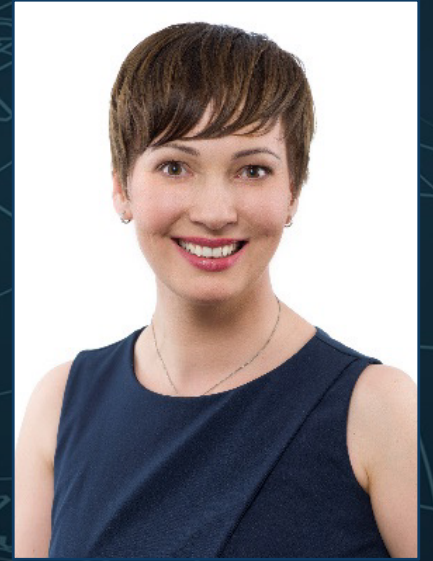




GALA
GLOBAL ADVERTISING LAWYERS ALLIANCE

Advertising Law Year in Review - EMEA

December 9, 2021 – 1pm GMT



MODERATOR

Anikó Keller
Szecskay Attorneys at Law
HUNGARY

Speakers

- Brinsley Dresden, Lewis Silkin LLP (United Kingdom)
- Delia Fehr – Bosshard, VISCHER (Switzerland)
- Dusan Nitschneider, Nitschneider & Partners (Slovakia)
- Anikó Keller, Szecskay Attorneys at Law (Hungary)
- Mariam Sabet, Al Tamimi & Co. (United Arab Emirates)
- Esohe Olajide, Integrated Legal Consultants (Ghana)



UNITED KINGDOM

Brinsley Dresden
Lewis Silkin LLP

brinsley.dresden@lewissilkin.com

UK Year in Review 2021

- Influencers: ISBA Code of Conduct Recent ASA decisions
- Portrayals of the LGBTQ+ community in advertising
- Environmental Advertising & Green Claims
- HFSS Restrictions:
 1. Further restrictions on TV and online advertising
 2. Restriction on promotions of HFSS products by location and price
- Sources and Resources

Influencers: ISBA Code of Conduct Recent ASA decisions

ISBA Code of Conduct for Influencer Marketing

ISBA

- The Code has 3 aims:

- 1) Deliver the transparency: clarity about when and how to disclose ads (#ad), and committing to not use misleading editing techniques.
- 2) Enable authentic and effective influencer marketing – supporting influencers to give their honest opinions; and promoting diversity and inclusion.
- 3) Improve brand/agency/talent relationships: aligning brands and talent, and promoting collaborative working.

Emma Louise Connolly / BOL Foods



18 August 2021



BOL
eat plants love life

Emma Louise Connolly / BOL Foods

18 August 2021

- 2 complaints re Instagram post
- **Issue:** Not obviously identifiable as marketing communication (Rule 2.1).
- **Response:** Connolly is an investor in BOL Foods but did not use any hashtag as she had previously told her followers she was a business partner. Powder Bowl Trading Ltd (t/a Bol Foods) said she will use #TeamBol in future. This would still be **insufficient** to make it clear that it is marketing communication.
- **Assessment:** Commercial intent behind the post was not clear and it was not obviously identifiable as marketing communication. Should use identifiers such as #ad clearly and prominently next time.
- **Upheld**

Primark Stores Ltd / Gabby Dawn Allen



27 October 2021



Primark Stores Ltd / Gabby Dawn Allen

27 October 2021

- 1 complaint
- **Issue:** Not obviously identifiable as a marketing communication (Rule 2.1). Used #iworkwithprimark not #ad.
- **Response:** post was part of a contractual obligation, but #iworkwithprimark made it clear there was a commercial relationship. #ad was later added.
- **Assessment:** # used was ambiguous, long and the meaning would not be immediately obvious to consumers. Also appeared at end of post.
- **Upheld**



Portrayal of the LGBTQ+ community in advertising

Cadbury's Crème Egg Easter 2021



Environmental Advertising & Green Claims

CMA's Green Claims Code

- CMA has published the 'Green Claims Code' to provide businesses with guidance to ensure the green claims they make comply with the CPRs.
- CMA will begin a full review of green claims in early 2022, but where there is clear evidence they may take action before this.
- Follows concerns that consumers are being misled by environmental claims, and the CMA wants to ensure businesses feel confident navigating the law in this area.
- Certain sectors (e.g. fashion) will be prioritised in the review.

ASA Statement re Green Claims

- The ASA has also made a statement on environmental claims in advertising.
- (1) CAP to issue guidance on avoiding misleading consumers with environmental claims;
 - (2) Commence enquiries into priority areas requiring carbon reduction e.g. cars; and
 - (3) Research consumer understanding of 'Carbon Neutral' and 'Net Zero' claims.



Green Claims Code: Principles

- Environmental claims must:

(1) Be truthful and honest

(2) Be clear and unambiguous

(3) Not omit or hide important information

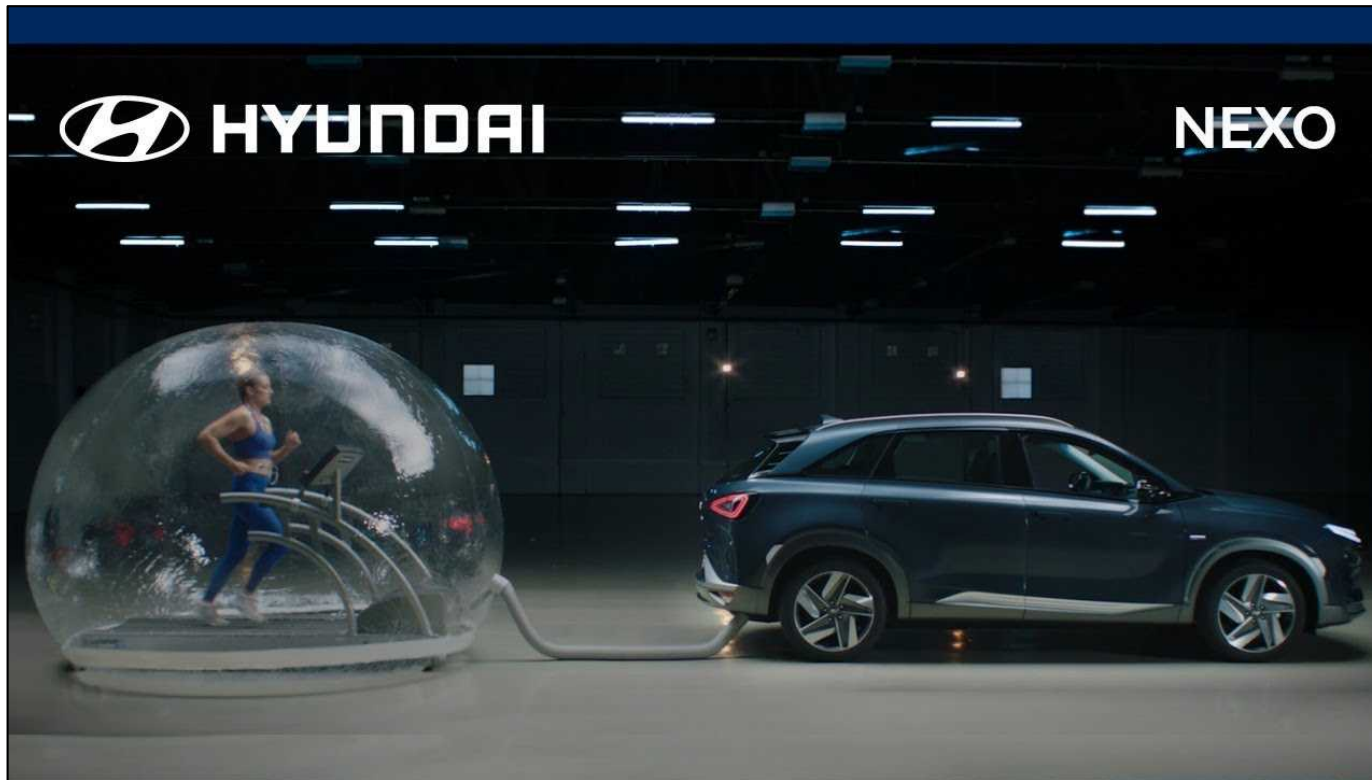
(4) Only make fair and meaningful comparisons

