohibition on the use of other companies' products in advertising. Rather, in each case, the advertiser will have to analyze whether the use implicates trademark, copyright, or other concerns. Often, though, advertisers try to use generic products whenever possible, in order to minimize the risk of a claim.

Generally, using a competitor's product in comparative advertising is permissible, so long as the comparison is fair and accurate and the use of the competitor's product does not result in a likelihood of confusion as to source, identity, or sponsorship of the advertiser's product.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of the United States which affect advertising (eg Swedish gender equality law)?

Under United States anti-discrimination laws, there are a variety of protected classes (including race, religion, national origin, and gender) that cannot be targeted for discrimination. While these laws do not pertain to advertising content, advertisers typically take great care to ensure that no such class is depicted in a negative or discriminatory light. In addition, advertising directed at children is subject to additional scrutiny and should not depict, or encourage children to engage in, any unhealthy or unsafe activity.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

In the United States, there are a variety of cultural issues that advertisers should take into account. For instance, broadcast and cable networks' guidelines restrict and/or prohibit advertising that contains obscene, lewd, or provocative content. In addition, the insensitive depiction of national symbols or use

of religious imagery, while not necessarily illegal, would generally be frowned upon. There is also a federal law and numerous state laws regarding the use of the flag in advertising. However, these laws are typically not enforced.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in United States of America?

The United States is highly litigious, and advertisers should proceed carefully, obtaining comprehensive legal advice before engaging in any advertising or promotional activities.

URUGUAY

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Uruguay?

The main source of advertising regulation is consumer protection regulation, specifically Law 17,250 and its Regulatory Decree 244/000. Additionally, the Media Law (Law 19,307) regulates general aspects of advertising done by audiovisual media, excluding the internet. The Media Law does not yet have its Regulatory Decree.

Other statutes also have an impact on advertising. The Data Protection Law 18,331 stipulates the manner in which personal data can be used for marketing, advertising and promotional purposes. Intellectual property laws, such as copyright and trademark law, may also impact upon creative treatments and comparative advertising. In addition, and as explained below, there are sector-specific laws that apply to advertising for particular goods or services, such as tobacco, and advertising with children, among others. Self-regulation also plays an important role.

1.2 What types of communications are considered to be 'advertising'? How is this determined?

In Uruguay there is no legal definition of advertising. Legal scholars have defined advertising as all information directed to the public for the purpose of promoting, directly or indirectly, an economic activity. Advertising must have three basic aspects:

- (a) information;
- (b) that is widespread; and
- (c) addressed to consumers in order to influence their purchase or use of certain products or services.

The Media Law defines 'advertising message' as 'any kind of message from institutions, private or public companies or from a natural person in relation with its business, transmitted by a traditional media for a consideration, with the purpose of promoting its business (goods or services), or information about rights and obligations, among others'.

Additionally, the Media Law defines other types of advertising, such as 'hidden advertising', 'non-traditional advertising' and 'subliminal advertising'.

The Consumer Protection Law states that advertising must be transmitted and disclosed in such a way that consumers identify it as advertising. Also, the Consumer Protection Law defines 'misleading advertising'.

1.3 What is the basic regulatory framework for advertising regulation?

The basic regulatory framework for advertising is provided by Law 17,250, its Regulatory Decree 244/000 regarding consumer's rights, and the Media Law.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

No, different types or practices of advertising are not regulated specifically, and the general rules apply to all. There are, however, certain aspects, regarding the sources from which personal data used for advertising purposes may be obtained, which are regulated under the Data Protection Law.

The rule is the 'opt in' (ie granted by the data subject) except certain exceptions, such as public sources, or contact details received from customers, to the extent that the advertising is related to the existing relationship between the customer and the supplier.

The Media Law regulates general aspects of advertising through radio, television and other audiovisual communication services.

1.5 **Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?**

There are several industries that are subject to specific laws which govern their advertising. Below we point out some of the main ones, but the list is not exhaustive:

- (a) **Tobacco** (Law 18,256 and its Regulatory Decree 284/008): All forms of tobacco advertising are prohibited, even within the premises of the shops where said products are sold;
- (b) **Medicines and associated products, such as modified foods (eg dietetic products) and medicated feed** (Decree 18/989 as amended by Decrees 568/989, 493/990 and 635/991): Advertising under the control of the Ministry of Public Health, and subject to certain specifications; Prescription medication advertising can only be aimed at doctors or other health professionals; and
- (c) **Advertising with children** (Code of Childhood and Adolescence): Children and teenagers cannot participate in advertisements promoting alcoholic beverages, or any other product that is damaging to a child's physical or mental health, or that threaten children's dignity, or physical, psychological or social integrity.

Furthermore, there are some bills under consideration by the Uruguayan Parliament which, if approved, will have an impact on advertising. For example, the bill on alcoholic beverages consumption.

1.6 **Are any government pre-approvals required?**

As a general rule, there are no government pre-approvals required for advertisements.

However, there are requirements for specific types of advertising, regarding certain products that are required to contain certain pre-approved warnings or disclaimers in order to be lawful. For example, advertisements regarding prescription medication, which apart from only being allowed to be aimed at health professionals, require prior authorization from the Ministry of Public Health.

1.7 **Does the media pre-clear advertising?**

It is not a common practice for the media to pre-clear advertising, nor is there a legal obligation for media to do so; there is no organization (governmental or private) that focuses on clearance issues.

However, it is common to include clauses within agreements that require companies' whose products are being advertised to indemnify the media from all possible infringements and violations of advertising regulations and other laws.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The Directorate General of Commerce (DGC), through the Consumers' Defense Area, is in charge of advertising aimed at consumers in general. The DGC is in charge of enforcement of all advertising laws, even though other regulators are competent in Advertising in specialized industries (ie Ministry of Public Health for medicines and other associated products such as modified foods; Central Bank of Uruguay for advertising related to Finance and Insurance Companies; the Agency for the Regulation of Communication services for advertising linked to communication services, among others).

As a general rule, the DGC does not initiate procedures for violations of advertising regulation ad hoc, but rather acts upon claims filed either by consumers or by competitors. Once a claim has been filed, the DGC informs the alleged infringer, investigates the claim, and if proven, imposes penalties that are generally monetary fines, or remedies in a court of law (such as corrective advertising in the case of misleading advertising).

Additionally, the Media Law has created a centralized body to enforce compliance thereof (the Audiovisual Communication Committee). This body has not yet been integrated, so, in the meantime, its powers have been enforced by the telecoms regulator (URSEC).

1.9 When does a competitor have a right of action? What are the potential remedies?

A company alleging harm by its competitor's advertising may either:

- (a) file a claim before the DGC to initiate the procedure explained above;
- (b) initiate actions/complaints before CONARP (please see answers to question 2); or
- (c) seek redress through a court of law.

The first option, to file a claim before the DGC, is applicable whenever a company alleges that its competitor's advertising is deceiving in any way to consumers, regardless of whether the company was actually damaged. The aim of this action is to protect consumers, but the DGC also accepts claims filed by competitors if the basis of the claim is alleged actual damage to consumers.

The second option, to initiate actions/complaints before CONARP, is applicable when a company alleges infringement of the Code of Ethics of the self-regulatory body.

To initiate the third option, filing claims in a court of law, damage must be proven, as well as a causal connection between the damage and the practice of the competitor.

1.10 When do consumers have a right of action? What are the potential remedies?

As explained above, consumers may file claims before the DGC for any type of infringements to consumer protection regulation, and specifically for allegations of misleading or deceitful advertising.

In such case, the DGC would initiate the procedures detailed above, but the consumer would also have the option to request that the advertiser complies with the offer advertised. In that case, the claim would be referred to the advertiser who would have the ability to answer in writing. If the claimant is not satisfied by the advertiser's response, he/she may schedule a mediation hearing before the DGC. If after the hearing, the parties have not come to an agreement, and if the claim is for

an amount lower than 100 UR (approximately US \$3,500), the consumer may bring the claim before a court of law in a summary trial and need not have legal representation to do so.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Uruguay have a primary advertising self-regulation system?

Yes. Uruguay has a self-regulation system that governs the relationship between advertisers and agencies.

The ad hoc arbitration center is called the 'CONARP' and is a member of CONARED, the Latin American network of self-regulatory entities.

The self-regulatory body is rather new, as it has only been in place since 2011, with its first ruling issued in December of that year.

2.2 Is there a self-regulatory advertising code? What are the key principles?

Yes. The current code was enacted in 2013 and its object is to uphold ethics and ensure the responsible use of commercial freedom. Consumer protection and fair competition are its ultimate goals. The main principles established within the Code of Ethics are that advertising materials must be legal, truthful, decent and honest, and there is an emphasis on corporate social responsibility.

Additionally, the Digital Annex to CONARP's Code of Ethics, drawn up in 2017, establishes that advertising in electronic media must respect the Code's rules and legal regulations in force in Uruguay.

The Digital Annex provides specific guidelines regarding digital advertising, such as:

- (a) advertising sent via e-mail or other equivalent individual media of communication;
- (b) advertising in newsgroups, forums, chats and the like;
- (c) influencers;
- (d) brand content;
- (e) advertising on the internet; and
- (f) sponsorship.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Yes, the system does have an enforcement of dispute resolutions in place.

Disputes are litigated through an expedited process, beginning with the filing of a complaint by one of the legitimate parties before the decision-making body. Legitimate parties are the Government and its Institutions; Consumers Associations, and/ or associations or unions that have a duly demonstrated direct interest in relation to the claim; Advertising Agencies; Advertisers; Mass Media.

The adjudicatory process takes approximately 10 days, followed by a ruling, and, where appropriate, an appeals process with the same ruling body.

Parties that do not comply with the decisions can be ousted from the system.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Since its creation in 2011, only a few cases have been litigated before CONARP, so it is fair to say that it is not a widely-used and followed system. For those cases that have been adjudicated by CONARP it has proven to be effective (save the exceptions detailed below).

2.5 Are the self-regulatory system's decisions reported?

Yes, both the decisions and claim filling process are publicly reported.

Instructions for filing a claim before CONARP are detailed on its website (<http://www.conarp.com.uy/>), under the Section 'Denuncias'.

All the decisions issued by this self-regulatory body are published in the CONARP's website, in the Section 'Resoluciones'.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Not particularly. However, some experience shows that the CONARP has not been particularly good at dealing with cases involving scientific evidence.

2.7 Are there any other self-regulatory systems that govern advertising practices in Uruguay?

No.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Uruguay (eg, consumer protection laws; IP laws; unfair competition laws)?

Law 17,250 and its Regulatory Decree 244/000 establishes general principles, such as the grounds on which advertising must be supported, practices that will be deemed unlawful and are forbidden, and the minimum amount of information that must be included in advertisements. Consumer protection regulation prohibits any advertising or claims that are deceitful or misleading, (meaning entirely or partially false, in any way, including by omission of essential information, and capable of inducing an error in the mind of a consumer concerning the product or service's nature, quantity, origin, or price.)

The regulation also prohibits certain types of comparisons such as when the point of comparison is based on subjective information of a psychological and/or emotional character rather than objective facts, or when the basis for the comparison cannot be verified.

As mentioned above, the Media Law regulates advertising in radio, television and other audiovisual communication services. The Media Law does not regulate the internet.

