

Sarah Drukarch

Use of Social Media for OTC Advertising

Is a de-facto exclusion of advertising for over-the-counter pharmaceutical products on social media supported by the Swiss legal framework?

Werbung für rezeptfreie Medikamente (OTC-Produkte) ist in der Schweiz grundsätzlich erlaubt, doch auf Social-Media-Plattformen stossen Pharmaunternehmen auf erhebliche Hürden. Dies liegt insbesondere an der strikten Haltung von Swissmedic zu Werbung auf Plattformen wie Facebook und YouTube, welche die Pharmaunternehmen daran hindert, das Potenzial dieser Plattformen vollumfänglich auszuschöpfen. Dieser Beitrag zeigt das gegenwärtige Werberegime für OTC-Produkte auf und analysiert die Haltung von Swissmedic zu Werbung auf Social-Media-Plattformen. Er geht der Frage nach, ob das faktische Werbeverbot für OTC-Produkte auf Social Media mit der Wirtschaftsfreiheit vereinbar ist oder ob es weniger einschränkende Mittel gibt.

La publicité pour les médicaments en vente libre est en principe autorisée en Suisse, mais les entreprises pharmaceutiques se heurtent à des obstacles considérables sur les plateformes de réseaux sociaux. Cela est notamment dû à la position stricte de Swissmedic concernant la publicité sur des plateformes telles que Facebook et YouTube, qui empêche les entreprises pharmaceutiques d'exploiter pleinement le potentiel de ces plateformes. Cet article présente le régime publicitaire actuel pour les médicaments en vente libre et analyse la position de Swissmedic à l'égard de la publicité sur les réseaux sociaux. Il étudie la question de savoir si l'interdiction de fait de la publicité pour les médicaments OTC sur les réseaux sociaux est compatible avec la liberté économique ou s'il existe des moyens moins contraignants.

I. Introduction

II. Rules on Advertisement for Over-the-Counter Pharmaceutical Products – an Overview

III. Focus: Advertisement on Social Media

1. Social Media
2. Swissmedic's Position and its Consequences on Social Media Advertisement
3. Comments vs. Like/Share
4. Fundamental Rights Unduly Restricted?
5. Some Additional Thoughts

I. Introduction

Online advertising campaigns in Switzerland are becoming increasingly important. In 2021, 9% of spending in Switzerland was invested in social media advertising, defined as a sub-category of online advertising.¹ The same study found that advertisers with smaller budgets spent more on advertising on social media as a format than the average.² Also the Federal Administration highlights in its SME Portal the importance of social media advertising for companies in

Switzerland, and points out that an important indicator for a company's success are the numbers of comments and users' feedback, rather than the mere number of followers.³

Swissmedic's current position, however, does not allow pharmaceutical companies to leverage the power of such social media advertising as it has prohibited the advertising of pharmaceutical products on community tools, such as Facebook and YouTube.⁴ After outlining the current regime for advertisement of over-the-counter pharmaceutical products, this article will analyze social media advertising in light of Swissmedic's restrictive standpoint and contrast it with considerations based on fundamental rights.

SARAH DRUKARCH, MLaw, Attorney at law, Zurich.

Thanks to Carola Winzeler, attorney at law in Zurich, for her valuable contributions to this article.

The english translation of the lead and summary is included on Swisslex and legalis only.

1 B. VON RIMSCHA/R. RIEMANN, Der Online-Werbemarkt Schweiz, Studie für das Bundesamt für Kommunikation (BAKOM), in Kooperation mit dem Schweizer Werbe-Auftraggeberverband (SWA), 31 October 2021, 1, available at <www.bakom.admin.ch/dam/bakom/de/dokument/bakom/elektronische_medien/Zahlen%20und%20Fakten/Studien/online-werbemarkt-schweiz-bericht.pdf.download.pdf/Rimscha_Riemann_2021_Der%20Online-Werbemarkt%20Schweiz.pdf> (October 2024).

2 VON RIMSCHA/RIEMANN (Fn. 1), 8 et seq.

3 <www.kmu.admin.ch/kmu/de/home/praktisches-wissen/kmu-betreiben/e-commerce/nutzung-der-website/online-werbung/soziale-netzwerke.html>, October 2024.

