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# Advertising & Marketing 2021

Belgium: Law & Practice

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# BELGIUM

## Law and Practice

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## 1. LEGAL/REGULATORY FRAMEWORK

### 1.1 Source of Regulations

In Belgium, there is no special legislative code compiling advertising standards. Commercial advertising is governed by a regulatory framework constituted of binding legal provisions and self-regulating, non-binding professional rules.

The Belgian Code of Economic Law (CEL) sets out the core principles governing advertising practices in Belgium:

- Article I.8.13° of the CEL broadly defines advertising as being any communication with the direct or indirect aim of promoting the sale of products or services irrespective of the place or means of communication used;
- Article VI.17 of the CEL lists the conditions under which comparative advertising is legal;
- Articles VI.93 to 103 of the CEL prohibit unfair commercial practices against consumers (including misleading and aggressive practices);
- Articles VI.104 to 109 of the CEL prohibit unfair market practices against other enterprises (including misleading and aggressive practices); and
- Book XII of the CEL contains rules concerning online commercial communications.

Provisions governing the processing of personal data include:

- the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR);
- the Belgian Act of 30 July 2018 on the protection of individuals with respect to the processing of personal data;

- the Belgian Act of 13 June 2005 on electronic communications;
- the Royal Decree of 4 April 2003 to regulate the sending of advertising by electronic post; and
- the (non-binding) recommendation on direct marketing of the Belgian Data Protection Authority.

Depending on the nature of the product or service, additional rules may apply in order to advertise them lawfully. Such product-specific rules are included in the legislation regarding that product or service.

### 1.2 Regulatory Authorities

The laws and regulations governing advertising practices are, in principle, enforced by the Belgian courts.

Only specific regulatory authorities are charged with enforcing advertising law provisions, such as the Belgian Data Protection Authority (DPA), for breach of data protection law, the Financial Services and Markets Authority (FSMA), for advertising for insurance products, the Federal Agency for medicines and health products or the FPS Economy via its mediation service. Further, there is a self-regulatory body named the Jury for Ethical Advertising (**1.4 Self-Regulation**).

### Action for an Injunction (Action en Cessation)

In case of unlawful advertising, consumers, the relevant organisations, or undertakings can bring an action for an injunction before the president of the competent commercial court (Article XVII.1. of the CEL).

The president can ascertain the existence of the unlawful advertising and order, possibly under payment of a penalty, the cessation, prohibition or even the adaptation of the disputed advertising practice.

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The judgment can be published, either in full or in extracts, its publication on the internet, on radio or on television, its public display, or even its distribution to customers at the expense of the losing party.

### Proceedings on the Merits

Consumers can obtain damages and the company in question can be criminally sanctioned (Article XV.69 of the CEL).

### Reimbursement without Restitution

The legislature has introduced a mechanism to ensure rapid and actual compensation for the harm suffered by the consumer.

If a contract with a consumer has been concluded as a result of an unfair commercial practice, the courts can order the reimbursement of sums paid by the consumer, without restitution of the delivered product (Article VI.38 Section 2 of the CEL).

### 1.3 Scope of Liability

In Belgium, there is no general rule regarding liability for advertising. Generally, the advertiser is held responsible if they did not comply with the applicable rules and regulations. Further, every member of the advertising chain who has materially contributed to the breach, intentionally or negligently, can be held liable.

In the event of an action for injunction, Article XVII.10 of the CEL sets forth a cascading presumption of liability:

- the advertiser (provided they are domiciled in Belgium);
- the publisher of the written advertising or the producer of the audio-visual advertising;
- the printer or the director; and
- the distributor.

The legislature's objective is to ensure that illegal advertising initiated outside Belgium cannot be broadcasted in Belgium without impunity. Liability can be shared between co-authors. Further, advertisers can be held criminally liable.

### Defining Advertisers

Advertisers are:

- the general contractor, namely the person who orders and commissions the advertising to be carried out at their own expense in order to promote the sale of their products and services;
- the person who knowingly contributed to the advertising having effect and who has authority over the content of the information published; and/or
- the principal, or the person who benefits from the effects of the advertising.

### 1.4 Self-Regulation

#### The Centre for Communication

The Centre for Communication is the professional organisation that brings together all the communication professions, themselves represented by their respective associations.

It organises advertising self-regulation in Belgium. The Jury for Ethical of Advertising (JEP) is its independent self-regulatory body and has two main competences (opinion procedure and complaint procedure).

#### The Jury for Ethical Advertising

The Jury for Ethical Advertising (JEP) is the self-regulatory body of the advertising sector in Belgium. The JEP's mission is to ensure fair, decent, truthful, legal and socially responsible advertising. The Jury is composed of equal numbers of members from the civil society and members of the advertising sector.

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The JEP examines the compliance of the content of advertising messages with the applicable legislation and the self-regulatory conventions, codes and rules that complement the legislation.

## *JEP main competences*

### *The opinion procedure*

An advertiser, agency or media can request an opinion before, during or after the broadcast of an advert. Opinions are confidential and are non-binding. The JEP renders two opinions:

- an opinion issued by the JEP Secretariat (composed of two lawyers), setting out, without interpreting them, the applicable ethical and/or legal provisions and recalls the relevant case law of the JEP; and
- an opinion issued by the jury (composed of equal numbers of members from the civil society and members of the advertising sector); in addition to referring to the applicable ethical and/or legal provisions and the relevant JEP case law on the subject, this opinion includes the jury's views on the practice at hand.

### *The complaint procedure*

Consumers, socio-cultural associations, professional federations and public authorities may lodge a complaint with JEP against any advertising content.

## *JEP decisions*

The JEP:

- may consider that the advertising does not contain any element that is contrary to applicable legislation and/or self-regulatory codes, therefore makes no comment;
- may consider that the message contains editorial elements that do not comply with the applicable legislation or codes and formulate a decision to modify or stop the advertising; or

- may, if the advertising message raises only reservations, limit itself to formulating a reservation opinion, leaving the advertiser, agency and media responsible for the action to be taken.

The JEP does not issue fines or award damages. It can only issue recommendations, advice and injunctions to stop or modify the advertising. Further, the JEP's decisions do not constitute any warranty.

