

Online deceptive advertising and consumer protection in South Africa – The law and its shortcomings?

Yeukai Mupangavanhu

LLB LLM LLD

Associate Professor, Private Law Department, University of the Western Cape

Dominique Kerchhoff

LLB LLM

Law Educator, Boston City Campus

SUMMARY

E-commerce and e-marketing has grown significantly over the past few years. More businesses are moving away from original forms of marketing tools such as newspapers, magazines, billboards and televisions and instead prefer online platforms such as social media. The article focuses on false, misleading and deceptive online marketing representations. It examines the legislative framework that seeks to protect online consumers in South Africa in terms of the Electronic Communications and Transactions Act 25 of 2002 (ECTA), the Consumer Protection Act 68 of 2008 (CPA) as well as the Social Media Code¹ of the Advertising Regulatory Board (ARB). It is recommended that although a consolidated statute that makes provision for both offline and online consumers would be ideal, the current provisions in ECTA could also be reviewed to ensure that they are in line with the new developments in marketing trends such as influencer marketing. The Social Code of the ARB is also important to complement ECTA and the CPA, as well as to promote the overall protection of consumers in South Africa.

1 Introduction

The rise of the internet and the emergence of social media have created opportunities for advertisers who are constantly trying to find new ways to market their goods or services. The buying and selling of goods and services through electronic networks or over the internet (generally referred to as e-commerce) has become a new phenomenon in today's marketplace and has been on a sharp rise.² There has been a significant

1 Advertising Regulatory Board "Appendix K: Social Media Code" 2022 [https://www.arb.org.za/assets/appendix-k-social-media-\(2022\).pdf](https://www.arb.org.za/assets/appendix-k-social-media-(2022).pdf) (last accessed 2023-06-12) (hereinafter Social Media Code).

2 De Klerk and Kroon "E-commerce adoption in South African businesses" 2004 *South African Business Management* 3; Srivasta and Koekemoer "The legal recognition of electronic signatures in South Africa: A critical overview" 2013 *African Journal of International and Comparative Law* 427.

shift in consumer behaviour towards the use of e-commerce.³ The lockdowns imposed by the South African government to deal with the spread of the coronavirus (COVID-19) pandemic further heightened the need for e-commerce.⁴ In the same breath, advertising over the years has increasingly moved away from traditional tools such as newspapers, magazines, billboards, and televisions to online platforms such as TikTok, Instagram, Facebook, and YouTube.⁵ For example in 2020, Clicks Retailers advertised on its website TRESemmé shampoo with images of the hair of four women.⁶ There was also a “cropped” version of the same advert on social media which resulted in the TRESemmé advertisement being referred to the Equality Court since it was regarded as racist.⁷ This case is instructive since it demonstrates that businesses are now advertising their products on their websites and even on social media platforms.

There is no doubt that the digital era has had a profound effect on how goods and services are marketed as new avenues are being created to reach consumers.⁸ E-commerce has numerous benefits which are, among others, business efficiency, a substantial reduction in paperwork, and an increase in revenue as businesses are able to reach new markets and reduce marketing and promotional costs.⁹ This makes online marketing a very effective and efficient marketing strategy for businesses. People spend a significant amount of time each day consuming online content.¹⁰ Online shopping, however, presents new challenges in terms of consumer protection and one of the major issues arising from online shopping relates to misleading or deceptive advertising.¹¹ The persuasive nature of the information shared makes it

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- 3 Eiselen “Digitisation and consumer law in South Africa and Africa” 2021 *TSAR* 439; Kariyawasam and Wigley “Online shopping, misleading advertising and consumer protection” 2017 *Information and Communication Technology Law* 73; Singh “The changing face of e-commerce in South Africa 2001-2004” 2005 *Alternation* 628.
 - 4 South Africa Government “About Alert Systems” <https://www.gov.za/covid-19/about/about-alert-system> (last accessed 2021-11-18). See also Anakpo and Mishi “Business response to Covid-19 impact: Effectiveness analysis in South Africa” 2021 *Southern African Journal of Entrepreneurship* 5.
 - 5 Kariyawasam and Wigley 2017 *Information and Communication Technology Law* 73; Vinerean and Cetina et al “The effects of social media marketing on online consumer behaviour” 2013 *International Journal of Business Management* 67. See generally Kotler and Armstrong *Global and Southern African Perspectives: Principles of Marketing* (2014) 457-519.
 - 6 *Baba v Clicks Group Limited* 2022 ZAWCHC 32 (hereinafter *Baba v Clicks Group Limited*) para 2.
 - 7 See *Baba v Clicks Group Limited* para 76.
 - 8 Kotler and Armstrong (2014) 457. See also Eiselen 2021 *TSAR* 437.
 - 9 Singh 2005 *Alternation* 629.
 - 10 As of 2022, the average daily social media usage of internet users worldwide amounted to 147 minutes per day. See Statista “Daily time spent on social networking by internet users worldwide from 2012 to 2022” <https://www.statista.com/statistics/433871/daily-social-media-usage-worldwide/> (last accessed 2023-05-01).
 - 11 See Kariyawasam and Wigley 2017 *Information and Communication Technology Law* 73.

very easy for consumers to be influenced by the content being disseminated on these sites. Deceptive advertising is, therefore, problematic and consumers have not only been duped but have also been induced to enter into prejudicial transactions.¹² This is because it is relatively easy to make oneself appear legitimate online.¹³ The “bells and whistles” do not always reflect the true state of affairs and are meant to entice consumers.

Van Eeden and Barnard point out that consumers in electronic commerce face many of the same problems that offline consumers experience including misleading advertising and unconscionable conduct.¹⁴ The purpose of this article is to critically discuss the extent to which deceptive, false, and misleading advertising online is addressed in South Africa. The two central questions are: how are online consumers protected from false and deceptive marketing practices in South Africa, and what are the shortcomings in the current legislative framework, if any? In answering these questions, the article first examines the different forms of online advertising and marketing. This article analyses the fragmented legislative framework namely, the Electronic Communications and Transactions Act 25 of 2002 (ECTA), the Consumer Protection Act 68 of 2008 (CPA), and industry-specific self-regulation such as the Social Media Code that was adopted by the Advertising Regulatory Board (ARB).¹⁵ Although the Protection of Personal Information Act 4 of 2013 (POPIA) is partly relevant, the extent of its application to deceptive and false advertising is limited and it is thus not discussed.¹⁶ The last part of this article provides a commentary and the way forward in the protection of online consumers.

2 E-commerce and online marketing

In this Fourth Industrial Revolution and digitisation era, there has been a significant shift in consumer behaviour towards the use of e-commerce.¹⁷ The accessibility of the internet has aided the exponential growth in the use of electronic communication media.¹⁸ The National Integrated ICT Policy¹⁹ states that digital and mobile infrastructure are tools that enable all citizens to have access to information and services from a range of sources anywhere and at any time.²⁰ It, however,

12 See Mupangavanhu and Kerchhoff “The regulation of false advertising in South Africa: An analysis of the Consumer Protection Act 68 of 2008 and self-regulation” 2021 *SAMLJ* 261.