4 Swissmedic FAQ question related to blogs and community tools in the category «Internetrichtlinie – Kontakte, Patientenfeedbacks, medizinische Beratung, Selbsttest», available at <www.swissmedic.ch/swissmedic/de/home/humanarzneimittel/marktueberwachung/arzneimittelwerbung/fragen-und-antworten/internetrichtlinie-kontakte-patientenfeedbacks-medizinische-b.html>, October 2024.

II. Rules on Advertisement for Over-the-Counter Pharmaceutical Products – an Overview

The legal framework for the advertisement of pharmaceutical products in Switzerland is set by Arts. 31 and 32 Therapeutic Products Act (TPA) as well as the related Ordinance on the Advertising of Medicinal Products (MPAO⁵). While advertising directed at the public for prescription-only medicinal products (commonly abbreviated as POMs) is prohibited (Art. 32 para. 2 TPA), the law sets limitations for, but does not prohibit, the advertisement to the public of over-the-counter medicinal products (so-called OTC products). To the contrary, Art. 31 para. 1 lit. b TPA explicitly allows such advertisement to the public for OTC products.

Limitations to advertising are possible for reasons of health protection, in particular to protect from improper product use, as well as protection against fraud.⁶

In light of this legal framework, we need to first establish its scope by looking at the concepts of (i) advertisement, specifically advertising for medicinal products, (ii) OTC products, as well as (iii) the term advertisement to the public, before diving deeper into the topic of social media advertising.

While the plain term advertisement is not defined in Swiss law,⁷ Art. 2 lit. a MPAO defines medicinal products advertising as all measures to provide information, market development and the creation of incentives aimed at promoting the prescription, dispensing, sale, consumption, or use of medicinal products. It is noteworthy that while information, market development, and the creation of incentives are not legally defined activities, the second part of the definition refers the interpreter back to activities with therapeutic products defined in the TPA.⁸ Jurisprudence seems to apply a broad understanding of medicinal products advertising, stating i.a. that aiming to change the advertising addressee's consumption behavior is in itself sufficient to trigger the scope of application of advertising law.⁹

Medicinal products are classified in different categories, namely categories A, B, D, or E. In the course of the marketing authorization procedure, Swissmedic decides in which category a specific product should be classified, based on established classification criteria. While the medicinal products in categories A and B may only be dispensed based on a prescription, and thus qualify as POMs, medicinal products in categories D and E may be dispensed without a prescription and are thus generally referred to as OTC products.¹⁰ In 2023, about 2000 medicinal products were authorized as OTC products in Switzerland.¹¹

The last important aspect is the targeted audience: the focus of the present article lies on advertising that is directed to the public, in contrast to advertisement directed to healthcare professionals.¹²

Various aspects of such advertisement to the public of OTC products are addressed in the third section of the MPAO, which exclusively deals with this topic. It includes general requirements related to transparency, the provision of samples, as well as unlawful forms of advertising and un-

lawful advertising statements. To add some flavor, the provisions for example prohibit obtrusive, vociferous advertising or advertising that would promise a medicinal product's guaranteed effect.¹³ Online advertisement is also addressed and qualifies as advertisement to the public per Art. 15 lit. c MPAO.¹⁴

III. Focus: Advertisement on Social Media

1. Social Media

The European Federation of Pharmaceutical Industries and Associations' Code of Practice (EFPIA Code), which addresses digital channels, considers social media as «websites or applications on which people can interact in social networks». The examples enumerated by the EFPIA Code are Facebook, Twitter, Snapchat, LinkedIn, YouTube, Instagram.¹⁵ Other platforms commonly used in Switzerland are TikTok and Pinterest.¹⁶

2. Swissmedic's Position and its Consequences on Social Media Advertisement

Since at least 2011, Swissmedic has held the position (and states so in its FAQs available online) that advertising of pharmaceutical products on community tools is prohibited. As examples for such community tools, Swissmedic explicitly mentions Facebook and YouTube, and as advertising measures both promotional films and banner advertising. The short explanation provided by Swissmedic for this position refers to the «Share» and «Like» functions on the relevant platforms and the related risks that patient interactions may lead to unlawful advertising statements as prohibited by Art. 22 MPAO.¹⁷ As of today, Swissmedic does not seem to have deviated from the position it took back