Any dispute which is not solved by the JEP may be brought to Court.

## **Codes Issued by Self-Disciplined Bodies/Organisations**

In Belgium, self-disciplined bodies publish various codes, rules and recommendations on professional ethics regarding advertising. These texts are important because the JEP bases its decisions on both the applicable legal provisions and self-regulatory provisions (codes). Actors agree to respect them in the exercise of their professional activity.

These codes can be broadly divided into the following categories.

- General, eg, the International Chamber of Commerce code.
- Sectoral (by category of products/services), such as:
  - (a) the Convention on the advertising and marketing of beverages containing alcohol;
  - (b) the Code of advertising for foodstuffs; and
  - (c) the Code of advertising for cosmetic products.
- Cross-sectoral (on an issue of interest to several sectors), such as:
  - (a) the Green advertising code; and

- (b) the Code for the Identification of Native Advertising and Related Commercial Communications.

### 1.5 Private Right of Action

As mentioned in **1.4 Self-Regulation**, consumers can challenge advertising practices by launching complaints before the JEP. These are free of charge and must relate to a concrete advertising content broadcast via the media within the JEP's area of expertise. An advertisement can be challenged immediately or within a short period of time.

The complaint must be based on the visual or editorial elements of the advertising (eg, misleading or deceptive elements, non-compliance with applicable legislation and/or codes, shocking or offensive nature, etc). The JEP or its Secretariat may, on its own initiative, invoke other elements (eg, non-compliance with legislation and/or other self-regulatory rules). The JEP can only issue recommendations, advices and injunctions to stop or modify the advertising.

As mentioned in **1.2 Regulatory Authorities**, a consumer can commence an action for injunction before the Belgian courts in order to obtain, for example, the cessation of an unfair advertising or damages.

### 1.6 Regulated Industries

Under Belgian law, there are a number of types of products and services that are either prohibited from being advertised or are subject to additional regulations.

#### Products Banned from Advertising

In Belgium, there is notably a general ban on advertising for the following.

- Tobacco products (Law of 24 January 1977) – there are a few exceptions, eg, in newspapers and periodicals published outside the EU,

aimed at professionals in the tobacco sector; the Law of 15 March 2020 forbids the advertising of tobacco products on posters inside and outside shops selling tobacco products.

- Blood and blood derivatives (Law of 5 July 1994) – an exception applies to advertising exclusively for medical information.
- Sex (adult) services – all forms of advertising directly or indirectly promoting such services for payment are prohibited and criminally punishable by law (Article 380 ter of the Criminal Code).

#### Advertising Regulated for Certain Products

##### *Alcohol*

The Law of 24 January 1977 and self-regulated convention of 12 May 2005 delegates regulation of the advertising of alcohol products to the alcohol trade sector itself. The parties in this sector have signed a self-regulatory convention on the conduct and advertising of drinks containing alcohol which prohibits alcohol advertising from:

- being directed or shown to minors;
- encouraging irresponsible, excessive or illegal consumption;
- alluding to favourable physical or psychological consequences of drinking alcoholic beverages; or
- suggesting that alcohol consumption leads to social or sexual success.

Beer advertising must include the educational slogan “Beer brewed carefully, to be consumed with care”. For spirits, the message must read “Taste our know-how wisely”. The convention stipulates that sales may not take place near schools and that free distribution is prohibited.

##### *Other products*

Food (Royal Decree of 17 April 1980 and FEVIA Code): it is prohibited to claim properties which cannot be demonstrated.

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Food supplements (Royal Decree of 12 February 2009): advertising may claim to prevent, treat or cure a human disease and cannot state or imply that a balanced and varied diet cannot provide appropriate quantities of nutrients.

Firearms, weapons and ammunition (Law of 8 June 2006, Article 19): it is prohibited to advertise illegal weapons. It is also prohibited to advertise or display licensed weapons without displaying that a specific licence is required for use.

Biocides (Royal Decree of 4 April 2019): any form of advertising for biocidal products whose placing on the market or use is not permitted by Royal Decree is prohibited.

Medical devices (Law of 25 March 1964): it is prohibited to advertise implants or the acts of implanting them. Other devices may be promoted if they carry the CE certification mark.

Medicinal products for human use (Law of 25 March 1964 and Royal Decree of 7 April 1995): provisions are specific to advertising to the public or health professionals. Only medicines that have valid marketing authorisation or registration in Belgium can be advertised. In addition, advertising must promote rational use of by presenting it objectively and without exaggerating its properties. It must not be misleading.

Cosmetics (Code of advertising for cosmetic products): any cosmetic claim, whether explicit or implicit, has to be supported by adequate and appropriate evidence demonstrating the performance of the product.

Such list is not exhaustive.

## **Advertising Regulated for Certain Services**

Gambling/Games of chance (Law of 7 May 1999 and Royal Decree of 25 October 2018): the advertising of non-licensed gambling facili-

ties and/ or games is prohibited. Online casinos and other gambling websites may only advertise on their own websites or through personalised advertising.

Consumer's Credit (Articles VII.64-65 of the CEL) and Mortgage Credit (Articles VII.123 -124 of the CEL): these Articles list the mandatory mentions and the forbidden mentions in credit and mortgage advertising.

Radio and television advertising (Flemish Media Decree and French Media Decree): advertising must be clearly recognisable and distinguishable from editorial content. Advertising must therefore be separated from editorial content with visual and acoustic means. In addition, under the French Media Decree, the maximum length of an advertising spot within a given clock hour cannot exceed twenty percent (20%).

## **Legal Trends**

The Act of 4 April 2019 expanded the provisions of the CEL relating to unfair market practices by transposing into the B2B universe the provisions applicable in B2C relationships that prohibit misleading and aggressive market practices. In addition to the prohibition of unfair market practices by Article VI.104 of the CEL, misleading and aggressive commercial practices are specifically prohibited by a new Article VI.105 of the CEL.

If advertising is directed to one or more businesses as well as to consumers, the (more stringent) rules regarding business-to-consumer (B2C) will apply.

The Belgian Data Protection Authority adopted, in January 2020, a new recommendation on direct marketing.