In addition, there are legal obligations to include certain disclosures on packaging, labels, and in advertisements for specific products. That is the case for modified food products (such as dietary products), energy efficient products, paints and varnishes containing lead, chemical agents and phyto-sanitary products, among others (see answer to 3.10 below).

3.2 Is substantiation required for advertising claims?

Yes; however, no direct action is required, but only being able to substantiate the information included in the claim. According to consumer's protection regulation, the advertiser bears the burden of proof with respect to the accuracy of the material and of the factual information contained in the advertisement. The law establishes a 90 day period after the advertisement is made public, during which the product or service provider must maintain the factual and scientific data that substantiates the advertising message.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

There is no particular regulation regarding puffery. In our country, according to consumer protection regulation, all kinds of misleading advertising are prohibited. Misleading advertising is considered to be any form of information or communication contained in advertisements that is wholly or partially false, in any way, including by omission of essential information, and capable of inducing an error in the mind of a consumer as to the nature, quantity, origin and price on products and services. The simple exaggeration of the benefits of a product is not deemed to be misleading because exaggeration is considered to be detectable by the consumer.

3.4 What are the rules governing the use of disclosures in advertising?

There are no special rules governing disclosures in advertising. However, the main principles in advertising apply.

Uruguayan doctrine has deduced from the spirit of local regulations five principles, which are based on the need to protect the consumer:

- (a) **Legality:** all type of advertising and marketing ought to be made according to the applicable and current legislation and regulation;
- (b) **Advertising Identification:** advertising and marketing should be identifiable as such by the consumer. This principle is meant to prevent the usage of subliminal messages or covert advertising;
- (c) **Contractually Binding Nature of Advertising:** advertisements are considered legally binding business offers according to Uruguayan law;
- (d) **Truthfulness:** advertising and marketing cannot be misleading by words or by omission; and
- (e) **Advertising and marketing cannot be abusive:** an ad cannot harm the dignity of the consumer.

Notwithstanding the foregoing, the Consumer Protection Law establishes that advertising of a product or services must be transmitted and disclosed in such way that consumers can identify it as advertising.

Additionally, though, it would be ok to use the words 'sponsored' and 'Ad' to indicate if material is sponsored by a brand or an advert. Spanish words are preferable. In practice, though, enforcement of the Spanish language requirement is unusual for these kinds of matters.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

There is no specific regulation governing to the use of endorsements and testimonials in advertising, but the general principles governing advertising, in particular the principle of truthfulness, are applicable.

3.6 What are the rules governing the use of product demonstrations in advertising?

As stated in relation to the use of endorsements and testimonials, there is no specific regulation governing the use of product demonstrations in advertising either.

Also bear in mind that local regulation on consumer protection provides that the consumer has the right to be properly informed about the product or service acquired. The information must be clear, sufficient, easily legible, accurate and in Spanish. Hence, standing alone, a demonstration of how a product works does not fulfill an advertiser's information requirements.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

In general comparative advertising is permitted, so long as the comparison is based on objective facts rather than subjective information of a psychological and/or emotional character, and the basis for the comparison can be verified.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

There is no specific regulation on the subject, and neither trademark nor copyright rules prohibit comparative advertising. There are two opposing views on this issue, however. One view is that by using the competitor's trademark for the comparison, a trademark infringement takes place. Another view is that using the competitors trademark for comparison is a non-typical use of the trademark, thus, not an infringement To date, both positions have been followed by different judges, thus it is difficult to predict the outcome of a given case. Each situation ought to be assessed on a case to case basis.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

There are no specific rules. However, claims related to geographic origin must comply with the no misleading advertising rule.

3.10 Are there any special rules governing product packaging?

Notwithstanding the absence of a generic regulation regarding product packaging, there are certain specific rules according to the type of product:

- (a) **Foods:** The general rules on food labeling are applicable, especially the Consumer Protection Law, Decree 244/000, Decree 315/994, Decree 117/006, Decree 141/992, Decree 36,554 (only for genetically modified food, this Decree is applicable in Montevideo) and Decree 272/018.

- (b) **Dietary products:** In the case of dietary products, in addition to general rules on food labelling mentioned above, in practice the Ministry of Health also applies a draft proposal to regulate dietary supplements. (Whilst the bill has not yet been approved, it follows global guidelines and is used by the Food Department to carry out the relevant controls. It is expected that the draft will be approved as soon as possible, and forms part of current regulations.)
- (c) **Energy efficient products:** There are national technical standards that define and establish energy efficiency criteria for products and installation of products and facilities. Specific rules establish the labelling system to be used for such products in order to provide consumers with information on the energy performance of equipment that use energy.
- (d) **Paints and varnishes containing lead:** Under Decree 69/011, which establishes the regulation regarding labels, the sale of paints and other lead-containing products in Uruguay can only be carried out in compliance with the labelling obligations established in Law No 17,775 on the prevention of lead contamination. Law No 17,775 states that the packaging of products containing lead should include:
 - (i) instructions in Spanish language;
 - (ii) indicate that the product contains lead; and
 - (iii) include indications regarding safety precautions.

It is also worth pointing out that imported products that do not comply with this obligation must bear a complementary label for the purpose of marketing.

- (e) **Tobacco:** As mentioned in answer 1.5, tobacco is regulated under Law No 18,256 and its Regulatory Decree 284/008. This regulation establishes that all tobacco products' packaging, and all external packaging and labelling, must show health warnings and images or pictograms describing the harmful effects of tobacco or other appropriate messages.

Additionally, the Law establishes certain prohibitions such as the prohibition to mislead consumers with respect to the products' characteristics, health effects, risks or emissions, or to use terms, descriptive elements, trademarks, figurative or other signs that have the direct or indirect effect of creating the false impression that a certain tobacco product is less harmful than others.

- (f) **Alcoholic Beverages:** The labelling of alcoholic beverages is regulated by the Bill on Alcohol Consumption, currently under scrutiny. The current bill states that the labelling of alcoholic beverages must contain:
 - (i) the alcoholic strength of the beverage; and
 - (ii) preventive messages established by this law and regulations thereof (for instance 'forbidden to minors').

4 PRICE ADVERTISING

4.1 What are Uruguay's rules regarding price advertising?

Rules regarding price advertising are provided within consumer protection regulation, which permits the price (or recommended price) of a good or service to appear in ads. If the price is mentioned, the ad must state whether price is in cash or credit.

The main requirements are the following:

- (a) the price must include taxes (final price);
- (b) if the provider accepts payment by credit cards, coupons or similar, the ad must inform consumers in cases where there are additional charges in comparison with the price paid in cash; and
- (c) if the provider offers financing plans, in addition to stating the price in cash, the ad must also state the following:
 - (i) down payment;
 - (ii) the number of installments and the amount payable for each one;
 - (iii) the final financed price;
 - (iv) interest and any other additional late payment;
 - (v) any other charge due by the customer; and
 - (vi) the place to pay.

It should also be noted that price advertising can be eventually regulated under antitrust law, which prohibits retail price maintenance, under certain circumstances.

4.2 What are Uruguay rules regarding advertising 'free' products?

There are no special rules on advertising of 'free' products, however, since the general rules apply, it is important to bear in mind that advertising a product as free, and subsequently charging a fee for anything related to the same may be deemed an abusive practice of misleading advertising which violates consumer protection regulation.

4.3 What are Uruguay's rules regarding sales and special offers?

The general rules apply. Providers must duly inform customers regarding the offer.

The following information concerning the special offer or sale shall be provided to consumers:

- (a) which products are included in the promotion, or, at least, information on whether all products in the store or only some specifically identified products will be included in the promotion;
- (b) the timeframe during which the special offer will be valid;
- (c) if the special offer is applicable only to certain consumers (eg some type of credit card holders, regular customers or other) or to any and all consumers;
- (d) if a discount is applied to the full price, or the price before taxes; and
- (e) any other relevant information linked to the sale or special offer.

4.4 What are Uruguay's rules regarding rebates?

The same rules regarding sales and special offers apply. Please refer to answer 4.3. Also, antitrust rules may apply.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

No, there are no other key restrictions that advertisers should be aware of regarding retail advertising practices.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

The only products that may not be advertised in any way, not even within at point of sale, are tobacco, its derivatives and cannabis products.

Prescription medicines can only be advertised to health professionals, not to consumers, and the Ministry of Public Health must give prior authorization for such advertising.

Moreover, during elections periods, there is a special provision called the electoral ban, according to which it is forbidden to campaign on public roads, in places open to the general public, or in public media during the forty-eight hours before the day of the election, plebiscite or referendum.

In addition to the above, there are other restrictions mentioned in this document but none involve complete prohibitions.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

The Media Law prohibits surreptitious advertising and subliminal advertising.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Article 181 of the Code of Childhood and Adolescence establishes that the exhibition or public broadcast of images, objects or messages cannot infringe children or teenagers' rights or the principles recognized in the Uruguayan Constitution and national laws, or encourage violent, criminal, discriminatory or pornographic attitudes or conduct.

Moreover, the Media Law provides that programming suitable for minors should be broadcast between 6:00 am and 10:00 pm, and during such timeframe the exhibition of shows that promote violent, morbid, criminal, discriminatory or pornographic attitudes or conduct must be avoided.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Although there is no express rule stating the obligation to identify who the advertiser/sponsor of the advertising is, consumer protection regulation does require advertisers to give consumers all relevant information regarding an offer of products and/or services (including the name of the responsible company and its address).

Accordingly, the offeror of the product should be identified so as to comply with the obligation to inform.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

The Media Law prohibits non-traditional advertising during shows aimed at children and/or teenagers (with the exception of product placement and sponsorship).

Surreptitious advertising is prohibited.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no special disclosures or other obligations when integrating advertising content and entertainment. However, consumer protection regulation requires that all advertisements are clearly identified as such, so that consumers are not misled (see answer 3.4).

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

In the Uruguayan legal system there are no specific regulations concerning advertising and marketing via social media. General regulation applicable to all type of advertising applies to advertising and marketing activities carried out through social media. Also, the Digital Annex to CONARP's Code of Ethics must be taken into consideration.

It is important to highlight the situation in which products are advertised outside of the commercial establishments (which certainly applies to social media advertising). Consumer protection regulation establishes that all offers made outside of a commercial establishment through postal, telephone, television and/or other computerized systems must give the consumer the option to cancel the contract within 5 days of purchasing the product. A consumer can notify the seller of said decision through any reliable mean.

From a data protection perspective, advertising through social media may be challenging since Act 18.331 on Personal Data Protection provides that for advertising purposes only certain type of information may be used. Said personal information is all data obtained from public sources of information, information provided by the data subject him/herself or with his/her consent. Given that the internet itself and social networks are not considered by regulation or law to be 'public sources of information', the collection of personal data from social media sites for advertising and/or marketing activities is not consistent with the aforementioned regulation, unless the data is obtained from the data source with his/her consent.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

There are no special rules governing this matter, so the analysis should be done case by case.

Claims made in user generated content, such as statements that consumers make on an advertiser's Facebook page, could be considered protected by Intellectual Property regulation. Thus, in order to use such a statement the advertiser must obtain the author's authorization.