5 In German usually referred to as AWV.

6 Art. 31 para. 3 TPA; BGE 141 II 66 ff. E. 3.3.4 f.; U. EGGENBERGER STÖCKLI, Arzneimittel-Werbeverordnung, Bern 2006, AWV 2 N 44; U. JAISLI/N. SCHUMACHER-BAUSCH, in: T. Eichenberger/U. Jaisli/P. Richli (Hg.), Basler Kommentar HMG, Basel 2022, Vor. Art. 31–32 HMG N 17 ff.

7 See for a comprehensive overview of the term in the context of medicinal products for example EGGENBERGER STÖCKLI (Fn. 6), AWV 2 N 8 ff.

8 See art. 4 para. 1 lit. f et seq. TPA.

9 BVGer vom 23. April 2024, C-2733/2021, E. 5.2.

10 See art. 23 and 23a TPA and art. 40 et seqq. Ordinance on Therapeutic Products.

11 Swissmedic Geschäftsbericht 2023, 36.

12 Art. 2 lit. b and c MPAO.

13 See art. 21 para. 1 lit. b and art. 22 lit. b MPAO.

14 D. DONAUER/S. MARKIEWICZ, Ein Überblick zur Arzneimittel-Werbe-regulierung, Jusletter 3. Mai 2021, margin No. 49.

15 EFPIA Code, version 2019, Annex 2, section 3, 59, available at <www.efpia.eu/media/fg2n40ks/efpia-code-of-practice.pdf>, October 2024.

16 See statista, Führende Social-Media-Kanäle in der Schweiz nach Anzahl der aktiven Nutzer im Jahr 2024, available at <de.statista.com/statistik/daten/studie/520144/umfrage/nutzer-sozialer-netzwerke-in-der-schweiz/>, October 2024.

17 Swissmedic FAQ (Fn. 4).

then.¹⁸ Also the Code Secretariat of science industries, administering the relevant industry self-regulation as codified in the Pharma Code and the Pharma Cooperation Code, highlights this understanding of Swissmedic in the context of social media.¹⁹

Some social media platforms do allow for some sort of deactivation of their respective «Comment» function when it comes to advertising on their platforms.²⁰ However, the platforms seem not to have a similar offering for the «Like» or the «Share» functions. This means that ads placed on social media can automatically be «Liked» or «Shared» by social media users without any restriction options for the advertisers. Swissmedic argues that it is precisely due to such «Likes» or «Shared» posts – functions which cannot be deactivated or limited – that the ads displayed on social media may infringe the MPAO's advertising framework. This is why it established and maintains a de-facto ban for advertising OTC products on social media. When considering the TPA's explicit approval of advertisement to the public for OTC products, such a de-facto banning of one (as shown above, not unimportant²¹) advertising channel seems at least surprising if not even contradictory.²² In the following, the «Comment» as well as the «Like» and «Share» functions will be analyzed in more detail in view of the MPAO's requirements.

3. Comments vs. Like/Share

a) Commenting

«Comments» posted as reactions to social media content may cover a wide range, from simple or more complex questions, to opinions, positive or negative user experiences, additional information, and even misinformation, all are possible. Their common denominator is the creation of content that is additional to that already included in the ad. This new content, separately as well as in combination with the ad content, still needs to comply with the MPAO's requirements. Assuming that such new content creators will usually be lay persons rather than experts familiar with the regulatory framework, it seems obvious that the new content may compromise the ad's compliance with the MPAO.

Some examples for potential non-compliance are:

- A generic statement of a satisfied patient that the advertised product had no undesirable effects;
Reasoning: Art. 22 para. b MPAO prohibits advertisement that claims a medicinal product would not have undesirable effects.
- A recommendation for the use of the advertised OTC product by a lay person;
Reasoning: Art. 22 para. g MPAO prohibits the mention or reference to a recommendation issued by a lay person.
- A comment describing an inaccurate medical history;
Reasoning: Art. 22 para. l MPAO prohibits misleading to a wrong self-diagnosis by means of medical history description.

