

National Report: Switzerland

“Claims about claims and disclaimers - welcome to the glamorous world of advertising!”

Distribution Commission

Technology, Media and IP Commission

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1. Content of Advertising Law in Switzerland

1.1 Legal Framework

Can you describe in 100 words or less the legal framework regulating the advertising practice?

The right to advertise is guaranteed by several fundamental rights stipulated in the Swiss Federal Constitution.¹ However, this right is restricted in order to protect public policy interests² and to prevent misleading advertising.

There is no single piece of Swiss legislation comprehensively regulating advertising. General advertising restrictions, particularly regarding misleading advertising, are enshrined in the Federal Unfair Competition Act ("**UCA**"). In addition, advertising is regulated in various legislations for specific products and services and for certain means of advertising. In addition, various soft laws exist in the field of advertising, most notably the principles of the Swiss Commission for Fairness in Commercial Communication.³

1.2 Regulation regarding Health, Comparative and Wrongful Claims

What is the general content of the regulations regarding health claims in advertisement?

Health claims⁴ for food advertising have to comply with the Federal Ordinance on Foodstuffs and Utility Articles ("**Foodstuffs Ordinance**") and with the Federal Ordinance on Labelling and Advertising of Foodstuffs ("**Labelling Ordinance**"):

Pursuant to the Foodstuffs Ordinance, advertising and labeling of foodstuffs may not create the impression that food has any therapeutic effect.⁵ However, claims relating to health in a positive sense (e.g. "helps you to stay fit"), or nutritional information are generally permitted.

Annex 8 of the Labelling Ordinance contains a list of permissible health claims. Health claims which are not listed in this annex have to be approved by the Federal

¹ These constitutional rights include the right to economic freedom (Art. 27), to freedom of expression and freedom of information and media (Art. 16 and 17), to personal freedom (Art. 10), to freedom of religion and conscience (Art. 15), to freedom of assembly and association (Art. 22 and 23) and the guarantee of ownership (Art. 26).

² Such public policy interests include the protection of health, minors, public order and protection from discrimination.

³ See www.faire-werbung.ch. Other examples of soft law rules are the Code of Conduct of the Swiss Association of Spirits Producers or the Agreement between Swiss Cigarette and the Swiss Commission for Fairness in Commercial Communication regarding Self-Restraint of the Tobacco Industry in Advertising.

⁴ According to the Proposal for a Regulation of the European Parliament and of the Council on Nutrition and Health Claims made on Foods (para. 25) health claims "are a number of claims [...] which would describe a relationship between a category of food, or a food or one of its constituents and health".

⁵ Art. 10(2)(d) Foodstuffs Ordinance.

Food Safety and Veterinary Office.⁶ All health claims have to fulfill certain criteria, including that they must be easily comprehensible, have to be based on scientific proof and may not be wrong, ambiguous or misleading.⁷ The labels and packaging of food that is advertised with health claims in addition have to contain certain information, e.g., information about the quantity of the food needed to achieve the claimed effect etc.⁸

What is the general content of the regulations regarding comparative claims in advertisement?

As a general rule comparative claims are permissible under Swiss law, as long as they are not incorrect, misleading, unduly disparaging or imitative.⁹ In addition, only similar goods or services of comparable quality and quantity may be compared.

What is the general content of the regulations regarding wrongful claims in advertisement?

In general, advertising claims have to be factually correct from an objective point of view. In particular, it is considered as unfair competition if factually incorrect or misleading statements are:

- used to disparage others, their goods, works, services, prices or business relationships;¹⁰
- made by a company regarding itself, its company or trade name, its goods, works, services, prices, stock, or its business relationships; or if such statements are made to favour third party competitors;¹¹
- used to compare a company, its goods, works, services or prices with others, their goods, works, services or prices, or if such statements are used to favour third party competitors.¹²

When assessing a potentially incorrect or misleading statement, the overall impression created by the statement is relevant as it would be perceived by the average addressee of the communication.