In addition, from a data privacy standpoint, such statements could be construed as personal data, so advertisers must obtain consent before use.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

No.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

The main laws are Law 18,331 on Personal Data Protection and Law 9,739 on Copyright and Image Rights. Basically, according to these laws, people are entitled to protection from unauthorized use of their image, voice and other personal identifying information or features

From a data privacy standpoint, in order to collect and use personal data, the owner of the data must give his/her prior consent to such collection and use. Consent is required for use of a person's image, voice and identity as they are all considered personal information.

Also a personal image is protected under Law 9.739. Consequently, in order to use the image, the person has to give their prior authorization.

Both authorization and consent may be included within the same document, which should be signed by the person whose image, voice and/or identity is being used for advertising purposes.

9.2 Are there situations when permission is not required?

The general rule is that permission is required. The aforementioned laws contain certain exceptions to the general rule, but they do not include advertising uses.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

No, there are no specific rules in this regard.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

The answer to this may vary, depending on whether the advertisement uses recognizable products in a denigrating sense (for example, in order to advertise a certain brand of cars, it is not permissible to use the image of a car from another brand which is in a poor state, and claim that is the reason why the main character of the ad is changing his car brand). In any case, using companies' recognizable products is not recommended, not only for the reason stated above, but also in order to avoid litigation based on claims related to the linking of one brand to another.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Uruguay which affect advertising (eg Swedish gender equality law)?

Yes, gender equality is indeed a relevant topic in Uruguay, as well as non-discrimination, and the protection of children, among others.

For example, the Media Law, contains certain rules regarding non-discrimination in the media and the content of advertising addressed to children. According to these rules, advertising addressed to children:

- (a) cannot directly encourage children to buy products, taking advantage of their lack of experience;
- (b) must take into account the World Health Organization's recommendations regarding certain nutrition aspects when advertising food products; and
- (c) cannot contain any form of discrimination, including any discrimination based on race, nationality, religion, age, or offend human dignity.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

The Media Law contains certain rules regarding non-discrimination in the media in general. Audiovisual images cannot broadcast contents that promote discrimination or national, racial or religious hate, or violence or any other attack based on race, ethnics, sex, gender, sexual orientation, gender identity, age, disabilities, cultural identity, place of birth, etc.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Uruguay?

No. However, there is a public debate where some entities are trying to extend the Media Law to the internet.

 VENEZUELA 

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Venezuela?

In Venezuela there is no general advertising code and thus, specific laws address special topics.

The most important law governing advertising was recently repealed, as a result of the creation of a new agency, 'Superintendence for the Protection of Socioeconomic Rights' (SUNDDE), an entity that has replaced the Consumer Protection Agency, 'Indepabis'. Unfortunately, legislators responsible for the law on the SUNDDE failed to include the chapters related to the rights and obligations of consumers and advertisers. Thus, most of the aspects covered by the Indepabis concerning advertising law, from the perspective of individual rights, were eliminated in the law on the SUNDDE. However, this new agency has ample powers to rule on the subject of advertising, promotions, sweepstakes and other topics related to the advertising industry.

Advertising on TV, radio and digital media is governed by the Law on Social Responsibility in Radio, Television and Digital Media.

The only aspect of the Indepabis law that remains in the SUNDDE law is a penalty for misleading, discriminatory and false advertising; the SUNDDE law has not yet defined the principles behind those concepts.

Finally, there is a self-regulating body and an arbitration procedure, but it applies only to members of the National Advertisers Association (ANDA).

1.2 What types of communications are considered to be 'advertising'? How is this determined?

Unfortunately, Venezuelan legislators have been approving laws with isolated chapters affecting the advertising industry, but have failed to provide a solid group of definitions. A vague definition can be inferred from examples of what constitute a promotion or sweepstake, both of which require administrative approval.

1.3 What is the basic regulatory framework for advertising regulation?

The National Constitution, the Fair Price Organic Act, the Law on Social Responsibility in Radio, Television and Digital Media, the Pharmaceutical Law, the Traffic Law and the Commercial Advertising Law all contain relevant guidance. The Anti-monopoly and Unfair Competition Act, in addition to international conventions (such as the Paris Convention on Industrial Property) has a chapter regulating acts of advertising that could be considered unfair competition.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

Yes, advertising on TV, radio and digital media is governed by the Law on Social Responsibility in Radio, Television and Digital Media, covering several practices in industries whose products/services are totally banned (ie alcohol and tobacco), product placement and teaser campaigns.

The Unfair Competition Act has a chapter regulating acts of advertising that could be considered unfair competition practices (ie misleading advertising that could produce losing clients to one competitor).

Concerning email marketing, Venezuela has an opt-out system, so the advertiser has the right to send you a first email inviting you to subscribe to a certain web site or to be part of a virtual community, as long as there is a clear procedure to disable the reception of future emails (the advertiser has 24 hours to delete the user from its database) or to simply reject the invitation. Unfortunately, all the legislation contained in the Consumer Protection Act, including that regarding e-mail marketing, which was not expressly included in the Fair Price Act, remains in a legal 'limbo'.

As mentioned before, advertising and promotions such as sweepstakes, or contests, are highly regulated by the SUNDDE, with a mandatory pre-approval administrative procedure.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

According to the Law on Social Responsibility in Radio, Television and Digital Media, advertising services through premium-rate telephone numbers must clearly express the nature of the service provided. The cost per minute of the call must be displayed at least at 50% of the visual proportion of the phone number and at the same audio volume when the advert is announced.

As mentioned before, alcohol, tobacco, drugs, arms, gambling and lottery advertising is expressly prohibited according to the Law on Social Responsibility in Radio, Television and Digital Media (see question 5.1).

1.6 Are any government pre-approvals required?

Since legislation has suffered constant changes in recent years, and considering the power given to regulators to impose sanctions, normally advertisers' lawyers seek advice or assistance from the regulator, especially in the field of promotions or sweepstakes, which need pre-approval by the regulator (in the recently repealed consumer protection law), in order to determine if the advertising initiative falls under the definitions of a promotion or sweepstakes.

1.7 Does the media pre-clear advertising?

Historically, the media did not interfere with the content of advertising material to be broadcast/published, other than those industries whose products/services are totally or partially prohibited from being broadcast/published.

However, since the Law on Social Responsibility in Radio, Television and Digital Media was implemented, 85% of the advertising broadcast must qualify as locally produced; normally, the media negotiates with the main advertisers for the correct distribution of foreign advertising spots, to comply with this obligation.

In general, there is close co-operation between the media and the advertising industry, since both could be sanctioned in the event that the regulator detects infringement to the above-mentioned Act.

1.8 How does the government enforce advertising laws? What are the potential remedies?

Depending on the topic, different agencies could be competent to hear and determine a case. For example, the newly-created SUNDDE could have jurisdiction on misleading advertising cases; but, if

monetary damages are sought, a civil court could take over the case. Even criminal courts could eventually be involved.

If the complaint involves potential damages to the market, the complainant could evaluate the possibility of filing a complaint before PROCOMPETENCIA. (This is a body with functional autonomy, administratively under the Ministry of Popular Power for Commerce. Its organization and operation is governed by the Law to Promote and Protect the Exercise of Free Competition.) Whether the case will prevail will depend on legal and economic evaluations made by regulators from the PROCOMPETENCIA, which means that, even if the advertisement denigrates a competitor's products, damage to the market must be proved, which is why, in recent years, parties have been reluctant to consider using this alternative.

The Directorate for Social Responsibility in Radio, Television and Digital Media, a body of the National Telecommunications Agency (CONATEL), has jurisdiction over any violation of the Law on Social Responsibility in Radio, Television and Digital Media.

SUNDDE maintains the power of the former Consumer Protection Agency to impose a wide variety of sanctions, ranging from fines to the temporary closing of the offending business.

1.9 When does a competitor have a right of action? What are the potential remedies?

Based on the fact that there is no advertising law or code, interested parties need to evaluate the interests at stake when considering challenging an advertisement by a competitor. The following alternatives exist:

- (a) **Complaint before the civil courts:**
 - (i) based on the expectation of obtaining damages caused by a strategy of the competitor;
 - (ii) sustained by a general regulation on damages;
 - (iii) rules established by the Civil Code;
 - (iv) the Paris Convention may be relevant.
- (b) **Criminal action:** If the intention is to stop a defamation campaign, this could be the best alternative; however, criminal courts and prosecutors are extremely slow and do not consider these cases high priority.
- (c) **Administrative action:** A non-orthodox alternative could be to file a complaint before the Directorate of Social Responsibility of Media (radio, TV and digital media). Additionally, if the argument of damages to the marketplace (eg, product simulation) can be sustained, a case could be submitted before PROCOMPETENCIA.
- (d) **Mediation/Arbitration:** Brought before the Arbitration Court, invoking a breach of the ANDA's Self-Regulation Code. This option has two clear limitations:
 - (i) the powers granted to the Arbitration Court are limited; and
 - (ii) they can only issue recommendations, the process is confidential, and it is only accessible to the ANDA's members.

1.10 When do consumers have a right of action? What are the potential remedies?

In general, there is a lot of opportunity for a consumer to file an action before the consumer protection office, based on one of the many scenarios covered by the now-revoked Consumer Protection Act,

specifically based on possible deceptive, false and/or discriminatory advertising. Unfortunately, it is discretionary for the regulator to accept and then sustain complaints.

In terms of class actions, there have not been many cases brought by consumer associations. However, in recent months there has been a significant increase in the number of actions filed by the only recognized consumer association (ANAUCO), before the SUNDDE (where the consumer protection agency now operates). Decisions remain pending.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Venezuela have a primary advertising self-regulation system?

Unfortunately, no.

2.2 Is there a self-regulatory advertising code? What are the key principles?

As mentioned before, there is a self-regulating code known as ANDA'S Code of Ethics which self-regulates commercial communications in Venezuela.

In addition, certain sectors have issued independent codes (ie, the beer industry), although with almost no impact in practical terms, probably due to their lack of presence in the market.

In practical terms, advertisers are more concerned with the *ex-officio* procedures of the different public regulatory agencies with jurisdiction on advertising issues, than they are concerned with what their competitors are doing, since their biggest fear is public sanction, rather than a civil suit against a competitor.

The inefficiencies of our judicial system also make most advertisers favor the use of private mediation and, as a last resort, arbitration, to solve conflicts between competitors.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

Yes, ANDA'S Code of Ethics establishes arbitration as a dispute resolution mechanism. This option has a few limitations:

The powers granted to the Arbitration Panel are limited, since they can only:

(a) publish a decision with recommendations,

and, if the infringing party does not comply with the ruling,

(b) publish the decision in the national media,

and, as a last resort,

(c) expel the infringing member from the Association.

The process itself is confidential, and it is only accessible to the parties.

Publication of the decision is a prerogative of the Panel appointed based on the importance of the subject matter of the dispute.

2.4 Is the self-regulation system effective? Is it widely used and followed?

Historically speaking, YES. It has worked as the perfect solution for the main advertisers with presence in the country.

However, as explained in questions 2.2 and 2.3, in recent times there has been a significant decrease in the number of cases brought, since advertisers' primary concern is now regulatory action. The lack of updated legislation and unreliability of the judicial system when handling non-traditional matters (as is the case with advertising issues), also contributes to the low number of cases.