(5) Consider the full life cycle of the product

(6) Be substantiated



**“A car so beautifully clean, it purifies
the air as it goes”**



Alpro (UK) Ltd t/a Alpro

20 September 2021



Alpro (UK) Ltd t/a Alpro



20 September 2021

- 1 complaint
- "YOUR RECIPE TO A HEALTHIER PLANET" "GOOD FOR THE PLANET"
"DELICIOUSLY PLANT-BASED"
- **Issue:** is "GOOD FOR THE PLANET" misleading and can it be substantiated?
- **Response:** consumers would understand this meant plant-based products (such as Alpro products) have a lower environmental impact than dairy products. They provided evidence that plant-based milks have a lower environmental impact.
- **Assessment:** "GOOD FOR THE PLANET" could be interpreted in more than one way – e.g. that it had a net positive impact on the environment. Not obvious if the other claims qualified this claim, or if they were separate claims. Unclear basis to the claim, making it misleading.
- **Upheld**

HFSS Restrictions

New restrictions on HFSS advertising

- **From the end of 2022:**
 - 9pm watershed for TV ads for HFSS products, including On Demand Programme Services
 - Ban on paid-for ads online for HFSS products
- **Exceptions include:**
 - Brand Advertising i.e. with no identifiable product
 - SME's <249 employees
 - Factual information
 - Communications with principal purpose of facilitating online sales
 - B2B online
 - Broadcast radio
- **Enforcement**
 - By ASA, with Ofcom backstop with fines of up to £250k


Scope of promotions ban

- Promotion of HFSS products will be restricted by location and price:
 - **Volume price restrictions** will prohibit retailers from offering promotions such as "buy-one-get-one-free" or "3 for 2" offers on HFSS products.
 - **Location restrictions** will apply to store entrances, aisle ends and checkouts and their online equivalents (that is, entry pages, landing pages for other food categories, and shopping basket or payment pages).



Sources and Resources

Ads & Brands Law Digest

 **LEWIS SILKIN**
IDEAS. PEOPLE. POSSIBILITIES.

About usContact usJoin UsPayments

FIND PEOPLESECTORS SERVICES EVENTS INSIGHTS & NEWS INTERNATIONAL

[Share article](#)

Ads & Brands Law Digest: November 2021

01 November 2021

Welcome to the November 2021 issue of our monthly Ads & Brands Law Digest.

Advertising & marketing

[CAP issues guidance on recycling claims](#)


Climate change and the environment are currently high on the ASA and CAP's (and wider) agenda, so it is more paramount than ever that advertisers familiarise themselves with the CAP guidance in this area. CAP has issued a note summarising some key features of CAP's guidance, and the ASA approach to, recycling claims. The two key points are that:

- ▶ Claims about recycling and recyclability must be supported by evidence. Marketers should ensure that they only describe products as being "recyclable" if they are actually capable of being recycled. Marketers should ensure they hold suitable evidence in substantiation of the recycling claims they make. And importantly, they should hold that evidence before publishing any ad making such a claim.
- ▶ Claims should not exaggerate the recyclability of a product. Marketers must not exaggerate the recyclability of a product or its packaging. Consumers are increasingly conscious of trying to make an effort to recycle the packaging and goods they consume. To this end, marketers should be cautious about making claims exaggerating the environmental credentials of a product that is not widely recyclable. The ASA has previously upheld complaints about claims that packaging "100% recyclable" when it contained a plastic element that was not widely recyclable.

For more information, see [here](#).

[CAP issues call for evidence on body image in advertising](#)

Author





Brinsley Dresden
Partner


I am a specialist in advertising and marketing law and regulation, representing both brand owners and marketing services agencies across a ...

+44 (0)20 7074 8069
brinsley.dresden@lewisilkin.com

[View bio](#)



adlaw.lewissilkin.com



IDEAS. PEOPLE. POSSIBILITIES.

[About us](#) [Contact us](#) [Join us](#) [Payments](#)

[FIND PEOPLE](#) [SECTORS](#) [SERVICES](#) [EVENTS](#) [INSIGHTS & NEWS](#) [INTERNATIONAL](#)

AdLaw Insights

[Blogs](#)


[Manage Posts](#) [Subscribe](#) [All Posts](#) [Contributors](#) [Archive](#)

Brinsley Dresden
26 November, 2021

European Commission proposes sets out new laws on political advertising – will the UK follow suit?

The European Commission has proposed legislation on transparency and targeting of political advertising as part of measures aimed at...

[Read More...](#)




Geraint Lloyd-Taylor
25 November, 2021

Free webinar on green claims - available to download now

Environmental claims are - or should be - near the top of the agenda for most companies. In an effort to protect consumers from misleading...

[Read More...](#)




Brinsley Dresden
24 November, 2021

Fake News: ASA overturns Land Rover ad ban.

This morning, the Advertising Standards Authority published its decision not to uphold complaints about a newspaper ad for the Land Rover...

[Read More...](#)




Brinsley Dresden
18 November, 2021

Join me for a fireside chat with Guy Parker, Chief Executive of the Advertising Standards Authority

After the roaring success of our last event, Guy Parker, CEO of the Advertising Standards Authority is back to reignite our fires. We've...

[Read More...](#)




Geraint Lloyd-Taylor
18 November, 2021

Event hosted by Green Story: Greenwashing in fashion - the dos and don'ts for brands

I'm looking forward to joining the panel to discuss #Environmental claims with Lara Pizzato, CMO of Green Story, and Mike Coates of the...

[Read More...](#)




Jeff Greenbaum
4 November, 2021

GALA Publishes Second Edition of Guide to Conducting Sweepstakes & Contests Globally

The Global Advertising Lawyers Alliance is very pleased to announce the publication of the second edition of Sweepstakes & Contests: A...

[Read More...](#)




Matthew Roadbotham
27 October, 2021

Autumn Budget 2021: Welcome! Everything is fine.

The Chancellor has hit upon a canny trick. Make the difficult announcements a few weeks before your Budget speech so that when the...

[Read More...](#)




James Gill
29 October, 2021

Buy Now Pay Later: FCA regulation looms... what would this mean for those offering this form of payment option?

HM Treasury is consulting on bringing Buy Now Pay Later and other forms of interest-free, short-term credit within the scope of FCA...

[Read More...](#)




Reposted by Geraint Lloyd-Taylor from Lewis Silkin - Commercial

Stevens Jennings
29 October, 2021

An introduction to brand clearance (featuring AdSlogans) – Join the final webinar of our IP360 series!

This webinar marks the end of our IP360 Series, a series of weekly events which covered the full spectrum of IP needs, guiding you to...