13 Kariyawasam and Wigley 2017 *Information and Communication Technology Law* 73.

14 Van Eeden and Barnard *Consumer Protection Law in South Africa* (2017) 553.

15 The common-law position is also beyond the scope of this paper.

16 See s 69 of the Protection of Personal Information Act 4 of 2013. For more information see Botha “POPIA and electronic direct marketing: A storm (in a teacup)” 2021 *Property Law Digest* 1.

17 Eiselen 2021 *TSAR* 439.

18 As above.

19 *National Integrated ICT Policy White Paper*, GN1212 in GG40325 of 3 October 2016.

20 *National Integrated ICT Policy White Paper*, 114.

cautions that digital transformation is disruptive and that it will continue to transform the way societies and economies work, and how consumers access goods and services.²¹ Therefore, the transition of the global economy from an industrial focus to one based on knowledge and information can present numerous opportunities and challenges.²² For example, it might be difficult for a small business to adapt its business model to a more digital one due to limited resources.²³ This was particularly evident especially during the time of COVID-19 when many industries were forced to sell goods online.²⁴ Conversely, by going online, businesses now have access to a broader range of consumers and they can offer more goods or services.²⁵ Consequently, e-commerce and the use of the internet have levelled the playing field for the benefit of smaller businesses as they are also able to advertise their products and services.

The internet and the various online platforms have prompted a change in marketing communications and the consumer decision-making process. Many companies have an online presence with the aim to conduct marketing activities.²⁶ This includes the use of online platforms such as social media to initiate dialogues with consumers, foster relationships, deliver customer support, create brand communities, and connect with consumers.²⁷ The online platforms can increase awareness about a company and its products and services, provide opportunities for more targeted marketing, and help companies learn how existing and potential customers perceive the company's brand and reputation.²⁸ Businesses recognise the importance of online marketing because they are able to identify and target certain types of consumers and appeal to those consumers' specific interests.²⁹ This means that there is a focused market that "ensures that the advertising message is delivered to the intended audience rather than wasting efforts on mass audiences".³⁰

21 National Integrated ICT Policy White Paper, 114.

22 *A Green Paper on E-commerce for South Africa* (November 2000) 15.

23 UN Conference on Trade and Development "Covid-19 and E-commerce: Impact on businesses and policy response" 2020 https://unctad.org/system/files/official-document/dtlstictinf2020d2_en.pdf (last accessed 2022-02-25).

24 Anakpo and Mishi 2021 *Southern African Journal of Entrepreneurship* 5; OECD "Policy Highlights: The Digital Transformation of SMEs" 2021 <https://www.oecd.org/industry/smes/PH-SME-Digitalisation-final.pdf> (last accessed 2022-01-25).

25 Budree "Policy considerations for e-commerce in South Africa and other African countries" 2017 *Policy Briefing* 2; De Klerk and Kroon 2004 *South African Business Management* 33.

26 Singh 2005 *Alternation* 636.

27 Kariyawasam and Wigley 2017 *Information and Communication Technology Law* 73; Duffert and Wakeham "Social media marketing communications effect on attitudes among millennials in South Africa" 2016 *The African Journal of Information Systems* 20.

28 Chaher and Spellman "Corporate governance and social media a brave new world for board of directors" 2013 *Corporate Report* 30.

29 Vinerean and Cetina 2013 *International Journal of Business Management* 77.

30 Singh 2005 *Alternation* 629.

3 Social media advertising and influencer marketing

Companies and owners of businesses often advertise their goods or services on social media.³¹ Influencer marketing is also becoming important in the field of advertising and consumer protection.³² It has become so prevalent that it is difficult to scroll through social media platforms such as an Instagram page without coming across some sort of promotion or marketing.³³ Influencer marketing improves product awareness and it makes information about the products and services easily accessible to consumers.³⁴ Forty-nine percent (49%) of consumers are reported to depend on recommendations by influencers while forty percent (40%) of those consumers are said to have purchased something after seeing it on Twitter, Instagram, or YouTube.³⁵ The current trend demonstrates that more consumers are relying on advertisements or marketing information on social media to make purchasing decisions. The importance of truthful information remains at the heart of consumer protection and it extends to advertising posts by influencers on social media.

Influencer marketing involves the hiring of individuals with a good reputation and a significant societal impact such as influencers who are well-known professionals, celebrities, musicians, and comedians.³⁶ They have huge followers that follow and seek guidance from them when making purchasing decisions. The role of influencers is to use their popularity to promote products and expand the companies' marketing

31 Singh 2005 *Alternation* 639; Kotler and Armstrong (2014) 456. See generally De Klerk and Kroon 2004 *South African Business Management* 3.

32 Goanta and Ranchordas *Regulation of Social Media Influencers* (2020) 2. See also LINQIA Report "The State of Influencer Marketing 2021: How Enterprise Marketers View Influencer Marketing – The Need for Influencer ROI" 2021 <https://www.linqia.com/wp-content/uploads/2021/04/Linqia-The-State-of-Influencer-Marketing-2021.pdf> (last accessed 2022-04-22).

33 Most businesses are using influencer marketing as part of their digital marketing strategy: Knight and Vorster *Digital Marketing in Practice: Design, Implement and Measure Effective Campaigns* (2023) 281. See also Sundermann and Munnukka "Hope You're not Totally Commercial! Toward a Better Understanding of Advertising Recognition's Impact on Influencer Marketing Effectiveness" 2022 *Journal of Interactive Marketing* 237.

34 Knight and Vorster (2023) 281.

35 Digital Marketing Institute "20 Surprising influencer marketing statistics" <https://digitalmarketinginstitute.com/blog/20-influencer-marketing-statistics-that-will-surprise-you> (last accessed 2023-06-11). See also Croes and Bartels "Young adults' motivations for following social influencers and their relationship to identification and buying behavior" 2021 *Computers in Human Behavior* 1.

36 LINQIA Report "The State of Influencer Marketing 2021: How Enterprise Marketers View Influencer Marketing – The Need for Influencer ROI" 2021 <https://www.linqia.com/wp-content/uploads/2021/04/Linqia-The-State-of-Influencer-Marketing-2021.pdf> (last accessed 2022-04-22).

strategy.³⁷ Influencers nowadays use various platforms such as TikTok, YouTube, Instagram and Instagram Stories, Twitter, Facebook, and blogs for marketing purposes.³⁸ Fashion, health and fitness, and beauty are some of the industries that rely heavily on influencer marketing to generate sales and reach new audiences.³⁹

There are various types of influencer marketing such as affiliate marketing, endorsement deals, the exchange of goods or services for benefits as well as the launching of personal brands.⁴⁰ An affiliate marketing strategy is whereby the influencer is paid money based on the number of clicks and sales that are generated from the links.⁴¹ An example is when the influencer provides a link that redirects the consumer to the website where the goods are being sold.⁴² The influencer receives a commission for every item purchased using the affiliate's link to the company's website. The same applies when a promotion or discount code from the affiliate is used. Therefore, the purpose of affiliate marketing is to increase sales.