- Description of an OTC product's use for a non-approved indication or use case;

Reasoning: Art. 16 para. 1 MPAO requires advertisement to comply with the product information as approved by Swissmedic.

- A comment highlighting an OTC product's galenic form as new, even though it has already been authorized for use in Switzerland for more than 18 months;

Reasoning: Art. 16 para. 5 MPAO limiting the use of the term «new» to a period not exceeding 18 months since authorization for the Swiss market.

- A comment requesting other users to get in contact with the marketing authorization holder;

Reasoning: Art. 21 para. 1 lit. g MPAO prohibiting any requests to contact the marketing authorization holder.

These examples illustrate why Swissmedic appears justified in considering the infringement risks regarding the «Comment» function's availability to be too high. The respective advertisers are unlikely to be in a position to set up such extensive monitoring schemes that would allow the use of the «Comment» function with very strict moderation and monitoring schemes as a less restrictive approach (or, at least, are not interested in so doing).

An additional complication originates in the pharmacovigilance requirements. Pharmaceutical companies would also have to monitor such «Comments» for undesirable effects and ensure that such «Comments» are channeled into and followed-up within its usual processes for such cases.²³

b) Liking and Sharing

Considering the «Like» function, however, the starting point seems to be completely different. When a social media user «Likes» an ad no new content is generated by the interaction. The content of the original ad remains unchanged and, thus, assuming that the initial ad complied with the MPAO, the «Liked» ad will also comply with the legal requirements. Thus, potential regulatory risks in connection with the «Like» function are rather low. An increased visibility of the advertisement due to a user's «Like» does not appear as problematic either, given that we are dealing with advertisement directed to the public anyway.

18 While this position was not explicitly (re-)confirmed when writing the present article, this piece's author previously received Swissmedic's confirmation that the above was still Swissmedic's position as regards social media more than ten years after it had last updated the FAQ reply in question. Given that the FAQ reply at hand remained unchanged since April 2011, as evidenced on Swissmedic's website, there are no indications to suggest that Swissmedic's position may have changed in the meantime.

19 See Code Secretariat's «Recommendation for using digital channels: professional promotion, continuing education and social media», January 2021, 11 et seq., available at <www.scienceindustries.ch/_file/27886/digitale-kanale-2020-e.pdf>, October 2024.

20 See for example for Facebook at <www.facebook.com/business/help/1129470964230971>, October 2024.

21 See above I.

22 Art. 31 para. 1 lit. b TPA; see above II.

23 See also Code Secretariat (Fn. 19), 12.

The third commonly available function on social media is referred to as the «Share» function, whereby a user may share an ad created by a third party under the user's own profile. While a user «Sharing» a third-party post may usually add its own content to such a post, the platforms usually do not mandate the user to add further content in its «Sharing» statement. However, when additional content is included in the user's «Sharing» statement, the same issues as elaborated upon above for the «Comment» function may arise.

The «Share» function seems, however, different when it comes to its appearance. The «Comments» usually appear graphically subordinated to the main post. The «Shares» as well as a «Sharing» statement usually are shown under the user's own profile, more removed from the business account in charge of the main post. Hence, at least from a visual perspective, a «Share» does not automatically and directly invoke a relationship with the pharmaceutical company. While this distancing does not solve the issue of a potential infringement of the MPAO's requirements, the question arises who is to be considered in charge for such additional content. Swissmedic seems to apply an approach resembling the concept of natural causality. Without the original ad posted by the pharmaceutical company the potentially non-compliant «Share» post would not exist. Thus, it prohibits the creation of the original ad and even considers a further dissemination that is no longer exclusively under the advertiser's umbrella to be the responsibility of the advertiser.²⁴ The problem with this approach may be illustrated with the following example: in the digital age, it is an easy task to take a picture of print advertising for OTC products and further share it via messaging apps, or get the ad copied and further disseminated, all without the advertiser's involvement. Nevertheless, so far, a general ban of print advertising has not been considered because of this risk of further dissemination. The issue is even further accentuated when considering Swissmedic's guidelines on hyperlinks. In the context of the framing of third-party content on a website, Swissmedic explains that the mere fact that the original website operator includes a statement highlighting for the website user that the user is being redirected to a third party's website may be sufficient to comply with Swiss regulatory requirements.²⁵ Considering Swissmedic's framing approach in combination with the alienation from the advertiser inherently included by «Sharing», it seems inappropriate to hold the advertiser accountable for such «Sharing» posts by customers. Rather, the framing standards and its release of the advertiser's responsibility for the «Share» post should apply.