[Read More...](#)

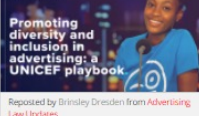


Jeff Greenbaum
22 October, 2021

UNICEF Releases Playbook to Promote Diversity and Inclusion in Advertising

UNICEF just released, "Promoting diversity and inclusion in advertising: a UNICEF playbook," which provides guidance about how to avoid...

[Read More...](#)




Reposted by Brinsley Dresden from Advertising Law Updates

Oz Watson
4 November, 2021

ASA says alcohol brands should distill their ad targeting practices

Alcohol brands should distill the way they target their ads, according to an ASA report. The ASA has worked with Facebook, Instagram...

[Read More...](#)




Brinsley Dresden, Amy Garrishaw
21 October, 2021

CAP and BCAP call for evidence on the link between advertising and body image

Today the Committee of Advertising Practice (CAP) and Broadcast Committee of Advertising Practice (BCAP) announced a call for evidence...

[Read More...](#)





SWITZERLAND

Delia Fehr - Bosshard
VISCHER

dbosshard@vischer.com

Switzerland Year in Review 2021

- Data Protection: New federal law on the horizon
- Sweepstakes & Contests: New rules on promotional games
- Product Regulation: New rules for tobacco products
- Price indications and discounts: Simplified rules for required disclosures; increased enforcement of rules on price comparisons
- Influencer Marketing: First decisions
- Gender discrimination/Sexism: Constant case load
- Consumer credits: Unfair practices with media attention
- Country of origin claims: Increased enforcement activities
- Online Media: New rules to come?

Data Protection

New federal law on the horizon

Data Protection

In force: 2023 (?)

Revised Federal Data Protection Act (and Ordinance)

- Increased administrative/compliance burdens (e.g. information/transparency)
- Concepts of “Controller”, “Processor” (GDPR)
- New concept of “profile building”
- Data minimization
- Right to object/opt-out, right to access, ...
- More and higher sanctions: fines (up to CHF 250'000)

But: No copy of GDPR

Sweepstakes & Contests

New rules on promotional games

Sweepstakes & Contests

Rule: Monetary stake...

- Purchase of raffle tickets, payment of entry fee
- Purchase of goods or services
- Participation via a value-added phone number

...triggers Money Games Act

Sweepstakes & Contests

Rule: Money Games are principally prohibited

- Subject to a license/permission regime
- Strict prerequisites for games and organizer/sponsor depending on the game

But: *Promotional Games* are excepted

Sweepstakes & Contests

Rule: Permitted **Promotional Games** (in general)

- Lotteries or games of skill
- Offered for a short period of time
- For the purpose of sales promotion
- Which do not pose a risk of excessive gambling
- Participation is exclusively through the purchase of goods or services offered at market prices or below and/or free participation route

*Attractive for
most advertisers*

But: Free participation route required for media companies

*Less attractive for
media companies*

Sweepstakes & Contests

«Offered for a short period of time»

- Not defined by Money Games Act
- Less than 6 months, 1-3 months OK

«For the purpose of sales promotion»

- Linked to the purchase of a product or the use of a service (e.g., purchase of goods in retail stores or to the conclusion of a subscription)
- Or represent a customer loyalty measure (e.g., during television or radio broadcasts with the aim of binding viewers or listeners to the corresponding broadcast or the entire broadcast offer of the corresponding provider)

Sounds easier
than it is...

Sweepstakes & Contests

«Which do not pose a risk of excessive gambling»

- Not encourage gambling addiction
- Not encourage stakes that are disproportionate to income and assets
- If free participation route is offered (with equivalent chances to win): no risk of excessive gambling?

Risky: Higher chances of winning with repeated (paid) entries?

Sweepstakes & Contests

«Participation is exclusively through the purchase of goods or services offered at market prices or below »

- No influence of game on prices of products/services
- No purchase of additional raffle tickets etc.

Sweepstakes & Contests

«Free participation route with the equivalent access and participation conditions» (in case of media companies)

- Objective criteria

- No disadvantages compared to paid participation
- Not more restricted in numbers
- As easily available and accessible (not outdated technology, e.g., WAP)

new

- Subjective criteria

- No indications of disadvantages (off-texts, fonts, sizes...)
- E.g., no statements such as "last chance," "countdown," constant ringing of telephone lines during the airtime of the contest

Not: "**Call NOW 01234567** or participate online xyz.abc"

Sweepstakes & Contests

Increased enforcement activities, especially:

- **Blocking lists:** Telecommunications providers required to block access to illegal games (public list for DNS-blocking) whose organizers are domiciled or resident abroad or conceal their domicile and which are accessible from Switzerland.
- **Criminal sanctions:** Individuals responsible (or in rare cases, the organization) are subject to fines/monetary penalty and even prison sentences. More criminal cases
Monetary penalty of up to CHF 540'000
- **Advertising:** Civil actions, complaints with self-regulatory body. Recent recommendations by self regulatory body

Product Regulation

New rules on tobacco products

Product Regulation

Still subject to a potential referendum

New Federal Act on Tobacco Products

- Rules on advertising and sponsoring but no general ban of advertising in press and online *Less strict than anticipated*
- Ban of advertising on products/online if “intended for minors” (<18)
- Ban of OOH advertising visible from public spaces, advertising in cinemas, on public transport, in public buildings, on sport
- Ban of sponsoring of events in Switzerland with an international character or aimed at an underage audience
- Fines of up to CHF 40'000 *Not compliant with WHO Framework Convention on Tobacco Control*

Price indications and discounts

*Simplified rules for required disclosures;
increased enforcement of rules on price
comparisons*

Price indications and discounts

- Link to online source for specifications (essential criteria of the product) instead of including all information in marketing materials *Facilitates all advertising*
- More enforcement activities with regard to price comparisons (Federal State Secretariat for Economic Affairs, cantonal authorities): cease-and-desist, information requests, criminal proceedings *Frequent complaints by competitors*
- Fines of up to CHF 20'000

Influencer Marketing

First decisions

Influencer Marketing

First decisions of self regulatory body *So far only recommendations*

- Separation requirement:
#ad (or the like) required if not obvious to audience as advertising content *No decision on wording, position: But #sponsoredby or #poweredby not sufficient for native advertising*
- Ban of influencer marketing for certain products: e.g. Alcohol (Spirits) *So far only cease-and-desist letters*
- Civil claims and/or criminal complaint, complaints with self-regulatory body

Influencer Marketing

Separation requirement, recent examples

Ok without “#ad”: professional promotional video by Roger Federer featuring the logo of his current sponsoring partner. It was clear from the presentation that the tennis star was advertising for the brand owner.



rogerfederer • Folgen

rogerfederer Always a pleasure playing in Madrid 🙌
2Wo.



1 Wo. Antworten

Great day, m
moms birthday
1 Wo. Antworten

Роджер вы мо
кумир!



923.382 Aufrufe

6. MAI

Melde dich an, um mit „Gefällt mir“ zu m
oder zu kommentieren.

Influencer Marketing

Separation requirement, recent examples

✗ Not without “#ad”:
post by professional
snowboarder Iouri
Podladtchikov in
connection with an
existing sponsoring
relationship between
him and sports
equipment company.



Influencer Marketing

Separation requirement, recent examples

Ok without “#ad”: clear that this was commercial communication, even though the jewelry presented was not labeled accordingly.

The fact that the influencer Xenia Tchoumitcheva had no cooperation with the brands advertised was not relevant insofar as it is often part of the strategy of influencers to advertise brands only with a view to doing business with them in the future.



