



**COUNTRY  
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# **The Legal 500 Country Comparative Guides**

## **Malta**

# **ADVERTISING & MARKETING**

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This country-specific Q&A provides an overview of advertising & marketing laws and regulations applicable in Malta.

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# MALTA

## ADVERTISING & MARKETING



### 1. How is harmful and offensive advertising regulated? [For example, advertising content that may be obscene, blasphemous, offensive to public morals or decency, or offensive to protected minorities or characteristics?]

Harmful and offensive advertisement in Malta is heavily regulated within the Broadcasting Act (Chapter 350 of the Laws of Malta) within the context of all transmission by means of radio, television programmes or of any audiovisual material intended for reception by the public on any electronic communications network and any electronic communications service as defined in Article 2 of the Electronic Communications (Regulation) Act (Chapter 399 of the Laws of Malta)

Within this context Article 16K of the Broadcasting Act provides for general provisions that govern audio-visual commercial communications. Within the context of harmful and offensive advertisement this regulation specifically restricts any form of advertisement that would;

1. prejudice respect for human dignity;
2. include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
3. encourage behaviour prejudicial to health or safety;
4. encourage behaviour grossly prejudicial to the protection of the environment

Article 16K further encompasses a comprehensive prohibition on audio-visual commercial communications that could cause physical, mental, or moral detriment to minors in any manner. Additionally, Article 16JA of the Broadcasting Act provides for a series of restrictive measures intended to safeguard the well-being and best interests of minors.

Responsible advertising practices, especially when

targeted towards minors, requires careful consideration. Advertising that would possibly negatively affect minors should only be made publicly available in such a way to ensure that minors will not normally hear or see them.

Particularly harmful content, such as gratuitous violence and pornography, is subject to the strictest measures. As a general principle, advertisements should not contain material that is unsuitable for minors, including explicit or violent content, offensive language, or explicit sexual imagery.

Certain prohibited aspects such as, but not limited to, advertising content that may be obscene, blasphemous, offensive to public morals or decency, or offensive to protected minorities or characteristics are also further regulated within the Criminal Code (Chapter 9 of the Laws of Malta), subjecting offenders to criminal liability.

### 2. How is unfair and misleading advertising regulated? [Briefly describe the law and regulation applying to unfair and misleading advertising in your jurisdiction. Cover any specific unfair or misleading practices that are prohibited, as well as the general category of misleading advertising]

In Malta, consumers have the legal right to clear and accurate information prior to making a purchase. As such unfair and misleading advertising is regulated specifically within the Broadcasting Act, the Consumer Affairs Act (Chapter 378 of the Laws of Malta) and the Commercial Code (Chapter 13 of the Laws of Malta).

Within the Broadcasting Act, advertising that is not immediately recognizable as an advertisement, and consequently might mislead the public as to its nature is considered surreptitious. Such surreptitious advertising is prohibited as advertising must be readily recognisable as such. Likewise, subliminal advertising techniques, where marketing techniques are employed to be perceived by the subconscious mind, without being

consciously being perceived are also prohibited within this Act.

The Consumer Affairs Act is intended to protect the interests of the average consumer in Malta. As such, provisions within this Act apply to all forms of advertisement directed towards consumers. Within this context, unfair and misleading advertising is heavily regulated. Any commercial practices, including advertising, shall be deemed unfair if they are found to be misleading in terms of this Act. Article 51C and 51D of the Consumer Affairs Act specifically provide for several 'actions' and 'omissions' of commercial practices respectively that are considered misleading and as such in breach of the Act. Continuing along the same line of thought, it's also relevant to observe that Article 51B outlines commercial practices considered unfair and thus prohibited. This article also includes an accompanying schedule within the act, which enumerates a comprehensive list of circumstances deemed to be unfair, which are also applicable to various types of misleading advertising, depending on the specific context and situation.

A misleading 'action' refers to, various situations in which advertising incorporates inaccurate information or practices that have the potential to deceive or direct the average consumer in the wrong direction. This can occur even if the information presented is factually correct. These deceptive practices, often driven by specific features and circumstances, can ultimately prompt or may be likely to cause the average consumer to make a transactional choice that they wouldn't have made otherwise.

Misleading 'omissions' on the contrary, involve the deliberate withholding of crucial information that the average consumer needs to make an informed decision. This encompasses situations where information is concealed, presented in an unclear or ambiguous manner, or presented in an untimely manner. When determining such misleading information, consideration must be had for the medium used to communicate the advert and any limitations such mediums may have been subject to.

In relation to the Commercial Code, Article 32B prohibits traders from engaging in any form of misleading advertising. The Code defines 'misleading advertising' as those adverts likely to deceive the average consumer and by reason of this deceptive nature injure or are likely to injure a competitor or are likely to affect the economic behaviour of the average consumer. This is done largely by factoring in the totality of the features of the advert such as the characteristics of the goods and services, the price, and conditions as well as the nature,

attributes and rights of the advertiser. Within the Commercial Code it is also important to highlight that when addressing misleading comparative advertising, the Code explicitly refers to deceptive actions and/or omissions as defined within the Consumer Affairs Act.