In October 2020, a draft law was proposed to better control alcohol advertising (especially

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advertising indirectly targeting minors). This proposal is still pending before the Chamber of Representatives (the Belgian parliament).

### Trends in Case Law

There were no significant trends in case law in the last 12 months in Belgium.

On 15 October 2019, the Belgian Supreme Court defined what the word “poster” meant, in the context of advertising of cosmetic products, in its original common sense, a billboard.

### 1.7 Regulatory Trends

In November 2020, a draft law was proposed to qualify advertising campaigns encouraging over-consumption (such as “Black Friday”, “Prime Day” and “Cyber Monday”) as aggressive commercial practices. The authors of the draft law proposed to prohibit these advertising campaigns in order to avoid, on the one hand, giving the false impression to consumers that they will save a lot of money by buying the proposed products and, on the other hand, encouraging consumerism. This proposal is still pending before the Chamber of Representatives.

In May 2021, a resolution was adopted by the Chamber of Representatives to request the government to take measures to strengthen the transparency and accountability of social media platforms and information online. This resolution contains provisions relating to political advertising.

### 1.8 Impact of the COVID-19 Pandemic

The COVID-19 pandemic had an impact on the functioning of the Belgian market. After the beginning of the pandemic, face masks, hydroalcoholic gels and other products of questionable quality were put on the market and fraudsters took advantage of the emergency situation to market their products with deceptive advertising

(ie, claim that a product was able to prevent or cure the infection).

As a consequence, the FPS Economy has received an increasing number of alerts and has increased the number of its interventions in this domain.

However, the pandemic had no impact on the regulation of advertising in itself.

### 1.9 Political Climate

There have been no significant changes to the political climate or political administration in Belgium that have impacted on the regulation of advertising and/or enforcement of advertising regulations.

## 2. ADVERTISING CLAIMS

### 2.1 General Standards

Usually, the examination of the advertising claims will be carried out in stages (“cascade loyalty test”).

The general standards to determine if advertising claims are misleading or aggressive for B2C and B2B commercial practices are globally similar.

#### General Principles

Article VI.93 of the CEL prohibits unfair commercial practices (ie, advertising) that are contrary to the requirements of professional diligence and that distort the economic behaviour of the average consumer. To assess this impact, consumer behaviour or, where the offending practice is aimed at a targeted group, the behaviour of a representative member thereof, will be considered.

Article VI.104 of the CEL states that any act contrary to fair market practice which harms or may



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harm the professional interests of one or more other undertakings is prohibited.

Under Article VI.94 of the CEL, commercial practices directed at consumers are unfair if they are either misleading within the meaning of Articles VI.97 to VI.100 of the CEL, or aggressive within the meaning of Articles VI.101 to VI.103 of the CEL.

In parallel, under Article 104/1 of the CEL, B2B market practices directed at other undertakings are unfair if they are either misleading within the meaning of Articles VI.105 to VI.109 of the CEL or aggressive within the meaning of Articles VI.109/1 to VI.109/3 of the CEL.

## **Black List of Misleading and Aggressive Commercial Practices**

The Belgian legislature has set out a list of commercial practices that are universally misleading (Article VI.100 of the CEL) or aggressive (Article VI.103 of the CEL) commercial practices against consumers, eg, claiming a product increases the chances of winning at games of chance, falsely claiming that a product is likely to cure diseases, communicating factually inaccurate information on market conditions or on the possibilities of finding the product, with the aim of inciting the consumer to acquire the product under less favourable conditions than normal market conditions, etc.

## **Grey List of Misleading and Aggressive Commercial Practices**

The Belgian legislature has set out a list of commercial practices that are presumed to be misleading (Article VI.97-99 of the CEL) or aggressive (Article VI.101-102 of the CEL) commercial practices against consumers.

### *Misleading practices*

A practice is misleading if it contains false information and is therefore untruthful or otherwise

misleads or is likely to mislead the consumer/undertaking and causes or is likely to cause the consumer/undertaking to take a transactional decision that they would not have taken otherwise (eg, false information on the existence or nature of the product, its main characteristics it's the price, etc).

Further, a practice is considered as a misleading omission if it omits material information which the consumer/undertaking needs to take an informed transactional decision and thereby causes or is likely to cause the consumer/undertaking to take a transactional decision that it would not have taken otherwise.

### *Aggressive practices*

If advertising materially impairs or is likely to materially impair, as a result of harassment, coercion or undue influence, the consumer/undertaking's freedom of choice or conduct with respect to the product and thereby causes or is likely to cause the consumer/undertaking to make a decision with respect to the transaction that it would not otherwise have made. it is deemed aggressive.

In order to determine if a practice is aggressive, the following elements are taken into account:

- the time, place, nature and persistence of the practice;
- the use of physical or verbal threats; and
- any threat of action when such action is not legally possible, etc.

Similar rules apply in case of misleading or aggressive commercial practices in a B2B context.

## **2.2 Actionable Advertising Claims**

All advertising claims are subject to regulation. All claims, both express and implied are prohibit-

ed if they constitute unfair commercial practices or unlawful comparative advertising.

There is no exception in Belgian law for claims that cannot be objectively measured. As long as the claims do not constitute a misleading commercial practice, they are allowed under Belgian law.

Regulators and courts determine and assess implied claims on their own.

### **2.3 Claim Substantiation**

To support advertising claims, information should be truthful and should therefore not mislead the average consumer/undertaking. In some sectors, the type of substantiation depends on the nature of the claim.

#### **Medicinal Products for Human Use (Article 4 of the Royal Decree of 7 April 1995)**

All elements of drug advertising must be accurate, up-to-date and verifiable. For homeopathic medicines, all elements of the advertising must be consistent with the information on the package leaflet or labelling.

For advertising content for prescribers and pharmacists, all the information must be sufficiently complete to enable the recipient to form their own opinion of the therapeutic value of the product.

#### **Food (Royal Decree of 17 April 1980, Fevia Code)**

It is prohibited to attribute properties regarding composition which cannot be demonstrated through objective or measurable criteria. Any claim or communication that can reasonably be interpreted by the consumer as a nutrition or health claim must be scientifically substantiated in an appropriate manner.