2.5 Are the self-regulatory system's decisions reported?

Yes, but only those decisions which, in the Panel's discretion, deserve to be known by the general public, due to the importance of the matter in dispute.

The only other scenario in which decisions are reported on ANDA's website or in the national media are cases where the infringing party ignores the recommendations of the Panel.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Nowadays Venezuela is a highly-regulated country, where the Government has the prerogative to intervene in almost all economic activities, establishing strict controls with that idea in mind; advertisers must seek advice prior to developing and launching an advertising campaign.

2.7 Are there any other self-regulatory systems that govern advertising practices in Venezuela?

As previously mentioned, a few sectors of industry have worked on approving self-regulatory systems, but with almost no impact (eg the beer industry, with only one case to report, which did not produce a decision by the Panel, since the parties settled the dispute).

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Venezuela (eg, consumer protection laws; IP laws; unfair competition laws)?

The Venezuelan system is a classic 'melting pot', in terms of legislative rulings on this matter, considering that advertising claims could be regulated by:

- (a) Trademark legislation;
- (b) Consumer Protection norms;
- (c) the Anti-Monopoly Law, which has a chapter on unfair competition;
- (d) Under-Age legislation;
- (e) Constitutional principles, regulated in the Civil and Criminal Codes;
- (f) the Pharmacy Practice Law;
- (g) the Commercial Advertising Law; and
- (h) the Transit Law.

3.2 Is substantiation required for advertising claims?

The Venezuelan system is very conservative in terms of legislation, with a clear tendency to protect consumers, which is why analysis must begin with the principle of veracity set out in the Constitution. A consumer can bring a case for examination to a consumer protection officer, who, if initially convinced on the potential merits of the case, will summon the potential infringer to present defenses against the claims of the consumer, even if they are vague.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Although there is no specific definition of 'puffery', it should be treated with special care by advertisers, since regulators do not favor these kinds of messages and consider them potentially misleading from a consumer perspective (at least, the recently-repealed consumer protection law was certainly restrictive, even though very few cases have been opened, and there is no reason to think that the new law will follow the same line).

3.4 What are the rules governing the use of disclosures in advertising?

The SUNDDE law provides that misleading advertising is subject to a penalty that ranges from fines up to the temporary closure of the establishment for a maximum of 90 days, depending on the circumstances of the infringement.

If editorial content has somehow been influenced by an advertiser, a full disclaimer must be announced or printed. 'Informative' advertising must also be clearly identified, as well as 'infomercials'. Also, on TV, radio and online live shows, the beginning of all commercial messages should be properly announced as advertising before they begin.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

No specific regulations govern the use of endorsements and testimonials, but certain situations may need special treatment (ie, the use of minors demands express consent from parents or legal representatives). The use of testimonials is frequent, and, as long as they are conceived in a positive way, no problem should arise, unless they involve comparative advertising, though this is not commonly used in Venezuela.

3.6 What are the rules governing the use of product demonstrations in advertising?

Advertising claims (ie, comparative advertising), must be supported by scientific studies that validate the claims made. As such, all products demonstrations must include a legend that explains who was responsible for conducting the test supporting the results of the demonstration.

There are several precedents (especially on PROCOMPETENCIA), ruling on misleading advertising that was not supported by the appropriate investigation, which must be locally validated as applicable to Venezuelan consumers to be accepted as evidence.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

There are no restrictions on comparative advertising or identifying the competitor and its product or service by name. However, Venezuela has proven to be a market where competitors are reluctant to

use this advertising mechanism, which certainly favors consumers, probably because it is a relatively small market, where many brands control a big portion of the market share in each category.

It must be pointed out, though, that, even in the absence of specific legislation governing this subject, the information or comparison must be ethical, verifiable and fair, since infringement could be punished as a civil violation (giving rise to damages) or a criminal one (defamation and slander, for example).

3.8 Are there any special copyright or trademark rules that may impact comparative advertising (eg, whether the use of a competitor’s trademark or products may be used)?

Yes, ‘fair use’ principles must be followed, in order to produce an ethical comparison. The use of a competitor’s trademark or copyright design is legally allowed, as long as the comparison between the products/services is reasonable (real competitors) and does not constitute an act of passing off or, in general, an unfair competition practice, where one actor is trying to position a brand relying on the prestige of the ‘compared’ brand.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is ‘made in France’)?

Yes, there are administrative regulations issued by the National Autonomous Standardization, Quality, Metrology and Technical Regulations Service (SENCAMER), which requires the labels of products to be commercialized in the country to include the geographic origin of the product.

3.10 Are there any special rules governing product packaging?

Yes, there are several regulations that governs product packaging, such as:

- (a) the Law related to taxes for cigarettes and tobacco manufacturers, which sets out packaging regulations for cigarettes and other tobacco products;
- (b) the Administrative regulations issued by SENCAMER that establish the information required in the labeling of:
 - (i) all types of clothing (textiles) marketed in Venezuela, and
 - (ii) the footwear marketed in Venezuela;
- (c) the Law on the Promotion and Protection of Maternal Lactation, which sets out packaging regulations for:
 - (i) baby formula,
 - (ii) labeling of modified milk,
 - (iii) labeling of complementary foods,
 - (iv) requirements that the packaging and labels of pacifiers and similar products must meet, and
 - (v) special prohibitions on advertising materials relating to baby food, bottles, pacifiers etc;
- (d) the administrative regulation issued by SENCAMER that establishes the information required in the labeling of all types of toys;

- (e) the administrative regulation issued by SENCAMER that establishes the information required in the labeling of all types of packaged food; and
- (f) the technical regulation for the energy-efficient labeling of fluorescent lamps and the technical regulation for the energy-efficient labeling of refrigerating and freezing.

4 PRICE ADVERTISING

4.1 What are Venezuela's rules regarding price advertising?

In general, pricing information must be widely disclosed, and cannot be subject to interpretation. There are products and services whose price structure is under total regulation. Hence, no modification or change on the pricing can be made.

For non-regulated industries, any special offer or change on pricing must be submitted to the regulator (SUNDDE), since it can be considered a 'promotion', and thus subject to a mandatory pre-approval process. All special offers must last no more than 3 months. If the promotion runs for more than 3 months, then the 'promotional' new price will be permanent.

4.2 What are Venezuela's rules regarding advertising 'free' products?

In this kind of situation, an approval must be obtained from SUNDEE, since this is considered a 'promotion'.

4.3 What are Venezuela's rules regarding sales and special offers?

Sales and special offers are considered to be 'promotions', and thus subject to a mandatory approval process.

4.4 What are Venezuela's rules regarding rebates?

Sales and special offers are considered to be 'promotions', and thus subject to a mandatory approval process.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

All products/services being offered with a discount must be exhibited or displayed with preference over other products/services of the same category being offered with a higher price.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Advertising the following products on radio or television is prohibited:

- (a) cigarettes and tobacco products;
- (b) alcoholic beverages; narcotic or psychotropic substances prohibited by law;
- (c) professional services offered by individuals not meeting the skills established in specific laws;

- (d) goods, services or activities (temporarily or definitively) forbidden or not authorized, as the case may be, by law or competent authorities for health reasons or for the purpose of protecting the rights of certain people;
- (e) gambling. Specific exceptions may apply, for instance, lotteries or sweepstakes conducted exclusively for charity or humanitarian reasons;
- (f) goods or services addressed to minors that show elements of violence; and
- (g) weapons, explosives or related services.

It is expressly prohibited to advertise a product or service:

- (a) using the same distinguishing phrases, slogans or melody, images, logos, symbols, devices, distinctive signs or images related to a product, service or activity that is forbidden from being broadcast;
- (b) spreading messages using religious faith, cults or beliefs for commercial purposes; or
- (c) promoting practices that constitute a violation of laws governing transportation laws.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Any type of advertising that could be potentially considered deceptive, confusing or misleading, should be used carefully, due to the fact that, as of today, non-regulated powers have been given to the SUNDDE.

When advertising services through premium-rate telephone numbers, the nature of the service provided must be clearly expressed. The cost per minute of the call must be displayed at least 50% of the visual proportion of the phone number and at the same audio volume when is announced.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

Yes, the Law on Social Responsibility in Radio, Television and Digital Media, specifically regulates the presence of content containing texts, images or sounds of sexual acts or nudity, among many other elements, depending on the time when the spot will be aired. For public television, the law establishes a complex definition of elements concerning language, health, sex and violence, which can only be aired in the appropriate time segment, according to the categories set forth in the law.

In general, content considered obscene and/or indecent can only be broadcasted by pay television, during the appropriate timeframe.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

Yes—A full identification of the advertiser should be included in all media where the advertising will be aired/displayed, including the tax identification number of the advertiser, as the responsible entity behind the advertising.

The same rule applies to product placement, which is only acceptable in sporting events, as long as the goods or services advertised are not included among those that cannot be broadcast. Commercial sponsorship is acceptable, as long as the product or service is not the object of the same restriction for broadcasting.

Finally, indirect marketing is not acceptable, as advertising must be clearly and conspicuously identified.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

No particular rule applies, as long as the integration of advertising content and editorial content is not misleading.

The only mandatory rule is the pre-eminent disclosure explaining that the content displayed is advertising material.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

No particular rule applies, as long as the integration of advertising content and editorial content is not misleading.

The only mandatory rule is the pre-eminent disclosure explaining that the content displayed is advertising material.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

In theory, and in accordance with several rules, starting with the Constitution, the protection of individual rights is of supreme concern.

In practical terms, and mostly as a result of the tense political climate, the social media environment is a 'space free of regulations' until further notice, despite intense use of it for both commercial and non-commercial purposes.

This tolerance clearly contradicts the concepts included in the amendment to the Law on Social Responsibility in Radio, Television and Digital Media, which named electronic media, including the Internet, wireless services and, consequently, all social media tools as an object of regulation; thus creating barriers to the dissemination of information between individuals, and imposing limitations on constitutional rights to privacy and freedom of expression, information and opinion.

The law prohibits the circulation of messages distributed via electronic means or any other form of information disclosure, which contains the following:

- (a) inciting or promoting hatred and intolerance based on religious, political and gender differences, racism or xenophobia;

- (b) constituting war propaganda;
- (c) promoting distress or disturbing public order;
- (d) disregarding legitimately constituted authorities; or
- (e) inciting murder or promoting the violation of legal order.

'Electronic means' are defined as all forms of audiovisual media, audio and electronic broadcasting services arising from the development of telecommunications through legal instruments that are deemed relevant, which can be interpreted broadly to regulate both the internet and wireless services.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

No—as long as the right disclaimer of responsibility is displayed, and the user has accepted responsibility, the advertiser should not be held responsible for third-party opinions. However, it is advisable that, if a notification of a potential violation is received, the website where the content was generated takes responsibility for taking the appropriate measures to delete the offending content.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

As of today, no. The vast majority of social media cases have been related to political issues (ie suspension of accounts based on defamation of public officers). To the best of our knowledge, users are following and complying with the mechanisms for dispute resolution established by social media platforms.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

Individuals' rights prevail, and consent must be obtained in order to use any element that identifies a person in advertising. Special attention must be given to the use of children, since special regulations apply.