### **3. Do any specific rules restrict advertising for the following product sectors? If so, how? a. Alcohol b. Tobacco and related products, such as vapes and nicotine pouches c. Medicines, medical devices and surgical or medical procedures d. High fat, salt and sugar foods e. Gaming and gambling services f. Adult and sex-related services**

The Broadcasting Act, in relation to Radio and Television broadcasts originating from Malta provides for certain restrictions in relation to specific product sectors. Taking this into account, Article 16K prohibits advertisement relating to;

- a) cigarettes and other tobacco products including electronic cigarettes and their refill containers,
- b) alcoholic beverages aimed specifically at minors, and
- c) medicinal products and medical treatment available only on prescription.

Article 16M of this Act also regulates advertisement in the form of product placement within a general context. In relation to product placement, it is worth emphasizing that there are specific restrictions also in place. Firstly, tobacco-related products and prescription medical goods and treatments are strictly prohibited from being featured in product placements. Secondly, more stringent limitations are imposed on alcoholic beverages with an alcohol content exceeding 1.2% and gambling products. These items cannot be included as product placements during broadcast hours from 6:00 a.m. to 7:00 p.m., although there are some exceptions for gambling products directly linked to ongoing sporting events.

Further to the above outlined regulations specific subsidiary legislations also exist in relation to several products.

#### **Alcohol**

Alcohol products in Malta are further governed by the regulatory framework outlined in the 'Requirements as to Advertisements, Methods of Advertising, and Directions Applicable to Alcoholic Drink Advertising,

Sponsorship, and Teleshopping' (Subsidiary Legislation 350.24). While advertising of alcohol is allowed, it is subject to stringent restrictions, particularly with regard to broadcasting formats, in order to safeguard minors.

This subsidiary legislation must be read in conjunction with 'Schedule Three' of the Broadcasting Act. Schedule Three provides that advertisement of alcohol cannot be directed towards minors, cannot suggest that the consumption of alcohol provides benefits, and cannot discourage abstinence. With this understanding, the subsidiary legislation goes on to provide guidelines pertaining to the time periods in which advertisement of alcohol is permissible, the further protection minors, unacceptable types of advertisements, safety related aspects and even the way humour in adverts cannot be used to undermine any of the conditions stipulated within these guidelines.

#### **Tobacco and related products, such as vapes and nicotine pouches**

Tobacco and all related products are subject to specific regulation under the 'Advertising and Promotion of Tobacco Products Regulations' (Subsidiary Legislation 315.06). These regulations prohibit the advertising of cigarettes, cigars, tobacco, and all related products in Malta across all advertising formats.

Pictures of cigarettes or any such representation pertaining to cigarettes and tobacco products are only permissible on cigarette machines, for the purpose of product selection, however all such depictions must include health warnings as stipulated by law.

#### **Medicines, medical devices and surgical or medical procedures**

Advertising of products and services of a medical nature is highly regulated in Malta. Within the context of the Broadcasting Act, Subsidiary Legislation 350.30 entitled 'Requirements as to Standards and Practice on Programmes involving the Participation of Certain Health Care Professionals in the Broadcasting Media and Requirements as to Advertisements and Directions Applicable to Medicinal Products and Treatments' is applicable.

Consideration must also be had for the 'Medicines Act' (Chapter 458 of the Laws of Malta) and the subsequent 'Medicinal Products (Advertising) Regulations', (Subsidiary Legislation 458.32) transposing Directive 2001/83/EC, Title VIII.

Of a general note, Article 4 of the 'Medicinal Products (Advertising) Regulations' provides that all advertising of medical products must promote rational use, the

products must contain a list of all particulars required by law and the advertising cannot be misleading. Article 5 (1) then provides that all medicinal products being advertised must have a valid authorisation to be placed on the Maltese market.

Advertising to the public of over-the-counter medicinal products is permissible in Malta, however the advertising of prescription only medicines or medicines that contain substances defined as psychotropic or narcotic under Maltese law towards the general public is prohibited.

Additionally, advertising cannot imply that the effects of the product are guaranteed or that they are comparatively better than other products or treatments. It is further prohibited for advertisement to include any form of endorsement and advertising targeted towards minors.

Several specificities in relation to this industry exist and as such any advertisement should be taken on a case-by-case basis in full consideration of the product or treatment and the targeted group. By way of example, different regulations apply to advertisement intended for the general public when compared to advertisement intended towards medical practitioners.

#### **High fat, salt and sugar foods**

The advertising of High fat, salt and sugar foods is not banned in Malta however food related products must be fully transparent regarding their contents. As such Subsidiary Legislation 449.46, titled the 'Labelling, Presentation and Advertising of Foodstuffs Regulations' must be carefully considered in relation to all food products sold in Malta. The regulation defines and outlines most food products sold in Malta and requires clear and transparent labelling, outlining the contents of all food products sold within the Maltese market.

