

ADVERTISING & MARKETING

Austria



Advertising & Marketing

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Quick reference guide enabling side-by-side comparison of local insights, including into the legal and regulatory framework; private enforcement (litigation and administrative procedures); misleading advertising; prohibited and controlled advertising; social media advertising; and recent trends.

Generated 16 August 2022

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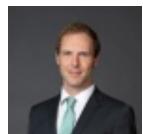
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LEGISLATION AND REGULATION

Legal framework

What are the principal statutes regulating advertising generally?

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

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

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

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

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specialised acts and provisions dealing with, for example, promotional gifts, price discounts or clearance sales were repealed.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

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

Law stated - 11 April 2022

Regulators

Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

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

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

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

Law stated - 11 April 2022

Regulators' powers

What powers do the regulators have?

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

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

Law stated - 11 April 2022

Regulators' priorities

What are the current major concerns of regulators?

Digital Markets Act

With the EU Digital Markets Act, an additional legal framework for online advertising services will be is soon to come. Among other things, it will provide protection rights for business users of platforms (including advertisers).

At present, Austrian civil procedure law does not provide for a class action like in the US and other countries. There is an 'Austrian class action', which means that each injured party needs to assign its claims to a person for collection (eg, a consumer protection organisation or process financier). This person then sues by accumulating all claims.

Law stated - 11 April 2022

Industry codes

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

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

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

The Advertising Council has published guidelines for advertisers ('Dos and Don'ts in Advertising'), including best practices, as well as examples of both good and bad advertising. These guidelines can also be found on the Advertising Council's website. They are currently available in German and English.

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

Law stated - 11 April 2022

Authorisation

Must advertisers register or obtain a licence?

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

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

Law stated - 11 April 2022

Clearance

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

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

Advertisers do not need clearance before publication or broadcasting.

Law stated - 11 April 2022

PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)

Challenging competitors' advertising

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

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

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

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

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

Law stated - 11 April 2022

Public challenges

How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

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

According to case law, even consumers have the right to claim non-contractual damages, if a company makes misleading statements about one of its products.

Law stated - 11 April 2022

Burden of proof

Which party bears the burden of proof?

The plaintiff must prove that the defendant undertook the advertising in question. The defendant must prove that its advertising statements are true. In the proceedings for the preliminary injunction it is sufficient for the plaintiff to substantiate the claim on *prima facie* evidence.

Law stated - 11 April 2022

Remedies

What remedies may the courts or other adjudicators grant?

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

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

Law stated - 11 April 2022

Length of proceedings

How long do proceedings normally take from start to conclusion?

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

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

Law stated - 11 April 2022

Cost of proceedings

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

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

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

For proceedings at first instance, costs are usually between €7,000 and €15,000.

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

Law stated - 11 April 2022

Appeals

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

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

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

Law stated - 11 April 2022

MISLEADING ADVERTISING

Editorial and advertising

How is editorial content differentiated from advertising?

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

Law stated - 11 April 2022

Advertising that requires substantiation

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

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

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

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

Law stated - 11 April 2022

Rules on misleading advertising

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

An advertising claim is misleading if it causes confusion among a significant section of the target public. According to recent case law, a section of more than 25 per cent is always considered significant (sometimes even less).

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

case of merely commercial interests.

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

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

Law stated - 11 April 2022

Substantiating advertising claims

Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

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

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

Law stated - 11 April 2022

Survey results

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

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

Law stated - 11 April 2022

Comparisons with competitors

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

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

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

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

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

comparative advertising.

Law stated - 11 April 2022

Test and study results

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

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

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

Law stated - 11 April 2022

Demonstrating performance

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

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

Law stated - 11 April 2022

Third-party endorsements

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

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

Some professional codes of conduct provide for particular advertising restrictions. For example, doctors must not make testimonials or otherwise advertise for medical products.

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

Law stated - 11 April 2022

Guarantees

Are there special rules for advertising guarantees?

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

Law stated - 11 April 2022

Environmental impact

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

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

Law stated - 11 April 2022

Free and special price claims

Are there special rules for describing something as free or a free trial or for special price or savings claims?

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

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

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

Regarding special prices, the source of the higher initial price must be indicated as consumers generally expect the advertiser to compare with his or her own (previous) regularly charged prices. If it is not clear to which price an offer refers, the price more favourable to the consumer should be used. A practice is misleading within the meaning of section 2 of the Federal Law Against Unfair Competition if services are misleadingly described as 'free of charge', while they are not free of charge but are subject to a payment obligation (eg, as is only apparent from the terms and conditions).

Law stated - 11 April 2022

New and improved

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

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

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

Law stated - 11 April 2022

Claims of origin

Are there special rules for claiming where a product is made (such as country of origin)?

EU Regulation No. 1151/2012 on quality schemes for agricultural products and foodstuffs regulates the protection of designations of origin and geographical indications of agricultural products and foodstuffs, which, owing to their geographical origin, have verifiable characteristics and qualities. This means that certain geographical names are reserved for certain agricultural products and foodstuffs. There are also other EU Regulations with regard to the protection of geographical indications for spirit drinks.

Furthermore, the incorrect reference to the geographical origin of a product is also inadmissible, based on the Federal Law Against Unfair Competition, where it is capable of influencing a significant proportion of the customers when considering the choice of product.

