

# Advertising Q&A: Ireland

by Adam Finlay and Ruth Hughes, *McCann FitzGerald*

Country Q&A | Law stated as at 31-Mar-2020 | Ireland

---

Ireland specific information concerning the key legal issues that need to be considered when designing an advertising campaign.

This Q&A provides country-specific commentary on *Advertising: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

---

## Advertising regulation

1. How does national law regulate the advertising industry?

The principal sources of regulation of advertising in Ireland are:

- **Legislation.** While there is a large body of law governing advertising, the key pieces of legislation are the:
  - Consumer Protection Acts 2007 and 2014 (which, among other things, implement Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive)).
  - EC (Misleading and Comparative Marketing Communications) Regulations 2007 (which implement the Directive 2006/114/EC concerning misleading and comparative advertising (Misleading and Comparative Advertising Directive)).
  - EC (Requirements to Indicate Product Prices) Regulations 2002.
  - intellectual property legislation, primarily the Trade Mark Act 1996, as amended and the Copyright and Related Rights Act 2000, as amended.
- **Common law.** The most relevant areas of common law are passing off, defamation and malicious falsehood.
- **Broadcasting regulation.** The Broadcasting Act 2009 and the EC (Audiovisual Media Services) Regulations 2010 (as amended), implement Directive 89/552/EEC on the co-ordination of certain provisions concerning the pursuit of television broadcasting activities (Television Without Frontiers Directive), as

amended by Directive 2007/65/EC on the co-ordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities (Audio-Visual Media Services Directive).

The Broadcasting Authority of Ireland (BAI) regulates TV and radio stations in Ireland and has published a number of codes and standards including the:

- General Communications Code;
  - Children's Commercial Communications Code; and
  - Rules on Adverts and Teleshopping.
- 
- **Self-regulation.** Self-regulation is the principal method of regulation of advertising in Ireland and is carried out and enforced by the Advertising Standards Authority for Ireland (ASAI). The ASAI is an independent body financed by the advertising industry with the aim of promoting standards in advertising and promotional and direct marketing.
  - **Industry-specific regulation.** In addition, there are a number of industry-specific laws, regulatory bodies and codes of practice such as the:
    - Code of Standards for Advertising Practice for the Consumer Healthcare Industry issued by the Irish Pharmaceutical Healthcare Association (IPHA); and
    - Guidance on Advertising Requirements of the Consumer Protection Code 2012 issued by the Central Bank of Ireland (CBI).

For further information on industry-specific regulation, see [Question 14](#).

2. What obligations or standards do national codes of advertising impose upon advertisers?

The main rules governing advertising in Ireland are set out in:

- The ASAI's Code of Standards for Advertising, Promotional and Direct Marketing in Ireland (ASAI Code).
- Codes applicable to broadcasting issued by the BAI.

The ASAI Code is very broad in scope and applies to:

- Marketing communications in:
  - newspapers, magazines and printed publications (including free newspapers and magazines);
  - posters and other promotional media in public places (including moving images and digital screens);

- brochures, leaflets, circulars and mailings;
  - fax transmissions, emails and text transmissions.
- Marketing communications broadcast via television, radio or cinemas, or on DVD, and so on.
- Marketing communications via digital media including:
- online advertisements in paid-for space (including banners, pop-ups and videos) and paid-for search listings;
  - preferential listings on price comparison sites;
  - viral, in-game and commercial classified advertisements;
  - "advergames"; and
  - online sales promotions and prize promotions.
  - Promotional marketing and sales promotions.
  - Advertorials.
  - Marketing communications in non-paid-for space online that is under the control of the advertiser or their agent (including advertisers' own websites that are directly connected with the supply of goods, services, facilities, opportunities, prizes or gifts, or that solicit donations).

For additional information on the ASAI Code and online advertising (such as in relation to user generated content, viral advertising and bloggers and influencers), see [Online Advertising and marketing: Ireland](#).

## Exclusions

There are a number of exclusions from the ASAI Code, including:

- Marketing in relation to political, religious, industrial relations, social or aesthetic matters or issues of public interest or concern.
- Press releases and other public relations material.
- The content of books and editorials.
- Oral communications.
- Specialised marketing communications addressed to the medical, veterinary and allied professions.

## Territorial scope

Direct marketing originating outside Ireland and sales promotions and marketing on non-Irish websites are regulated in the country of origin if the relevant authority accepts cross-border complaints (for example, through the European Advertising Standards Alliance). If not, the ASAI states that it "will take what action it can".

The principal requirements are set out in section 3 of the ASAI Code, and require advertising to:

- Be legal, decent, honest and truthful.
- Be prepared with a sense of responsibility to consumers and to society.
- Respect the principles of fair competition generally accepted in business.