With regard to prices, the actual total price the consumer has to pay for a product has to be disclosed according to the Federal Ordinance on Price Disclosure.¹³ For certain goods and services there are specific rules as to which prices have to be disclosed, including for flights tickets¹⁴ or telephone services.¹⁵

⁶ Art. 29f(2) Labelling Ordinance.

⁷ Art. 29i Labelling Ordinance.

⁸ Art. 29h Labelling Ordinance.

⁹ Art. 3(1)(e) UCA.

¹⁰ Art. 3(1)(a) UCA.

¹¹ Art. 3(1)(b) UCA.

¹² Art. 3(1)(e) UCA.

¹³ Cf. Art. 2(1)(d) in conjunction with Art. 13(1) Federal Ordinance on Price Disclosure.

¹⁴ Cf. Art. 11c Federal Ordinance on Price Disclosure.

¹⁵ Cf. Art. 11a et seqq. Federal Ordinance on Price Disclosure.

Furthermore, it is considered to be unfair competition if products or services are repeatedly offered below cost price and if these offers are emphasized in advertising so as to mislead customers.¹⁶

1.3 General Regulation on the Content

Is there a general regulation on the content, without a target audience being specified (for example, no "offensive" or "pornographic" or "political" advertisements)?

Discriminatory advertisements

Swiss criminal law prohibits discrimination on the grounds of race, ethnic origin or religion.¹⁷ Insofar discriminating advertisement is restricted.¹⁸

Advertising concerning other types of discrimination (e.g. advertising with sexual motives) is not regulated by law, but declared as impermissible in the principles of the Swiss Commission for Fairness in Commercial Communication.¹⁹

Pharmaceuticals and medical devices

Swiss law distinguishes between therapeutic products (chemical or biological substances for medical treatment) and medical devices, i.e. products used for medical purposes that are not pharmaceuticals.²⁰ Advertisement for pharmaceuticals is highly restricted and governed by special regulations.²¹

Advertising for pharmaceuticals is only permitted if the product is registered in Switzerland.²² Such advertising needs to be clearly distinguishable from editorial contributions.²³ Furthermore, advertising for pharmaceuticals is perceived as unlawful if it is misleading or contrary to public order and morality and if it incites an excessive, abusive or inappropriate use of pharmaceuticals.²⁴

Advertisement for medical devices is less regulated. However, also for medical devices, advertisements directed at consumers are prohibited for products that may only be handed out against prescription and for products that are only for use by

¹⁶ Cf. Art. 3(1)(f) UCA.

¹⁷ Art. 261^{bis} Swiss Criminal Code.

¹⁸ According to Art. 261^{bis} Swiss Criminal Code it constitutes a criminal offence to publicly incite hatred or discrimination against a person or a group of persons on the grounds of their race, ethnic origin or religion, or to disseminate ideologies that have as their object the systematic denigration or defamation of the members of a race, ethnic group or religion.

¹⁹ Principle 3.11 of the Swiss Commission for Fairness in Commercial Communication.

²⁰ Cf. Art. 4(1)(a and b) Federal Act on Therapeutic Products and Medical Devices.

²¹ Cf. Art. 31 to 33 Federal Act on Therapeutic Products and Medical Devices in conjunction with the Federal Ordinance on the Advertisement of Pharmaceuticals. With respect to advertisements for pharmaceuticals there is a distinction between public advertising and business to business advertising.

²² Art. 32(1)(c) Federal Act on Therapeutic Products and Medical Devices.

²³ Art. 5(4) Federal Ordinance on the Advertisement of Pharmaceuticals.

²⁴ Art. 32(1)(a and b) Federal Act on Therapeutic Products and Medical Devices.

professionals. Also, advertisements for medical devices that are sold to patients directly and/or that are intended for direct use by patients are restricted.²⁵

1.4 Regulation regarding types of audiences

Is there any regulation regarding types of audiences, regulating content (for example, no fast food advertisements targeted at children)? If yes, what is the general content of this regulation?