The exchange of goods or services between the influencer and the advertiser is a popular form of influencer marketing.⁴³ In such a case, the influencer who, for example, promotes hotel accommodation, gets a free stay benefit at the hotel. The company advertising its facilities such as a tourist resort can also take the influencer to an event at one of its resorts. By so doing, the company obtains or gains the free marketing services of its facilities through the influencer's online posts.

Social media influencers also endorse products.⁴⁴ An influencer with an endorsement deal has to satisfy the conditions given by the company with regard to the number of postings and stories shared about the products. In most cases, the influencer is not allowed to endorse

37 Goanta and Ranchordas (2020) 4. See also Digital Marketing Institute "20 Surprising influencer marketing statistics" <https://digitalmarketinginstitute.com/blog/20-influencer-marketing-statistics-that-will-surprise-you> (last accessed 2023-06-11).

38 LINQIA Report "The State of Influencer Marketing 2021: How Enterprise Marketers View Influencer Marketing – The Need for Influencer ROI" 2021 <https://www.linqia.com/wp-content/uploads/2021/04/Linqia-The-State-of-Influencer-Marketing-2021.pdf> (last accessed 2022-04-22).

39 Goanta and Ranchordas (2020) 6.

40 Goanta and Ranchordas (2020) 6. See also Mangio and Di Domenico "All that glitters is not real affiliation: How to handle affiliate Marketing Programs in the era of falsity" 2022 *Business Horizons* 766-767.

41 Mangio and Di Domenico 2022 *Business Horizons* 767. LINQIA Report "The State of Influencer Marketing 2021: How Enterprise Marketers View Influencer Marketing – The Need for Influencer ROI" 2021 <https://www.linqia.com/wp-content/uploads/2021/04/Linqia-The-State-of-Influencer-Marketing-2021.pdf> (last accessed 2022-04-22).

42 See Mangio and Di Domenico 2022 *Business Horizons* 767.

43 Goanta and Ranchordas (2020) 10.

44 Nabil; Khaled and Taher et al "Celebrity endorsement and its impact on purchase intention of luxurious brands" 2022 *The Business and Management Review* 286; Sundermann and Munnukka 2022 *Journal of Interactive Marketing* 237; Goanta and Ranchordas (2020) 4.

competing products, and she or he has to act like a brand ambassador.⁴⁵ In return, the influencer obtains a financial benefit.⁴⁶ Product endorsement is an effective strategy in promoting a level of credibility and in ensuring a “positive electronic word of mouth” which some forms of traditional advertising fail to do.⁴⁷ Product endorsement does not, however, mean that the influencer actually uses the product. There is also no guarantee that whatever stories are written about the product are necessarily correct.⁴⁸ Consumers are nonetheless easily swayed and influenced into buying products that have been endorsed by their favourite celebrities. An example of a group of consumers that is vulnerable to being induced into purchasing the advertised goods are young adults as they are likely to follow the advice given by influencers.⁴⁹

The question that comes to mind is whether influencers in South Africa have the power to influence consumers’ purchasing decisions. South African consumers, just like their counterparts in Europe and the United States, have a large interest in online trends.⁵⁰ Some of South Africa’s top influencers include Zozibini Tunzi, AB De Villiers, Bonang Matheba (known as Queen B), Refiloe Phoolo (Casper Nyovest), Trevor Stuurman, and Boitumelo Thulo (Boity).⁵¹ They advertise by endorsing a different range of products and services which include, among others, fashion, beauty products, travel and health, and fitness.⁵² As indicated earlier, influencers have the ability to influence the purchasing decisions of their followers. The need for regulation cannot be overstressed since

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- 45 Goanta and Ranchordas (2020) 11. See also Digital Marketing Institute “20 Surprising influencer marketing statistics” <https://digitalmarketinginstitute.com/blog/20-influencer-marketing-statistics-that-will-surprise-you> (last accessed 2023-06-11).
- 46 Sundermann and Munnukka 2022 *Journal of Interactive Marketing* 237.
- 47 Nabil; Khaled and Taher et al 2022 *The Business and Management Review* 286. See also Nyamakanga, Ford and Viljoen “Local and international celebrity endorsers’ credibility and consumer intentions” 2019 *Acta Commercii* 1-2.
- 48 Product reviews are sometimes written by employees who are actually paid but the producer: see European Parliament Directorate-General for Internal Policies “Policy Department Economic and Scientific policy – Misleading advertising on the internet” 2010 https://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/440289/IPOL-IMCO_ET%282010%29440289_EN.pdf (last accessed 2023-06-12) part 1.2. Although the views therein were made in the European Union context, the same is true to the South African context.
- 49 Croes and Bartels 2021 *Computers in Human Behavior* 1.
- 50 Partner “What the future holds for digital marketing in South Africa” 2018 *The Media Online* <https://themediainline.co.za/2018/11/what-the-future-holds-for-digital-marketing-in-south-africa/> (last accessed 2023-06-12).
- 51 AB De Villiers, for example, is reported to have almost twenty million followers; see McInnes “The top 10 South African Instagram influences” 2022 <https://www.meltwater.com/en/blog/instagram-influencers-south-africa> (last accessed 2023-05-04). See also Odesomi “Biggest Social Media Influencers in Africa” *African Leadership Magazine* (2023-02-21) <https://www.africanleadershipmagazine.co.uk/55391-2/> (last accessed 2023-06-12).
- 52 For example, in 2015, Revlon’s local ambassador was Bonang Matheba: Nyamakanga, Ford and Viljoen 2019 *Acta Commercii* 1-2.

deceptive practices in influencer marketing can be detrimental to consumers.

4 Legal and regulatory framework

4 1 Electronic Communications and Transactions Act 25 of 2002

The main purpose of ECTA is to provide for the facilitation and regulation of electronic communications and transactions.⁵³ ECTA seeks to, *inter alia*, promote legal certainty and confidence in electronic transactions, to ensure that there is a safe, secure, and effective environment to conduct and use electronic transactions, and to promote the development of electronic transaction services which are responsive to the needs of users and consumers.⁵⁴ ECTA is also an enabling piece of legislation and should not be read in isolation but with relevant statutes and the common law.⁵⁵ The aspects of consumer protection in ECTA were largely retained and they take precedence over the provisions of the CPA.⁵⁶

ECTA applies to all electronic transactions and data messages except those excluded by the Act itself or its schedules.⁵⁷ It is important to define certain words in order to determine what kinds of transactions are covered by ECTA, and which persons are protected under its provisions. First, ECTA defines “transaction” to mean a transaction of either a commercial or non-commercial nature and includes the provision of information and e-government services.⁵⁸ It does not, however, define the phrase electronic transaction.⁵⁹ Second, it defines “data” as well as “data message”. There is a difference between the two concepts in that data refers to “electronic representations of information in any form” while “data message” means data generated, sent, received, or stored by electronic means and includes voice, where the voice is used in an automated transaction; and a stored record.⁶⁰ Therefore, according to the definition in the Act, a data message would include, *inter alia*, an SMS, WhatsApp text, and voice recording.⁶¹ Since the message function

53 Van Eeden and Barnard (2017) 555.

54 See ss 2(1)(a)-(r) of ECTA for the full list of the objects of Act.

55 See s 3 of ECTA. Also see Michalson “Guide to the ECTA Act in South Africa ECTA” <https://www.michalsons.com/blog/guide-to-the-ect-act/81> (last accessed 2021-09-5).