The «Like» and «Share» functions also seem somewhat different from the «Comment» function when viewed from another angle. As already mentioned, the MPAO prohibits advertising that is to be considered as a request to contact the marketing authorization holder.²⁶ The availability of the «Comment» function may be interpreted as an invitation to contact the advertiser, even though its main aim is to provide a platform for engagement between users. This

risk, however, does not exist with the «Like» and «Share» functions. These forms of interaction are not aimed at motivating the public to address the pharmaceutical company as advertiser. Rather, their aim is to address and engage with the community of other social media users.²⁷

Overall, the three common social media interaction functions of «Like», «Share», and «Comment» seem not to serve the same purpose and entail different, non-infringement risks when it comes to the MPAO's requirements. The question thus arises whether the undifferentiated treatment of these three functions by Swissmedic and the resulting de-facto ban for advertising OTC products on social media can be justified.

4. Fundamental Rights Unduly Restricted?

It is undisputed that certain forms of advertisement of pharmaceutical products – measures aimed at increasing sales – should be limited or even banned as the excessive consumption of pharmaceutical products should not be actively promoted.²⁸ In legal terms, such restrictions or prohibitions on advertising qualify as limitations of the fundamental right of economic freedom.²⁹ Hence, their legitimacy must be reviewed under the familiar concept of justifications for fundamental rights.³⁰ In the context of the de-facto ban for advertising OTC products on social media, we are thus required to ask whether (i) a sufficient legal basis for this limitation exists, (ii) public interests are met, and (iii) proportionality is maintained by establishing necessity, suitability, and reasonableness as well as subsidiarity.³¹

a) Sufficient Legal Basis

When first looking at the legal basis, it is noteworthy that the delegation provision in Art. 31 para. 3 TPA empowers the Federal Council to limit or prohibit advertising for certain types of medicinal products or for groups of medicinal products on the one hand, and on the other to issue provisions on cross-border advertisement. Strictly speaking, however, when banning social media advertising for medicinal products as such, the prohibited item is the advertising means rather than the type or group of medicinal products.³² Even when applying a generous approach as regards the delegation norm, and relying on the cross-border aspect

24 The EFPIA Code seems to apply a more differentiated approach when stating that «A Member Company owning the social media page or site is responsible for the content.», even though the EFPIA applies only to POMs and not to OTC products; EFPIA Code (Fn. 15), Annex 2, section 1, 57.

25 Swissmedic Journal, 8/2006, 798; DONAUER/MARKIEWICZ (Fn. 14), margin No. 60.

26 Art. 21 para. 1 lit. g MPAO.

27 See also EFPIA Code (Fn. 15), Annex 2, section 3, 59 et seq.

28 BGE 123 I 201 ff. E. 4.

29 Art. 27 Cst.

30 Art. 36 Cst.

31 JAISLI/SCHUMACHER-BAUSCH (Fn. 6), HMG 31 N 17.

32 See for a similar concern related to the advertisement pre-approval EGGENBERGER STÖCKLI (Fn. 6), AWV 23 N 10.

in view of social media's nature, the MPAO does not provide for a provision dealing with the restriction or banning of social media.³³ In this context it is telling that Swissmedic's FAQ reply does not include a reference to any of the MPAO's provisions when addressing the ban on community tool ads.³⁴ It thus seems that we already fall at the first hurdle of the justification process. One may argue, however, that there are indeed relevant legal provisions serving as a legal basis for a limited ban of social media ads, in particular where the «Comment» function cannot be deactivated. As shown in the above-mentioned examples,³⁵ the relevant legal provision depends on the specific content and may be found throughout the MPAO's third section.