Under the Consumer Affairs Act, deceptive advertising in all mediums is strictly prohibited. Therefore, all forms of communication related to the promotion of products or services, especially food items, must be transparent and straightforward. Food labelling is of paramount significance and must include essential information such as the product's name, ingredient list with specified quantities, including ingredients like sugar and fat, quantity, best-before date, and other pertinent details.

Currently no legislation in Malta prohibits or restricts the advertisement of food or drink high in fat, salt or sugar. Discussions are however ongoing at a European level that would in turn affect Maltese legislation.

#### **Gaming and gambling services**

Online advertising for online gaming or gambling services is governed by the 'Gaming Commercial Communications Regulations' (Subsidiary Legislation 583.9). In this regard any form of advertisement, publication or commercial communication is prohibited in relation to gaming and gambling services, unless the game and the operator are duly authorised in accordance with the Gaming Authorisations Regulations.

The 'Gaming Commercial Communications Regulations' outlines the duty of any such advertisement to be socially responsible, providing several guiding limitations and further prohibits unsolicited or targeted commercial communications. Advertisement in this industry must be very transparent, promote responsible gaming and in no way targeted towards minors and/or vulnerable persons.

Further regulations found within the 'Broadcasting Services, Advertisements, Methods of Advertising, Gambling Advertisements' (Subsidiary Legislation 350.25). This legislation provides guidelines pertaining to what type of advertising is permissible and the times at which advertisement in relation to gaming and gambling services can take place, by means of Radio and Television, in an effort to reduce the exposure of such advertising towards minors.

#### **Adult and sex-related services**

Concerning the advertising of adult and sex-related services no legislation is currently in place to specifically regulate this area. Nevertheless, the absence of such regulations does not imply that this area of advertising allows for free and unrestricted advertising practices.

Within this context, other regulations pertaining to advertising, consumer affairs and criminal law indirectly regulate this area of advertising, whereby any form of advertising may be restricted or even prohibited to ensure the protection of public morals and the protection of minors.

As such a significant mention must be made of the Broadcasting Act in which any audiovisual commercial communications that may cause physical, mental, or moral detriment to minors are strictly prohibited. Minors cannot be exposed to any audio-visual material of an adult or sexual nature, especially any material of a pornographic nature, through television and radio.

The Criminal Code also addresses the display of pornographic material in public places under Article 208. Within this context, the law requires any establishments, duly authorised of an adult or sexual nature, to provide adequate warning outside the establishment, without imagery, restricting anyone below the age of 18 from entering. Such establishments are prohibited from

having explicit content being displayed in public areas, as such they are heavily restricted in the manner in which they can advertise their products and services. A specific restriction is also in place concerning the advertisement of sexual tourism, any person guilty of such a conviction is liable to a term of 2-5 years imprisonment.

Interestingly, prostitution carried out by a person of legal age without coercion in Malta has been decriminalised, however, the act of loitering and soliciting such a service in public is illegal, as such advertising of such services is prohibited in Malta.

When advertising by means of Billboards and/ or any other means on the 'Road, the Placing of Billboards and Advertising on the Road Regulations' (Subsidiary Legislation 499.32) is applicable. The regulation provides for a specific provision pertaining to public decency, whereby certain forms of advertising may be removed if considered to be offensive or contrary to public decency or public security or otherwise against the public interest. The regulation does not however provide for a definition of what may be considered offensive or contrary to public decency, as such the decision of what is acceptable is at the discretion of the Public Authority responsible, currently Transport Malta.

#### **4. Do any specific rules apply to advertising featuring prices?**

Price indication is regulated by the 'Consumer Affairs Act (Price Indication) Regulations' (Subsidiary Legislation 378.9) under the Consumer Affairs Act. This legislation is intended to ensure that consumers are granted the right to know exactly how much a product will cost prior to purchase and without the need to ask the seller for information. As such Traders who sell goods to consumers on a retail basis have the obligation to display prices of goods in a clear and unambiguous manner.

In relation to advertising, traders are not legally obliged to indicate prices within their advertisement, however where the trader decides to indicate a price, the price must be indicated clearly in terms of the 'Price Indication Regulation'. The price displayed must be the final retail selling or unit price, including VAT and any other taxes or charges. In this manner there can be no hidden charges that the purchaser may incur.

#### **5. Do any specific rules apply to the use of testimonials and endorsements in**

## advertising?

No specific legislation exists in Malta pertaining to the use of testimonials and endorsements in advertising. However, the Consumer Affairs Act prohibits falsely claiming endorsements from public bodies or entities, creating or commissioning individuals to submit fraudulent consumer reviews or endorsements, and misrepresenting genuine consumer reviews or social endorsements for the purpose of promoting products. Such practices are misleading and unfair. All testimonials and endorsements must be truthful and accurate, they must also be substantiated.