56 See ss 16, 19(1)(b), 23(1)(b), and 26(1)(a)-(b) of the CPA. See also Eiselen 2021 *TSAR* 437.

57 Van Eeden and Barnard (2017) 556

58 S 1 of ECTA; see also Papadopoulos and Snail *Cyber Law @ SA IV: The Law of the Internet in South Africa* (2022) 83.

59 Van Eeden and Barnard (2017) 556.

60 S 1 of ECTA.

61 S 1 of ECTA. Esterhuizen *Social Media: Changing face of contracting* (LLM dissertation 2019 UJ) 26.

on social media allows users to send and receive messages, it could be considered to be a data message similar to an email or SMS.⁶²

Third, the word “consumer” is defined as “any natural person who enters or intends to enter into an electronic transaction with a supplier as the end user of the goods or services offered by that supplier”.⁶³ This implies that a juristic person is excluded from the definition. The wording of the second part of the definition “intends entering” is significant because it also includes consumers who are merely browsing a website with the intention of possibly entering a transaction.⁶⁴ Such consumers are also protected by the consumer protection provision of ECTA in Chapter VII.⁶⁵ Furthermore, the definition of “consumer” goes on to exclude the operation of the consumer protection provisions in all business-to-business (B2B) transactions.⁶⁶ For example, where goods or services are supplied to juristic persons such as companies and close corporations. Certain business-to-consumer (B2C) transactions, where the consumer is a natural person but not the end-user of the purchased goods or services, are also excluded.⁶⁷ For example, where a natural person buys goods with the intention of selling them to another consumer.⁶⁸ Notably, the wording in the definition of “consumer” is very specific to indicate that only natural persons who are ultimately the end-users of the goods or services are regarded as consumers. However, small businesses, corporations, and trusts are frequently in practice in the same position as a natural person consumer, as an end-user of goods or services.⁶⁹ Thus, a compelling case could be made to include at least some of these parties in the definition of a consumer worthy of protection.⁷⁰

Furthermore, the word “supplier” is also not defined in terms of ECTA.⁷¹ Therefore, it is deemed necessary to attach the ordinary grammatical meaning of the word in order to determine who is responsible for complying with the provisions of Chapter VII of ECTA.⁷² When perusing the Oxford Dictionary, a supplier is defined as “[a] person who or organisation (or occasionally a thing) which provides something needed, especially a commodity, or necessary goods and equipment”.⁷³

When looking at the definitions above, advertising on social media platforms could arguably constitute an electronic transaction.⁷⁴ Therefore, all advertising in the electronic broadcast media is subject to

62 Esterhuizen 26.

63 S 1 of ECTA. See also Papadopoulos and Snail (2022) 84.

64 Papadopoulos and Snail (2022) 84; Van Eeden and Barnard (2017) 556. S 1 of ECTA.

65 Van Eeden and Barnard (2017) 557.

66 Papadopoulos and Snail (2022) 83-84.

67 Papadopoulos and Snail (2022) 83-84.

68 Papadopoulos and Snail (2022) 84. See also Van Eeden and Barnard (2017) 557.

69 Papadopoulos and Snail (2022) 84.

70 Papadopoulos and Snail (2022) 84.

71 Papadopoulos and Snail (2022) 83.

72 As above.

73 As above. Another definition for a supplier includes “a person or organisation that provides something needed such as a product or service.”

74 S 1 of ECTA. See also Thompson and Smalberger *South Africa: Advertising and marketing* (2017) 75.

ECTA.⁷⁵ The person who views the content on the social media site or online store intending to purchase something or to make use of a service would qualify as a consumer under ECTA.⁷⁶ Therefore, when a consumer or potentially a small business makes an online purchase by placing an order that would constitute an electronic transaction.⁷⁷

The part of ECTA that is particularly relevant for the purposes of this discussion is Chapter VII. Chapter VII introduces a myriad of “important protective measures for online consumers over and above those that are available for offline consumers”.⁷⁸ It addresses the issue of consumer protection and its scope of application is limited to electronic transactions only.⁷⁹ Thompson and Smalberger correctly opine that advertisers must give due consideration and comply with the provisions of ECTA given that advertising on social media amounts to electronic communication.⁸⁰ In Chapter VII, each section deals with a specific issue in relation to consumer protection in electronic transactions. This article does not consider all these sections but only the relevant sections to this discussion. Section 43 of ECTA sets out the information that a supplier must provide the consumer when engaging in an electronic transaction. In other words, whenever a supplier offers goods or services for sale, hire, or exchange to a consumer in the context of an electronic transaction, there is certain information that must be available for the consumer on the website where the goods or services are being offered or advertised.⁸¹ The information includes, *inter alia*, the details of the supplier such as the full name; legal status; physical address; telephone number; and email address. Most importantly, there should be:

- (h) ...a sufficient description of the main characteristics of the goods or services offered by that supplier to enable a consumer to make an informed decision on the proposed electronic transaction;
- (i) the full price of the goods or services, including transport costs, taxes and any other fees or costs;
- (j) the manner of payment;
- (k) any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers;

75 *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* 2022 ZASCA 51 3. (hereinafter *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd*).

76 Coetzee “The Electronic Communications and Transaction Act 25 of 2002: Facilitating electronic commerce” 2004 *Stellenbosch Law Review* 508.

77 Jacobs “The Electronic Communication and Transaction Act: Consumer protection and internet contracts” 2004 *SAMLJ* 559.

78 See Van Eeden and Barnard (2017) 555; Papadopoulos and Snail (2022) 95.

79 S 42(1) of ECTA; De Villiers *Consumer Protection under the Electronic Communications and Transactions Act 25 of 2002* (LLM thesis 2004 UJ) 49. See also Papadopoulos and Snail (2022) 95-96; Van Eeden and Barnard (2017) 556.

80 Thompson and Smalberger (2017) 74.

81 The Act prescribes the nature of the information that must be included on the website, how and where it must be displayed: see s 43(1) of ECTA. See also Papadopoulos and Snail (2022) 96.