Gender discrimination/sexism

Constant case load

Gender discrimination/sexism

Decisions of self regulatory body

- Natural connection between portrayal and advertised product/services (ok)
- or purely decorative function (not ok)? Cases on regular basis
- Technically: "It is unfair in commercial communications to use computer-generated images of bodies and body shapes of bodies and body shapes in a deceptive manner in order to advertise an effect or result that is not result that is not achievable." (Photoshop-Rule) No cases so far

Gender discrimination/sexism

Recent examples



✗ Ad for tires: "Depicting a scantily clad woman lifting a dumbbell whose weights have been replaced by two car wheels has no natural connection to the advertised summer tires, even if an allusion to a sporting activity (here: weight training) can be inferred from the depiction. The person depicted serves as an attention-getter in the otherwise plainly designed advertisement."



✗ Ad by a sawmill: "We have wood in front of the hut, grab it."



✗ Ad by a plumbing company on a car: "Depicting a woman in a potentially real-life situation where she is repairing a defect due to a water leak from a sink. However, this woman is depicted in an illustration intentionally structured as a teaser exclusively to attract the eye. Thus, only the lower part of the woman's body is placed in the foreground of the woman dressed in a narrow miniskirt, with her bare legs and high heels."

Consumer Credits

Unfair practices with media attention

Consumer Credits

No new rules but recent complaints with self regulatory body confirmed

Self regulation of Swiss Consumer Finance industry based on statutory prohibition of "aggressive advertising" for consumer loans

- No impression that consumer loans are available particularly quickly and without performing a detailed creditworthiness check
- Not target young adults (< 25)
- No arguments that obviously do not make economic sense
- No loans to finance short-term costly leisure activities, festivities, etc.
- No intrusive distribution of advertising materials on streets and squares

✗ "Express credits", "credit check within 30 minutes", "instant credits", "immediate cash", "crediting of the credit amount within 4 hours".

Country of origin claims

Increased enforcement activities

Country of origin claims

New laws in force since 2017

- Swiss Federal Trademark Act (TA) and ordinances, Coat of Arms Protection Act, CAPA and ordinances
- Cover voluntary use of all (!) designations of geographic origin as marketing claims and trademarks
- E.g.: "Swiss made", "Made in Switzerland", "Swiss Quality", "Swiss recipe",
- Use of Swiss cross (flag) allowed
- Use of Swiss Coat of Arms not allowed



Country of origin claims

New laws in force since 2017

- Precise definition of geographic origin of all categories of products and services
- Use of designation in ad covers all promoted products
- Possibility to advertise the origin of a specific activity (only): “Swiss research”, “Swiss design”
- Legal risks:
 - Criminal sanctions (fines of up to CHF 540'000, imprisonment)
 - Civil actions (e.g. interim measures, injunctions, damages)
 - Reputational risks (e.g. media coverage, complaint with Swiss Commission of Fairness)

Country of origin claims

New laws in force since 2017

- **Increased enforcement activities in Switzerland...**

Random samples, seizure at Customs for imported products (with destruction of goods); official refusals for trademark applications in Switzerland; "friendly" cease-and-desist letters by IPI, focus on dialogue; cease-and-desist letters (e.g. competitors, consumer protection organizations); criminal complaint (e.g. by IPI, competitors, consumer protection organizations); civil actions (e.g. by IPI, competitors, consumer protection organizations); recommendations by Swiss Commission on Fairness in Advertising (self-regulatory board); new association "Swissness Enforcement" as Public Private Partnership

- **...and abroad (!)**

Monitoring of foreign trademark applications; notice to advertiser/trademark owner via local embassies; informing local trade associations; some foreign trademark office contact IPI/require IPI's approval for new trademark applications bearing a designation of Swiss origin (e.g. China/HK)

Online media

New rules to come?

Online media: new rules to come?

- **Legislative draft for a Federal law on the protection of minors in the areas of film and video games** *To early to tell...*
 - providers of films and video games and providers of streaming services
 - Concept of co-regulation between federal statutes/ordinances and industry self-regulation
 - Various topics including age restrictions for online purchases, in-app purchases *Impact on advertising?*
- **New target: communication platforms** *Mandate for drafting report only*
 - Federal council initiates project aiming at “strengthening user rights and dealing with non-transparent business practices”
 - Targeting hate speech, fake news ... *Impact on advertising?*



SLOVAKIA

Dusan Nitschneider
Nitschneider & Partners
nitschneider@nitschneider.com

Slovakia Year in Review 2021

- Green Marketing or Greenwashing?
- Advertising of CBD products
- Influencers
- New Act on Audiovisual Media Services
- Creativity

Green Marketing or Greenwashing?

Green Marketing or Greenwashing?

- Advertiser: Slovak electricity seller
- Green Claim: "Thanks to the Clean Electricity product, your household can have electricity exclusively from renewable sources, for only 2 euros a month."
- Complainant: "Green claim is not sustainable. In Slovakia it is not technically possible to supply electricity exclusively from renewable sources ."
- Self regulatory body:
 - Misleading advertising.
 - Non sustainable claim.
 - Violation of the Code of Ethics.



Advertising of CBD products

Advertising of CBD products

- As of May 2021, CBD was removed from the list of narcotic drugs and psychotropic substances (Act No. 124/2021 Coll.)
- Sale and advertising of products containing CBD is legal
- No special regulation regarding the advertising of CBD products
 - → sale and advertising of CBD products is subject to general legislation, including consumer protection regulations or the Advertising Act
- Possession, consumption, and sale of marijuana remains illegal,
 - → linking CBD products to marijuana consumption, or presentation of any statements about the miraculous effects of CBD should be avoided in advertising

Influencers

Influencers

- More and more influencer marketing
- Works on Ethical Code of Influencer Advertising with emphasis on:
 - recognizability of advertising through a clear disclosure
 - protection of minors
 - protection against:
 - misleading claims (e.g. no real experience with a product)
 - use of third-party content without a consent/license
 - unsubstantiated health claims
 - violent and hateful content
- IAB Slovakia + NITSCHNEIDER & PARTNERS

New Act on Audiovisual Media Services

New Act on Audiovisual Media Services

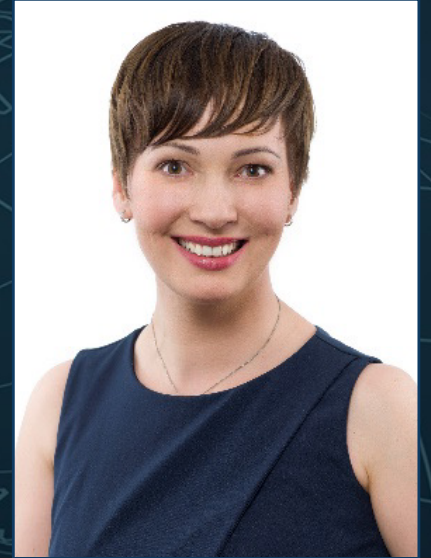
- Expected to be adopted in 1 Q of 2022
- Transposition of the Audiovisual Media Services Directive (EU 2018/1808)
- Stricter rules for providers of video-sharing platforms
- System of co-regulation (Self-regulators & State Authorities)
 - Complaint addressed to a State Authority → forwarded to the Self-regulator (90 days for a decision) → A) decision of the Self-regulator, or B) proceedings before the State Authority

Creativity

Creativity

- Bad Luck Brian meme in a campaign of an orthodontic clinic
- **Slogan:** *"With invisible braces, there are no such memories."*
- **Issue:** The agency was accused (by other marketers) of a flagrant breach of the copyright and privacy rights of the main protagonist.
- **Outcome:** Free distribution of advertising across the media and social networks, because of alleged violation of advertising rules.
- **Was it legal?** Yes. Kyle Craven (real name Bad Luck Brian) confirmed, that he was the official face of the campaign from the beginning.