This is in line with the overarching EU legislation regulating unfair commercial practices, specifically the Unfair Commercial Practices Directive (UCPD), which prohibits the use of untruthful testimonials and endorsements. Such practices are dark patterns, prohibited as they are likely to negatively influence consumer behaviour.

Specific legislation concerning testimonials and endorsements does exist in relation to the medical industry. Advertisements related to medical products in Malta are prohibited from containing any material that may refer to any testimonials and endorsement by scientists, health professionals, celebrities, well-known organisations, or persons who because of their profession or celebrity status could encourage the consumption of medicinal products.

Moreover, the 'Health Care Professions Act' (Chapter 464 of the Laws of Malta) and subsequent 'Ethics of the Medical Profession Regulations' (Subsidiary Legislation 464.17) further extends this prohibition to Medical Professionals, who, in a general manner are prohibited from providing testimonials and endorsements in advertising. All Medical Professionals, including doctors, surgeons and dentists in Malta are expected to adhere to these ethical standards, and as such should exercise care when presenting any information to the public.

While no specific regulations exist in Malta, pertaining to testimonials and endorsements in advertising of other professions, most professions are often subject to the standards and ethical guidelines of their professions, and as such must adhere to these autonomous and diverse regulations.

## 6. Do any specific rules apply to environmental or "green" advertising claims?

In terms of the Consumer Affairs Act, misleading or false

advertising is prohibited in all types of communication that promote products or services whether offline or online. While environmental or "green" advertising claims are not specifically addressed under Maltese law, unfounded environmental or "green" advertising claims are likely to breach Maltese Consumer Affairs regulations.

Articles 51C and 51D respectively of the Consumer Affairs Act provide for several instances that, by way of action or omission, may be regarded as misleading commercial practices. In this regard the law takes into consideration all the features and circumstances of the advertisement that may cause or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. The rules pertaining to the Consumer Affairs Act rules apply to all industries and is applicable to all forms of advertising.

As such any claims made in relation to environmental or "green" advertising must be accurate, truthful, and clear, they cannot in any way mislead the average consumer.

Any practices regarding green and environmental advertising would also be generally regulated by the Unfair Commercial Practices Directive (UCPD), which prohibits dark patterns in advertising and consumer law. Consequently, should an advert present misleading information to consumers, who as a result may or may not purchase goods due to the environmental characteristic presented, then such advertisement would be deemed misleading and contrary to Article 6 of the UCPD.

## 7. What rules apply to the identification of advertising content - for example, distinguishing advertorial from editorial?

Under Maltese law, the general guiding principle for advertisement is transparency. Advertisement must be clearly identifiable as such. As previously noted, in terms of the Broadcasting Act, advertising must be immediately recognizable as an advert. Surreptitious and subliminal advertising techniques are prohibited.

The Broadcasting Act further elaborates that viewers must be clearly informed of the existence of any sponsorship agreement that may exist and such sponsored programmes must be clearly identified as such by the name, logo and, or any other symbol of the sponsor, such as a reference to any of its products or services, or a distinctive sign thereof in an appropriate way for programmes at the beginning, during and, or the end of the programmes.



Where advertisement is carried out in the form of product placement, the Act further provides that viewers must be clearly informed of the existence of such product placement by an appropriate identification at the start and at the end of the programme and when a programme resumes after an advertising break, to avoid any confusion on the part of the viewer.

Where advertisement is concealed, should the advert deceive or is likely to deceive the average consumer, this may be considered as a 'Misleading action' in terms of the Consumer Act. As such when advertising the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product must be made clear to the consumer.

In relation to native advertising, where advertising seamlessly blends into content such as articles, must be clearly identified as advertising and distinguished from editorial or non-promotional content. It should be evident to the audience that they are engaging with sponsored content. Clear labelling or design elements that differentiate native adverts from regular content are essential. Any material connection between the advertiser and the content must be disclosed. If the content is sponsored or paid for, this fact must be transparently communicated to the audience. In line with the Consumer Affairs Act, they should not deceive or mislead consumers and should avoid creating confusion between commercial messaging and editorial content.

## 8. How is influencer/brand ambassador advertising regulated?

Influencer/brand ambassador advertising is not directly regulated under Maltese law, however depending on the advertising medium the relevant legislations will apply. Overall advertising and promotional literature must be clear, unambiguous, accurate and containing no false or misleading information. Legislative instruments regarding consumer matters are also applicable to advertising on the internet.

As a result of the Consumer Affairs Act, it is expected that influencers and/or brand ambassadors, should disclose any connections with the brands or clients being endorsed. As influencers and/or brand ambassadors are also bound by relevant advertisement laws all information presented must be truthful, accurate and transparent. All and any endorsements must be genuine, and all forms of advertisement must be easily recognisable as such.

All forms of advertisement presented by influencers

and/or brand ambassadors must also comply with product and service relevant regulations while always being mindful of not misleading the average consumer and not negatively affecting minors.