9.2 Are there situations when permission is not required?

Consent must be obtained. Exemptions apply to other forms of communication, such as informative coverage of a live event.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Access to historical places and national parks for commercial purposes is restricted and permission must be obtained from the relevant agencies.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

No, this could be considered trademark/copyright infringement, due to lack of consent from the IP owner.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Venezuelawhich affect advertising (eg Swedish gender equality law)?

Any advertising material that could be considered discriminatory in any possible way (gender, religion or race) should be closely reviewed before launch, mostly because of the social tensions experienced in recent years, due to Venezuela's complex political climate.

11.2 Are there any other cultural norms that should be considered (eg religious concerns)?

Indigenous rights are a highly sensitive topic. The use of public figures (even as part of a parody, which are not illegal per se), is not advisable.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Venezuela?

ALWAYS seek local advice, both from an advertising agency AND a law firm, before starting a project. Our system is constantly changing, not necessarily for legal reasons, but for the increasing power given to public officers.

ZIMBABWE

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Zimbabwe?

There are no specific advertising laws in Zimbabwe. However, there are general laws relating to intellectual property, unfair trade practices and competition, foods, drugs, alcohol, gambling, tobacco, pornography, environmental, health and safety, and security which advertisers must follow.

The advertising industry in Zimbabwe is itself largely self-regulated. Accordingly, the acceptability of advertising content is usually determined by advertisers themselves through their various industry associations. These self-regulatory bodies, such as the Advertising Media Association (ADMA), the Advertising Standards Authority (ASAZIM) (which was created by ADMA), the Advertising Standards Association of Zimbabwe (ASAZ), the Zimbabwe Advertising Practitioners Association, the Communication Industry Association, and the Association of Zimbabwe Advertisers (AZA), set rules to be followed by their members. The rules are enforced through complaint procedures, investigations and adjudication of disputes. The body responsible for such matters for the advertising industry is the ASAZIM, which has published a Code of Standards (the Code of Standards).

1.2 What types of communications are considered to be 'advertising'? How is this determined?

There is no clear definition of what types of communications are considered to be advertising. However, the Code of Standards states that its rules apply to 'all advertising accepted for publication, transmission or broadcast...'. This would appear to include any communication accepted for publication.

Accordingly, a private letter not intended for publication would not be advertising. However, letters, emails, internet content, newspapers and broadcasts as well as other media where the communication is for publication, would be advertising.

1.3 What is the basic regulatory framework for advertising regulation?

The basic regulatory framework is the Code of Standards.

The self-regulatory body for the advertising industry in Zimbabwe, the Advertising Standards Authority (ASA) became dormant during the early 2000s as result of the economic crisis in Zimbabwe. However, In March 2017, the ASA relaunched and rebranded itself as ASAZIM. As an independent body, ASAZIM works in conjunction with all entities involved in advertising in Zimbabwe: Zimbabwe Association of Accredited Practitioners in Advertising (ZAAPA), Marketers Association Zimbabwe (MAZ), Advertising Media Association (ADMA) and the Consumer Council of Zimbabwe (CCZ). The organization is governed by an Executive Committee which is made up of representatives from the aforementioned organizations. A primary objective of ASAZIM is to provide prompt, accessible and cost-efficient mechanism to ensure advertising is 'legal, decent, honest and truthful'.

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

No. There are no special provisions for advertising practices using the internet, mobile (text messaging) or other new electronic technology. They are all regulated under the general laws relating to unfair competition, intellectual property and other acts. It is important to note that most advertisers are reluctant to use these new technologies for advertising, as they involve higher risks of fraud, are not readily accessible to the majority of the population in high density and rural areas of the country, and transmissions are affected by power cuts and network and telecommunications instability from time to time.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

There are several industries whose advertising practices are regulated. These are some of the main ones, but the list is not exhaustive:

- (a) Food advertisements/packaging must comply with specific labeling requirements, such as 'Best Before', date of manufacturing, fat content, any preservatives, and list any fish and the types of poultry and mixture of cheeses. There are strict requirements with regards to the importation of genetically modified goods. However, for operators allowed by government to import, produce or sell food or feed containing at least 1% genetically modified produce, they must have the correct labeling put on their products.
- (b) Tobacco products are required to include health warnings on packaging.
- (c) Hazardous substances, pesticides and toxic substances must comply with specific rules on packaging.
- (d) Advertisements offering products or services through payment by instalments must show details of the full cash price, the deposit, the number of installments, and any extra costs, as well as any other legal requirements pertaining to this type of purchase.

1.6 Are any government pre-approvals required?

The government requires pre-approvals for anyone who desires to take pictures of government buildings or offices to use for adverts.

1.7 Does the media pre-clear advertising?

The Zimbabwe Broadcasting Corporation (ZBC) is the only locally-operated television station in Zimbabwe. The ZBC, which is owned by the Zimbabwe government as a parastatal, pre-clears commercials.

An advertisement for use on TV is delivered to the ZBC Marketing Department. It assesses the advertisement and, if it believes it is acceptable, then the advertiser makes a payment. The ZBC charges advertisers based on the time slot and length of the advertisement. If the ZBC does not believe the advertisement to be acceptable, it will either refuse to broadcast the advertisement or ask the advertiser to remove that aspect of the advertisement it has deemed to be unacceptable.

A similar system applies to radio advertisements. However, the most popular forms of advertising are roadside bill board signs and email/internet advertisements.

1.8 How does the government enforce advertising laws? What are the potential remedies?

The Government does not have adequate resources to enforce advertising laws and, accordingly, relies on a self-regulatory system. Should it fail, the Government may intervene if safety, health, security or political interests of the State are affected.

The Drugs Control Council of Zimbabwe can intervene if medicinal claims are made for products which are not licensed medicines.

1.9 When does a competitor have a right of action? What are the potential remedies?

Complaints by competitors are made to the ASAZIM.

The Code of Standards sets out rules to which all competitors should adhere. By agreement of its members, the ASAZIM may arbitrate disputes between competitors and render decisions which are final.

ASAZIM cannot award any damages or injunctive relief. However, ASAZIM can levy a fine, expel a member, order an advertiser to cease and desist and require corrections with or without apology.

Claims may also be presented to the High Court for injunctive relief (interdict), specific performance (such as corrective advertising) and/or damages. Such claims may be based upon unfair business practices, trade mark and copyright infringement, other relevant laws or the common law.

Competitors may report a violation or criminal offence to the police and seek police assistance in seizure of offending goods. A competitor may also request the State to proceed with criminal prosecution, which may result in a fine and, for some offences, imprisonment. There is no cost award in criminal cases, but there can be in civil matters, and the court has discretion to award on a higher scale of attorney/client.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers have rights which include, but are not limited to, those set out in the Consumers Contract Act and the Competition Act. These Acts prohibit unfair trade practices. If these unfair trade practices occur as a result of advertising, then an aggrieved consumer may make a complaint to the ASAZIM and, under its Code of Standards, the ASAZIM may take appropriate action. This may include investigations, negotiations with the consumer and the advertiser, holding a hearing which may or may not result in a fine or other appropriate action. The ASAZIM is not empowered, however, to make an order for specific performance, injunctive relief, damages or restitution. The latter can only be pursued by a consumer in a court of law.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Zimbabwe have a primary advertising self-regulation system?

There is a primary advertising self-regulation system, the ASAZIM. It is established and operated by companies in the advertising industry through the Code of Standards by which they agree to be bound.

The Code of Standards prohibits certain conducts which may be considered as unfair, indecent, false or misleading. It also provides guidelines on what content is acceptable in advertisements.

Specifically, the Code of Standards requires that advertisers make every effort to ensure that no advertisement contains anything which is likely to offend the susceptibilities of any section of the community. The Code of Standards provides that, in the event that any group makes a justifiable complaint, the ASAZIM Committee shall be convened and will make a ruling.

The Code of Standards also prohibits any advertising that contains anything which is considered malicious or scandalous. Furthermore, the Code of Standards states that no advertisement shall make undue appeal to fear on the part of the public if the intended objective is to make a profit and or sell a product/service.

The Code of Standards includes rules dealing with the use of the word 'new'. The word 'new' may be used in all media, packaging, posters, billboards for an entirely new product or service marketed or sold during a given 12-month period. The word 'new' may also be used to advertise any change or improvement to a product.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The Code of Standards is Zimbabwe’s self-regulatory advertising code.

The key principles set out in the Code of Standards are:

- (a) advertising must be ‘legal, decent, honest and truthful’ and must not contain ‘material of doubtful propriety or which is obscene, indecent or profane, or contrary in any way to accepted standards of good taste and morality’;
- (b) a prohibition of certain conduct in advertising, including, but not limited to:
 - (i) conduct which is false, misleading and/or constitutes misrepresentation (regardless whether such conduct will likely lead to legal action for infringement),
 - (ii) malicious or scandalous content as well as disparaging reference to competitive products or services, or
 - (iii) any content which may be considered as dangerous to children; and
- (c) ASAZIM’s power to receive, investigate and make rulings concerning complaints by members and community group.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

There is a system of enforcement whereby complaints are submitted, investigated, parties make representations and a decision is made.

A decision may require specific performance and/or imposition of a penalty. In the event of the offender failing to pay, the ADMA members will be advised to stop accepting any advertising copy from that advertiser. Reports of any criminal conduct may be made available to the relevant authorities.

There are no specific time lines or deadlines for presenting a claim, but, generally, claims must be submitted within a reasonable time after knowledge of publication of the offending advertisement.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The self-regulation system appears to be effective, as ‘offensive’ advertisements are rare. There are cases of complaints, but they are rare and not reported.

2.5 Are the self-regulatory system’s decisions reported?

Since its re-launch, ASAZIM has already considered a few disputes, the names of which appear in the Cases and Rulings section of their website (<http://www.asazim.co.zw/cases-rulings/>). One such case is of *PPC vs Lafarge* lodged 25/09/17—this was a complaint against unethical and factually incorrect adverts by Lafarge. The committee found Lafarge to have contravened Section 4 of the ASAZIM Code of Standards, which prohibits disparaging references and were fined \$1,000.

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Zimbabwe is a developing country and, although it has taken positive steps in some areas of personal freedoms, it takes a conservative and less tolerant view on issues related to sex and politics. Accordingly, advertisements in these areas may not be acceptable and thus prohibited by government and/or the Code of Standards.

For example, the Code of Standards specifically prohibits advertisements containing any reference or claim that the product, medicine or treatment advertised will promote sexual virility, treat sexual

weakness, or remedy sexual excess or indulgence. Accordingly, drugs such as Viagra may not be advertised.

Certain advertisements, including advertisements that suggest Government incompetence or encourage voting for an opposition party, may be deemed to be politically sensitive. For example, an international non-governmental organization for family planning which distributed free condoms was found to be in breach of these rules. The condom packages featured an advertisement urging people to vote for the opposition party. The Government objected on the grounds that this was a foreign entity interfering in national politics. The organization was threatened with revocation of its operating permit and deportation of its foreign employees. However, the organization made representations to the Government and, following further consideration, the Government simply issued a warning.

2.7 Are there any other self-regulatory systems that govern advertising practices in Zimbabwe?

Not applicable.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Zimbabwe (eg, consumer protection laws; IP laws; unfair competition laws)?