b) Public Interest

Continuing with the second step, the public interests involved are health protection, in particular protecting from improper or excessive product use, along with protection against fraud.³⁶ In this context, the Swiss Federal Tribunal reminds us that even OTC products may pose health risks when consumed imprudently,³⁷ though, in general, the OTC products' hazard potential is considered considerably lower than of POM's.³⁸ In the same decision, the Swiss Federal Tribunal considered that the interest of the individual customer to find a competitive offering for OTC products does not override the public interest to protect from improper or excessive product use.³⁹ The public interest therefore does also seem established in the social media ad ban scenario at hand.

c) Proportionality

However, in its decision mentioned above, the Swiss Federal Tribunal then considers that the complete ban on advertisements for price rebates for medicinal products in categories C⁴⁰ and D, as envisaged by the Geneva legislation under scrutiny in this case, does not meet the proportionality standards. According to the Swiss Federal Tribunal, a mere prohibition for obtrusive, vociferous (price/rebate) advertising would have been an adequate and sufficient measure to address the risk of abusive or excessive consumption, especially in view of the additional safeguards in place, such as the pharmacist's professional duty to inform the patients of the medication's proper use, the instructions for use and preservation guidelines accompanying the product itself.⁴¹

Applying these proportionality considerations of the Swiss Federal Tribunal to social media advertising for OTC products, we may question whether the de-facto ban of all social media advertising for OTC products indeed satisfies the proportionality requirements. As in the Geneva price rebate scenario, we deal with a complete ban of social media advertising for OTC products for which advertisement is explicitly allowed. Further, social media advertising does not *per definitionem* need to be obtrusive, vociferous advertising, which would in any case be prohibited based on Art. 21 para. 1 lit. b MPAO.⁴² Finally, the requirement for advertise-

ment pre-approval for certain special types of OTC products, as already currently in place⁴³, and the limitation to platforms that allow the deactivation of the «Comment» function, may both serve as additional safeguards addressing the health protection interest at stake. On top of this, the more widespread availability of information on illnesses and treatment possibilities, including medicinal products, may lead to a more competent lay person from the outset who will actually require less protection.⁴⁴ To counterbalance potentially remaining concerns, and in the spirit of proportionality, the legislator may even consider introducing specific mandatory statements for OTC products' social media advertising, similar to the ones already in place for other electronic means.⁴⁵

In summary, the present analysis concludes that it is likely that neither a sufficient legal basis nor the proportionality requirements necessary for a justified restriction of fundamental rights by a complete social media advertising ban for OTC products are met. A differentiated approach with a limited ban – focused for example on social media platforms that do not allow the deactivation of the «Comment» function, potentially combined with other measures – may, however, be justifiable considering the interests at stake.

33 JAISLI/SCHUMACHER-BAUSCH (Fn. 6), HMG 31 N 81 and L. FRANZ/P. METTLER, LSR 2023, 63 even go as far as to argue that there are no specific rules addressing advertising on digital channels.

34 Swissmedic FAQ (Fn. 4).

35 See above III.3.a).

36 See above II.

37 BGE 123 I 201 ff. E. 4.

38 D. DONAUER, Heilmittel, Lebensmittel, Kosmetika, Chemikalien, Alkohol und Tabak, in: MLL Legal (Hg.), Praxishandbuch Produktregulierung, Bern 2023, margin No. 1972.

39 BGE 123 I 201 ff. E. 4.

40 Category C has been abolished as of 1 January 2019, resulting in a reclassification of the medicinal products from category C to either category D or category B.

41 BGE 123 I 201 ff. E. 5a; interestingly, the Court of Justice of the European Union (CJEU) came to a different conclusion than the Swiss Federal Tribunal when analyzing the Latvian prohibition of advertising OTC products on the basis of price, special sales or bundled sales. In its judgment of 22 December 2022 in the case C-530/20, the CJEU mentioned that «irrational and excessive use of medicinal products may also arise as a result of advertising material that [...], by referring to promotional offers or bundled sales of medicinal products and other products, treats medicinal products in the same way as other consumer goods, which are in general the subject of discounts and price reductions where a certain level of expenditure is exceeded.» (margin No. 68). It concluded that the Latvian provisions in question «merely prohibits advertising of promotional offers or bundled sales and advertising on the basis of price, without prejudice to the possibility [...] to grant discounts and price reductions when selling medicinal products and other health products.» (margin No. 72). Hence, it found that the Latvian restriction on price advertisement was compliant with EU law.