There are advertising restrictions regarding alcohol and tobacco products in order to protect minors (persons below 18 years of age).

Alcohol

Swiss law distinguishes between alcoholic beverages in general, including wine and beer,²⁶ and spirits in particular.²⁷ Whereas advertising and sponsoring for alcoholic beverages in radio and television is generally permitted with certain restrictions,²⁸ it is completely prohibited for spirits.²⁹

Advertising of alcoholic beverages which aims at minors is prohibited. Particularly, advertising is prohibited a) at places, which are mainly visited by young people, b) in publications which are targeted at young people, c) on objects which are mainly used by young people and d) on objects which are distributed to young people free of charge.³⁰ Advertisements for spirits are subject to further restrictions.³¹

Tobacco

The Tobacco Ordinance provides that tobacco advertising aimed at minors is prohibited. Particularly, it is forbidden to promote tobacco products and smoking products with tobacco substitutes a) at places, where young people mainly stay; b) in newspapers, journals or other publications, which mainly aim at young people; c) on school material; d) on advertising objects which are distributed to young people free of charge; e) on toys; f) with free of charge gifts of tobacco products to young people; and g) at cultural, sports or other events, which are mainly attended by young people.³² The Federal Act on Radio and Television prohibits advertising and sponsoring on radio and television for tobacco products.³³

²⁵ Cf. Art. 21 Ordinance on Therapeutic Products.

²⁶ That is all beverages with an alcohol content of more than 0.5%.

²⁷ Spirits (i.e. liquors such as vodka, gin, whisky) are defined in the Federal Act on Spirits as beverages containing ethyl alcohol (i.e. have been obtained through distillation). This may also include beverages with a low alcohol content, such as pre-mixed beverages (also called "Alcopops") containing spirits. Besides spirits, also vermouth, or liqueur-wines such as sherry or port with an alcohol content of over 15% by volume are subject to this alcohol legislation.

²⁸ Cf. Art. 16 Federal Ordinance on Radio and Television.

²⁹ Cf. Art. 10(1)(b) and Art. 12(4) Federal Act on Radio and Television.

³⁰ Cf. Art. 11(3) Federal Ordinance on Foodstuffs and Utility Articles.

³¹ Cf. Art. 42b Federal Act on Spirits.

³² Cf. Art. 18 Tobacco Ordinance.

³³ Cf. Arts. 10(1)(a) and Art. 12(4) Federal Act on Radio and Television.

1.5 Development regarding ad blockers

What are the developments in your jurisdiction regarding ad blockers?

To date, there is no Swiss published case law on this issue.

Ad blocker software is generally considered permissible both under unfair competition law aspects and under Swiss competition (i.e. antitrust) law.

With respect to unfair competition law, ad blocker software that generally blocks unsolicited advertising does not raise concerns as long as users are made aware of the ad blockers function. On the other hand, software that would specifically aim to block advertising of certain competitors could potentially be viewed as unfair.

With respect to competition (i.e. antitrust) law, concerns may arise if advertisers may pay a provider of ad blocker software to ensure that the advertiser's communications will not be blocked (so-called "whitelisting"). However, such business practice would likely not raise competition law concerns unless the software provider abuses a dominant position on the relevant market.

1.6 Sanctions

What are the sanctions in the field of advertisement law in your jurisdiction? Please cover both public (fines etc.) and private (damages claims etc.) sanctions related to wrongful advertisement.

The sanctions for violations of Swiss advertisement law as set out above depend on the regulation(s) violated in the individual case.

Public sanctions

Violations of the relevant advertising regulations can constitute criminal offences. According to Swiss law, in general and with certain exceptions only natural persons may be prosecuted. As a result, the below criminal sanctions would apply to the persons within a company responsible for the criminal acts.