There are no specific laws governing advertising claims per se. A person making a claim would have to rely on the Code of Standards and make his/her complaint to the ASAZIM or make a claim based upon various other statutes which indirectly regulate advertising.

The principal statutes which indirectly regulate advertising include:

- (a) **Intellectual property:** Intellectual property laws, such as trade marks and copyright, prohibit advertising unless the registered owner authorizes use. For example, under the Copyright Act, a person is prohibited from copying without permission of the owner. The Copyright Act, section 52:2 provides that: 'In any proceedings for an infringement of copyright there shall be available to the plaintiff all such remedies by way of damages, interdict, attachment, the rendering of account, the delivery of infringing copies or articles used or intended to be used for making infringing copies or otherwise, as are available in respect of the infringement of any other proprietary right.' Therefore, any advertisement which produces unauthorized copies is unlawful. Likewise, in the case of trade marks, failure to get permission from the proprietor before advertisement may result in products being seized, as well as enforcement remedies similar to those mentioned for copyright, as it may be considered an infringement.
- (b) **Consumer protection:** Consumer protection laws include provisions dealing with purchases made by instalments. Where an advertisement contains a price and reference to specific terms of payment relating to any form of purchasing by instalments, advertisers must take care to ensure that the amounts quoted clearly indicate the cash price and the extra costs required for hire purchase.
- (c) **Unfair competition:** Unfair competition laws specifically prohibit unfair business or trade practices, ie, advertising false or misleading representations or false bargains. For example, according to the Competition Act section 42:3: 'Any person who enters into, engages in or otherwise gives effect to an unfair trade practice (which includes misleading advertisements, false bargains and distribution of commodities or services above advertised price) will be guilty of an offence under that statute.'

3.2 Is substantiation required for advertising claims?

There are no specific rules governing the substantiation of claims made in advertisements. However, the Code of Standards requires that advertisers stand ready to produce such substantiation if and when called upon to do so.

The Code of Standards states that advertisers failing to substantiate claims can be subject to a fine of \$1,000.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Generally, the ASAZIM is prompted to act by a complaint from either its members or community groups. However, if an advertisement is obviously contrary to its Code of Standards, then the ASAZIM may act on its own initiative and will not need substantiation in such cases.

3.4 What are the rules governing the use of disclosures in advertising?

The Code of Standards states: 'No advertisement should contain any reference which is calculated to lead the public to assume that the article, product, medicine or treatment advertised has some special property or quality which is in fact unknown or recognized.'

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

The Code of Standards states: 'Testimonials must be voluntary, genuine and unpremeditated and must not be used in a manner likely to mislead. Advertisers and their agencies must have evidence in support of any testimonial and of any claims therein. Such evidence must include authority to publish from the source of the testimonial.'

3.6 What are the rules governing the use of product demonstrations in advertising?

There are no specific rules for demonstrations. Accordingly, the 'General Principle' of the ASAZIM Code of Standards applies, ie, 'it will be legal, decent, honest and truthful' and it must not contain 'material of doubtful propriety or which is obscene, indecent or profane, or contrary in any way to accepted standards of good taste and morality.'

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

Comparative advertising in connection with the same advertiser's goods or services is allowed, but comparative advertising with another competitor is prohibited.

In practice, comparative advertising is rarely if ever used in Zimbabwe because of its intellectual property laws, defamation laws and constraints in terms of ethical standards.

3.8 Are there any special copyright or trade mark rules that may impact comparative advertising (eg, whether the use of a competitor's trade mark or products may be used)?

The copyright law prohibits unauthorized use of another's copyright: 'Copyright is infringed by any person who is not the owner of the copyright and who, without the owner's authority, does or causes any other person to do an act in Zimbabwe which the owner has the exclusive right to do or to authorize.' (Section 51 of Copyright and Neighboring Rights Act, Cap 26:05).

Likewise, trade mark law prohibits unauthorized use of an owner's trade mark: '...a registered trade mark shall be infringed by any unauthorized use in the course of trade, whether as a trade mark or otherwise...' (Section 8:1 of the Trademarks Act, Cap 26:04). However, this provision appears to

prohibit conduct whereby the mark is used as though it were owned by, or the user was authorized by, the registered owner to use it to make sales, and does not deal with use of another's trade mark for comparative purposes for similar goods or services. Although not specifically stated, the Code of Standards appears to permit such comparative advertising so long as it is truthful and the advertiser can substantiate the claims.

3.9 Are there any special rules that govern claims relating to geographic origin (for example, that the product is 'made in France')?

The laws related to intellectual property, unfair trade practices and competition govern claims to geographic origin. According to the Geographic Indication Act of Zimbabwe (Part III, Section 9), it is prohibited to use misleading geographic indicators; and the Competition Act states that misleading advertising, which includes 'containing a statement, warranty or guarantee that any service is or will be of a particular kind, standard, quality or quantity, or that it is supplied by any particular person or by a person of a particular trade, qualification or skill, which statement, warranty or guarantee the publisher knows or ought to know is untrue' is an offence.

3.10 Are there any special rules governing product packaging?

Yes, according to the National Biotechnology Authority (Genetically Modified Food and Feed) (Labelling) Regulations (Statutory Instrument 159 of 2018), operators who produce or sell food or feed containing at least 1% genetically modified product shall ensure that the label has appropriate wording correctly displayed. Operators of products with less than 1% shall not be compulsorily required to label their products, but if they do so, they must ensure that the label has appropriate words specified. Operators must ensure that labels are printed in clear, indelible, visible legible letters and indicators about the genetic status appear in a footnote not less than font size six, close to the list of ingredients.

4 PRICE ADVERTISING

4.1 What are Zimbabwe's rules regarding price advertising?

The Code of Standards sets out rules related to comparative pricing and savings claims. The basic thrust of the rules is that there must not be any false or misleading representations either express or implied. If merchandise is stated in an advertisement as being 'wholesale price' or 'manufacturer's cost' or 'less than cost', the advertiser must be able to substantiate the statement as true. There are a number of rules on prices advertising, including on the inclusion of comparative prices. For example, the previous and the old prices must be reflected in the advertisement and the old prices must have been offered for at least 28 days prior to the advertisement.

Also, the Competition Act section 42:3 discourages false advertising of prices and bargains, stating that: 'Any person who enters into, engages in or otherwise gives effect to an unfair trade practice (which includes misleading advertisements, false bargains and distribution of commodities or services above advertised price) will be guilty of an offence under that statute'.

4.2 What are Zimbabwe's rules regarding advertising 'free' products?

The Code of Standards allows advertising of 'free' products, provided the buyer 'not be required to pay or perform any other actions which would require payment in some form' and the goods or samples are supplied at 'no cost or no extra cost (other than actual postage or carriage) to the recipient.' A trial may be described as 'free' although the customer is expected to pay the cost of returning the goods, provided that the advertisement makes clear the customer's obligation to do so. Advertisements

offering free goods shall indicate that such goods are received free with every purchase or with a specified number of purchases or within a specified time.

As regards printed materials, there are special rules, such that the materials, whether free or not must 'in all respects conform to the standards of propriety and good taste governing all advertising'.

4.3 What are Zimbabwe's rules regarding sales and special offers?

Sales and special offers may be permitted subject to the rules of the Code of Standards. The Code of Standards requires that such offers are true and there are no false or misleading representations.

Special sales are usually conducted by companies who would like to sell excess stock remaining after a holiday or stock approaching a 'sell by' date. The Code of Standards states that merchandise shall not be offered for sale at 'less than cost' unless such claim or representation is true and can be substantiated. It further states that merchandise shall not be offered for sale at a price purported to be reduced from what is a fictitious 'list' price, or when the purported reduction is itself fictitious.

4.4 What are Zimbabwe's rules regarding rebates?

A company or supplier of goods and services may offer or give a rebate so long as it does not involve 'exclusive dealings'; ie, offering the rebate on condition that the buyer will limit/restrict buying from or resupplying to a competitor, which is prohibited by unfair competition law. Accordingly, an advertisement offering such rebate must not have any such conditions and must otherwise comply with the competition law and the Code of Standards.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

There are a number of advertising restrictions for medicines and treatments, medical products and services. Certain terminology may be restricted or prohibited in advertisements, such as, but not limited to 'college', 'clinic', 'institute', 'Doctor' or 'Dr', 'dental' or 'medical opinions'.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

There are strict gun control laws and, therefore, advertising guns for sale is prohibited. Advertising of certain medicines is prohibited. For example, aphrodisiacs, impotence remedies, any product or medical treatment which implies that it could be effective in inducing miscarriage, slimming or weight control. Medicines likely to have harmful effects and any medicine or treatment that is held out to cure certain diseases cannot be advertised.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

Not applicable.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

The use of indecent and obscene content and materials in advertisements is regulated by the Code of Standards, which provides that 'all advertising accepted for publication, transmission or broadcast will

be governed by the general principle that it will be legal, decent...'. However, the Code of Standards does not provide any guidance in relation to what content is considered 'decent'.

The Censorship and Entertainment Act deals with indecency and obscenity in advertisements that promote films and public entertainment. The Act sets out rules on the age rating of such advertisements. Publishers of such advertisements found to be in breach of these rules are at risk of a fine and/or a maximum of three months' imprisonment.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

The Code of Standards requires disclosure of the full name and full address of advertisers when offering products and/or services in exchange for remittance through the post, or when advertisements are published from friendship clubs, marriage bureau, health institutes or for massage treatments.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

There are no special rules.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

There are no special disclosure or other obligations.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

No. Social media is still a relatively new phenomenon in Zimbabwe. Although there are no specific laws relating to social media, the same general laws which would apply to off-line activities would apply to social media online where it affects transactions and/or persons within the borders of Zimbabwe. Such laws include, but are not limited to: unfair competition (related to unfair business practice, which includes false or misleading advertising); intellectual property; contract; and defamation.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

To date, there have been no cases related to this in Zimbabwe.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

Not applicable.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual's name, picture, likeness, voice and identity in advertising?

There are no special rules relating to protecting the data acquired from an individual, but advertisers have a common law duty not to publish personal information, including pictures, likenesses, voice and identity except as authorized by the individual.

9.2 Are there situations when permission is not required?

If a person provides the information when participating in a promotion or contest, such information may be used for the intended purpose as initially authorized by the individual, without further authorization.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

The taking of photos of Government-owned buildings, as well as information within the buildings, will need prior approval.

The restriction is imposed by the Government for security reasons. An advertiser would need to contact the Ministry of Information, Communication and Technology and Ministry of Home Affairs before taking and using such images in an advertisement.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

It is acceptable so long as the use is passive, ie, the product is not worn in a negative context, suggestive of any negative connotation, and no announcement is made concerning its use without the prior consent of the trade mark or copyright owner.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Zimbabwe which affect advertising (eg, Swedish gender equality law)?

There is cultural sensitivity to advertisements related to sex and medications or products related to the same, as well as homosexuality, race discrimination, intolerance and political criticism.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

The Constitution of Zimbabwe prohibits discrimination on the grounds of race, tribe, place of origin, political opinions, color, creed, sex, gender, marital status or physical disability. The Constitution states 'no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of any functions'.