#### **Cosmetics (Code of Advertising for Cosmetic Products)**

Any cosmetic claim, express or implied, must be supported by adequate and appropriate evidence demonstrating the products' performance. The context and circumstances in which the claim is made (including social and cultural factors) are taken into account.

### **2.4 Testing**

No general standard applies to testing that is conducted to support advertising claims. However, under Article XV.16.1. of the CEL, the Belgian authorities may require a company to provide evidence of the material accuracy of the factual data that it communicates in the course of commercial practice.

A company must provide, within a one month, evidence of the material accuracy of the factual data. The company can prove the accuracy of its argument by any means of proof. If the evidence required is not provided or deemed insufficient, Belgian authorities can consider the commercial practice to be unfair or an act contrary to fair market practices.

#### **Cosmetic Products**

Under the code of advertising for cosmetic products, when studies or tests are mentioned in advertising:

- their nature must be explicitly stated (either statistically valid scientific tests or satisfaction tests);
- the measurement of the efficacy of a product can only be related to scientific tests;
- when the message is based on satisfaction tests, it may only report the percentage of individuals who are satisfied or who have perceived the claimed effect; and
- the presentation of scientific or satisfaction tests must clearly distinguish them from each

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other when they are used in the same advertising message.

## Medicinal Products for Human Use

The advertising claims must be in line with the data that has been approved as part of the marketing authorisation or registration of the product. Therefore, the principles that apply to testing under the marketing authorisation or registration indirectly apply to advertising claims.

Article 5, 10° of the Royal Decree of 14 December 2006 states that the marketing authorisation application must include all the administrative information and scientific documentation necessary to demonstrate the quality, safety and efficacy of the medicinal product namely the pharmaceutical, pre-clinical and clinical test results.

## 2.5 Clinical Studies

For medicinal products for human use, the principles that apply to testing under the marketing authorisation or registration indirectly apply to advertising claims.

## 2.6 Regulated Claims

### Environmental Claims

The Environmental Advertising Code applies to all advertising that refers to the environmental effects of a product. For example, under this code:

- advertising should not contain any indication that is likely to mislead, directly or indirectly, as to the properties and characteristics of a product or service regarding its effects on the environment;
- absolute expressions, statements or slogans (eg, “good for the environment”, “ecologically safe”) implying that a product or service has no effect on the environment at any stage of its life cycle is prohibited; and

- the advertiser must be able to justify with certainty, and without delay, any references to effects on the environment.

## Claims in Cosmetics

Cosmetic advertising claims are subject to the Code of Advertising for Cosmetics. Under that Code the following rules apply.

- The term “natural” can only be used:
  - (a) for a finished product containing no substances and/or synthetic products; and
  - (b) for specified ingredients and provided that the term “natural” is limited to that (those) component(s) alone.
- The term “biological/organic” may only be used:
  - (a) for a finished product derived or obtained from animal or plant organisms; and
  - (b) for specified ingredients of the same organisms and provided that the term “biological/organic” is limited to the component(s) alone.

## 3. COMPARATIVE ADVERTISING

### 3.1 General Requirements

In Belgium, there are specific rules that apply to comparative advertising claims. Comparative advertising is defined as any advertising that explicitly or implicitly identifies a competitor or goods or services offered by a competitor (Article I.8.14° of the CEL).

Under Article VI.17 of the CEL, comparative advertising is lawful when it meets eight conditions. Comparative advertising must not be misleading, confusing, disparaging or take unfair advantage of the reputation of the competitor. It is therefore permissible to identify a competitor by name if the requirements of Article VI.17 of the CEL are met.

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### 3.2 Comparative Advertising Standards

Comparative advertising presupposes the implicit or explicit identification of a competitor.

#### Explicit or Implicit Comparative Advertising

Comparative advertising is:

- “explicit” when it expressly names the competitor to whom the advertiser is comparing its product or services (direct comparative advertising); and
- “implicit” when it does not explicitly name the competitor (indirect comparative advertising).

#### Identification of a Competitor – Competitive Link

In order to assess whether a competitor is identified, the competitive relationship must be examined. This link between competitors is assessed in the light of the substitutability, in the eyes of the consumer, of the products or services offered by the competitor from those of the advertiser. The point of view of the average consumer, normally informed and reasonably observant and circumspect, must be taken into account.

#### Lawfulness if Eight Conditions are Met

Under Article VI.17 of the CEL, comparative advertising is lawful only if the following conditions are met:

- it must not be misleading;
- it must relate to similar goods or services;
- it must compare relevant and verifiable characteristics of the goods or services, such as price;
- it should not cause confusion with competing goods or services;
- it should not denigrate competitors and their goods or services;
- it should not take advantage of a competitor’s reputation and the appellation of origin of competing goods;

- it should relate in each case, for goods with an appellation of origin, to goods with the same appellation; and
- it should not present a good or service as an imitation or reproduction of a good or service bearing a protected trade mark or trade name.

### 3.3 Challenging Comparative Claims

In order to challenge comparative advertising claims, the targeted company has to prove:

- that the advertising explicitly or implicitly identifies it;
- that they are competitors (that their goods/services are substitutable); and
- that the comparative advertising does not meet the legal requirements of Article VI.17 of the CEL.

The remedies available to a competitor targeted by comparative advertising are either a complaint before the JEP or an action for an injunction before the president of the competent Commercial Court (see **1.2 Regulatory Authorities** and **1.4 Self-Regulation**). The competitor will most likely start an action for injunction.

There have been no particular trends in case law in the past 12 months. Not all comparative advertising results in a court decision. Further, some are not the subject of any action, some are settled, and some court decisions may remain unpublished.

However, it is recognised that Belgian judges often consider comparative advertising to be unlawful and are somewhat reluctant to accept the practice.

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## 4. SOCIAL/DIGITAL MEDIA

### 4.1 General Requirements

Advertising on the internet, in particular on social/digital media, is subject to all the rules applicable to all forms of advertising, regardless of the medium used.

#### Identification and Transparency Principles

The principles of identification and transparency of commercial practices on the internet were introduced by the E-Commerce Directive and are transposed into Belgian law by book XII of the CEL and apply to all advertising on social media.