- (l) the time within which the goods will be dispatched or delivered or within which the services will be rendered;
- (m) the manner and period within which consumers can access and maintain a full record of the transaction;
- (n) the return, exchange and refund policy of that supplier...⁸²

The supplier, therefore, has the duty to comply with the above-listed information as the minimum requirement.⁸³ It is important to note that ECTA does not have express provisions that deal with online marketing *per se*. Section 43, however, provides guidance on what must be contained in an advertisement on social media. By implication, an advertisement should, among others, contain a sufficient description of the main characteristics of the goods or services to enable a consumer to make an informed decision on whether or not she or he wants to enter into the proposed electronic transaction.⁸⁴ Also, the full price of the goods or services and the manner of payment should be displayed.⁸⁵ It is clear that ECTA regards this information as an essential part of the consumer's decision-making process. While it is not possible to include all the information in a single social media post, material information such as the description of the main characteristics of the good or service and the full price should be displayed on the post. There should be an indication of where the rest of the information can be found and accessed on the supplier's website.⁸⁶ Thus, consumers who are browsing an advertisement on social media should have access to the required information through, for example, a hyperlink.⁸⁷ It is important that the information and details presented in the advertisement are accurate and also truthful since online consumers do not have the opportunity to physically inspect the goods they are ordering. Misleading or deceptive advertising is problematic as the consumer is not able to make an informed decision about their purchase.⁸⁸ Online deceptive or misleading representations regarding the nature or properties of the goods or services are thus implicitly prohibited.

The supplier is also required to provide a consumer with an opportunity to review the entire transaction, correct any mistakes, and withdraw from the transaction before finally placing an order.⁸⁹ If a supplier does not comply with the provisions of sections 43(1)-(2), the consumer is allowed to cancel the transaction within 14 days of receiving the goods or services under the transaction.⁹⁰ In addition, the consumer

82 Ss 43(1)(h)-(n) of ECTA.

83 Papadopoulos and Snail (2022) 98.

84 Underlined for my emphasis. See s 43(1)(h) of ECTA.

85 See ss 43(1)(a)-(r) for the complete list containing all the information that must be provided to the consumer by the supplier.

86 Jacobs 2004 *SAMLJ* 559.

87 Papadopoulos and Snail (2022) 97.

88 Mdluli *Online Consumer Protection: An analysis of the nature and extent of online consumer protection by South African legislation* (LLM thesis 2014 UCT) 11.

89 Ss 43(2)(a)-(c) of ECTA.

90 S 43(3) of ECTA.

is entitled to a “cooling-off” period in terms of ECTA.⁹¹ This means that a consumer may cancel without reason and without penalty any transaction for the supply of goods or services within 7 days after the date of the receipt of the goods or the conclusion of the agreement.⁹²

Section 45 of ECTA specifically deals with unsolicited goods, services, or communication in electronic transactions. Bernard and Sylvia opine that “unsolicited electronic communications range from bothersome ... destructive, irritating to offensive” information.⁹³ Spam emails or phone calls are a good example of unsolicited electronic communication. However, ECTA does not define what constitutes unsolicited communication. Any form of marketing that would fall into the category of unsolicited communication is proscribed as they are considered bothersome by consumers.⁹⁴

4 2 The Consumer Protection Act 68 of 2008

The CPA applies to every transaction for the supply of goods and services taking place within South Africa unless the transaction is exempted.⁹⁵ South Africa has no specific or express laws that govern online and social media advertising.⁹⁶ Owing to this, existing consumer protection laws apply to the latter in the same way they apply to any traditional marketing practices. The definition of “advertisement” in the CPA is very wide and it includes “any direct or indirect visual or oral communication transmitted by any medium”.⁹⁷ This broad definition covers social media advertising as well. The CPA goes on to define direct marketing as an approach to a person, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting, offering to supply, in the ordinary course of business, any goods or services or to request a donation of any kind.⁹⁸

The general clauses of the CPA on misleading advertisements find application to online and social media advertising.⁹⁹ Misleading or deceptive online advertisements fulfil the same legal requirements as offline advertising. The relevant provisions which apply to the traditional forms of marketing have already been discussed in detail in one of the

91 S 44 of ECTA.

92 Ss 44(1)(a)-(b) of ECTA.

93 Hamann and Papadopoulos “Direct marketing and spam via electronic communications: An analysis of the regulatory framework in South Africa” 2014 *De Jure* 44.

94 Hamann and Papadopoulos 2014 *De Jure* 44.

95 S 5(1)(a) of the CPA.

96 Thompson and Smalberger (2017) 74.

97 See s 1 of the CPA.

98 As above.

99 This includes ss 29-38 contained in Part E: Right to fair and responsible marketing; Part F that deals with Right to fair and honest dealings particularly ss 40-41; and Part G: Right to fair, just and reasonable terms and conditions, ss 48 and 51. For a detailed discussion of these provisions, see Mupangavanhu and Kerchhoff 2021 *SAMLJ* 262-271.

articles and this part will only deal with those that directly apply to online and social media advertising.¹⁰⁰ In regulated industries, the CPA applies alongside the existing industry-specific legislation unless the regulator for that industry has applied for an exemption from one or more of the provisions of the Act.¹⁰¹ It is also possible that other legislation may apply to a particular industry or activity. In that instance, if it is possible to comply with both statutes, particularly where complying with one does not result in the contravention of the other, they will apply concurrently.¹⁰² If the concurrent application is not possible, the provision that extends greater protection to the consumer prevails over the alternative provision.¹⁰³

The CPA has extensive provisions that deal with the marketing and promotion of goods or services.¹⁰⁴ It does not, however, apply to electronic transactions where ECTA already provides for equivalent or better protection.¹⁰⁵ For instance, when section 44 of ECTA applies then section 16 of the CPA does not apply.¹⁰⁶ This relates to the consumer's cooling-off right in relation to transactions concluded as a result of direct marketing.¹⁰⁷ Section 23 of the CPA relates to the disclosure of a price for goods or services and does not find application when the "informational duties for a website" contained in section 43 of ECTA Act applies.¹⁰⁸ Similarly, when Chapter VII of ECTA applies then section 33 of the CPA, which deals with catalogue marketing and the minimum information that needs to be disclosed, does not apply.¹⁰⁹ In a nutshell, Chapter VII of ECTA applies to all online marketing and promotional activities.

The CPA covers some aspects of online trading not covered under ECTA. Online false, misleading, or deceptive advertising can, for example, be deemed unfair under the general clauses of the CPA. Deceptive marketing is governed in terms of Part G of the CPA and section 48 prohibits suppliers from marketing goods or services in a manner that is unfair, unreasonable, or unjust.¹¹⁰ The word "supplier" refers to any person who markets or promotes any goods or services.¹¹¹ A supplier is, therefore, not a producer of the goods but rather anyone

100 Mupangavanhu and Kerchhoff 2021 *SAMLJ* 262.

101 De Stadler *Consumer Law Unlocked* (2013) 19.

102 S 2(9)(a) of the CPA.

103 S 2(9)(b) of the CPA; De Stadler (2013) 20; Papadopoulos and Snail (2022) 86.

104 See ss 29, 40-41, and 48 of the CPA. For more information see Mupangavanhu and Kerchhoff 2021 *SAMLJ* 262. See also Papadopoulos and Snail (2022) 86-87.