Accordingly, the ASAZIM espouses the same general principles when it comes to advertising. For example, advertisers cannot advertise for a job that states 'wanted black male', nor could an advertisement state 'wanted Ndebele person'. However, it would be permitted to advertise 'wanted person fluent in Ndebele'.

Cultural names should also be considered when targeting specific groups. A large group from a certain church were once offered buses by a local bus company. The buses had the logo of a beer company, so they refused to board the buses and opted to walk. Whether material is appropriate or not depends on the particular group the advertiser is targeting. Content that is obscene, or sex scenes, or inappropriate language is not allowed.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Zimbabwe?

Advertisers need to understand social, economic and political conditions, as well as cultural nuances, as many restrictions will not be stated in the Code of Standards or laws but may nevertheless need to be followed.

As a developing country, there are sensitivities with respect to political criticism or affiliation, which would not be an issue in a developed country. For example, an advertising firm refused to provide a bulletin board advertisement using the words 'BANANA REPUBLIC' during election year without additional information and representations showing clearly that the words were related to the well-known trade mark for clothing stores, due to concerns that the words would be mistakenly thought to be criticism of the government.

Positive relationships with other members of the advertising industry as well as with government, are important to succeed in Zimbabwe.

 GALA MEMBERS 

ARGENTINA

Paula Fernandez Pfizenmaier
Randle Legal
Carlos Pellegrini 1135. 2nd
Buenos Aires B1009ABW
T: +54.11. 5252.0700
E: pfernandez@randlelegal.com
W: www.randlelegal.com

AUSTRALIA

Peter Le Guay
Thomson Geer
Level 25, 1 O'Connell Street,
Sydney NSW 2000
T: +61.2.8248.5800
E: pleguay@tglaw.com.au
W: www.tglaw.com.au

AUSTRIA

Stefan Kofler & Georg Huber
Greiter, Pegger, Kofler & Partners
Maria-Theresia Strasse 24,
A-6020 Innsbruck
T: +43.512.571.811
E: stefan.kofler@lawfirm.at
E: georg.huber@lawfirm.at
W: www.greiter.lawfirm.at

BELGIUM

Jan Ravelingien
*Marx, Van Ranst, Vermeersch
& Partners*
Avenue de Tervueren 270,
1150 Brussels
T: +32.2.285.01.00
E: jan.ravelingien@mvp.be
W: www.mvp.be

BOLIVIA

Marcos Mercado
Guevara & Gutierrez S.C.
Torre Ketal, Piso 4, Oficina 2 -
Calacoto La Paz P.O. Box 9332
T: +591.2.2770808
E: mmercado@gg-lex.com
W: www.gg-lex.com

BRAZIL

Valdir Rocha
Veirano Advogados
Av. Presidente Wilson, 231, 23. andar
20030-021 - Rio de Janeiro
T: +55.21.38244747
E: valdir.rocha@veirano.com.br
W: www.veirano.com.br

BULGARIA

Kalina Tchakarova & Violetta Kunze
*Djingov, Gouginski, Kyutchukov
& Velichkov*
10 Tsar Osvoboditel Blvd.
Sofia 1000, Bulgaria
T: +00359.2.932.1105
E: kalina.tchakarova@dgkv.com
E: violetta.kunze@dgkv.com
E: dgkv@dgkv.com
W: www.dgkv.com

CANADA

Catherine Bate & Kelly Harris
Miller Thomson LLP
Scotia Plaza, 40 King Street West,
Suite 5800, P.O. Box 1011,
Toronto, Ontario, M5H 3S1
T: 416.595.8582
E: cbate@millerthomson.com
E: kharris@millerthomson.com
W: www.millerthomson.com

CARIBBEAN

Karyl D. Bertrand (Dutch)
Bertrand Legal
Castorweg 22-24
Willemstad, Curaçao
T: +5999 461 8183
E: karyl@bertrand-legal.com

Dianne Daley (English)
Foga Daley
7 Stanton Terrace, Kingston 6,
St. Andrew, Jamaica
T: +876 927 4371
E: daley@fogadaley.com
W: www.fogadaley.com

CHILE

Ariela Agosin & Oscar Molina
Albagli Zaliasnik
Av. El Golf 150, Piso 4, Las Condes
Santiago
T: +56 2 2 445 6000
E: aagosin@az.cl
E: omolina@az.cl
W: www.az.cl

CHINA

Justina Zhang
TransAsia Lawyers
1 Jianguomenwai Avenue,
Beijing 100004
T: +86 10 6505 8188
E: whzhang@TransAsiaLawyers.com
W: www.TransAsiaLawyers.com

COLOMBIA

Juan Carlos Uribe & Sandra Ávila
Triana, Uribe & Michelsen
Calle 93B No. 12-48 P. 4, Bogotá,
D.C. 110221
T: +57 1 6019660
E: jcu@tumnet.com
E: sag@tumnet.com
W: www.tumnet.com

COSTA RICA

Uri Weinstok M.
BLP
BLP Building, 4th floor. Via Lindora
Business Center, San Jose
T: +506.2205.3939
E: uweinstok@blplegal.com
W: www.blplegal.com

CROATIA

Mladen Vukmir
Vukmir & Associates
Gramaca 2L 10 000 Zagreb
T: +385.1.376.0511
E: mladen.vukmir@vukmir.net
W: www.vukmir.net

CYPRUS

George Z. Georgiou
George Z. Georgiou & Associates LLC
1 Iras Street, Nicosia 1060
T: +35722763340
E: admin@gzg.com.cy
W: www.gzg.com.cy

CZECH REPUBLIC

Libor Štajer, Pavel Musil & Petr Kuta
KMVS, advokátní kancelár, s.r.o.
Hellichova 1, 118 00 Praha 1 -
Malá Strana
T: +296.210.562(3)
E: libor.stajer@kmvs.cz
E: petr.kuta@kmvs.cz
E: pavel.musil@kmvs.cz
W: www.kmvs.cz

DENMARK

Johan Løje
Løje, Arnesen & Meedom
Øster Allé 42, 6. floor
P.O.Box 812 DK-2100
Copenhagen
T: +45 33 43 21 15
E: jl@iplaw.dk
W: www.iplaw.dk

DOMINICAN REPUBLIC

Jaime R. Angeles
AngelesPons
Ave. 27 de Febrero 210
Suite 203 El Vergel
T: +809..373.9418
E: jangeles@angelespons.com
W: www.angelespons.com

ECUADOR

Carlos Alberto Arroyo del Rio
Falconi Puig Abogados
Av. Amazonas N21-147 y Roca
Edificio Río Amazonas,
Oficina 900, Quito
T: +593.2. 256.1808
E: carroyo@falconipuig.com
W: www.falconipuig.com

EGYPT

Mohamed Eldib & Amr Eldib
Eldib & Co
Citadel Plaza Building, Intersection of
Mokattam Road & Autostrade, Facing
the Citadel Mokattam, Cairo 11411
T: +20 2 2510 0000
E: mohamed.eldib@eldib.com
E: amr.eldib@eldib.com
W: www.eldib.com

EL SAVADOR

José Roberto Romero
Romero Pineda & Asociados
Edificio AVANTE, Suite 5-01, Blvd.
Luis Poma, Santa Elena, Antiguo
Cuscatlan, La Libertad
T: +503.2505.5555
E: jose@romeropineda.com
W: www.romeropineda.com

FINLAND

Mikael Segercrantz &
Johanna Flythström
Roschier, Attorneys Ltd.
Kasarmikatu 21A, Helsinki 00130
T: +358.20.506.6000
E: mikael.segercrantz@roschier.com
E: johanna.flythstrom@roschier.com
W: www.roschier.com

FRANCE

Michel Béjot & Caroline Bouvier
Bernard Hertz Béjot
29, rue Fortuny, Paris 75017
T: +33.1.43.18.8080
E: mbejot@bhbfrance.com
E: cbouvier@bhbfrance.com
W: www.bhbfrance.com

GERMANY

Søren Pietzcker (Hamburg Office),
Dominik Eickemeier (Cologne Office)
& Thorsten Wieland (Frankfurt Office)
Heuking Kühn Lüer Wojtek
Neuer Wall 63, Hamburg
T: +49.40.355.280.53
E: s.pietzcker@heuking.de
E: d.eickemeier@heuking.de
E: t.wieland@heuking.de
W: www.heuking.de

GREECE

Kriton Metaxopoulos & Aris I. Syssilas
A. & K. Metaxopoulos & Partners
Law Firm
54 Vas. Sofias Av. , 11528 Athens
T: +30.210.7257614
E: k.metaxopoulos@metaxopouloslaw.gr
E: asyssilas@metaxopouloslaw.gr
W: www.metaxopouloslaw.gr

GUATEMALA

Marco Antonio Palacios &
Hilda Monterroso
Palacios & Asociados / Sercomi
Avenida Reforma 6-64 zona 9
Edificio Plaza Corporativa,
Torre I, Nivel 9,
01009, Guatemala City
T: +502.2385.3416 / 19
E: mapalacios@sercomi.com.gt
E: hmonterroso@sercomi.com.gt
W: www.sercomi.com.gt

HOLLAND

Ebba Hoogenraad & Daniël Haije
Hoogenraad & Haak
Jozef Israelskade 48 G,
Amsterdam 1072 SB
T: +31 20 305 3066
E: eh@hoogenhaak.nl
E: dh@hoogenhaak.nl
W: www.hoogenhaak.nl

HONDURAS

José M. Álvarez & Fernando Godoy
BLP
Torre Nova, 5th Floor, Suite 95-A,
Paseo Los Próceres, Tegucigalpa
11101
T: 504 2269 1217
E: jalvarez@blplegal.com
E: fgodoy@blplegal.com
W: www.blplegal.com

HONG KONG

Angus Forsyth
Angus Forsyth & Co.
16A, Hillier Commercial Building,
65-67 Bonham Strand
Sheung Wan
T: +852.2638.9099
E: angus@angfor.hk
W: www.angfor.hk

HUNGARY

András Szecskay, Anikó Keller
& János Vajda
Szecskay Attorneys at Law
H-1055 Budapest, Kossuth Lajos
tér 16-17
T: +36 1 472 3000
E: andras.szecskay@szecskay.com
E: aniko.keller@szecskay.com
E: janos.vajda@szecskay.com
W: www.szecskay.com

INDIA

Sharad Vadehra
Kan and Krishme
KNK House, A-11 Shubham Enclave
Paschim Vihar, New Delhi-110063
T: +91.11.4377 66 66, 4377 66 75
E: knk@kankrishme.com
W: www.kankrishme.com

IRELAND

Duncan Grehan & Conor Griffin
Duncan Grehan & Partners Solicitors
Gainsboro House, 24 Suffolk Street,
Dublin 2
T: +353.1677.9078
E: dgrehan@duncangrehan.com
E: cgriffin@duncangrehan.com
W: www.duncangrehan.com

ISRAEL

David Wolberg
Kuperschmit, Goldstein & Co.
Kefar Netter Industrial Park,
P.O. Box 3726, Kefar Netter 4059300
T: +972.9.835.6122
E: dwolberg@kgcolaw.com
W: www.kgcolaw.com