## 9. Are any advertising methods prohibited or restricted? [For example, product placement and subliminal advertising]

Yes, certain advertising methods are prohibited or restricted in Malta.

In terms of product placement, the Broadcasting Act specifically prohibits the placement of tobacco related goods and prescription medical good and treatments. Alcohol products and Gambling product placement are restricted, they are only permissible within certain instances. Within this context alcoholic drinks of more than 1.2% alcohol and gambling products, such adverts by means of Radio or Television cannot be included as product placements in broadcasts between 6.00a.m. and 7.00 p.m. with certain concessions to gambling products which are strictly related to an ongoing sporting event.

These prohibitions and restrictions are regulated by both the Broadcasting Act and all relevant product specific regulations previously explored.

As also previously discussed, surreptitious and subliminal advertising techniques are banned from advertisement in Malta by means of the Broadcasting Act as advertising must be readily recognisable as such.

In relation to the Consumer Affairs Act, all and any advertising that may be considered misleading by action or omission is also prohibited.

## 10. Are there different rules for different advertising media, such as online, broadcast, non-broadcast etc?

The Broadcasting Act is specifically applicable to all Radio and Television broadcasts originating from the Maltese Islands, including all advertisement within this scope.

The Media and Defamation Act (Chapter 579 of the Laws of Malta) regulates all forms of dissemination of ideas, information, or opinions on matters of public interest to the general public or to a portion of the public under the editorial control of an editor. In this regard any forms of advertisement that may be considered libelous or defamatory would also be regulated by this Act.

Legislation relative to consumer matters applies to all

forms of advertising specifically intended to protect consumers. Consequentially the Consumer Affairs Act prevents misleading advertising practices across all forms of advertising, both offline and online.

Other legislations such as the 'Tobacco (Smoking Control) Act', 'Gaming Commercial Communications Regulations' and the 'Presentation and Advertising of Foodstuffs Regulations' among others then provide sector specific restrictions and guidelines intended for implementation in all forms of advertising.

Specifically in relation to online forms of advertising the 'Electronic Commerce Act' provides regulations pertaining to the level of information that must be provided in all commercial communications over and above any other information requirements that may already be established at law within the context of the provision of services. This is intended to provide more transparency to the consumer.

Advertisement by means of Billboards and by any other means on the Road is regulated by the 'Placing of Billboards and Advertising on the Road Regulations'. The regulations overall address regulations pertaining to necessary road safety criteria set out by Transport Malta as the relevant Authority. While such adverts do not require licensing, the medium on which they are present, for example a billboard does require a licensee so as to verify safety standards. Interestingly this regulation also includes regulations pertaining to public decency, whereby certain forms of advertising may be removed at the discretion of the Authority if they are considered to be offensive or contrary to public decency or public security or otherwise against the public interest.

## **11. Are there specific rules for direct marketing such as email, SMS and direct mail?**

The use of electronic communications for the purpose of direct marketing in Malta is regulated by the 'Processing of Personal Data (Electronic Communications Sector) Regulations' (Subsidiary Legislation 586.01), a subsidiary legislation promulgated under the Data Protection Act (Chapter 586 of the Laws of Malta), which in turn transposes the provisions of the e-Privacy Directive 2002/58/EC. These regulations apply to the processing of personal data in connection with the provision of publicly available electronic communications.

In this regard no person shall make use of publicly available electronic communications service to make an unsolicited communication for the purpose of direct marketing by means of an automatic calling machine, a

facsimile (fax) machine or electronic mail without the prior consent of recipient.

However where a controller of such data has obtained from his customers their contact details for electronic mail in relation to the sale of a product or a service, that same controller may use these details for the direct marketing of their own similar products or services, so long as the recipient is given the opportunity to object to such marketing, in a manner that is free of charge and simple, at the instance when information was collected and with each marketing communication.

Direct marketing by means of other forms of communication, not listed in this subsidiary legislation, such as conventional mail and cold calling, involving human interaction, is permissible so long as it is at no charge to the subscriber or user, while also granting the recipient the ability to request that such communications cease.

Furthermore, non-direct forms of marketing, such as generically sent mail is not regulated in this manner as there is no personal data involved.

The Processing of Personal Data (Electronic Communications Sector) Regulations also applies to messaging and multi-media services (including short message services, enhanced media services and multi-media services).

The processing of data is of course also regulated heavily by the General Data Protection Regulation (GDPR) which places a great deal of obligations on data controllers and processors who must process data in accordance with the principles of the regulation such as lawfulness, fairness, transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity and confidentiality and accountability.

Moreover, Article 7 of the E-Commerce Directive speaks of unsolicited commercial communication which places a general obligation on service providers to maintain opt-out registers where any natural person may register themselves.

## **12. Is advertising to children and young people restricted beyond general law and regulation? If so, how?**

Advertising to children and young people is addressed in most regulations pertaining to advertising in Malta.