HUNGARY

Anikó Keller

Szecskay Attorneys at Law

aniko.keller@szecskay.com

Hungary Year in Review 2021

- New Anti-LGBTQ+ Act: No LGBTQ+ „promotion“
- Is Facebook „free“? Hungarian Supreme Court annuls HU Authority decision against Facebook on „it's free and always will be“ statement



Anti-LGBTQ+ Act

Background

- Anti-LGBTQ+ legislation introduced as of July 8, 2021
- Original objective: fight against pedophile criminal offences
- BUT: MPs from the government party proposed further provisions to the bill.
- Reasoning: the provisions added will help protecting the healthy development of children by shielding them from content that could have adverse effects on them.

Prohibited content

- Act prohibits making available to children under the age of 18 any content (including advertisements) that:
 - is pornographic
 - depicts sex(uality) for its own purpose
 - depicts/promotes self-identification deviating from that corresponding to sex at birth, gender transitioning
 - depicts/promotes homosexuality.

Prohibited program(s)

- The categorisation of programs (including ads) under the Media Act has changed accordingly
- A program, that is likely to adversely affect the physical, mental or moral development of minors, by containing the following as a dominant element, will be categorized as *“program not recommended for children under 18”*:
 - violence,
 - deviation from self-identity according to sex at birth,
 - gender transitioning,
 - depiction or promotion of homosexuality, or direct, natural, or self-serving depiction of sexuality.
- Such programs may only be broadcasted between 10 pm and 5 am.

Retail restrictions on LGBTQ+ goods

- **Government Decree no. 473/2021. (VIII. 6.) in force as of September 5, 2021:**
 - **Display ban:** No placement in shop windows and public displays of children's products that depict or promote homosexuality or transgenderism.
 - **Packaging requirement:** "closed packaging", sold separately from other products – only products for minors (<18).
 - **Local sales ban:** No sale of any products depicting homosexuality or transgenderism within 200 meters of any school or church. Applicable to all goods regardless of whether intended for minors.

Guidelines on how to interpret the new rules

- Recommendation of the Self-Regulatory Advertising Board for interpretation by the NMHH
- Recommendation of the National Media and Infocommunications Authority (NMHH) issued on September 15, 2021

What does „depicting or promoting homosexuality“ mean?

- As a general rule, the direct or indirect depiction of homosexuality is OK
- However, it needs to be assessed whether the dominant element of the program / advertisement is homosexuality
 - as the subject of the program, or
 - as a behaviour to be followed.

What „depicting or promoting homosexuality“ means?

- Dominant element if the content presented focuses on the values, benefits and uniqueness of homosexuality, i.e. this topic is a central, essential and indispensable part of content.
- Promotion:
 - If it is shown as a social norm, or as a way of life which is more attractive and desirable than the traditional heterosexual lifestyle; or
 - Propaganda activities aimed at disseminating these views, at influencing minors emotionally and at persuading them by means of communication.

What does „depicting or promoting homosexuality“ mean?

- General gestures expressing tenderness, such as hugs, walking hand in hand, kissing, should not be considered problematic provided that
 - they are not presented for their own sake and
 - they are not the central element of the content.
- It is clearly intended to demonstrate tenderness, love, togetherness, or, where appropriate, compassion.

Facebook

„It's free and always will be“

Keep this in mind...



free *adjective*

no payment

3 ★ ⓘ A2 costing nothing

• *Admission is free.*



free *adjective*

Definition of *free* (Entry 1 of 3)

1 : not costing or charging anything

// a *free* school

// a *free* ticket



Wiktionary
The free dictionary

free

2. Obtainable without any **payment**. [quotations ▼]

*The government provides **free** health care.*



SZECSKAY
ATTORNEYS AT LAW

Facebook investigated by the HCA

- The HCA initiated an investigation against Facebook (now Meta) in October 2016 due to alleged unfair commercial practices
- **Matters investigated:**
 - FB does not clearly indicate which commercial practices its policies apply to,
 - FB does not ensure that all commercial practices are covered by policies, and
 - FB does not apply the sensitive data requirement in the Advertising Policy ("we don't use sensitive data to target ads ")

Expands case to claim of „[FB] is free and always will be” (used since 2010)

- Act on Unfair B2C Commercial Practices (UCP Act):
 - Prohibits describing 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.
 - Considers a statement **misleading if it** contains false information and is therefore untruthful or 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 the price** or the manner in which the price is calculated, or the existence of a specific price advantage, **and causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.**

The HCA's decision

- HCA terminated case regarding initial subject-matters...
- BUT said „*it's free and always will be*“ violated the UCP Act and misled consumers (fine of EUR 3.3 million)
- Duration of the infringement: 2010-2019 (when FB ceased to use the claim „*it's free and always will be*“)

Grounds for the HCA decision (1)

- “For free” = consumer expects to give **nothing in return** for the service, i.e., there are virtually no material or any other risks of use
- „For free” is very alluring for consumers, significantly increases interest in a service → claim distracts consumers from the nature of the service and thus from making an informed decision.
- Consideration is typically the payment of some direct or indirect price or fee, but any other commitment or risk is also a form of compensation.
- Misleading that FB distorts the picture created for the consumer of price of the service (which is complex and is linked with FB data management)

Grounds for the HCA decision (2)

- **Consumers pay with their consumer activity, data, and other information, even from their friends**
- For consumers, „for free“ = complete lack of consideration
- Free FB registration and use is complex ‚asset‘ with significant market value, which takes place primarily by sharing (own and friends‘) personal data (by user activity, by consenting to data management and use).
- Instead of claiming „for free“, FB should properly demonstrate for consumers what the consideration is (e.g. commitment, risk taken, business model, complexity of data used, value of receiving commercial content).

The fine imposed

- **Calculation of the amount of the fine imposed:**
 - Based on turnover generated by advertising, as it reflects magnitude of consideration „paid by” consumers
 - Starting amount: 10% of this turnover for 2018 in Hungary
 - General rule is 10% of turnover reached during the entire infringement period. But HCA considered this would have been excessive.
- **Mitigating circumstances:**
 - FB withdrew „free” statement in August 2019
 - FB amended the contents of its Help Center as of October 24, 2019. Globally.

Judicial review of the HCA decision

- FB turned to court and won both at first and second instance
- Final and binding judgment of the Supreme Court of Hungary passed on October 6, 2021
- The HCA decision was annuled
- In short: the UCP Act cannot be interpreted to the effect that consumers pay consideration to FB by providing their personal data.

Reasoning of the courts (1)

- **Legal issue as defined:** Does (use of) personal data to place targeted advertisements qualify as a „price“ under the UCP Act? Or can Facebook be considered free if consumers receive targeted advertisements rather than simple ones using their personal data?
- **Answer:** Depends on the context, not just monetary, but different types of disadvantage influencing consumers' decisions can be interpreted as a price of the service when deciding whether something is „for free“ or not. This disadvantage, however, may not be an **obvious** result of the nature of the service in question (e.g. offline newspaper living from free advertising)
- A disadvantage can be regarded as consideration only if it:
 - does not follow directly from the nature of the service,
 - has a direct effect and
 - is significant,and thus, it is capable of influencing the transactional decision of consumers substantially.