Under Article XII.12 of the CEL, any internet advertising must comply with the following principles:

- the advertising must be clearly identifiable as such. Failing this, it has to include the words “advertising” in a legible, apparent and unambiguous manner;
- the natural or legal person on whose behalf the advertising is made is clearly identifiable;
- promotional offers have to be clearly identifiable as such and the conditions for benefiting from them should be easily accessible and presented in a precise and unequivocal manner; and
- promotional contests or games should be clearly identifiable as such and the conditions for participation should be easily accessible and presented in a precise and unambiguous manner.

Article XII.6 of the CEL lays down additional information and transparency requirements for the provider of an information society service (in this case the advertising agency), which must ensure that the recipient of the service and the competent authorities have easy, direct and per-

manent access to the information listed in the Article.

In addition, the Centre for Communication of Belgium recently adopted recommendations on influencers and native advertising.

### 4.2 Key Legal Issues

#### Transparency and Information Issues

The versatility of content on social media makes it more difficult for the user to distinguish between a personal post and advertising. The distinction is often blurred by either the social media interface or the content creators themselves. It is therefore crucial that users be as explicit as possible regarding advertisements in their communications.

Users must also ensure that the recipient of the information and the competent authorities have easy, direct and permanent access to a range of information listed in Articles XII.6 and XII.12 of the CEL.

#### Data Protection Issues

The use of targeted advertising is common on social media platforms. The mechanisms behind it must therefore comply with the applicable rules and regulations regarding data protection, the issues linked to the use of the “like” button (joint controllership) and the use of cookies.

### 4.3 Liability

As mentioned in **1.3 Scope of Liability**, there is no general rule regarding liability for advertising.

Advertisers can be held responsible if they did not comply with the applicable rules and regulations. In addition, every member of the advertising chain who has materially contributed to the breach, intentionally or negligently, can also be held liable.

On social media platforms, advertisers have the possibility to create a dedicated page or profile on which they can advertise content. Other users can subscribe to this page and receive information directly in their personal space. The owner of a commercial page will therefore have to ensure not only compliance with the principles of identification, transparency and loyalty, but also obtain the informed consent of the person who subscribes to it.

If they are qualified as joint controllers under the GDPR, they can also be held liable for every breach of such regulation.

#### 4.4 Disclosures

As illustrated in **4.1 General Requirements**, additional disclosure requirements apply to social media advertising in view of the principles of transparency and information on the internet.

Under Article XII.12 of the CEL, the natural or legal person on whose behalf the advertising is made should be clearly identifiable. However, this information does not have to appear on the advertising itself. The explanatory memorandum says that a hyperlink to this information is sufficient. This exception applies to all advertising on the internet.

Under the same article, the conditions for benefiting from a promotion or participating in a contest or game must be easily accessible and presented in an accurate and unambiguous manner. Such requirement can also be met by referring, by means of a hyperlink, to a web page containing all the relevant information.

#### 4.5 Platform Requirements

There are no unique rules or regulations that apply to the use of any of the major social media platforms in Belgium.

#### 4.6 Native Advertising

Using editorial content in the media to promote a product when the company has financed the promotion itself, without it being clearly indicated, is a commercial practice that is considered a misleading practice against consumers (Article VI.100, 11° of the CEL). Therefore, native advertising is only allowed under Belgian law if it is clearly indicated in the content or using images or sounds clearly identifiable by the consumer that the communication was financed by the company promoting the product.

#### The Code for the Identification of Native Advertising and Related Commercial Communications

This code was drafted by the Centre for Communication of Belgium and is enforced by the JEP and outlines the major principles applicable to native advertising.

The commercial nature of native advertising and related communications must be instantly and clearly identifiable by the group targeted by the communication. Whether this requirement is met, will have to be considered on a case-by-case basis, taking into account specific circumstances, the general impression given by the communication in question being decisive. In some cases, the content and/or context of the native advertising already immediately indicates that it is a commercial communication.

Where the commercial objective of the communication is not immediately and clearly apparent from the content and/or context, an explicit statement (marker) must be used to identify the commercial nature of the communication (eg, “advertising”, “publicity”, “advertorial”, “advertorial promotion”, “proposed by (...)”, “produced in close collaboration with (...)”, “powered by (...)”, etc).

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## 5. INFLUENCER CAMPAIGNS

### 5.1 Trends

In Belgium, as in the rest of the world, influencers are increasingly called upon to highlight the products and services of advertisers and/or recommend them to their followers, the advertiser's target group.

A global trend is emerging towards greater transparency and control of influencer campaigns. As an illustration of this, in October 2018 the Centre for Communication published a recommendation on online influencers.

The core objective of this recommendation is to protect consumers and make sure they know whether a post should be qualified as an opinion, experience, or is a commercial communication.

This recommendation applies if two conditions are met:

- if the online influencer receives a compensation; and
- if the advertiser has control over the communication.

### 5.2 Special Rules/Regulations on Influencer Marketing Campaigns

Under the recommendation mentioned in **5.1 Trends**, all commercial communications must be clearly identifiable to the recipient.

Moreover, commercial communications must be fair: their message should not contain incorrect information or mislead the target group with false statements, nor encourage children to persuade their parents or other adults to buy the products for them.

The recommendation on online influencers recommends:

- that the online influencer makes clear the commercial relationship with the brand in a visible or audible way by mentioning words such as “advertising”, “announcement”, “sponsorship” or by using one of the following hashtags: #spon or #ad;
- that online influencers adapt the wording according to the language of the message or the target group; and
- that online influencers make sure that these words are not hidden in the communication and are mentioned in such a way and in such a place that the recipient directly understands the exact nature of the message.

### 5.3 Advertiser Liability

The recommendation on online influencers states that whoever places the post, the online influencer is responsible for breach of this recommendation. In addition, companies that request the placing of advertising posts, networks, agencies, platforms and other parties involved in social media marketing may also be held liable for violations of this recommendation.

The advertiser can therefore be held liable for content posted by influencers and has a duty to monitor them.

## 6. PRIVACY AND ADVERTISING

### 6.1 Email Marketing

As mentioned, all advertising on the internet is subject to the rules applicable to all forms of advertising, regardless of the medium used. In addition, the principles of identification and transparency of Articles XII.12 and XII.6 of the CEL apply to email marketing.