Violating advertising regulations can constitute a criminal offence subject to the following sanctions:

- **Health claims:** Violating the regulations regarding health claims constitutes a criminal offence punishable by a maximal fine of CHF 40,000.³⁴ In case of negligence, the fine amounts to a maximum of CHF 20,000.³⁵
- **Unfair competition:** Willful (but not negligent) unfair competition within the meaning of Art. 3 UCA constitutes a criminal offence punishable by a monetary fine of up to CHF 1,080,000 or imprisonment of the responsible managers for up to three years. These offences are not prosecuted ex officio, but only if someone files a criminal complaint.³⁶

³⁴ Art. 48(1)(k) Federal Act on Foodstuffs and Utility Articles.

³⁵ Art. 48(1^{bis}) Federal Act on Foodstuffs and Utility Articles.

³⁶ Cf. Art. 23(1) UCA in conjunction with Art. 34 Swiss Criminal Code.

- Alcoholic beverages and tobacco products: Willful violations of the advertising restrictions relating to alcoholic beverages and tobacco products constitute a criminal offence punishable by a maximal fine of CHF 40,000.³⁷ Negligent violations are punishable by a fine of up to CHF 20,000.³⁸

Private sanctions

For acts of unfair competition, the UCA provides for three kinds of civil law remedies:

- A person affected by an act of unfair competition may request the court to prohibit an imminent infringement, to remove an ongoing infringement, or to declare the unlawful nature of an infringement if its consequences still subsist.³⁹
- Besides or in addition to these remedies, a person affected by an act of unfair competition may require that a rectification or the judgment be communicated to third parties or be published.⁴⁰ These sanctions are only granted if they are considered adequate, necessary and proportional in the individual case.
- A person affected by an act of unfair competition may claim financial compensation (damages or the disgorgement of profits).⁴¹

Furthermore, for acts of unfair competition and violations of the principles of the Swiss Commission for Fairness in Commercial Communication a complaint with the commission can be filed. Although the decisions of the commission as a self-regulation authority are not enforceable in the same way as civil judgments, they may be published.

2. Intellectual Property Rights and Advertisement

2.1 Use of Intellectual Property of Competitors in Advertisement

What is the general content of regulation in your jurisdiction regarding the use of Intellectual Property (such as trademarks) of competitors in advertisement?

As a general rule, a third party's intellectual property rights may not be used to advertise the advertiser's own goods or services, or to suggest a (non-existing) affiliation between the third party and the advertiser. Doing so may constitute an infringement of intellectual property rights (e.g. trademark infringement) and/or unfair competition.

However, a third party's intellectual property rights (e.g. a trademark) may be used in advertising if such use serves a legitimate purpose and if the use is made in an objective and factual manner (e.g., advertisements with price comparisons, the

³⁷ Art. 48(1)(l) Federal Act on Foodstuffs and Utility Articles.

³⁸ Art. 48(1^{bis}) Federal Act on Foodstuffs and Utility Articles.

³⁹ Cf. Art. 9(1) UCA.

⁴⁰ Cf. Art. 9(2) UCA.

⁴¹ Cf. Art. 9(3) UCA in connection with the Swiss Code of Obligations.

advertisement for complementary accessories to original products, or advertisements for repair services focusing on certain brands).⁴²

If the third party's intellectual property rights (e.g. a trademark) have already been exhausted (e.g. branded goods have already been put on the market by the original manufacturer), a reseller may use the third party's intellectual property rights in its own advertising to the extent this is necessary to inform the public about the goods offered by the reseller. However, the reseller's advertising may not create the impression of an affiliation or licensing relationship between the third party and the reseller.

2.2 Use of Trademarks of others as 'Ad Words'

Under what conditions would, based on the case law in your jurisdiction, the use of trademarks of others as 'Ad Words' in a Google ad word campaign be allowed?