Reasoning of the courts (2)

„In the lawsuit, no one disputed the value of personal data. The defendant (the HCA), when examining the registration process on the plaintiff's (FB) website, found that consumers cannot register until the data management regulations and GTCs are accepted by them. Consequently, after accepting these, consumers must be aware that they provide personal data and that they consent to such data management. From the point of view of the consumer's transactional decision, it is irrelevant that the plaintiff (FB), in an unforeseeable magnitude, receives monetary consideration from its business partners, typically market players publishing ads, for managing and providing personal data of consumers. This is because consumers do not suffer disadvantage as a direct result of their legal relationship with FB.”

Reasoning of the courts (3)

BUT: the issue whether the consumer is aware of the fact that and to what extent their personal data is used was not the subject of the case since this is primarily a data protection and not a consumer protection issue.

For consideration:

- What would have been the outcome in your jurisdiction?
- What should be the standard – interpretation of average consumer?



UNITED ARAB EMIRATES

Mariam Sabet
Al Tamimi & Co.

m.sabet@tamimi.com

UAE Year in Review 2021

- Media Regulatory Office: Established in 2021
- Advertising: Influencers and E-Commerce Providers
 - No new laws but focus on digital content
 - New Consumer Protection Law includes false and misleading advertising
- The rise of Sweepstakes and Contests
- Misleading Advertising: New Rumours and Electronic Crimes Law
- Long awaited, UAE Personal Data Protection Law
- Media laws: Expect changes in 2022

New Media Regulatory Office

Established in early 2021

Media Regulation Office (MRO)

- Established by the Ministry of Culture and Youth (MCY)
 - Replaces the National Media Council (NMC)
- Role of MCY: federal authority that regulates the media sector in the UAE and formulates media legislations, and ensures their implementation to develop and broaden the media sector in coordination with the concerned ministries
 - MCY has yet to issue any media laws and regulations or amend the current NMC laws and legislation
- Role of MRO: to support the media sector through its laws and regulations for organizing the sector and cooperating with other authorities to ensure proper implementation; and to develop media services procedures for licensing and media content permissions.
- Two main departments
 - Media Regulation Department
 - Department of Media Licenses and Media Content Follow Up

Advertising: Influencers & E-Commerce Providers

Advertising Restrictions

Since the NMC issued,

- Chairman of the Board's Resolution No. (26) of 2017 on Media Content (the "2017 Content Res");
- NMC Council Resolution No 35 of 2012) ("Advertising Standards");
- The Advertising Guidelines (the "Advertising Guidelines") in 2018; and
- The 2018 Electronic Media Regulation Resolution ("E-Media Law"),

there has been an increased focus on digital content.

These laws apply both offline and online; within the UAE, including the free zones.

Influencers and E-Commerce Providers

- The media laws place restrictions in relation to general advertising, which includes commercial advertising, promotional campaigns and special offers.
- All advertising materials or items require disclosures such as #ad or #paid_ad
- Special rules for advertisements, such as those related to medicine, medicine, energy drinks, promotions and special offers, as well as real estate, universities, educational institutions, nurseries, Hajj and Umrah promotion campaigns and the like.

New Consumer Protection Law

- Although issued in 2020, the Executive Regulations are yet to be issued.
- They apply to any commercial provider, including E-Commerce.
 - Requirement to include all data and contracts relating to consumers in Arabic, such as T&Cs
- 'Misleading Advertising' is now covered

The rise of Sweepstakes and Contests

Sweepstakes and Contests

- Skill-based games vs games of chance
- Generally, online and offline gambling is prohibited; unless a permit is obtained.
 - The Department of Economic Development in each Emirate issues permits to run 'Sales Promotions'
 - Although lotteries fall under gambling, there are many establishments that are currently running these activities, which seem to be licensed by the authorities

Misleading Advertising: New Rumours and Electronic Crimes Law

Issued 20 September 2021

Coming into force 2 January 2022

Misleading Advertising

Old Cybercrimes Law

- Cyber crimes focus
- Did not include advertising, only sharing and transferring of video and audio materials for illegal purposes
- Prohibited illegal content: pornography, gambling, terrorism, etc

New Rumours and Electronic Crimes Law!

- Focus on social media and data protection
 - More content shared on social media
- Specific advertising crimes
 - Misleading advertisements and use of misstatements
 - Advertising unlicensed medical products or copying licensed medical products
- Clarifies position on prohibited content: block the platform
 - Liability placed on content creator and even the platform.

New Data Protection Law

Issued 20 September 2021

Coming into force 2 January 2022

New Federal Data Protection Law

- Supported by the creation of the UAE Data Office
 - New regulatory authority to implement the National Data Protection Law
- Right to object to personal data processing for marketing purposes
 - In-line with global "best practice" principles
 - Complaints procedure through UAE Data Office
- Expecting accompanying UAE Cabinet Executive Regulations by 22 March 2022
 - Expected to cover company compliance requirements, legal basis for processing, etc.

Media Laws: New rules?

2022 and beyond

- With the ongoing World Conference on Creative Economy hosted by the MCY, we expect to see changes in the media sector
 - Focus on the music industry, possibly fill the gaps with a collection society
 - More films in the UAE next to the iconic landscape
 - More guidelines on influencer marketing
 - NFTs



GHANA

Esohe Olajide

Integrated Legal Consultants

esohe@integratedlegalconsultants.com

Ghana Year in Review 2021

- Introduction
- Regulation on advertising in Ghana is sector specific as the proposed Advertising Bill is still pending before Parliament.
- Key regulators of advertising include:
 - Food and Drugs Authority (FDA)- via Public Health Act, 2012 (Act 851)
 - National Communications Authority (NCA) regulates provision of communication services in Ghana - via National Communications Authority Act, (Act 769), Electronic Communications Act 2008, (Act 775) and its Regulations
 - Gaming Commission (GC) – Gaming Act, 2006 (Act 721) regulates publicity of games and contests by the provisions of Act 721 as well as its Advertising Guidelines.
- Industry self regulator- Advertising Association of Ghana (AAG) – Standards on advertisements that bind its members who can be sanctioned or fined for breaching same.



Ghana Year in Review 2021

- Key topics include:
- Regulation of advertisement on foods and drugs in relation to treatment of certain ailments including COVID- 19.
- Ban on Influencers and Celebrities in Ghana from endorsing alcoholic beverages by FDA.
- Ban on use of celebrities in advertisement in relation to Gambling.
- Proposed LGBTQA+ legislation.

Prohibition of Advertisement for Treatment of Certain Ailments

Ghana Year in Review 2021

- Act 851 prohibits advertisement of products regulated by the FDA without prior approval of the Authority.
- The FDA has guidelines for all advertisements of foods, drugs, cosmetics and household chemicals including in the media, which must be pre-approved before publication.
- By virtue of section 114 of Act 851 FDA has prescribed guidelines for the advertisement of drugs, house old chemicals and cosmetics which prohibit the advertisement for prevention, treatment and cure of certain diseases such as:
- Sexually Transmitted Diseases (STDs), other forms of Genitourinary diseases. Acquired Immune Deficiency Syndrome (AIDS) or diseases connected with the human reproductive functions.
- With the advent of COVID-19 the advertisement of medicines or products for the treatment of COVID-19 including vaccines was also prohibited.

Ghana Year in Review 2021

- As observed around the globe, certain claims made about various drugs being treatment for COVID- 19 before vaccines were developed and approved led to a rush in purchase and uses of such drugs (E.g. hydroxychloroquine).
- In Ghana, COA FS, a food supplement which was allegedly associated with treatment of patients infected with COVID-19 saw a sudden rise in demand and purchase of same by members of the public.
- FDA had to issue press releases disclaiming that as well as with respect to the online advertisement of COVID-19 vaccines.
- Section 129 of Act 851, stipulates penalty of not less than seven thousand five hundred penalty units and not more than fifteen thousand penalty units(a penalty unit is GHS 12.00/US\$ 2.00) or to a term of imprisonment of not less than fifteen years and not more than twenty-five years or to both for anyone convicted of contravening sections 111 to 124 of Act 851.