In addition, the ASAI Code sets out specific principles that apply to particular types of advertising such as:

- Misleading advertising.
- Promotional marketing.
- Distance selling.

## **Broadcast media**

The BAI has issued a number of codes to regulate broadcast content, including the:

- General Communications Code (GCC), which contains general rules and rules relating to specific products and services.
- Children's Commercial Communications Code, which applies to commercial communications that promote products, services or activities of particular interest to children or that are broadcast during or between children's programmes.
- Rules on Adverts and Teleshopping, which set the total daily time of broadcast advertising for general broadcast and for children's programming.

## **Breaches of consumer protection law**

Consumers can make complaints in relation to alleged breaches of the Consumer Protection Acts 2007 and 2014 to the Competition and Consumer Protection Commission.

3. What procedures exist for complaining against an advertisement? What sanctions can be imposed for infringements of advertising codes or laws?

Complaints can be made to the ASAI and are investigated free of charge. The ASAI can also investigate issues identified through its monitoring programme. The ASAI does not generally investigate disputes between commercially interested parties.

Complaints are subject to initial evaluation. If there is a case to answer, the advertiser is informed of the complaint and invited to comment. An ASAI committee then makes a decision as to whether the ASAI Code has been breached (or issues a statement) and publishes a case report on the ASAI website including the names of the relevant advertisers, promoters and agencies ("naming and shaming").

An advertisement or promotion that is found to be in breach of the ASAI Code must be withdrawn or amended. Media organisations that are members of the ASAI must refuse to publish a marketing communication that fails to conform to the requirements of the ASAI Code.

If advertisers persistently or gravely breach the ASAI Code, they can be required to submit future marketing communications for copy advice until the ASAI is satisfied that they are likely to comply with the ASAI Code. The ASAI can also discipline members and impose penalties such as fines or suspension of membership.

## **Broadcast media**

If the BAI's Codes are breached, members of the public can make complaints within the relevant timeframes. The BAI generally requires members of the public to first contact the relevant broadcaster and, if the broadcaster's response is not satisfactory, the member of the public can then complain to the BAI. The BAI will then invite submissions from the broadcaster and issue a decision.

Members of the public also have a right to reply if they are of the view that a broadcast was factually incorrect or impugned their honour or reputation. The relevant broadcaster must publish valid requests to exercise this right on their website.

## **Controls on advertising methods**

4. How does national law control product placement and editorial advertising?

Section 3 of the ASAI Code requires a marketing communication to be designed and presented in such a way that it is clear that it is a marketing communication and does not misrepresent its true purpose. Commercial communications must:

- Be clearly identified as such.
- Be distinguished from editorial material.
- Comply with the ASAI Code.

Marketing communications cannot be presented as private blogs or independent reviews if their purpose is marketing. The identity of the advertiser, product or service must be apparent.

The ASAI has issued specific guidance aimed at "bloggers" and "influencers" to ensure that the public is not misled by online advertisements, blogs and social media platforms. All paid marketing communications must be clearly

marked as such. Where celebrities or bloggers enter commercial arrangements, that is, they are sponsored by brands or paid to promote products, it must be clear that their posts are marketing communications.

## **Broadcast media**

Under the GCC, paid product placement (that is, a reference to a product, service or trade mark within a programme):

- Is subject to restrictions such as being editorially justified, not giving undue prominence to the products or services, and so on.
- Is only permitted in certain types of broadcast content, such as cinematographic works, television films, sport, drama and light entertainment programmes (provided they do not regularly include 20% or more of news/current affairs content).
- Must be appropriately identified, for example by announcements at the start, after breaks, at the end of a programme, and in the credits.

Product integration (where programme content is tailored around the product) and thematic placement (where programme content is tailored around a specific theme, such as the beliefs of the product or service provider) are prohibited. Product placement of tobacco products and medicinal or medical products is also prohibited.

Prop placement (that is the provision of products and services worth more than EUR1,000 for inclusion in a television programme free of charge) is permitted in all programmes but must not affect their integrity (particularly for news and current affairs programmes). Prop placement in children's programmes is not permitted if the products/services are not permitted to feature in children's programmes (such as alcohol).

5. Does national law permit subliminal advertising?

The GCC prohibits surreptitious and subliminal commercial communications.

Subliminal commercial communications are defined as commercial communications that include any technical device that, by using images of very brief duration or any other means, exploits the possibility of conveying a message to, or otherwise influencing the minds of, members of an audience without their being aware or fully aware of what has been done.

Surreptitious commercial communications are defined as commercial communications that both:

- Contain words or pictures of goods or services, or the name, trade mark or activities of a provider of goods or services, in programmes that are intended by the broadcaster to serve as a commercial communication (especially in return for payment or other consideration).
- Might mislead the public as to their nature.