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The rules concerning publicity by email are set out in Book XII of the CEL, as well as in the Royal Decree of 4 April 2003 to regulate the sending of advertising by email, the legislation on data protection (GDPR) and the recommendation of the Belgian Data Protection Authority on direct marketing.

Article I.18. of the CEL defines electronic mail as “any message in the form of text, voice, sound or image sent over a public communications network that may be stored in the recipient’s network or terminal equipment until retrieved by the recipient”. This is interpreted broadly to include text messages.

### Soft Opt-in Regime

The use of electronic mail for commercial purposes is prohibited without the prior, free, specific and informed consent of the recipient of the message (Article XII.13 of the CEL), with the exceptions set out in the Royal Decree of 4 April 2003 to regulate the sending of advertising by email.

The service provider is free to obtain the consent of the recipients by any appropriate means, provided that these means comply with the various legal requirements, in particular GDPR and its Article 7 on consent.

In addition, when sending an advertising by email, the service provider should:

- provide clear and comprehensible information concerning the right to object in the future to receive the advertising; and
- indicate and make available an appropriate means of effectively exercising this right by electronic means.

### Exercise of the Rights

Under the Royal Decree of 4 April 2003 to regulate the sending of advertising by email and the

GDPR, any person may notify a specific service provider directly, without charge or indication of reasons, of their wish to no longer receive advertising by email.

In such event, the service provider concerned is obliged to:

- issue, within a reasonable period of time, an acknowledgement of receipt by email confirming to that person that their application has been registered;
- take, within a month, the necessary steps to respect the will of that person; and
- maintain lists of persons who have notified their wish to no longer receive advertising by email.

### Exceptions

The regime set up by the Belgian legislature can be qualified as a “soft opt-in”, since two exceptions temper the stringency of Article XII.13 of the CEL. The Royal Decree of 4 April 2003 to regulate the sending of advertising by email exempts the service provider from obtaining prior consent based on one of two hypotheses.

- The service provider addresses their advertising to their existing clients (whether natural or legal persons), provided that:
  - (a) the advertising relates to similar products or services that they already provided;
  - (b) the electronic contact details of the client had been obtained in compliance with the rules on data protection and when the client purchased their first product or services; and
  - (c) the customer had been granted at that time a right of opposition.
- The other exception concerns advertising sent to legal persons, when impersonal electronic contact details are involved.



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## Liability

According to the CEL, the service provider is responsible for the respect of the aforementioned rules.

According to GDPR, the service provider acting as controller is responsible for the respect of the aforementioned rules.

## Sanctions

Breach to Articles XII.6 and XII.12 of the CEL is punishable by a criminal fine of EUR208 to EUR80,000 (Article XV.119 of the CEL).

Breach to Article XII.13 of the CEL is punishable by a criminal fine of EUR208 to EUR200,000 (Article XV.120 of the CEL).

If the infringements to Articles XII.6, XII.12 and XII.13 of the CEL are committed in bad faith, they are punishable by a criminal fine of EUR208 to EUR200,000.

Moreover, the (administrative) sanctions of the GDPR may also apply.

## 6.2 Telemarketing

The use of an automated calling system, without human intervention, or a fax machine for direct marketing purposes is prohibited without the prior, free, specific and informed consent of the intended recipient (Article VI.110 of the CEL).

Unsolicited communications for the purposes of direct prospecting, carried out by techniques other than the automated calling system or fax, are authorised in the absence of manifest opposition from the recipient, whether a natural or legal person.

With regard to telecom subscribers, the operator must comply with a specific set of rules laid down in Article VI.111 of the CEL.

Belgium has a “Do Not Call” list which allows natural and legal persons to prevent commercial phone calls. Direct marketers are obliged to consult the list before calling someone for such purposes.

## Sanctions

Infringements of Article VI.110 and VI.111 of the CEL are punishable by a criminal fine of EUR208 to EUR80,000 (Article XV.83 of the CEL).

Moreover, under Article VI.103.3° of the CEL, making repeated unwanted solicitations by telephone, fax, email or other means is a commercial practice that is in all circumstances an aggressive commercial practice.

Moreover, the sanctions related to GDPR may also apply.

## 6.3 Text Messaging

The definition of “electronic mail” in Article I.18. of the CEL includes SMS text messages, MMS messages and instant messaging discussions. See **6.1 Email Marketing**.

## 6.4 Targeted/Interest-Based Advertising

In Belgium, there are no special regulatory or self-regulatory requirements regarding the use of consumer data for the purposes of targeting consumers.

See **4.1 General Requirements** regarding the principles of information and transparency contained in Articles XII.6 and XII.12 of the CEL. In addition, the provisions set out in the ICC code on targeted/interest-based advertising apply.

Targeted/interest-based advertising must comply both with the legislation on the protection of individuals with regard to the processing of personal data and with Article 129 of the Act of 13 June 2005 on electronic communications

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and the GDPR, which permits the storage of personal information only if:

- the subscriber or user concerned receives clear and precise information concerning the purposes of the processing and their rights; and
- the subscriber or end-user has given their consent after having been accordingly informed.

## 6.5 Marketing to Children

In Belgium, advertising and marketing directed at children is not covered by a single law or regulation. A number of rules on this subject are contained in multiple Belgian laws and/or regulations.

### General Provisions

It is considered a misleading commercial practice to directly encourage children to buy or persuade their parents or other adults to buy an advertised product (Article VI.103 of the CEL).

Under Article 380 of the Belgian Criminal Code, it is forbidden to advertise services of a sexual nature directed specifically at minors or where it refers to services offered either by minors or by persons claiming to be minors.

### Special Regulations Concerning Advertising and Children

#### *Alcohol (convention on the advertising and marketing of beverages containing alcohol)*

Alcohol advertising cannot:

- target minors either by its content or by its mode of communication;
- portray minors or anyone who looks like one;
- portray the consumption of drinks containing alcohol as a sign of maturity;
- encourage minors to purchase drinks containing alcohol by exploiting their lack of information, experience and credulity; or

- present drinks containing alcohol as a means of coping with dangerous situations.