Head Office
Mail: P.O. Box CT 2783, Cantonments-Accra, Ghana
(+233)-302-233200/235100
(+233)-299-802932/3 (Hotline)
Email: fda@fdaghana.gov.gh
Digital Address: GA-237-7316

FDA/CSD/CPE/PRS/21/0006

9th March 2021

FOR IMMEDIATE RELEASE

FDA ALERTS GENERAL PUBLIC ON SEIZURE OF FAKE COVID-19 VACCINES IN SOUTH AFRICA

Subsequent to the Food and Drugs Authority (FDA)'s Press Release dated January 12, 2021, committing to providing periodic up-dates on Covid-19 vaccines, the FDA hereby wishes to inform the general public that, so far, the only Covid-19 vaccines authorised for use in Ghana are **SPUTNIK V** and **COVISHIELD** vaccines. Furthermore, the **importation and deployment** of these two vaccines in the country are under the control of **only the Ministry of Health** and the **Ghana Health Service**, respectively.

This alert has become necessary as a result of reports of the seizure of fake COVID-19 vaccines **in South Africa**. The FDA wishes to caution the general public that online advertising, offering for sale and supply of medicinal products including the COVID-19 vaccines are strictly prohibited. Therefore, the public should **not purchase any COVID-19 vaccines online**.

The public and courier services including shippers and freight forwarders are further cautioned that any unauthorised imports of vaccines will be in contravention of Sec 118 of the Public Health Act and the FDA's Guidelines for Emergency Use Authorisation of Medical Products (FDA/GEN/GL-EUA/2021/04). Covid-19 Vaccines are to be expressly imported **only by and through the Ministry of Health**.

The Authority wishes to assure the general public that with the collaboration of the security and kindred agencies, it will continue its monitoring and remains committed to protecting public health and safety as mandated by the Public Health Act, 2012, Act 851.


The public is therefore advised to report to the FDA any suspicious activity(ies) relating to the advertising and offering for sale and supply of COVID 19 vaccines and/or related products. All reports/complaints shall be treated in confidence.

To help prevent the spread of the virus, the we encourage all to continue to follow the COVID-19 protocols.

Concerns and clarifications on this publication are to be directed to the FDA on the following contacts:

☎ 0551112224/5 📞 0551112224 📧 fdaghana
📷 fdaghana_ 📺 fdaghana_ 📧 fda@fda.gov.gh

FDA...Your Well-being, Our Priority


DELESE A. A. DARKO (MRS)
CHIEF EXECUTIVE OFFICER

ISO 9001 (2015) Certified Institution, ISO 17025 (2017) Accredited Laboratory, Regional Centre for Regulatory Excellence (RCORE) in Clinical Trials, Pharmacovigilance and Drug Registration



Head Office
Mail: P.O. Box CT 2783, Cantonments-Accra, Ghana
Fax: +233 - 302 - 229794
(+233)-302-233200/235100
(+233)-0299802932/3 (Hotline)
0800151000 (Toll free)
Email: fda@fdaghana.gov.gh

FDA/CPED/PR/20/0004

17th April 2020

PRESS RELEASE :PRODUCT RECALL- COA FS

The Food and Drugs Authority wishes to notify the general public of a recall involving all batches of COA FS Food Supplement manufactured by COA Herbal Centre, Cape Coast and registered with the FDA as a food supplement.

This is as a result of laboratory analysis on samples picked from the market and the manufacturing facility of COA Herbal Centre in Wusorkrom near Cape Coast, which showed excessive microbial, mold and yeast contamination. The samples were also contaminated with E. Coli which must be absent in all medicinal products. This makes the product substandard and therefore not recommended.

This contamination poses serious health risk to the consumers for the following reasons:

- E. Coli contamination can cause diarrhoea, gastroenteritis, abdominal pain, nausea and vomiting.
- Exposure of children and older adults to E. Coli contamination can result in serious health implications like hemolytic uremic syndrome leading to kidney failures.
- Individuals with weakened immune systems (e.g HIV patients) can become seriously ill due to the ingestion of products contaminated with E. Coli

In view of the above, those who are in possession of the product are being directed to return the product to the manufacturer, place of purchase or any of the FDA offices across the country.

Meanwhile, the manufacturer, COA Herbal Centre, has been directed by the FDA to recall the product from the Ghanaian market.

The FDA wants to assure the general public that it will always uphold the health and safety of Ghanaians as mandated by the Public Health Act, 2012, Act 851.

Furthermore, the Ghanaian public is assured that FDA officers in the regions are working to ensure that this contaminated product (COA FS) is removed from the market.

All concerns and questions arising out of this publication as well as any other FDA regulated product can be directed to the FDA on the following contacts:

☎ 0299802933/0546469711 📞 0206973065 📧 fdaghana
📷 fdaghana_ 📺 fdaghana_ 📧 fda@fda.gov.gh

Signed
DELESE A. A. DARKO (MRS)
Chief Executive Officer

Page 1 of 1

ISO 17025 (2017) Accredited Laboratory, ISO 9001(2015) Accredited Institution, Regional Centre for Regulatory Excellence (RCORE) in Clinical Trials, Pharmacovigilance and Drug Registration