To date, there are only two published decisions on this issue. Both are from lower courts and they come to different conclusions:

In a 2012 decision on preliminary measures, the Superior Court of the Canton of Thurgau decided that the use of a third party trademark in keyword advertising does neither constitute a trade mark infringement, nor unfair competition.⁴³ The court in particular relied on the fact that the word used as a keyword is not shown to the internet user, which – according to the court – means that the keyword is not used as a trademark. This corresponds to what seems to be the prevailing view of Swiss scholars on this issue.⁴⁴

On the other hand, the Cantonal Court of Lucerne decided in 2015 that the use of a third-party trademark as a Google Ad Word by a competitor offering similar services as the ones for which the trademark is protected constitutes trademark infringement.⁴⁵

3. Remarkable case regarding advertising claims

Can you please describe a case from your (national) jurisdiction that concerns a claim used in advertisement, which claim (or statement) was allegedly wrongful, misleading or in any other way unlawful? What was the claim or statement under dispute? What was the outcome? What are in your opinion the interesting points in this case?

In a published French-language decision of the Federal Supreme Court dated 2 May 2003 (BGE 129 III 426), the court assessed the legal relevance of the defendant's objection concerning claimant's "unclean hands" and set forth the principles of comparative claims in advertisements and superlative advertising.

⁴² Cf. Marbach/von Büren/David, paras. 1505 et seqq.

⁴³ sic! 2012, "Ifolor", p. 387.

⁴⁴ David/Reutter, paras. 390 et seq.; Thouvenin/Dorigo, paras. 46 et seqq. to Art. 13; cf. Reinle / Obrecht, pp. 117 et seqq.

⁴⁵ sic! 2015, "Aquaterra Travel (fig.)", p. 392.

Subject of the dispute were two companies active in the optical sector, one of which advertised its products using the results of a price comparison test. The defendant first tried unsuccessfully to obtain a court order prohibiting claimant's advertisements. The defendant then started its own comparative advertising campaign, claiming that "[Defendant], the Swiss market leader in the optical sector, is the cheapest".⁴⁶ Claimant initiated court proceedings based on unfair competition law against this campaign.

The Federal Supreme Court first dismissed the defendant's "unclean hands" objection. Defendant had argued that claimant cannot act against a competitor's unfair advertising as long as claimant itself uses unfair advertising methods. The Court disagreed and held that even a party with "unclean hands" can sue a competitor who acts unfairly.⁴⁷

The Federal Supreme Court then confirmed that comparative advertising (including advertising using superlatives like "the cheapest") is permissible if it is accurate, comprehensive and based on objective criteria. The Court further noted that references in advertising to product tests or price comparisons conducted by third parties (e.g. consumer organizations) shall not only selectively highlight the elements in the advertiser's favor if this may cause confusion.⁴⁸

Applying these principles, the Federal Supreme Court qualified defendant's advertising campaign as unfair competition.

4. Points of interest in the field of advertisement law and B to C communication

This final part of the questionnaire is an unusual one. As discussed with many of you in 2015 in Antwerp and in London, every one of us has particular expertise and interests that cannot be captured in a traditional questionnaire. As you know, you will have the chance to speak during the Working Session in Munich. The answers provided to this part of the questionnaire will be used to shape and prepare the speakers panel of that Working Session.

What would you like to be discussed during the Working Session?

What could be of interest is to what extent case law in other jurisdictions allows a so-called "unclean hands" defense in the context of unfair advertising between competitors (see above para. 3.).

What specific advertisement law related point of interest would you like to speak about yourself?

In Switzerland, a new legislation touching on advertising claims related to Switzerland (e.g. "Swiss made", "Swiss bank", "Swiss chocolate") is going to enter into force on 1 January 2017. Under the new so-called "Swissness" bill, several of the

⁴⁶ Federal Supreme Court 129 III 426.

⁴⁷ Federal Supreme Court 129 III 426, para. 2.2.

⁴⁸ Federal Supreme Court 129 III 426, para. 3.1.3.

currently used advertisements and package designs for products and services will no longer be permissible. Thus, this issue is of significant practical relevance for clients.

Do you have any suggestions of points of interest omitted in this questionnaire?

A comparative view on national rules on email advertising (e.g. opt-in requirements) might be of interest. In Switzerland, this is regulated by Art. 3(1)(o) UCA.

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