6. How does national law regulate the use of billboards and other forms of outdoor advertising?

Outdoor advertising is governed by the:

- Litter Pollution Act 1997 (as amended).
- Planning and Development Acts 2000-2018 (Planning and Development Acts).
- Planning and Development Regulations 2001-2018 (Planning and Development Regulations).

The Litter Pollution Act prohibits the placing of an advertisement on any structure that is in or is visible from a public place without the permission of the owner or occupier. There are exceptions to this general rule in relation to the advertising of public meetings, elections or referendums. If an advertisement is in or visible from a public place, the local authority can serve a notice on the occupier requiring them to remove or take steps in relation to the advertisement in certain circumstances. In addition, the Litter Pollution Act provides that a person cannot place an advertisement on a mechanically propelled vehicle other than by securing it to the body of the vehicle (and putting advertisements under the windscreen wipers superficially is not permitted).

Under the Planning and Development Acts, a planning authority can serve a notice on the owner of a structure requiring them to repair, tidy or remove an advertisement in certain circumstances.

The Planning and Development Regulations set out a range of developments that are exempt from the restrictions in the Planning and Development Acts, subject to compliance with certain conditions and restrictions. In addition, the Planning and Development Regulations prohibit the erection, construction, placing or maintaining of an advertisement structure on, under, over or along a public road other than in accordance with a licence granted by a planning authority.

The Public Health (Alcohol) Act 2018 imposes restrictions on the advertising of alcohol products in certain places including:

- Certain parks and open spaces.
- Public service and light rail vehicles and trains.
- Train and bus stations and stops.
- Schools.
- Local authority playgrounds.

7. How does national law regulate the use of aerial advertising?

Under the Irish Aviation Authority (Rules of the Air) Order 2004, an aircraft must not be used for aerial work (meaning, among other things, aerial advertisement) unless the aircraft's certificate of airworthiness includes an authorisation for that purpose.

## Controls on advertising content

8. How does national law regulate price advertising and display?

### Legislation

The EC (Requirements to Indicate Product Prices) Regulations 2002 (Price Regulations) do not require traders to indicate the selling price in any advertisements, but if they choose to do so, the unit price of the product must be included. All prices must be displayed in euro and the selling price and unit price (where relevant) must be:

- Unambiguous and easily identifiable as referring to the product.
- Clearly visible and legible to prospective customers.
- Where distance selling, in proximity to the product or the description of the product.

Failure to comply with the Price Regulations is a criminal offence.

The Consumer Protection Acts 2007 and 2014 (CPA) prohibit false or misleading indications of price (or the recommended price) of goods or services (see [Question 9](#) and [Question 10](#)). Any prices displayed must be complete and not subject to hidden charges.

The Prices and Charges (Tax Inclusive Statements) Order 1973 requires retail prices for goods and all charges for services stated in an advertisement to be inclusive of all taxes.

In addition, there are a number of sector-specific Display Orders that require traders in certain sectors (such as licensed premises, restaurants and cafes, petrol stations, hairdressers and barbers) to display a price list at their premises. Failure to comply with such an order is a criminal offence.

### Guidance

Section 4 of the ASAI Code deals with the issue of pricing in advertising. Among other things the ASAI Code requires that:



- If a price is stated in a marketing communication, it must relate to the product depicted or specified in the marketing communication.
- Prices quoted must generally include VAT and any other taxes, duties or charges.
- If the price of one product is dependent on the purchase of another, the extent of any commitment required from consumers must be clear.
- If the cost of accessing a message or service or communicating with the trader is greater than the standard rate, this must be made clear.
- If a marketing communication involves a claim or creates an impression that a product was previously offered at a different price or at a particular price, it must be the case that the product was in fact previously offered at that specified price openly and in good faith and for a reasonable period of time.

9. How does national law regulate the use of false information in advertising?

Sections 42, 43 and 47 of the CPA make it a criminal offence to engage in a misleading commercial practice, that is, a commercial practice that both:

- Involves the provision of false, misleading or deceptive information in relation to the wide range of matters specified in section 43(3) of the CPA, including:
  - the product or service's geographical origin, availability, composition or ingredients, or price;
  - the legal rights of the consumer.
- Is likely to cause the average consumer to make a transactional decision that they would not otherwise make.

10. How does national law regulate misleading advertising?

## Legislation

Sections 42, 43 and 47 of the CPA make it a criminal offence to engage in a misleading commercial practice, that is, a commercial practice that is likely to cause the average consumer to both:

- Be deceived or misled in relation to the wide range of matters specified in section 43(3) of the CPA (*see Question 9*).
- Make a transactional decision that they would not otherwise make.

In addition, a number of other misleading commercial practices are prohibited under the CPA (but do not constitute criminal offences), including commercial practices that:

Include the provision of false information.