### Food

Under the code of advertising for foodstuffs:

- advertising of food to children must not create a sense of urgency or undue price minimisation;
- advertising must not directly urge children to persuade their parents or other adults to buy products that have been made the object of the advertising; and
- advertising for food must not mislead consumers as to the potential health or other benefits to be derived from the consumption of the product presented.

The “Belgian Pledge” is a self-regulatory commitment taken by the actors of the food industry to promote responsible food advertising to children. With this initiative, food companies, retailers and restaurant chains that have signed up make clear commitments regarding food advertising to children under the age of 12.

### Radio and television advertising

The Flemish Media Decree (Articles 70 to 77) and the French Media Decree (Articles 13 and 14) establish, without much difference, that:

- commercial communications aimed at children must be clearly recognisable as such;
- commercial communications must not cause moral or physical detriment to minors;
- commercial communications must not directly incite children to persuade their parents or third parties to purchase the products or services concerned; and
- children’s programmes cannot be interrupted by advertising or teleshopping.

The main difference is that the French Media Decree applies to minors (less than 18 years of

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age) whereas the Flemish Media Decree's principles apply to "children", being defined as children of less than 12 years of age (Article 2.18°).

## The Notions of "Personal Information" and "Children"

Under Belgian law, personal data is any information relating to a person that makes it possible to identify them directly or indirectly.

There are a number of rules on the subject of advertising and marketing to children:

- some of those rules apply to all minors (French Media Decree, Convention on the advertising and marketing of beverages containing alcohol). Under Article 388 of the Belgian Civil Code, a minor is an individual that has not yet reached the age of 18 years;
- some other rules apply to children of less than 12 years of age (Flemish Media Decree, ICC code, Belgian Pledge); and
- some rules do not define what is meant by "children" (CEL, Code of advertising for food-stuffs).

## Collection and Use of Personal Information from Children

In the case of products and services intended exclusively for adults, data from minors may not be collected.

If products and/or services are addressed in whole or in part to minors, personal data of minors may in principle only be used for direct marketing purposes in two situations:

- on the basis of the controller's "legitimate interest"; and/or
- on the basis of the data subject's consent.

In the case of information society services (ie, a service provided in principle at a distance, digitally) where the minor is asked to consent

to the processing of its personal data for direct marketing purposes, the minor must be at least 13 years old to do so.

If the minor is younger than 13, the controller may only process the minor's personal data if the holder of parental authority over the minor authorises it.

## 7. SWEEPSTAKES AND OTHER CONSUMER PROMOTIONS

### 7.1 Sweepstakes

Belgian law makes a distinction between sweepstakes and contests of skill (see **7.2. Contests of Skill**). A sweepstake (also called a lottery) is defined as an activity where a participant has a chance to win a prize and where the winners are determined exclusively or mostly by luck. A stake is not required but it has to be public.

A sweepstake is subject to a very strict regulation, namely Article 301 of the Criminal Code and (Lotteries Act of 31 December 1851). According to such provisions, it is forbidden, and even criminally sanctioned, to organise a sweepstake unless organised in partnership with one of the philanthropic registered associations or with the National Lottery.

Being commercial practices, sweepstakes and contests should not be misleading or aggressive, and should respect the principles in **2.1 General Standards**. In addition, certain practices relating to sweepstakes and contests are considered, in all circumstances, as being misleading. The following are considered misleading:

- to advertise a contest with prizes for the winner, without actually doing so or providing a reasonable alternative (Article VI.100.19° of the CEL);

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- to claim that a product increases the chances of winning at games of chance (Article VI.100,16° of the CEL);
- to give the false impression that the consumer has already won or will win a prize, with or without completing a formality, when in fact, either there is no prize or other equivalent benefit; and/or
- either the completion of the formality relating to the request for the prize or other equivalent benefit is subject to the consumer's obligation to pay money or bear a cost.

Consumers can be required to make a purchase in order to participate.

## 7.2 Contests of Skill

Belgian law makes a distinction between sweepstakes (see **7.1. Sweepstakes**), games of chance (see **8. Sports Betting/Gambling**) and contests of skill. Contests of skill are not regulated by law. The latter are defined as games which require the active participation of participants and more particularly that they make some intellectual, creative or physical effort, on which the outcome is based. The selection of winners could include some aspect of luck, but luck should be ancillary to the selection process (for example, participants could first answer “no” to some obvious question and the winner could then be randomly selected from amongst the participants who have replied correctly). This is allowed under Belgian law. The rules have only to be clear in order to avoid misleading the participants as to the duration of the contest, the prizes, the conditions of participation, etc.

## 7.3 Regulatory Bodies

### Games of Chance

According to the Act of 7 May 1999 on games of chance, it is prohibited to operate games of chance without obtaining a licence, issued by the Gaming Commission, to take part in illegal

games of chance, facilitate the operation thereof or to run advertising for such games of chance.

There are eight types of licences. In order to be granted, they require the filing of specific forms (available on the website of the Gaming Commission).

### Contests (of Skill)

There is no need to register the rules of a contest, nor to have such rules approved by a regulatory body.

## 7.4 Loyalty Programmes

There are no special laws or regulations that apply to loyalty programmes in Belgium. The rules have only to be clear in order to avoid misleading the participants on the duration of the programme, the prizes and the conditions of participation.

Loyalty cards can be simply made of a non-personalised piece of cardboard where each purchase is validated by a stamp. Nevertheless, most cards are personal and associated with a customer file. In this case, they must comply with data protection law.

## 7.5 Free and Reduced-Price Offers

A company offering promotions, in particular in the form of price-reduction advertising, must comply with the prohibition of unfair commercial practices towards consumers. This means that a price reduction announcement must be effective and not misleading, ie, it must be applied to a price that has been previously applied for a certain period of time.

### Seasonal Sales (Articles VI.25-30 of the CEL)

Twice a year, traders may sell at greatly reduced prices using the denomination “sales” or another equivalent denomination (Articles VI.25-30 C of the CEL).

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A company may sell goods on sale if these goods:

- have been offered for sale for at least 30 days before the start of the sales period; and
- are still in its possession at the beginning of the sale period.

The trader that sells on sale must charge reduced prices. The goods must be discounted from their reference price.