ITALY

Ernesto Apa, Lydia Mendola
& Donata Cordone
Portolano Cavallo
Piazza Borromeo 12
Milan 20123
T: +39.02.722.341
E: eapa@portolano.it
E: lmendola@portolano.it
E: dcordone@portolano.it
W: www.portolano.it

JAPAN

Chie Kasahara
Atsumi & Sakai
Fukoku Seimei Bldg., Reception: 12F
2-2-2 Uchisaiwaicho, Chiyoda-ku,
Tokyo 100-0011
T: +81 3-5501-2438 (Direct)
E: chie.kasahara@aplav.jp
W: www.aplav.jp/en/

KENYA

John Syekei
Coulson Harney
5th Floor, ICEA Lion Centre,
West Wing, Riverside Park,
Chiromo Road, Nairobi
PO Box 10643-00100, Nairobi
T: +254 20 289 9000
E: j.syekei@coulsonharney.com
W: www.coulsonharney.com

LUXEMBOURG

Michel Molitor & Virginie Liebermann
MOLITOR, Avocats à la Cour
8, rue Sainte - Zithe, B.P.690, L-2016
T: +352.297.298/1
E: michel.molitor@molitorlegal.lu
E: virginie.liebermann@molitorlegal.lu
W: www.molitorlegal.lu

MALAYSIA

Patrick Mirandah
mirandah asia
Suite 3B-19-3, Level 19 Block 3B,
Plaza Sentral, Jalan Stesen Sentral 5
50470 Kuala Lumpur
T: +603.2278 86 86
E: malaysia@mirandah.com
W: www.mirandah.com

MALTA

Georg Sapiano
Aequitas Legal
Valletta Buildings, South Street
Valletta, 1103
T: +356 21 234085
E: gsapiano@aequitas.com.mt
W: www.aequitas.com.mt

MEXICO

Roberto Arochi & David Quezada
Arochi & Lindner
Insurgentes Sur 1605, 20th Floor
San José Insurgentes, Mexico City,
03900
T: +52.55.50.95.2050
E: rarochi@arochilindner.com
E: dquezada@arochilindner.com
W: www.arochilindner.com

NEW ZEALAND

Erich Bachmann
Hesketh Henry
Level 14, PwC Tower, 188 Quay
Street, Auckland 1010
T: +64.9.375.8709
E: erich.bachmann@heskethhenry.co.nz
W: www.heskethhenry.co.nz

NICARAGUA

Julián J. Bendaña-Aragón
*Guy José Bendaña-Guerrero &
Asociados*
PO Box 3140, Managua 00005
T: +505.2266.5662
E: julian.bendana@guybendana.com.ni
W: www.guybendana.com.ni

NIGERIA

Lara Kayode
O. Kayode & Co.
2nd Floor, 21 Olanrewaju Street,
Oregon
T: +234 1 291 2412
E: lara@okayode.com
W: www.okayode.com

NORWAY

Bente Holmvang
Bull & Co Advokatfirma AS
Postboks 2583 Solli, N-0203 Oslo
T: +47.23.01.01.01
E: bho@bullco.no
W: www.bullco.no

PANAMA

Ramón R Benedetti A.
Estudio Benedetti
Edificio Comosa, Piso 19, Avenida Samuel
Lewis, Panama 5
T: + 507 321 5700
E: ramon@estudiobenedetti.com
W: www.benedetti.com.pa

PARAGUAY

Hugo Mersan & Lorena Mersan
MERSAN
Fulgencio R. Moreno No. 509 Edificio "De
La Colina". Casilla de Correos
Nº 693, Asuncion
T: + 595 21 447 739
E: hugo@mersanlaw.com
E: lorenamersan@mersanlaw.com
W: www.mersanlaw.com

PERU

Jorge Allende & Magali García
Allende & Garcia Abogados
Av. del Pinar 180 Of. 504,
Chacarilla, Lima 33
T: + 51 1 372 0395
E: jorge@allendegarcia.com.pe
E: magali@allendegarcia.com.pe
W: www.allendegarcia.com.pe

POLAND

Ewa Skrzydło-Tefelska
Softysinski Kawecki & Szlezak
Legal Advisors
ul. Jasna 26, 00-054 Warsaw
T: +48.22.608.70.47
E: ewa.tefelska@skslegal.pl
W: www.skslegal.pl

PORTUGAL

César Bessa Monteiro &
Ricardo Henriques
Abreu Advogados
Av. Infante D. Henrique, 26
Lisbon 1149-096
T: +351. 217 231 800
E: bessa.monteiro@abreuadvogados.com
E: ricardo.henriques@abreuadvogados.com
W: www.abreuadvogados.com

PUERTO RICO

Eugenio Torres
Ferraiuoli LLC
221 Ponce de León Avenue, 5th Floor
Hato Rey, Puerto Rico 00917
T: 787.766.7000
E: etorres@ferraiuoli.com
W: www.ferraiuoli.com

ROMANIA

Silviu Stratulat & Ana Kusak
Stratulat Albulescu Attorneys at Law
221 27 Ion Brezoiianu St.,
ground 5th & 6th Floor, Bog'Art
Center, 1st District Bucharest
T: 40.21.316.87.49
E: sstratulat@saa.ro
E: akusak@saa.ro
W: www.saa.ro

RUSSIA

Irina Anyukhina
ALRUD Law Firm
6 floor, 17 Skakovaya Street,
125040, Moscow
T: +7.495.234.96.92
E: ianyukhina@alrud.com
W: www.alrud.com

SERBIA

Slobodan Kremenjak, Nebojša
Samardžić & Miloš Stojković
Živković Samardžić
Makedonska 30/II
Belgrade 11000
T: + 381 11 2636636
E: slobodan.kremenjak@zslaw.rs
E: nebojsa.samardzic@zslaw.rs
E: milos.stojkovic@zslaw.rs
W: www.zslaw.rs

SINGAPORE

Denise Mirandah
Patrick Mirandah Co.
(Singapore) Pte Ltd.
1 Coleman Street, #07 - 08
The Adelphi, 179803
T: +65.63369696
E: denise@mirandah.com
W: www.mirandah.com

SLOVAKIA

Dušan Nitschneider & Peter Marciš
NITSCHNEIDER & PARTNERS
Cintorínska 3/A,
811 08 Bratislava
T: +421 2 2092 1213
E: nitschneider@nitschneider.com
E: marcis@nitschneider.com
W: www.nitschneider.com

SOUTH AFRICA

Kelly Thompson & Jenny Pienaar
Adams & Adams
P O Box 1014, Pretoria, 0001
T: +27 12 432 6000
E: kelly.thompson@adamsadams.com
E: jenny.pienaar@adamsadams.com
W: www.adamsadams.com

SPAIN

Ignacio Temiño Ceniceros, Rubén
Canales Quinto & Carolina
Montero Peralta
Abril Abogados
Calle Amador de los Rios,
1 Madrid 28010
T: +34 91 7020331
E: ignaciot@abrilabogados.com
E: rcanales@abrilabogados.com
E: cmontero@abrilabogados.com
W: www.abrilabogados.com

SWEDEN

Erik Ullberg
Wistrand
Box 11920, SE-404 39, Göteborg,
T: + 46 31.771.2100
E: erik.ullberg@wistrand.se
W: www.wistrand.se

SWITZERLAND

Dr. Rolf Auf der Maur &
Delia Fehr-Bosshard
VISCHER AG
Schuetzengasse 1, P.O. Box 5090,
CH-8021 Zurich
T: +41 58 211 34 00
E: ram@vischer.com
E: dbosshard@vischer.com
W: www.vischer.com

TRINIDAD AND TOBAGO

Olive Ramchand
Fitzwilliam Stone Furness -
Smith & Morgan
48-50 Sackville Street
Port of Spain
T: +868 623 1618
E: oramchand@fitzwilliamstone.com
W: www.fitzwilliamstone.com

TURKEY

Ugur Aktekin & Hande Hançer
Gün + Partners Avukatlık Bürosu
Kore Sehitleri Cad. No: 17,
Zincirlikuyu 34394, Istanbul
T: +90.212.3540000
E: ugur.aktekin@gun.av.tr
E: hande.hancer@gun.av.tr
W: www.gun.av.tr

UGANDA

Paul Asiimwe
Sipi Law Associates
Jocasa House, Unit 5, 3rd Floor
Plot 14 Nakasero Rd,
#4180, Kampala
T: +256.414-235391/312.272921
E: paul@sipilawuganda.com
W: www.sipilawuganda.com

UKRAINE

Oleksandr Padalka
Sayenko Kharenko
10 Muzeyny Provulok,
Kyiv 01001
T: +380 44 499 6000
E: opadalka@sk.ua
W: www.sk.ua

UNITED KINGDOM

Brinsley Dresden
Lewis Silkin LLP
5 Chancery Lane, Clifford's Inn,
London EC4A 1BL
T: +44 (0) 20.7074.8069
E: brinsley.dresden@lewissilkin.com
W: www.lewissilkin.com

UNITED ARAB EMIRATES

Fiona Robertson, Nick O'Connell
& Sana Saleem
Al Tamimi & Company
6th Floor, Building 4 East Dubai
International Financial Centre Sheikh
Zayed Road PO Box 9275 Dubai
T: + 971 (0)4 364 1641
E: f.robertson@tamimi.com
E: n.oconnell@tamimi.com
E: s.saleem@tamimi.com
W: www.gun.av.tr

UNITED STATES OF AMERICA

Ronald R. Urbach, Joseph J. Lewczak
& Allison Fitzpatrick
Davis & Gilbert LLP
1740 Broadway,
New York, NY 10019
T: +1.212.468.4800
E: rurbach@dglaw.com
E: jlewczak@dglaw.com
E: afitzpatrick@dglaw.com
W: www.dglaw.com

Rick Kurnit & Jeffrey A. Greenbaum
Frankfurt Kurnit Klein & Selz P.C.
488 Madison Avenue
New York, New York 10022
T: +1.212.980.0120
E: rkurnit@fkks.com
E: jgreenbaum@fkks.com
W: www.fkks.com

Melissa L. Steinman & Angel Garganta
Venable LLP
600 Massachusetts Avenue NW
Washington D.C. 20001
T: + 1 202 344 4000
E: mlsteinman@venable.com
E: agarganta@venable.com
W: www.venable.com

URUGUAY

Agustin Mayer
Ferrere Abogados
Juncal 1392, Ferrere Tower,
11.000 Montevideo
T: +598 2 900 1000
E: amayer@ferrere.com
W: www.ferrere.com

VENEZUELA

Ricardo Alberto Antequera
& María Alejandra Castillo
Estudio Antequera Parilli & Rodriguez
Edificio Centro COINASA, PH-B,
Avenida San Felipe, La Castellana,
Caracas 1060
T: +58.212.263.9944
E: ricardoalberto@antequera.com.ve
E: mcastillo@antequera.com.ve
W: www.antequera.com.ve

ZIMBABWE

Brenda M. Wood Kahari
B.W. Kahari
Baronage House, 24 Lanark Road
Belgravia/Avondale, Harare
T: +263.4.250994/5 or 253941
E: brendak@bwkahari.com
W: www.lawyersforafrica.com



488 Madison Avenue, 10th Floor, New York, NY 10022

Tel: 212.705.4895 | Fax: 347.438.2185 | Email: sbess@galalaw.com

www.galalaw.com

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