- Are likely to cause the average consumer to confuse a competitor's product with the trader's product.
- Involve a representation that the trader is bound by a code of practice, where the representation is likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make and the trader fails to comply with a firm commitment in that code of practice.
- Omit or conceal material information that the average consumer needs to make an informed transactional decision.
- Provide material information in a manner that is unclear, unintelligible, ambiguous or untimely, or that fails to identify the commercial intent of the practice, and this is likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make.

See *Question 11* in relation to comparative advertising.

## Guidance

The ASAI Code contains a number of requirements that are relevant to misleading advertising, including that:

- A marketing communication must not mislead by inaccuracy, ambiguity, exaggeration or omission.
- Deliberate hyperbole or obvious untruths that are unlikely to mislead are not necessarily in conflict with the ASAI Code, provided they do not affect the accuracy or perception of the communication.
- Disclaimers, footnotes or small print must not contradict a more prominent aspect of the message (such information must be of sufficient size and/or prominence and be located and presented in such a manner as to be clearly and easily legible or audible and, where appropriate, such information must be linked to the relevant part of the main copy).
- It must be clear that opinions about the quality of a product are opinions rather than a matter of fact and there must be no likelihood of consumers being misled about any matter that is capable of objective assessment.
- Claims (whether direct or indirect, expressed or implied) that a consumer would be likely to regard as being objectively true must not be included unless the objective truth of the claims can be substantiated.
- There must be no misuse, mischaracterisation or misleading citations of any technical data.
- Testimonials must be supported by documentation.

11. How does national law regulate comparative advertising?

## Legislation

The EC (Misleading and Comparative Marketing Communications) Regulations 2007 (Comparative Advertising Regulations) define a comparative marketing communication as any form of communication that explicitly or impliedly identifies a competitor or a product of a competitor. It prohibits such communications if they:

- Are misleading.
- Do not compare products or services that meet the same need or purposes.
- Do not objectively compare relevant, verifiable and representative features of the product or service.
- Discredit trade marks or present goods or services as imitations of those bearing a protected trade mark.
- Create confusion between the trader and the competitor or between trade marks.

Under regulation 5 of the Comparative Advertising Regulations, traders who believe they have been impacted by a prohibited marketing communication can apply for a Circuit Court or High Court order prohibiting the communication.

## Guidance

Section 4 of the ASAI Code relates to comparative advertising and provides that certain comparisons can be permitted in the interests of public information and vigorous competition. Such comparisons can be explicit or implied and can relate to advertisers' own products or those of their competitors. Marketing communications that do not identify a specific competitor can still be considered to contain an implicit comparative claim.

Comparisons must be fair and not give rise to a likelihood of a consumer being misled. In any marketing communication that uses comparisons, the basis of selection must be clear and the elements of comparison must not be unfairly selected in a way that gives the advertisers an artificial advantage. A claim that any product is superior to others can only be made if there is clear evidence to support the claim. Wording that implies superior or superlative status (such as "largest" or "leading") must be capable of substantiation with market share data or similar proof.

Marketing communications must not unfairly attack, discredit or denigrate other businesses or their products, trade marks, trade names or other distinguishing marks.

12. Can an advertisement create a contract between the advertiser and the buyer of the product advertised?

An advertisement does not generally create a contract between the advertiser and the buyer of the product advertised. However, in circumstances where the court finds that an advertisement was intended to be an offer, a contract can be created. This could arise where it would appear to a reasonable man that the advertiser is making a serious offer and the buyer performs the conditions attached to the offer (*Carlill v Carbolic Smoke Ball Co [1893] 1 Q.B. 256*).

13. How does national law regulate the use of obscene or indecent material in advertisements?

## Legislation

Advertisements are subject to prohibitions on the grounds of obscenity or indecency under the:

- Censorship of Publications Acts 1929-1967.
- Censorship of Films Acts 1923-1992.
- Video Recordings Acts 1989 and 1992.
- Indecent Advertisements Act 1889.

The Censorship of Films (Amendment) Act 1925 makes it an offence to display any photograph or picture in the context of advertising unless it has been certified by the Official Censor of Films. A display can be prohibited if it is indecent, obscene, blasphemous or immoral.

## Guidance

Under Principle 2 (Human Dignity, Offence and Harm) of the GCC, commercial communications must not:

- Prejudice respect for human dignity.
- Cause serious or widespread offence.
- Cause harm or encourage harmful behaviour.

In addition, broadcasters must have due regard for the appropriateness and justification for broadcasting commercial communications that include depictions or descriptions of violence, sexual conduct, and coarse or offensive language.