Within the main Broadcasting Act the protection of minors is considered under Article 16K, whereby audio-visual commercial communications that causes physical,



mental, or moral detriment to minors in any manner is prohibited. Furthermore, Article 16JA of the Broadcasting Act then provides that any such forms of advertising that may impair the physical, mental or moral development of minors shall only be made available in such a way as to ensure that minors will not normally hear or see them.

A subsidiary legislation promulgated under the Broadcasting Act entitled the 'Broadcasting Code for the Protection of Minors' (Subsidiary Legislation 350.05), further elaborates on this aspect. This regulation addresses a vast array of restrictions intended to specifically protect minors from the effects and influences of advertising. Essentially minimising the exposure and impact advertisement may have on minors.

Within the context of the Consumer Affairs Act, the commercial practice of directing advertisement towards children to buy advertised products or persuade their parents or other adults to buy advertised products for them is considered as an aggressive commercial practice in terms of Article 51B and 51E of the Act. As such this is specifically prohibited. The Act also makes reference to the Broadcasting Code for the Protection of Minors.

### **13. How is comparative advertising regulated?**

Comparative Advertising is directly addressed in the Commercial Code (Chapter 13 of the Laws of Malta), whereby Article 32A prohibits Traders from engaging in comparative advertising practices, however the Commercial Code then goes on to provide exceptional circumstances in which such comparative advertising is permissible. Accordingly comparative advertising is permissible in relation to instances involving 'like with like' products and services. Such comparisons must be objective and cannot be misleading. The Commercial Code in this regard then goes on to make a direct reference to the Consumer Affairs Act that further develops on this point.

Within the Consumer Affairs Act, comparative advertising is restricted if it may give rise to a Misleading Action under Article 51C. Such comparative advertising may be regarded as a misleading practice if when taking account of the factual context, all features and circumstances the comparative advertising creates confusion with any products, trademarks, tradenames or other distinguishing marks of a competitor and as such causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. As such Comparative Advertising is

permissible so long as it does not mislead the average consumer. Furthermore, such comparison cannot discredit or denigrate other goods or services.

It's essential to note that the opportunity to conduct comparative advertising does not absolve any potential liability under Intellectual Property Law. In terms of the Trademarks Act (Chapter 597 of the Laws of Malta), depending on use and intent the offending party may be exposed to civil and criminal liability.

### **14. Are consumer promotions specifically regulated as advertising (as distinct from contract law)? If so, how?**

Consumer promotions are not specifically regulated in a distinct manner from advertising. Rather, the laws applicable to consumer promotions, found within the Consumer Affairs Act are directly applicable and feed into the applicable advertising laws.

This is intentionally intended to ensure consumer protection is applied at all stages of a consumer transaction, including the manner in which information, in the form of advertisement, is received by the consumer. Advertisement is considered a key source of information for consumers in Malta, as such they must be provided with the most accurate information possible concerning all products and/or services.

There has been an increase in literature on the existence of dark patterns and a parallel development of legislation and case-law on the subject. In essence the development of legislation has seen a trend towards the protection of consumers. The UCPD in particular protects consumers from misleading actions and omissions and aggressive commercial practices of traders. Moreover, the EU is moving towards a stronger and more robust regulatory framework with the enactment of the Digital Services Package which will come into force in 2024.

### **15. Are there specific rules on promotional prize draws and skill competitions? If incorrectly executed, can these be classed as illegal lotteries? If so, what are the possible consequences?**

The Gaming Act, (Chapter 583 of the Laws of Malta), clearly distinguishes between 'contests of skill' and 'games of chance' resulting profoundly different regulatory framework governing the various forms of gaming. Within this context, a 'game of skill' is defined as an activity in which the outcome primarily hinges on the use of skill. It is a contest where the abilities and

expertise of the participants direct impact the outcome still this definition explicitly excludes sporting events, except when otherwise specified by law.

Normally, games of skill do not necessitate a license, unless involving a stake for participation or a monetary prize or its equivalent. In such instances, they are categorized as controlled skill games and necessitate licensing. The entity operating or promoting the said activity, is obliged to establish that an activity qualifies as contest of skill exempt from licensing.

A 'game of chance' however encompasses activities where chance, rather than skill, predominantly determines outcome, thus dependent on luck or random events. This also extends to activities that are reliant on future outcomes, presently unknown.

Any gaming service or critical gaming supply associated with an exempt game does not require a license or additional authorization. The Malta Gaming Authority provides for a De Minimis Games Directive, Directive 3 of 2019, defining conditions exempting games. Such games should resemble a lottery or raffle-type game, participation cost should not exceed €1 and the prize's value should not surpass €100. Additionally, the game's outcome should not depend on the result of another game.

Additionally, no person may organise more than ten de minimis games per calendar year and within this year, no more than two per month.

Concerning advertising and marketing consideration must be had for the subsidiary legislation entitled 'Requirements as to Standards and Practice, Award of Prizes, Conduct of Competitions' (Subsidiary Legislation 350.22). This provides the general conduct required for competitions held by means of broadcasting media. Competitions should be conducted fairly and according to established competition rules known to participants along with an accurate description of prizes.