Law stated - 11 April 2022

PROHIBITED AND CONTROLLED ADVERTISING

Prohibited products and services

What products and services may not be advertised?

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

Spirits must not be advertised in radio and TV spots or in audiovisual media. Further, for alcohol advertising, certain other restrictions apply.

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

Law stated - 11 April 2022

Prohibited advertising methods

Are certain advertising methods prohibited?

In general, aggressive advertising is prohibited.

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

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

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

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

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

messages.

Law stated - 11 April 2022

Protection of minors

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

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

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

Law stated - 11 April 2022

Credit and financial products

Are there special rules for advertising credit or financial products?

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

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

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

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

Law stated - 11 April 2022

Therapeutic goods and services

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

Pharmaceuticals and medical devices advertising must:

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

Although not unlawful, the Advertising Council found it inappropriate to promote a pharmaceutical for dyspepsia by showing a woman who secretly adds such pharmaceutical to her husband's and daughter's drinks. The Advertising

Council considered it against good morals and social responsibility to promote administering medicine to others without them knowing.

Law stated - 11 April 2022

Food and health

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

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

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

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

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

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

Law stated - 11 April 2022

Alcohol

What are the rules for advertising alcoholic beverages?

Spirits must not be advertised in radio and TV spots or in audiovisual media.

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

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

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

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

Law stated - 11 April 2022

Tobacco

What are the rules for advertising tobacco products?

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

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

Law stated - 11 April 2022

Gambling

Are there special rules for advertising gambling?

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

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

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

Law stated - 11 April 2022

Lotteries

What are the rules for advertising lotteries?

Lotteries fall under the Gambling Act.

Law stated - 11 April 2022

Promotional contests

What are the requirements for advertising and offering promotional contests?

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

Law stated - 11 April 2022

Indirect marketing

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

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

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

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

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

Law stated - 11 April 2022

Other advertising rules

Briefly give details of any other notable special advertising regimes.

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

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

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

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

Law stated - 11 April 2022

SOCIAL MEDIA

Regulation

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

In general, it must be assessed whether an advertisement falls under the Audiovisual Media Services Act and is thus subject to the restriction on commercial communication. To fall under this regulation, the service must be provided

under 'the editorial responsibility of the media service provider' and the principal purpose of such service is to 'inform, entertain or educate'. It is the characteristic of such services that they are 'television-like'. As an example, advertising on a video channel on YouTube was not qualified as an Audiovisual Media Service (ECJ C132-17).

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

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

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

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

Law stated - 11 April 2022

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

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

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

Facebook's new take on the data protection issue by claiming that the provision of personalised adverts is part of Facebook's contractual obligation is currently subject to pending ECJ proceedings.

Law stated - 11 April 2022

Are there regulations governing privacy concerns when using social media?

The use of a social media user's personal data must comply with general data protection provisions. The use of data for advertising or marketing purposes may, in some cases (especially if advertisements relate to third-party products or services or if processing comes close to profiling), require the data subject's explicit consent. The principle of informational self-determination determines that the data subject has to be aware of the exact facts that he or she is giving consent to. Further, the data subject's consent shall be given freely without any form of constraint. A valid consent requires the data subject's exact knowledge in advance about what data is collected for what purpose. A generic description of the recipients of the data is not sufficient.

On 25 May 2018, the EU General Data Protection Regulation (Regulation (EU) 2016/679) and the Austrian Data Protection Amendment Act entered into application. Generally speaking, this strengthened the individual data subject's (defensive and information) rights and provides for stricter penalties for the data processing companies ('controllers').

Law stated - 11 April 2022

UPDATE AND TRENDS

Recent developments

Are there any emerging trends or hot topics in your jurisdiction?

Recently, the Austrian Data Protection Supervisory Board has ruled (decision not enforceable yet) that the use of Google Analytics – at least in the case at hand – is unlawful due to the transfer of personal data to the US without adequate safeguards. This shows that the use of cookies and personal data for marketing purposes with the help of US internet giants is currently very risky.

New regulations governing the use of cookies have been a hot topic for many years. The EU member states have finally agreed on a draft for the ePrivacy Regulation, which was originally intended to be adopted together with the GDPR in 2016.

Of course, the draft ePrivacy Regulation still needs to be coordinated with the requests of the European institutions, so its entering into force is not yet imminent.

Further regulation is to be expected by the draft EU regulations called the Digital Markets Act and Digital Services Act. While the first wants to ensure a level playing field for all digital companies, regardless of their size, the latter focuses on creating a safer digital space for digital users and companies, by protecting fundamental rights online.

Law stated - 11 April 2022

Jurisdictions

	Austria	Greiter Pegger Kofler & Partners
	France	Bernard-Hertz-Béjot
	Hong Kong	Angus Forsyth & Co
	India	Anand and Anand
	Italy	Studio Legale Jacobacci & Associati
	Japan	Atsumi & Sakai
	South Africa	Herbert Smith Freehills LLP
	Spain	Jacobacci Abril
	Sweden	Wistrand
	Switzerland	Walder Wyss Ltd
	Turkey	CETINKAYA
	United Kingdom	Herbert Smith Freehills LLP
	USA	Crowell & Moring LLP