Under the ASAI Code, advertisers must:

- Take account of public sensitivities in the preparation and publication of marketing communications.
- Avoid the exploitation of sexuality and the use of coarseness and undesirable innuendo.
- Not use offensive or provocative images merely to attract attention.

Marketing communications that may be considered by some to be distasteful might not necessarily be in breach of the ASAI Code. Nevertheless, advertisers are urged to consider public sensitivities before using potentially offensive material.

Compliance with the ASAI Code is assessed on the basis of the standards of taste, decency and propriety generally accepted in Ireland. In this regard, attention is paid to the:

- Characteristics of the likely audience.
- Media by which the marketing communication is communicated.
- Location and context of the marketing communication.
- Nature of the advertised product and the nature, content and form of any associated material made available or action recommended to consumers.

## Industry-specific regulation

14. Does national law legislate or regulate advertising in any specific industry sectors?

### Alcohol

**Legislation.** The Public Health (Alcohol) Act 2018 (Public Health Act) introduces significant new rules on the advertising of alcohol. From 12 November 2019, there are prohibitions on:

- Alcohol advertising in certain places, including (*section 14*):
  - public transport stops, trains, bus stations or public service vehicles;
  - within 200 metres of a school, a playschool or a local authority playground.
- Children's clothing that promotes alcohol (*section 17*).
- Alcohol advertising in a cinema, except immediately before films with an 18 certificate or in licensed premises within a cinema (*section 20*).

Under section 22, from 12 November 2020, alcohol products and advertising in mixed retail outlets must be confined to certain specified areas.

From 12 November 2021, there will be prohibitions on:

- Alcohol advertising in or on a sports area during sporting events, events aimed at children, and events in which the majority of participants or competitors are children (*section 15*).
- Alcohol sponsorship of events aimed at children or in which the majority of participants or competitors are children.
- Alcohol sponsorship of events involving driving or racing motor vehicles (*section 16*).

The Public Health Act also provides for a number of other additional measures that have not yet been commenced, including minimum unit pricing and new requirements in relation to the labelling and advertising of alcohol

**Guidance.** The GCC provides that commercial communications for alcoholic beverages must not:

- Show children consuming alcohol or encourage children or non-drinkers to begin drinking.
- Link the consumption of alcohol to enhanced physical performance or to driving.
- Create the impression that alcohol:
  - increases sexual attraction and success or social success;
  - has therapeutic qualities;
  - is a stimulant, sedative or tranquiliser; or
  - is a means of resolving personal conflicts.
- Encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light.
- Place emphasis on high alcohol content as being a positive quality.
- Present health or nutrition claims for beverages containing more than 1.2% AbV (other than those that refer to a reduction in the alcohol or energy content).

Commercial communications are not permitted for beverages containing more than 25% AbV, or alco-pops, pre-mixed spirit drinks or similar.

Commercial communications are permitted for events with alcohol sponsorship (until 12 November 2021) provided that the sponsor's product is not more prominent than the event or activity being promoted. Alcohol sponsorship of sports programmes and sports bulletins, including competitions within sports programmes, is not permitted. Isolated individual advertising spots before the normal advertising breaks at half-time or full-time in coverage of a sports event are also not permitted for alcohol brands.

There are also restrictions in relation to:

- The type of programmes that commercial communications for alcoholic beverages can be broadcast in or around.
- A ban on advertising alcohol between 6am and 10am.
- A limit on the amount and percentage of advertising made up by alcohol advertising.

Broadcasters must:

- Identify programmes that carry commercial communications for alcoholic beverages, and publish a list of such programmes on their website.
- Enforce a Code of Conduct for their presenters ensuring that speech content that glamorises or encourages over-consumption or misuse of alcohol is prevented, and publish this on their website.

Section 9 of the ASAI Code sets out the rules in relation to advertising of alcoholic drinks. The rules are generally intended to ensure that advertising of alcohol is consistent with the need to demonstrate responsibility and moderation in consumption and not encourage consumption by children. Advertisements for any soft drink that is promoted as a mixer are also subject to the rules in section 9.

The ASAI Code contains a number of restrictions in relation to the responsible advertising of alcohol, including in relation to the portrayal of:

- The social dimension of alcohol.
- Children.
- Health and safety.
- Promotions.

In addition to the ASAI Code, advertisers must ensure that they carry Copy Clear approval and comply with:

- Any voluntary codes agreed between the Department of Health, the drinks industry and the media.
- The Code for Sponsorships by Alcohol Drinks Companies.
- The Responsible Retailing of Alcohol in Ireland Code.

## Financial services

**Legislation.** The Consumer Protection Code (CPC) aims to ensure a consistent level of protection for consumers regardless of financial services provider. Regulated entities must comply with the CPC at all times when providing financial services. The Central Bank of Ireland has the power to administer sanctions for a breach of the CPC.