The Consumer Affairs Act on the other hand directly considers competitions and/or prize promotions in relation to misleading commercial practices. In this regard traders are not permitted to carry out competitions or prize promotions without awarding the prizes described or a reasonable equivalent. Traders are also not permitted to fabricate instances whereby consumers are given the false impression that they have already won – will win, or will win after doing a particular act – a prize when in fact either there is no prize to be won, or when claiming the prize will involve asking the consumer to pay money or incur a cost. Such an action is considered as an aggressive marketing practice.

A person found guilty of an offence against the Consumer Affairs Act, on conviction shall be held liable to a fine (multa) of not less than four hundred and seventy euro (€470) and not more than forty-seven thousand euro (€47,000) imposed by the Civil Court.

Where a gaming service is provided without the necessary license or contrary to an order of the Gaming Authority, such offender may be liable towards a criminal offence whereby, on conviction, such person may be liable to a fine (multa) of not less than ten thousand euro (€10,000) and not more than five hundred thousand euro (€500,000) or to imprisonment for a term of not more than five years, or to both such fine and imprisonment. Recidivists may be liable for greater fines and periods of imprisonment.

## **16. Must promotional prize competitions be registered with a state agency or authority? [If so, briefly explain the process, typical time from application to approval, and any costs]**

Further to the generally applicable laws cited in Question 15, any promotional games that are organised with the purpose of promoting or encouraging the sale of goods and/or services are known as Commercial Communication Games, if not exempt in terms of *De Minimis Games Directive*, Directive 3 of 2019, such games may be considered as 'low risk games' and as such regulated by the Gaming Act (Chapter 583 of the Laws of Malta) and all subsidiary legislations under this Act.

Such games are not considered as an economic activity in their own right and any payments effected by the participant should serve only to acquire the promoted goods and/or services. Such purchase should not be a means of participating in the game itself, although it may be a condition that a person purchases the promoted goods or services to participate in the game. Nevertheless, no person can operate such a game without the approval of the Malta Gaming Authority granted under the Gaming Authorizations Regulations (Subsidiary Legislation 583.05).

'Low-risk games' as determined by the Fifth Schedule of the Gaming Authorisations Regulations (S.L. 583.05) and Gaming Definitions Regulations (S.L. 583.04), require a Low-Risk games permit issued by the Authority. Such permit is only valid for a singular event and expires upon conclusion of the event. The application shall be filed not less than seven working days before the commencement.

Also of note, a 'Non-Profit Game' is a licensable game wherein the stake cannot exceed €5 per player and where over 90% of the net proceeds go to a charitable, sporting, religious, philanthropic, cultural, educational, social, or civic purpose entity. Such permit is only valid for a singular event and expires upon conclusion of the event. The granting of a permit for a non-profit game (tombola/bingo game, or lottery game) is also subject to several conditions.

Where a gaming service is provided without the necessary license or contrary to an order of the Gaming Authority, such offender may be liable towards a criminal offence whereby, on conviction, such person may be liable to a fine (multa) of not less than ten thousand euro (€10,000) and not more than five hundred thousand euro (€500,000) or to imprisonment for a term of not more than five years, or to both such fine and imprisonment. Recidivists may be liable for greater fines and periods of imprisonment.

### **17. What is the relationship between IP law and advertising law? [For example, can IP law provide an alternative enforcement mechanism in addition or alternatively to advertising-specific law and regulation?]**

Intellectual Property rights take various forms, some require registration, such as trademarks, while others, such as copyrights, arise automatically. As a result of this varying nature, "intellectual property rights" under Maltese Law refers to rights accorded under various legislations such as the Commercial Code, the Copyright Act, the Trademarks Act and the Patents and Designs Act, and several other relevant legislations.

Within Maltese legislation, IP law does overlap with advertising law within the Consumer Affairs Act and the Commercial Code in relation to Comparative Advertising. As previously explored comparative advertising should be avoided under Maltese Law however is overall permissible so long as it is not misleading to the consumer. Within the context of IP law, any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, tradenames or other distinguishing marks of a competitor is considered to be a misleading action and as such prohibited.

So as to avoid such misleading practices, in general, advertisers may only compare 'like with like' products and services, meaning that the products or services being compared must be identical in every manner, including but not limited to use, weight and purpose. Because of the stringent requirement for products and

services to be identical, Maltese companies have typically refrained from engaging in comparative advertising, and examples of successful implementation are few and far between.

Due to this overlap in legislation, comparative advertising may give rise to potential legal repercussions of a civil and/or criminal nature. In terms of the Commercial Code, where comparative advertising is in breach of the code, the trader responsible, at the request of the injured trader, may be found exposed to civil liability. In terms of the Trademarks Act the unauthorised use of trademark with a view to gain, or with intent to cause loss to another, and without the consent of the proprietor may cause the offending party to be exposed to civil and criminal liability according to circumstance and severity.