105 S 16(1) of the CPA.

106 S 16(1) of the CPA.

107 De Stadler (2013) 20.

108 Papadopoulos and Snail (2022) 97. Refer to part 4.1 of the article for a discussion on s 43 of ECTA "informational duties" for a website.

109 S 33(1)(b) of the CPA. See also Papadopoulos and Snail (2022) 142, at footnote 348.

110 S 48(1)(b) of the CPA.

111 S 1 of the CPA.

who markets goods including online marketing. Where a consumer relies upon a false, misleading, or deceptive representation in any advertisement to his or her detriment, the advertisement may be regarded as unfair, unreasonable, or unjust.¹¹² Similarly, where the online or social media advertisement falls foul of the plain language requirement, it may also be regarded as unfair.¹¹³ Section 51 of the CPA further prohibits suppliers from making “a transaction or agreement subject to any term or condition if its general purpose or effect is to ... mislead or deceive the consumer”.¹¹⁴ By implication, untruthful and misleading advertising, whether online or offline, is prohibited. The rationale is that they mislead the consumer regarding the characteristics or the nature of the goods or services.¹¹⁵

4 3 Self-regulation: Advertising Regulatory Board

The Advertising Regulatory Board [ARB’s widely-accredited Code of Advertising Practice (Code)] regulates advertising in South Africa and it is based on international best practices.¹¹⁶ Most importantly, the ARB adopted a Social Media Code in 2019.¹¹⁷ The Social Media Code serves to provide a clear set of rules around social media marketing to ensure the protection of consumers and the promotion of ethical conduct by brand marketers across all social media platforms.¹¹⁸

In terms of misleading advertising, the Social Media Code ensures that all social media advertising does not contain any deceptive, false, or misleading content, which includes deceptive claims, offers, or business practices (by commission or omission). All messaging should be responsible and accurate.¹¹⁹ It further states that social media parody accounts should clearly indicate on their account description biography that they are in fact a parody account, by incorporating words such as (but not limited to) “parody”, “fake”, “fan”, or “commentary”.¹²⁰ This must be done in such a way that it would reasonably be understood by the intended audience.¹²¹ There should be no confusion as to whether the account is a parody account or not.¹²² This Code is important in regulating the use of social media for advertising which appears not to be currently adequately regulated.

112 S 48(2)(c) of the CPA.

113 S 22 of the CPA.

114 S 51(1)(a)(ii) of the CPA.

115 Mupangavanhu and Kerchhoff 2021 *SAMLJ* 271.

116 *Advertising Regulatory Board v Bliss Brands 2*.

117 Social Media Code. See also Media Update “Advertising Regulatory Board enforces its Social Media Code in SA” <https://www.mediaupdate.co.za/marketing/146746/advertising-regulatory-board-enforces-its-social-media-code-in-sa> (last accessed 2021-11-30).

118 Social Media Code.

119 Clause 5.1 of the Social Media Code.

120 Clause 5.2 of the Social Media Code.

121 Clause 5.2 of the Social Media Code.

122 Clause 5.2 of the Social Media Code.

In the case of *Leslie Marie v BMW (South Africa Pty Ltd)*,¹²³ BMW posted a video on its website and Facebook advertising a remote engine start feature on its new motor vehicles which had to be activated in the BMW Connected Drive Store. The complainant, Leslie Marie, pointed out that only two very-end high models of the BMW vehicle had this feature and that no other models had the remote engine start model. The Directorate of the ARB had to consider whether BMW's advertisement was misleading since there was no mention of "model limitation" with respect to the new feature installed on the new BMW high-end vehicles. In its decision, the Directorate stated that the advertisement implied that the remote locking feature was widely available when in actual fact it was only available on some models. The advertisement was therefore found to have been misleading and in contravention of Clause 4.2.1 of Section II of the Code. The Directorate ordered BMW to immediately withdraw the Facebook post. The rationale is that such advertisements are required to indicate the feature as only available on certain models. The ARB finding on this matter was based on the Code of Advertising Practice¹²⁴ and not the Social Media Code. Arguably, the basis of the finding should have been section 5.1 of the Social Media Code since the claim before the Directorate was about the video that was still on Facebook.¹²⁵ It is important to note that the finding would have however changed even if the Directorate had relied on the general Code of Advertising Practice.

The Social Media Code makes provision for influencer marketing and it binds, among others, publishers and influencers. It defines an influencer as:

an individual or group who brands pay to engage with Social Media in a certain way, on a certain topic or *in the promotion of a brand or publisher. Often an Influencer has or is perceived to have the ability to influence the behaviour or opinions of others.*¹²⁶

The inclusion of influencers in the Social Media Code is pertinent since they are perceived to have the ability to influence and induce consumers into purchasing the advertised products or services. Consequently, advertisers are required to provide the influencer with sufficient and correct information to enable him or her to endorse the goods or services.¹²⁷ Therefore, an advertiser cannot mislead the influencer with the objective of having the influencer give an impressive or positive recommendation. Apart from the influencer being required to disclose his or her involvement with the brand, there must be a written contract between the influencer and the marketer.¹²⁸ The Code is prescriptive

123 Advertising Regulatory Board. "Rulings: Leslie Marie v BMW [South Africa (Pty) Ltd]" 2023 <https://www.arb.org.za/2023.html> (last accessed 2023-06-12). (hereinafter *Leslie Marie v BMW*).

124 Advertising Regulatory Board "Code of Advertising Practice" 2021 <https://www.arb.org.za/phone/codes.html> (last accessed 2023-06-12).

125 *Leslie Marie v BMW* 4.

126 Clause 1.2 of the Social Media Code; own emphasis added.

127 Clause 6.1.3 of the Social Media Code.

128 Clauses 6.2-6.3 of the Social Media Code.

and it requires the contract to include, for example, the details of the brief, the form of remuneration, and conditions of payment.¹²⁹

It is noteworthy that the ARB has adjudicated a case involving social media influencers. In 2019, the Directorate of the ARB had to consider a complaint lodged by Amanda du Preez against an Instagram post advertising Volvo Car South Africa.¹³⁰ The crux of the complaint was that the influencer Kandy Kane had not identified her collaboration with Volvo as advertising. In response to the complaint, Volvo submitted that the partnership agreement with Kandy Kane was mainly a form of trade exchange with no financial investment. In other words, Volvo allowed influencers, such as Kandy Kane, to drive its vehicles for a specific duration, and in turn, the influencers shared their experiences with the cars on their social media platforms.¹³¹

Since this was the first case where the ARB enforced the Social Media Code, the Directorate had to consider a few important issues first. The Directorate considered Clause 3.1 of the Social Media Code, which states that in order to ensure full transparency advertisers are required to disclose if the content is part of a Social Media Advertising Campaign as opposed to purely Organic Social Media.¹³² This means that whenever influencers share or publish, paid social media advertising on these platforms, it needs to be disclosed. This is achieved by using “social media identifiers” or “hashtags” such as “#AD”; “#promoted”; “Sponsored”. This indicates to the user that the particular content is paid advertising or sponsored content.