Under the CPC, a regulated entity must ensure that:

- The design, presentation and content of advertisements is clear, fair, accurate and not misleading.

- Advertisements do not seek to influence a consumer's attitude to the advertised product or service or the regulated entity through ambiguity, exaggeration or omission.
- The nature and type of the advertised product or service is clear and not disguised in any way.
- Advertisements are not misleading, in particular in relation to certain factors such as the independence of the information provided or the past performance or possible future performance of the advertised product or service.
- It is made clear that the communication is an advertisement. Key information in the advertisement must be prominent and any comparisons must be based on facts or reasonable assumptions.

Fixed warning statements set out in the CPC must be displayed when advertising credit to personal consumers (such as "if you do not keep up your repayments you may lose your home"). There are similar fixed warning statements in respect of investment products.

The Central Bank Act 1971 prohibits any person from advertising themselves as a banker or as carrying out banking business unless they have a licence from the Central Bank of Ireland.

**Guidance.** Although the primary regulation is the CPC, all marketing communications are also still subject to the ASAI Code. Section 13 of the ASAI Code sets out the rules in relation to advertising of financial services and products, including that:

- Advertisers must ensure that members of the public fully grasp the nature of any commitment into which they may enter as a result of responding to a marketing communication.
- The nature of the contract being offered and any limitations on eligibility, charges, expenses or penalties, and the terms on which withdrawal can be arranged, must be made clear (or alternatively, free explanatory material giving full details of the offer must be made available or readily accessible) before a binding contract is entered into.
- Any forecast or projections must make clear the basis on which they are made.
- It must be made clear in a prominent manner that the value of investments is variable and, unless guaranteed, can go down as well as up (if the value of the investment is guaranteed, details of this must be included).
- It must be specified that past performance or experience does not necessarily give a guide for the future.

## Food and nutrition

**Legislation.** The EU (Provision of Food Information to Consumers) Regulations 2014 (2014 Regulations) make it an offence to advertise food in a misleading manner, in particular in respect of the food's:

- Characteristics.
- Effects and properties.
- Ingredients.



Food business operators that breach the 2014 Regulations can be required to recall food and can be liable for a fine.

Advertisements making a nutrition or health claim about a food product must comply with Regulation (EC) 1924/2006 on nutrition and health claims made on foods (Nutrition and Health Claims Regulation). Health and nutrition claims must not:

- Be false, ambiguous or misleading.
- Give rise to doubt about the nutritional adequacy of other foods.
- Encourage excess consumption of a food.
- Suggest that a balanced and varied diet cannot provide adequate nutrition.
- Refer to changes in bodily functions that could exploit fear in the consumer.

Nutritional claims must be based on substantiated scientific evidence.

**Guidance.** The ASAI Code supplements the legislation in this area. It provides that:

- Marketing communications for food must not disparage good dietary practice or the selection of options that accepted opinion recommends should form part of the average diet.
- Health and nutrition claims must be presented clearly and without exaggeration.
- An advertisement must not imply health could be affected by not consuming a food or imply that a food prevents, treats or cures human disease (unless this is authorised by the European Commission).

Under ASAI Code, an advertisement must not imply that food supplements, including vitamins, will:

- Guard against dietary deficiency.
- Elevate mood.
- Enhance performance.

Such supplements must not be promoted as a substitute for a healthy diet.

The BAI's GCC contains requirements for commercial communications relating to food, nutrition and health (as well as particular types of food such as infant formula, follow-on formula and nutritional claims). Generally, food information must:

Be accurate, clear, easy to understand and not misleading.

Not attribute preventative, treatment or curative properties to any food.

Nutrition and health claims must be substantiated by accepted scientific data.

The BAI has issued a Code on Children's Commercial Communications, under which commercial communications for food products that are high in fat, salt and sugar are not permitted in children's programmes (as defined by the Code).

In addition, the Minister of Health has collaborated with the sector to put in place the Non-Broadcast Media Advertising and Marketing of Food and Non-Alcoholic Beverages, including Sponsorship and Retail Product Placement: Voluntary Codes of Practice.

## Medicinal products

**Legislation.** The advertising of medicinal products is primarily governed by the Medicinal Products (Control of Advertising) Regulations 2007 (2007 Regulations). Under the 2007 Regulations, any advertisement in respect of a medicinal product must:

- Be granted a marketing authorisation by Health Products Regulatory Authority (HPRA).
- Comply with the particulars set out in the summary of the product characteristics.
- Encourage the rational use of the product by presenting it objectively, without exaggeration and must not be misleading.