### **Clearance Sales (Articles VI.22-24 of the CEL)**

Clearance sales are permitted when specific circumstances require the accelerated disposal of stock or an assortment of goods.

Articles VI.22 of the CEL and following of the CEL set out the obligations to which companies are bound and list the circumstances in which such a sale may take place:

- court order;
- death of the seller;
- winding up of activities/business;
- renovation of sales facilities or moving of the business premises; or
- serious damage caused to the entire inventory or to part of it.

Pursuant to Article VI.23, Section 3 of the CEL, only the assets that are part of the stock of the enterprise before the start of the clearance sale may be put up for sale or sold in clearance sales.

Any advertising or other publicity concerning a clearance sale must specify the date of the beginning of the clearance sale.

### **Combined Offers of Products or Services (Articles VI.80-81 of the CEL)**

Without prejudice to Article VI.81, combined offers to consumers are allowed as long as they do not constitute an unfair commercial practice

within the meaning of Articles VI.93 et seq of the CEL.

According to Article VI.81.1 Section 1 of the CEL, any joint offer to the consumer, of which at least one element constitutes a financial service, and which is made by one enterprise or by different enterprises acting with a common purpose, is prohibited.

By derogation from paragraph 1, however, it is permitted to make a combined offer for:

- financial services that constitute a whole;
- financial services and minor goods and services admitted by commercial practice;
- financial services and participation in legally authorised lotteries;
- financial services and objects bearing indelible and clearly visible advertising inscriptions, which are not commercially available as such, provided that their acquisition price by the company does not exceed EUR10, excluding VAT, or 5% of the price, excluding VAT, of the financial service with which they are attributed; the 5% applies if the amount corresponding to this percentage is greater than EUR10;
- financial services and logos, vignettes and other images of minimal commercial value; and
- financial services and securities consisting of documents giving the right, after the acquisition of a certain number of services, to a free offer or a price reduction when acquiring a similar service, provided that this benefit is provided by the same company and does not exceed one third of the price of the services previously acquired.

The vouchers must mention the possible limit of their period of validity, as well as the terms of the offer.

### Free Offer of Vouchers (Articles VI.31-32 of the CEL)

Pursuant to Article VI.31 of the CEL, vouchers offered by a company at the time of the acquisition of a good or service and entitling the holder to a subsequent refund of the price or part of the price mention the following data:

- the name, address and, where applicable, the form of company and business number of the issuer;
- the amount reimbursed;
- the limit, if any, of their period of validity, unless it is unlimited; and
- the terms and conditions of repayment, including the steps that the holder of the voucher must take to obtain repayment and the period within which repayment will be made, unless that information is communicated at the same time as the voucher in a separate document.

### 7.6 Automatic Renewal/Continuous Service Offers

Under Article VI.2.6 of the CEL, before the consumer is bound by a contract, the seller must provide the consumer with information about the term of the contract or, in the case of a contract of indefinite duration or automatic renewal, the conditions for terminating the contract.

The seller must therefore inform the purchaser of this renewal clause before the contract is entered into, unless this information is apparent from the context. Otherwise, the automatic renewal is illegal and the purchaser can then demand a refund of the sums charged and cancel its subscription.

## 8. SPORTS BETTING / GAMBLING

### 8.1 Legality/Regulatory Framework

Sports betting and gambling are allowed under Belgian law but are strictly regulated. They are considered as “games of chance” regulated by the Law of 7 May 1999.

This law defines the term “game of chance” as a game or bet in which placing a stake of any kind results either in the loss of that stake by at least one of the players or betters, or in the winning of some prize of whatever nature by at least one of the players, betters or organisers of the game or bet and in which the element of chance is one of the elements in the gameplay, and/or in the determination of the winner or the size of the winnings.

This Law of 7 May 1999 on games of chance aims to channel the exploitation of games of chance through licences. The A licence is for casinos, the B licence is for slot machine arcades and the F1 licence for the organisation of wagers. A plus (+) symbol is added after the respective letters of the different licences if the holder is also authorised to provide its services online.

The Royal Decree of 25 October 2018 governs the operation of online games of chance.

The Belgian Gaming Commission issues the licences for games of chance and organises controls to ensure compliance with the relevant regulations (see **7.3. Regulatory Bodies**).

When a licensee violates the Gaming Act, the Commission may impose administrative sanctions consisting of a warning, the suspension of the operation of some machines for a specified period of time or the withdrawal of the licence.

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## 8.2 Gambling Advertising Regulation

Advertisements for games of chances are allowed as long as they comply with certain specific rules (ie, the advertisement may not exaggerate the odds, give the impression that gambling is an alternative to working or saving, and must respect rules relating to the protection of minors and people under 21) as well as respect the principles laid out in **2.1. General Standards**.

The Law of 7 May 1999 sets out the general rule that it is prohibited to run advertising for illegal games of chance.

The Royal Decree of 25 October 2018 concerns rules about the advertisement of online games of chance. Until recently, A+ and B+ licensees (ie, casinos and slot machine arcades) could only advertise online on their own websites or through personalised ads. However, a ruling issued on 6 February 2020 by the Belgian Council of State overturned this ban. From now on, casinos and slot machine arcades (with A+ and B+ licences) can promote their activities on other media, as wager organisers (F1+) may still do.

## 9. CRYPTOCURRENCY AND NON-FUNGIBLE TOKENS (NFTS)

### 9.1 Legal/Regulatory Framework

Cryptocurrency advertisement is not yet subject to specific rules or regulation in Belgium.

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**Lydian** is a full-service Belgian business law firm, with offices in Brussels, Antwerp and Hasselt. Through a fine blend of transactional law expertise and litigation skills, it delivers straight to-the-point solutions that add true value. The firm listens to what is important and provides practical and personalised advice in a constantly changing world that often requires fresh thinking and tech savviness combined with proven experience. The firm consists of 13 partners and 85 associates. The team assists its (inter)

national clients in all kind of disputes relating to advertising and marketing (including disputes over comparative and misleading advertising, trade marks or copyrights), and advises clients on their advertising and promotional campaigns or transactions (eg, review of promotional materials and drafting contracts). The team also has solid experience in privacy-related matters and frequently provides advice on direct marketing issues.

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# BELGIUM LAW AND PRACTICE

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