Another provision of the Social Media Code that the ARB looked at is clause 4, which requires publishers and influencers to disclose any financial benefit or receipt of goods and services in return for media coverage.¹³³ This means that influencers are expected to disclose their relationship with brands to ensure that there is transparency and to also allow consumers to “make an informed opinion of the applicable content, product or service”.¹³⁴ In this case, Volvo undertook to take steps to ensure that the initial post was amended to clarify the partnership between them and Kandy Kane, to reflect the non-financial investment partnership.¹³⁵ This case illustrates that influencer marketing requires the influencer to disclose if the advertisement is sponsored or not.

In another recent case, a woman dubbed the “Holiday Swindler”, the CEO of Hello Darlings, was accused of allegedly defrauding clients by

129 Clause 6.3 of the Social Media Code.

130 Advertising Regulatory Board. “Rulings: *Amanda du Preez v Volvo Car [South Africa (Pty) Ltd]*” 2019 <https://www.arb.org.za/assets/volvo--amanda-du-preez.pdf> (last accessed 2023-06-12). (hereinafter *Amanda du Preez v Volvo*).

131 *Amanda du Preez v Volvo* 2.

132 Clause 3.1 of the Social Media Code.

133 Clause 4.1 of the Social Media Code.

134 *Amanda du Preez v Volvo* 4.

135 *Amanda du Preez v Volvo* 3.

taking money for holidays that never happened. Victims claimed to have paid their money for the holiday but no bookings were made.¹³⁶ The Hello Darlings CEO used the services of social media influencers from all over South Africa, to promote her business, and in return, they were given discounted and free holiday trips.¹³⁷ Many influencers have since terminated their working relationship with the company following the allegations against the CEO of Hello Darlings.¹³⁸ This case reiterates the importance of social media influencers ensuring that they make their audience or followers aware of any partnership or sponsorship. It could be argued that the endorsement of a certain product or service by an influencer induces consumers to believe that it is from a reputable company. This is due to the fact that there is a high level of trust that consumers have in the influencer's opinion.¹³⁹

5 Commentary

The rise in electronic commerce and concomitant marketing practices pose new challenges that need to be addressed because of the likely effect they have on consumers. Consumer protection, in the context of electronic or online platforms, is necessary since many business use online advertising to encourage or lure consumers to buy their wares. Although online platforms provide consumers with wider choices, false and deceptive representations are bound to be prejudicial to the same consumers. The need for fair business, advertising, and marketing practices is at the heart of consumer protection law. This should be coupled with clear and transparent product or service information to enable the consumer to make informed decisions.

The Consumer Goods and Services Ombudsman (CGSO), in its press releases, warns consumers of certain online stores that engage in bait marketing, misleading advertising, and other unscrupulous marketing

136 Naidoo "Who is SA's 'holiday swindler'? Five things to know about Tasneem Moosa" <https://www.thesouthafrican.com/lifestyle/celeb-news/breaking-who-is-tasneem-moosa-south-africas-holiday-swindler-hello-darlings-latest/> (last accessed 2022-04-22).

137 As above.

138 Naidoo "Public angered over role of social media influencers in marketing Hello Darlings" <https://www.iol.co.za/news/south-africa/public-angered-over-role-of-social-media-influencers-in-marketing-hello-darlings-e6c36f08-0490-459b-96a3-21223da4f95f> (last accessed 2022-04-22).

139 Sudha and Sheena, "Impact of influencers in consumer decision process: the fashion industry" 2017 *Journal of Indian Management* 16.

practices.¹⁴⁰ The CGSO further cautions consumers to choose to transact with reputable retailers and be wary of unrealistically low deals.¹⁴¹ Educating and informing consumers of known scams, risks, and illegal schemes is one of the ways in which consumers are protected from misleading and deceptive advertising.¹⁴² This empowers consumers as they are able to make decisions that advance their needs and interests when transacting online.

Deceptive practices including abusive marketing tactics are discouraged in the United Nations (UN) Guidelines for Consumer Protection.¹⁴³ Such improper behaviour poses unnecessary risks or harm to consumers. The UN Guidelines encourage member states to ensure that consumers have adequate information to enable them to make informed choices based on their individual wishes and needs.¹⁴⁴ Access to adequate information indirectly promotes and protects the economic interests of consumers. Businesses should, therefore, not subject consumers to deceptive advertising. Instead, businesses should have due regard for the interests of consumers and the need to deal fairly and honestly with consumers. When advertising, businesses ought to provide complete and accurate information regarding their goods and services. Misleading promotional marketing information prevents consumers from making informed and independent decisions.

It is worth mentioning that there are specific guidelines on electronic transactions that apply to OECD countries such as Australia, the United Kingdom, and France known as the Guidelines for Consumer Protection in the Context of Electronic Commerce of the Organisation for Economic Cooperation and Development (OECD) of 2016.¹⁴⁵ The OECD Guidelines

140 Refer to CGSO “Press Release: October 13 2021- Consumers warned against online store Wiegenkind Boutique” 2021 <https://www.cgso.org.za/cgso/download/press-release-october-13-2021-consumers-warned-against-online-store-wiegenkind-boutique/> (last accessed 2023-06-12). and CGSO “Press Release: October 13 2021- Consumers warned against online store, Ana Eleven Brand” 2021 <https://www.cgso.org.za/cgso/download/press-release-october-13-2021-consumers-warned-against-online-store-ana-eleven-brand/> (last accessed 2023-06-12).

141 CGSO “Press Release: October 13 2021- Consumers warned against online store, Ana Eleven Brand” 2021 <https://www.cgso.org.za/cgso/download/press-release-october-13-2021-consumers-warned-against-online-store-ana-eleven-brand/> (last accessed 2023-06-12).

142 Kariyawasam and Wigley 2017 *Information and Communication Technology Law* 86.

143 UNCTAD “United Nations Guidelines for Consumer Protection” 2016 https://unctad.org/system/files/official-document/ditccplpmisc2016d1_en.pdf (last accessed 2023-06-12). (hereinafter United Nations Guidelines for Consumer Protection).