**Guidance.** Under the ASAI Code:

- Marketing communications must not suggest that a product is "special" or "different" because it has been granted an authorisation by the HPRA.
- Prescription-only medicines cannot be advertised to the public.
- Marketing communications for medicinal products cannot contain any offer to diagnose, advise, prescribe or treat by correspondence and must not claim that the effects of the product are guaranteed.
- Medicinal product advertisements must not use alarming or misleading terms.
- Medicinal product advertisements must not contain an offer to refund money to dissatisfied customers.

The BAI's GCC prohibits commercial communications for:

- Prescription-only medicinal products.
- Controlled drugs.
- Psychoactive substances.
- Medicinal products or medical devices intended to treat any serious complaint, condition, symptom or disease that should receive the attention of a registered medical practitioner.

There are limited exclusions to this prohibition in respect of vaccination campaigns approved by the Minister for Health and human health or disease awareness campaigns (provided there is no reference to medicinal products).

The GCC permits commercial communications for all other medicinal products where such products have the necessary authorisation, registration or certification. There are detailed requirements in respect of such commercial communications, such as that all such communications must comply with the particulars set out in the relevant summary of product characteristics. Certain minimum information must also be included.

## Tobacco

**Legislation.** A number of separate pieces of legislation govern the advertisement of tobacco products, including the:

- Public Health (Tobacco) Acts 2002 – 2015 (Tobacco Acts) and associated regulations.
- The Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Regulations 1991, as amended (1991 Regulations)
- EU (Manufacture, Presentation and Sale of Tobacco and Related Products) Regulations 2016, as amended (2016 Regulations).

The Tobacco Acts implement Directive 2003/33/EC relating to the advertising and sponsorship of tobacco products (Tobacco Advertising Directive). This provides that anyone who advertises or provides sponsorship in relation to a tobacco product in contravention of the directive is guilty of an offence. There is a ban on point of sale advertising and sales through vending machines, with certain limited exceptions. The Public Health (Standardised Packaging of Tobacco) Act 2015, as amended, has also introduced a requirement for standardised plain packaging of tobacco products.

The 1991 Regulations, as amended, were implemented under the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion Act 1978 (1978 Act). The 1978 Act has partially been repealed by the Tobacco Acts, and although provision has been made for the repeal of the 1991 Regulations, no order has yet been made for the commencement of this section. The 1991 Regulations provide that anyone who advertises tobacco products must do so in accordance with the 1991 Regulations. The 1991 Regulations contain specific requirements for advertisements in newspapers, advertisements on packages of tobacco products, government warnings, expenditure, and sponsorship. However, the scope of the 1991 Regulations does not extend to advertisements that are not directed at the public, or to advertisements in duty free areas.

The 2016 Regulations were enacted to give effect to Directive 2014/40/EU concerning the manufacture, presentation and sale of tobacco and related products (Tobacco Products Directive). The Tobacco Products Directive and the implementing regulations set out rules governing:

- The manufacture, presentation and sale of tobacco and related products.
- The lawful advertising of tobacco, including the labelling and packaging of tobacco products and cross-border distance sales.
- The sale of electronic cigarettes and herbal products.
- Health warnings, tamper proof security features and a unique identifier that must appear on every packet and outside packaging (for example, each packet must contain a general warning that "smoking kills").
- Electronic cigarettes, refill containers and herbal products, which are subject to requirements regarding information and labelling, health warnings, product presentation, and commercial communications.

Certain provisions relating to tracking and tracing of cigarettes and roll-your-own tobacco apply under the 2016 Regulations from 20 May 2019 and 20 May 2024 respectively.

**Guidance.** The ASAI Code contains specific requirements for tobacco products. Among other things, the ASAI Code states that marketing communications for e-cigarettes must:

Be socially responsible.

- Contain nothing that promotes the use of a tobacco product or shows the use of a tobacco product in a positive light.
- Do nothing to undermine the message that quitting tobacco use is the best option for health.
- Not use health professionals or celebrities to endorse electronic cigarettes.

The BAI's GCC includes guidance on advertisements for products or services claiming to assist people in giving up smoking, which requires that the communications make it clear that personal willpower is essential to achieve this, and that the product or service is merely a method of assistance.

The Department of Health has also issued some guidance notes in relation to the sale of tobacco products, such as a guidance document for retailers, manufacturers and distributors of tobacco products, enforcement agencies and the public, and guidance on electronic cigarettes and refill containers.

## **Other**

There are specific legislative restrictions and requirements in respect of a number of regulated professions, such as accountants, solicitors and so on.

In addition, the ASAI Code contains specific rules in relation to:

- Gambling.
- Health and beauty.
- Slimming.
- Employment and business opportunities.
- Environmental claims.
- Occasional trading.
- Online behavioural advertising.

The BAI's GCC also contains specific rules in relation to:

- Medical treatments and services.
- Cosmetic products, treatments and services.
- Hypnosis, hypnotherapy and similar services.
- Slimming treatments, products and services.
- Premium rate telecommunications services.