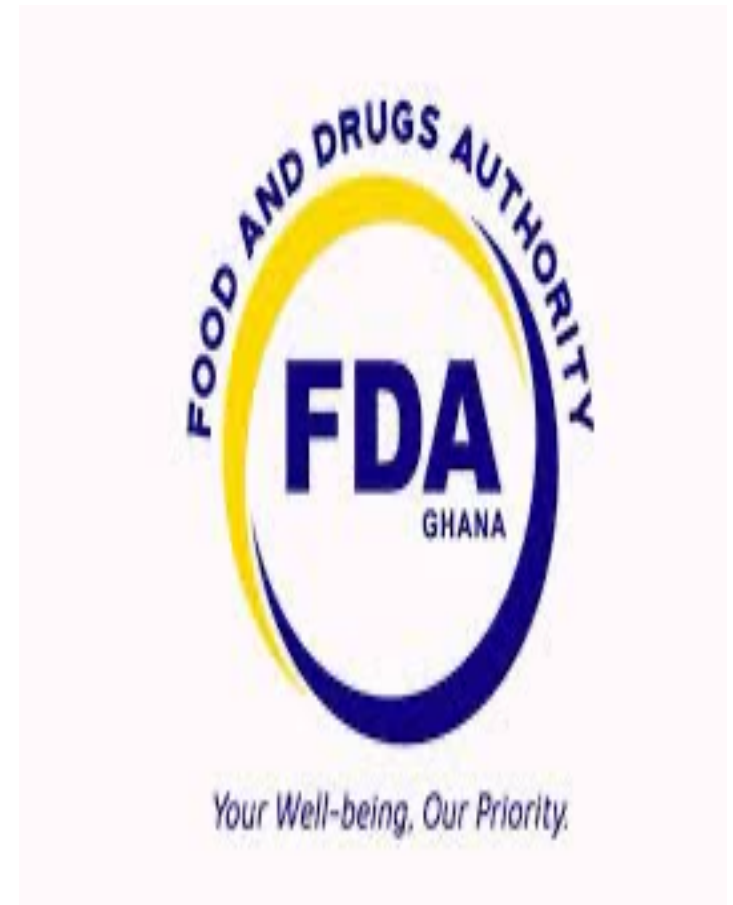


INTEGRATED LEGAL CONSULTANTS

Ban on Influencer Marketing

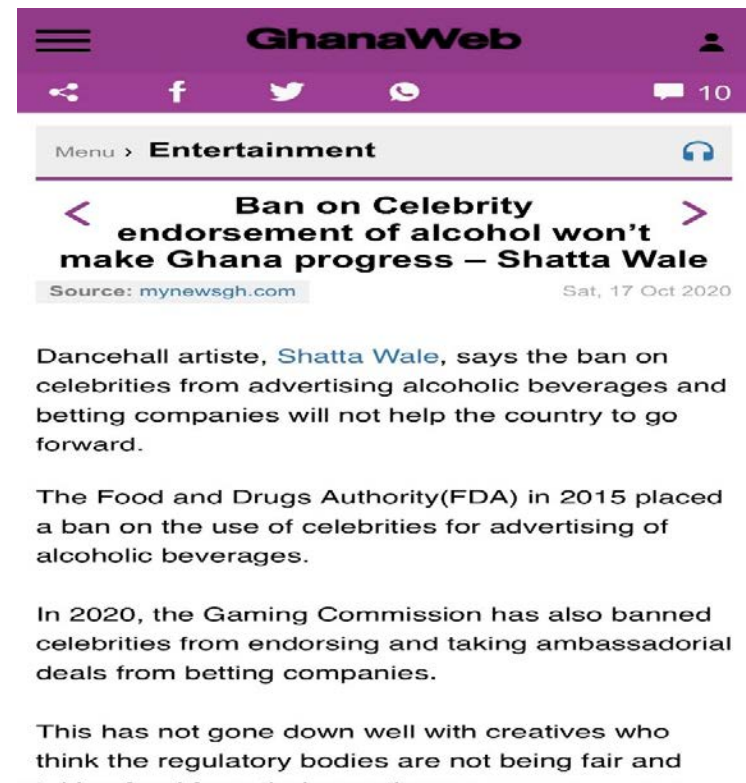
Ghana Year in Review 2021

- FDA introduced ban on influencers in its Guidelines on advertising of alcoholic beverages in 2015, aimed at protecting children and preventing them from being lured into alcoholism in line with the World Health organization's policy.
- Celebrities, influencers online personalities are prohibited for advertising or endorsing alcoholic beverages.
- Outcry by celebrities due to loss of revenue especially with COVID.
- FDA has maintained the Ban and has advised celebrities and influencers to go to court if they are of the opinion their rights are being infringed.



Ghana Year in Review 2021

- Those who have kicked against the ban and complained about their source of income being taken away from them include Wendy Shay, Shatta Wale, and Afia Swarzenegger who have posted various times on social media decrying the ban.



Ghana Year in Review 2021

- The GC has also prescribed Guidelines on Advertisements for operators of games of chance which mandates that advertisements must contain warnings to protect the public (“Gambling is Addictive” “Gamble responsibly” etc.)
- In addition, the GC in October 2020 also prohibited the use of celebrities in advertisements by promoters to entice people to bet.
- It states in its general guidelines that:
“Operators shall not use celebrities in their advertisement to entice the general public to gamble”.

While celebrities have also condemned this ban by the GC, there have been no record of persons flouting these directives or any one being prosecuted, or sanctions being imposed against any such persons.

Proposed LGBTQA+ Bill

Ghana Year in Review 2021

- Earlier this year, a bill “Promotion of Proper Human Sexual Rights And Ghanaian Family Values Bill 2021 was presented to parliament.
- Bill aimed at regulating the activities of LGBTQA+ in Ghana and the promotion of such activities.
- Bill defines various words used therein such as asexual, bi- sexual, gay, lesbian, queer, LGBTQA+, LGBTTTQQIAAP+.
- Section 7 proposes the prohibition of grant or order of adoption of a child to persons defined therein to include gays, lesbians, queers etc. and generally anyone other than males and females whose gender is assigned by birth.
- Section 18 proposes the prohibition of grant of an application for fosterage when the applicant is gay, lesbian, queers etc, and generally anyone other than males and females whose gender is assigned by birth.

Ghana Year in Review 2021

- The proposed Bill criminalizes LGBTQA+ advocacy and makes certain provisions for prison terms for offenders.
- Proposes a fine of between 1000- 2000 penalty units(a penalty unit is GHS 12.00/ US\$ 2.00)
- While Section 12 proposes prohibition of promotion of LGBTQA+ activities by media and breach to attract prison term of 6- 10 years.
- a prison term 5- 10 years is proposed for sponsorship of LGBTQA+ activities.
- Bill being debated by parliament.

Ghana Year in Review 2021

- Push by AAG for the Advertising Bill pending before parliament to be passed into law to properly regulate the industry, protect consumers and local investors in the sector.
- AAG also expressed worries that delay in passing the Bill may allow big foreign agencies to take over the market in Ghana.

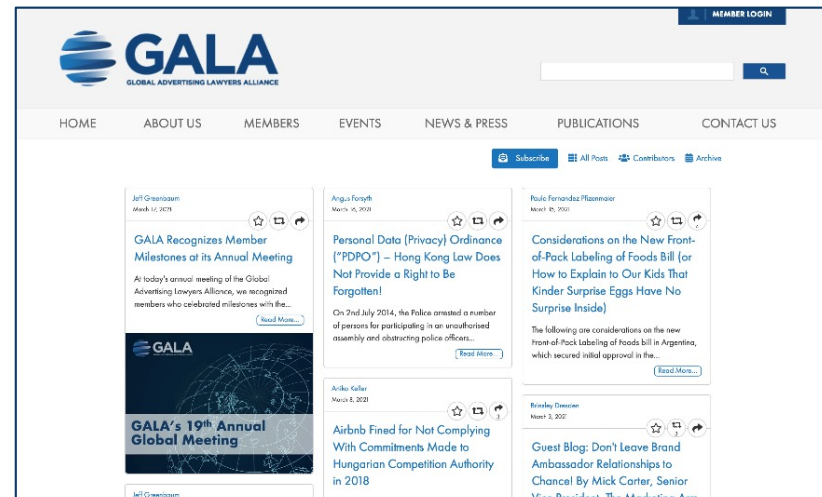
Resources

Resources

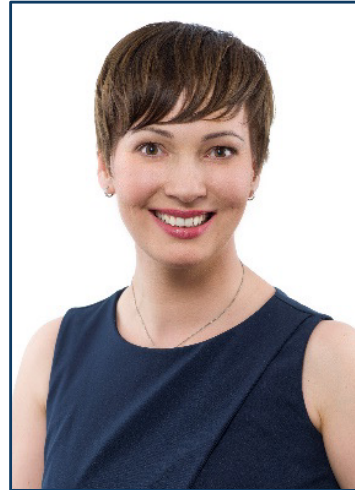
- GALA Website - www.galalaw.com



- GALA Blog - blog.galalaw.com



Thank you!



MODERATOR:
Anikó Keller
Szecskay Attorneys at Law
HUNGARY



Brinsley Dresden
Lewis Silkin LLP
UNITED KINGDOM



Delia Fehr-Bosshard
VISCHER
SWITZERLAND



Dusan Nitschneider
Nitschneider & Partners
SLOVAKIA



Mariam Sabet
Al Tamimi & Co.
UNITED ARAB EMIRATES



Esohe Olajide
Integrated Legal Consultants
GHANA