144 United Nations Guidelines for Consumer Protection 7.

145 OECD “Consumer Protection in E-commerce: OECD Recommendation” 2016 <https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf> (last accessed 2023-06-12) (hereinafter Consumer Protection in E-commerce: OECD Recommendation).

recognise the new emerging trends and challenges faced by consumers in today's dynamic e-commerce marketplace.¹⁴⁶ They provide that businesses engaged in e-commerce should pay due regard to the interests of consumers and act in accordance with fair business, advertising, and marketing practices as well as the general principle of good faith.¹⁴⁷ The OECD Guidelines further state that businesses should not make any representation, omission, or engage in any practice that is likely to be deceptive, misleading, fraudulent, or unfair.¹⁴⁸ This includes the general impression likely conveyed to consumers by the representation as well as implied factual misrepresentations.¹⁴⁹ These Guidelines demonstrate the need for accurate, truthful, and informative online marketing to ensure that the economic interests of consumers are protected as well as their ability to exercise independent choices in the marketplace.¹⁵⁰

Consumers using electronic commerce require adequate protection. This implies that the level of protection should not be less than that afforded to offline consumers.¹⁵¹ Consumer organisations such as the National Consumer Commission should monitor online false or misleading marketing. The National Consumer Commission should therefore fulfil its role in educating consumers about guarding against being duped as a result of deceptive marketing practices online. Section 96(a) of the CPA provides that the commission is responsible for promoting public awareness of consumer protection matters by implementing education and information measures to develop public awareness.¹⁵² This can be done through roadshows, radio programs, and by handing out pamphlets. The more informed the consumer is, the less likely they are going to be exploited due to unscrupulous marketing practices.¹⁵³

ECTA and the CPA both contain general clauses that are flexible enough to deal with, among others, online misleading advertisements. The CPA has more comprehensive provisions dealing with consumer protection issues as compared to ECTA. It, therefore, generally provides much wider protection to consumers.¹⁵⁴ Its application to online transactions is, however, limited since CPA did not repeal some important aspects of online consumer transactions contained in Chapter VII of ECTA.¹⁵⁵ Instead, the CPA supplements ECTA by covering those

146 Consumer Protection in E-commerce: OECD Recommendation 3. See also Mdluli (2014) 8.

147 Consumer Protection in E-commerce: OECD Recommendation 10.

148 Consumer Protection in E-commerce: OECD Recommendation 10.

149 Consumer Protection in E-commerce: OECD Recommendation) 10.

150 United Nations Guidelines for Consumer Protection 9.

151 United Nations Guidelines for Consumer Protection 9.

152 S 96(a) of the CPA.

153 Kariyawasam and Wigley 2017 *Information and Communication Technology Law* 86.

154 Eiselen 2021 *TSAR* 447.

155 See Part G, ss 48-52 of the CPA.

aspects such as unfair terms that are missing in the protection of online consumers.¹⁵⁶

The provisions in ECTA are out of touch with reality. The definition of “consumer” under ECTA is restrictive as it excludes a juristic person. The 2012 Electronic Communications and Transactions Amendment Bill¹⁵⁷ acknowledged this gap in ECTA and was set to change the definition of a “consumer” to resemble that in the CPA.¹⁵⁸ This meant that the consumer protection provisions contained in Chapter 7 of ECTA would protect both natural persons and small to medium-sized juristic persons.¹⁵⁹ The move to afford protection to both natural and legal persons is commendable since small companies tend to purchase their goods from other manufacturers.

The provisions dealing with the promotion of online services seem to be also deficient. Eiselen rightly argues that the consumer protection provisions in ECTA “deal with services fleetingly and certainly did not foresee or properly provide for the development of these services”.¹⁶⁰ This ranges from marketing on social media platforms to services such as Uber and Airbnb. Since the CPA provides wider protection to consumers, the provisions of the two statutes need to be considered jointly when one is dealing with online consumer transactions as well as advertising claims.¹⁶¹ Ideally, the CPA should protect both online and offline consumers. Having separate legislation to protect offline and online consumers is untenable. It is submitted that there is a need to have a “one-stop-shop” insofar as consumer protection is concerned in the future. Consequently, the provisions in the CPA need to be amended and updated to apply to online activities including false advertisements and the use of influencers.

Legislation cannot be easily amended in the same way as a Code. Arguably, the ARB is a step ahead in governing online and social media advertising since ECTA and the CPA do not contain specific provisions to this effect. The rationale for this positive development regarding the ARB is that self-regulation is flexible and the Code can easily be revised to cater to new developments.¹⁶² While it is commendable that self-regulation appears flexible, its effectiveness in enforcing the Social Media Code is questionable since rogue advertisers will not likely sign a Code of Conduct, and will not be willing to cooperate with self-regulatory bodies. The Supreme Court of Appeal (SCA) in *Advertising Regulatory Board NPC*

156 Eiselen 2021 *TSAR* 449.

157 Electronic Communications and Transactions Amendment Bill, GN35821 in Notice 888 of 2012 of 26 October 2012. (hereinafter ECTA Bill).

158 It provides that “shall have the meaning given to it in the Consumer Protection Act”, see s 1(f) of the ECTA Bill.

159 S 8.3.2 of the ECTA Bill.

160 Eiselen 2021 *TSAR* 441.

161 Eiselen 2021 *TSAR* 450.

162 Boddewyn “Advertising self-regulation: Private government and agent of public policy” 1985 *Journal of Public Policy and Marketing* 129. See also Mupangavanhu and Kerchhoff 2021 *SAMLJ* 277.

*v Bliss Brands (Pty) Ltd*¹⁶³ clarified that the ARB is entitled to consider advertisements of non-members and to make decisions for the purpose of providing guidance to its members.¹⁶⁴ The *ratio decidendi* was that ARB performs a public function and that it should be able to exercise its right to protect consumers from misleading or deceptive advertising, as it is in the public interest to do so.¹⁶⁵ A soft approach may not be the most appropriate way of regulating misleading advertisements since the ARB rulings are not binding on suppliers and sellers who are non-members. The decision, however, reinforces the importance of self-regulation. The ARB Social Media Code remains significant since it supplements or complements the CPA and ECTA in the protection of online consumers.

6 Conclusion

Consumer protection is about offering the greatest protection to the consumer especially those who are in a weaker bargaining position. The regulation of online advertising is relatively new worldwide and it presents challenges to consumer protection. The existing consumer protection laws which are usually applied to deal with online advertising were originally developed for traditional advertising media. There are thus gaps and uncertainties regarding the scope and the extent of protection of consumers with regard to misleading or deceptive advertising online. The standard of protection for consumers from deceptive or misleading online advertisements is currently low and deficient in some respects partly due to the fragmented laws. There is a need for an effective consolidated consumer protection instrument that deals with online advertising. Chapter VII of ECTA and the general clauses in the CPA need to be revised to ensure they are in line with the new developments with regard to online transactions and advertising in order to protect consumers from false and misleading advertisements.

163 2022 ZASCA 51 (hereinafter *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd*).

164 *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* para 24.

165 *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* para 17. There is an appeal to the Constitutional Court and it remains to be seen if the SCA decision will be confirmed or not.