- Fortune tellers and psychic services.

## Restrictions on advertising to children

15. Does national law regulate advertisements directed at children?

### Legislation

No legislation specifically regulates advertising to children.

### Guidance

Section 7 of the ASAI Code sets out the rules in relation to advertising to children. Marketing communications addressed directly or indirectly to children, or that are likely to be seen or heard by a significant proportion of children, must have regard to the special characteristics of children. Marketing communications must contain nothing that is likely to result in physical, mental or moral harm to children or that is likely to frighten or disturb them, except to promote safety or where it is in the public interest.

In addition, section 7 includes a number of other rules, including that children must not be:

- Portrayed in a manner that offends against accepted standards of good taste and decency.
- Encouraged to enter into unsafe situations, strange places or talk to strangers, or to engage in anti-social behaviour or bullying.
- Shown in morally or physically dangerous situations or behaving dangerously in the home or outside. Children must not be shown unattended in street scenes unless they are old enough to take responsibility for their own safety.

The BAI's Code on Children's Commercial Communications contains similar rules to the ASAI Code. It also provides that children's commercial communications must not:

- Directly encourage or exhort children to ask adults to buy them the products or services being promoted.
- Imply that possession or use of a product or service will make the child or their family superior, either physically, socially or psychologically.
- Show children using the internet without appropriate adult supervision.

## Protection and use of intellectual property rights

16. How is copyright protected under national law? Are advertising slogans protected by copyright under national law?

Copyright law in Ireland is governed by the Copyright and Related Rights Act 2000, as amended. There is no requirement to register a copyright once the work qualifies for copyright protection. Copyright does not protect ideas in the abstract, but only when the idea is recorded graphically or otherwise. Advertising slogans can be protected by copyright if they are sufficiently original.

17. How are trade marks protected under national law? Is there any form of protection for unregistered trade marks, for example, under unfair competition or passing off laws?

Irish trade marks are protected by the Trade Marks Act 1996, as amended, and the unauthorised use of a trade mark in business can sustain a common law action for passing off. If unregistered trade marks satisfy certain conditions, they can be protected under the tort of passing off. However, enforcing such protection can be uncertain and difficult.

If there is an infringement of a registered trade mark, the infringement is actionable by way of damages, injunction or accounts.

Similar protections apply in Ireland in respect of EU trade marks.

18. Can a trade mark registered in the name of a third party be used in comparative advertising? Where such use is permitted, will there be any copyright issues?

The Trade Mark Act 1996 specifically permits the use of registered Irish trade marks for the purpose of identifying goods or services as those of the proprietor of the registered mark. However, such use is only permitted if it is in accordance with honest practices in industrial or commercial matters and does not take unfair advantage of, or is not detrimental to, the distinctive character or reputation of the trade mark.

## Endorsements and the use of people in advertisements

19. What action lies for using an individual's name or image without consent?

Ireland does not recognise personality rights as property rights. However, celebrities whose images or names have been used can bring an action if there is a representation that a product or service is being endorsed or sponsored by the celebrity or the likeness of the celebrity was otherwise used without permission or contractual compensation. Generally, the claimant must prove that members of the public would believe the plaintiff had licensed the use of the image.

In *Irvine and Another v Talksport Limited* [2002] 2 All ER 414 the advertiser had altered a photograph of the Formula One racing driver, Eddie Irvine, to promote its radio service. The court found that the advertisement amounted to a false endorsement. Eddie Irvine was able to protect his goodwill even though there was no common field of activity between him and the advertiser, which had previously been a required element of the tort of passing off. This case, which is a UK decision but likely to be considered of persuasive authority in Ireland, strengthened the ability of celebrities to bring actions for passing off.

The ASAI Code reminds advertisers that persons who do not wish to be associated with a marketing communication may take legal action against them. It states that, subject to certain exemptions, advertisers should have written permission in advance from living persons portrayed or referred to in a marketing communication or where a person's house or other possessions are featured in a manner that identifies the owner to the public.

Marketing communications must not exploit a person's public reputation in a manner that is humiliating or offensive and must not claim or imply an endorsement where none exists.

### Contributor details

**Adam Finlay, Partner**

**McCann FitzGerald**

E [adam.finlay@mccannfitzgerald.com](mailto:adam.finlay@mccannfitzgerald.com)

T +353 1 607 1795

**Areas of Practice:** Technology & Innovation.

**Ruth Hughes, Associate**

**McCann FitzGerald**

**E** [ruth.hughes@mccannfitzgerald.com](mailto:ruth.hughes@mccannfitzgerald.com)

**T** +353 1 607 1482

**Areas of Practice:** Technology & Innovation.

---

**END OF DOCUMENT**