42 This does, however, not release the advertiser from a special review of a proposed campaign in view of the multiplying factors inherent in social media advertising and the prohibition for obtrusive, vociferous advertising.

43 See art. 23 para. 1 MPAO.

44 DONAUER/MARKIEWICZ (Fn. 14), margin No. 51.

45 See art. 17 MPAO.

5. Some Additional Thoughts

Irrespective of the undifferentiated approach applied by Swissmedic and criticized above, it seems important to note that there may be arguments legitimizing a complete social media advertising ban for OTC products. From the author's perspective, it would, however, be the legislator's responsibility to establish and prove such considerations and properly reflect them within the applicable legal framework and not by means of Swissmedic's FAQ replies.

To elaborate: certain legal scholars voice the concern that the need for protection is actually increased in the realm of advertisement to the public.⁴⁶ It is also noteworthy

that social media ads, in contrast to general information made available on the internet, are likely to be qualified as push information made available to the user without a specific request initiated by the user.⁴⁷ If it were possible to establish that the push information made available in the social media advertising world increases the risk of deception or the threat to the public's health, then the weighing of interests – being a crucial part of the justification process – could end up with a different result. So far, however, it does not seem that the legislator has indeed considered this carefully and initiated the respective measures, as also evidenced by the various scholarly voices demanding more specific regulatory guidance on social media advertising.⁴⁸

Zusammenfassung

Dieser Beitrag befasst sich mit den rechtlichen Anforderungen an die Werbung für rezeptfreie Medikamente (OTC-Produkte) in der Schweiz, insbesondere auf Social Media. Während Online- und Social-Media-Werbung zunehmend an Bedeutung gewinnen, verbietet Swissmedic die Werbung für OTC-Produkte auf Social-Media-Plattformen weitgehend, obwohl Werbung für OTC-Produkte grundsätzlich erlaubt ist. Dieser faktische Ausschluss der Pharmaunternehmen von einem wichtigen digitalen Werbekanal wirft Fragen zu Grundrechten wie beispielsweise der Wirtschaftsfreiheit auf. Der Beitrag geht auf die Besonderheiten von Social-Media-Funktionen (insbesondere Kommentare, Likes und Shares) ein und zeigt, dass diese Funktionen nicht alle die gleichen regulatorischen Risiken bergen und daher ein differenzierter Ansatz besser geeignet wäre, um die Gesundheit zu schützen und Täuschungen zu verhindern.

Résumé

Cet article traite des exigences légales relatives à la publicité pour les médicaments en vente libre (produits OTC) en Suisse, notamment sur les réseaux sociaux. Alors que la publicité en ligne et sur les réseaux sociaux gagne en importance, Swissmedic interdit en grande partie la publicité pour les produits OTC sur les plateformes de réseaux sociaux, bien que la publicité pour les produits OTC soit en principe autorisée. Cette exclusion de fait des entreprises pharmaceutiques d'un canal publicitaire numérique important soulève des questions quant aux droits fondamentaux, tels que ceux relatifs à la liberté économique. L'article aborde les particularités des fonctions des réseaux sociaux (notamment les commentaires, les likes et les partages) et montre que ces fonctions ne présentent pas toutes les mêmes risques réglementaires et qu'une démarche différenciée serait donc plus appropriée pour protéger la santé et empêcher la déception.

46 JAISLI/SCHUMACHER-BAUSCH (Fn. 6), HMG 31 N 46.

47 See JAISLI/SCHUMACHER-BAUSCH (Fn. 6), HMG 31 N 80.

48 See for example JAISLI/SCHUMACHER-BAUSCH (Fn. 6), HMG 31 N 119; FRANZ/METTLER (Fn. 33), 64 f.