### **18. What is the relationship between contract law and advertising law? [For example, if an "offer" made in advertising content is accepted by a third party, can this form a binding contract?]**

Adverts in Malta do not contractually bind a trader to a consumer, however, deviations from what is advertised may give rise to commercial practices which are *ipso jure* unfair and as such considered to be misleading commercial practices within the Consumer Affairs Act. The Consumer Affairs Act provides for several instances that are considered as misleading and applicable to such circumstances:

1. Where an invitation, such as by means of an advert, is made to purchase products at a specified price without disclosing the existence of any reasonable grounds by which the trader is aware that he may not be able to actually provide what is advertised or an equivalent, even if not in a reasonable quantity, this is considered to be bait advertising.
2. Making an invitation to purchase products at a specified price and then refusing to show the advertised item to consumers; or refusing to take orders for what is advertised (even refusing to deliver it within a reasonable time) and/ or advertising a product or service that the trader never intends to provide, however advertised as such to promote a different product (bait and switch).
3. Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed

choice.

As such while adverts do not create actual contractual obligations, in terms of the Consumer Affairs Act unfair and misleading deviation from what is advertised are not permissible and subject to enforcement.

### 19. What is the relationship between human rights law and advertising law? [For example, can advertisers rely on a right to freedom of speech to justify otherwise prohibited advertising?]

As an important source of information for the average consumer and general public aspects of advertising law do intersect and draw from human rights law. Some of the most important and most prevalent are:

**The Protection of Minors:** Advertising law in Malta, has several provisions intended to protect the well-being and best interests of minors, intended to restrict any advertising that could be detrimental to the physical, mental, or moral development of children. This aspect overlaps with human right law intended to protect the rights of minors that require special protection.

**Freedom of Expression:** Freedom of expression is an important aspect of human rights however this right is not absolute. It is thus unsurprising that several limitations apply to commercial communications intended to protect the rights of other or in the interest of the general public. As previously explored Article 16K of the Broadcasting Act provides for general provisions that govern audio-visual commercial communications and restricts advertisement that would prejudice the respect for human dignity, include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation, encourage behaviour prejudicial to health or safety and encourage behaviour grossly prejudicial to the protection of the environment.

**Non-Discrimination:** Related to the above discussed aspect of Freedom of Expression advertising law in Malta specifically prohibits discrimination in relation to sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation. As such advertising in Malta should ensure that the perpetuation of stereotypes or discriminatory content is avoided.

**Privacy:** Privacy is another aspect that is protected under human rights law. Advertising in Malta must comply with all privacy regulations in relation to the collection and use of personal data for the purpose of direct marketing. The use of electronic communications

for the purpose of direct marketing in Malta is regulated by the 'Processing of Personal Data (Electronic Communications Sector) Regulations'. These regulations apply to the processing of personal data in connection with the provision of publicly available electronic communications.

**Consumer Protection:** Human rights principles relating to consumer protection are also very prevalent in Maltese law. While in general advertising in Malta enjoys a high degree of freedom, it is subject to the provisions of the Consumer Affairs Act. Advertisement in Malta must present to the consumer information that is clear, correct, and fair to make informed decisions prior to making a purchase. This aspect is also highly linked to the protection of vulnerable persons.

### 20. How are breaches of advertising law and regulation enforced? [Briefly outline the process, including significant stages of the dispute, time to resolution and likely penalties]

In Malta, any breaches of advertising laws and regulations are typically enforced by the relevant authorities in a manner dependant on the nature of the violation. In relation to advertisement, the primary laws applicable in Malta are the Broadcasting Act and the Consumer Affairs Act, however other laws remain relevant and involve other forms of enforcement including criminal procedures where necessary.

Violations that fall within the scope of the Broadcasting Act are enforced through the Broadcasting Authority. Penalties including imprisonment up to six months, a fine not exceeding €11,646, or both. Appeals against the Authority's decisions can be made to the Court of Appeal within fifteen days.

Enforcement powers of the Broadcasting Authority are granted by Subsidiary Legislation 350.12 allowing the Authority various powers to enforce the act including a combination of monitoring, investigation, and enforcement actions.

Violations that fall within the scope of the Consumer Affairs Act are enforced by the Malta Competition and Consumer Affairs Authority through a specialized Enforcement Directorate. The Directorate is able to investigate any unfair trading practices and unfair contract terms, ensure price transparency and compliance with other information requirements and also ensure the observance of consumer-related legislation falling within the jurisdiction of the Malta Competition and Consumer Affairs Authority. Disputes

not exceeding €10,000 may be resolved through a Consumer Claims Tribunal. Larger claims are heard before the Civil Courts.

Claims that go beyond the scope of the Tribunal are referred to the Civil Courts, where fines can range from

€470 to €47,000 upon conviction.

Breaches related to advertisement, regulated by other legislations are however subject to enforcement authorities, procedures and penalties specific to the case under examination.

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