

# Technology Law Analysis

June 18, 2024

## SELF-DECLARATION MECHANISM FOR MISLEADING ADVERTISEMENTS: A HOUSE BUILT ON SAND

- The Supreme Court order dated May 7, 2024 in the case of Indian Medical Association & Anr. v. Union of India & Ors, Writ Petition (C) No. 645/2022, mandated establishment of a Self-Declaration mechanism for advertisements.
- The mechanism is operational through the **Broadcast Seva Portal** and **Press Council of India Portal**, established by the Ministry of Information and Broadcasting, from June 18, 2024.
- We discuss the background to the proceedings, compliance obligations on relevant stakeholders, issues and concerns with the Self-Declaration Mechanism and propose alternatives on the way forward

In its order dated May 7, 2024, the Supreme Court of India (“**SC**”) bench of Hon’ble Justices Hima Kohli and Ahsanuddin Amanullah (“**Bench**”) in exercise of its extraordinary jurisdiction, passed an order in Indian Medical Association & Anr. v. Union of India & Ors,<sup>1</sup> (“**Order**”) directing all advertisers and advertising agencies to submit a self-declaration certificate before publishing / broadcasting any advertisement (“**Self-Declaration**”) on television, radio, print and digital media and proof of uploading the same shall be made available by the advertisers to the concerned broadcaster/printer/publisher/platform.

The Order further directs that “*no advertisements shall be permitted to be run on the relevant channels and/or in the print media/internet without uploading the self-declaration*”.<sup>2</sup> Thereby, appearing to impose an implicit obligation on platforms/broadcasters to not run advertisements which have not been self-certified. The Ministry of Information and Broadcasting (“**MIB**”) was directed to create a dedicated portal within four weeks from the Order to enable uploading of the Self-Declaration.

The Order arose out of concerns relating to misleading advertisements. In this hotline, we discuss the background and consequences of the Self-Declaration framework.

## BACKGROUND TO THE PROCEEDINGS

The Order was in the context of the ongoing writ proceedings before the Supreme Court filed against Patanjali Ayurved for publishing misleading claims and advertisements about ayurvedic products as a complete cure for certain diseases while disparaging modern systems of medicine like allopathy, particularly during the COVID pandemic. In an earlier order dated April 23, 2024, however, the Bench expanded the scope of the proceedings to include all similarly placed FMCG and pharmaceutical companies making misleading advertisement relating to the products manufactured and marketed by them.<sup>3</sup> The Bench noted that such entities were taking the public at large for a ride, in particular, adversely affecting the health and *well-being of babies, young children, women (including lactating and pregnant women), senior citizens and the sick and infirm, who have been consuming the products on the basis of the said misrepresentations*.<sup>4</sup>

In the earlier order dated April 23, 2024, the Bench directed the Ministry of Consumer Affairs (“**MCA**”), Ministry of Food and Public Distribution, MIB and the Ministry of Electronics and Information Technology (“**MeitY**”) to file affidavits explaining action taken by them to prevent abuse of the various statutes governing advertisements: Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 (“**DMROA Act**”), Drugs and Cosmetics Act, 1940 (“**DCA**”), and the Consumer Protection Act, 2019 (“**CPA**”).

There is an existing legislative framework governing misleading advertisements involving a gamut of general and sector-specific laws. Regulators such as the Central Consumer Protection Authority, Telecom Regulatory Authority of India, Food Safety and Standards Authority of India, Ministry for Health and Family Welfare, MIB etc. enforce these laws. The self-regulatory body, the ASCI, which has been recognized by various government departments and the Supreme Court of India also has an enforcement mechanism in place for non-compliant ads. Given there is a wide host of laws already governing advertising content, the concern of the SC in the Order was not in relation to absence of such laws but that complaints in relation to non-compliance with existing laws are not adequately taken forward, resulting in poor enforcement actions. The Order appears to mainly seek accountability by advertisers.

In the Order, the Bench went on to generally examine the compliance under the CPA and actions taken against print, FM and television advertisements in general, i.e., not specific to advertisements making medical or health-related claims. The SC noted that “*provisions ought to be used with much more vigour and intensity*”.<sup>5</sup> However, subsequently in the Order, the SC directed the MCA to file an affidavit “*setting out the action taken by the [Central Consumer Protection Authority] on noticing/being informed of false/misleading advertisements, particularly in the food and health sector*”.<sup>6</sup>

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Hence, given the focus of the case is on drugs, cosmetics, food products and health services, the Order ideally should be read to apply to those products.

MIB PRESS RELEASE AND PORTAL

On June 3, 2024, the MIB issued a press release pursuant to the Order (which was further updated on June 5, 2024) ("Press Release") introducing features to enable submission of the Self-Declaration:

- A new feature on the Broadcast Seva Portal of MIB for TV and radio advertisement ("Broadcast Seva Portal");
- A feature on the Press Council of India's portal for print and digital/internet advertisements ("PCI Portal").

The PCI Portal went live on June 4, 2024, and the industry was directed to comply with the Self-Declaration mechanism by June 18, 2024. The Press Release was accompanied by guidelines for advertisers/advertising agencies using the portals ("Portal Guidelines").

However, the Self-Declaration mechanism and its implementation *vide* the Broadcast Seva Portal and PCI Portal (collectively, "Portals") appears to be riddled with ambiguities and implementation difficulties.

Per the Press Release, the Self-Declaration certificate is required to be submitted by all advertisers and advertising agencies for all new advertisements published on or after June 18, 2024. A mere two-week buffer period was provided in order to provide stakeholders to familiarize themselves with the process of Self-Declaration.

Ongoing advertisements, which were published before June 18, 2024, do not require the Self-Declaration.

The Order contemplates the Self-Declaration for certification of compliance with the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements, 2022 issued under the CPA. However, the Portal Guidelines in addition require that the Self-Declaration certificate certifies that the advertisement:

- Complies with all relevant regulatory guidelines, including those stipulated in Rule 7 of the Cable Television Networks Rules, 1994 and the Norms of Journalistic Conduct of Press Council of India.

The Order referred to self-certification in the context of Rule 7 of the Cable Television Networks Rules, 1994. However, the said rule does not refer to any self-certification requirement. The rule simply requires surrogate advertisements to provide affidavits certifying the availability of the advertised product in reasonable quantities as per the prescribed threshold and details of expenditure on the advertisement.

The Press Release provided for exceptions to Self-Declaration for classifieds (not directly relating to consumer products/services), personal advertisements, statutory advertisements, public information notices, tenders, and advertisements related to public functions.

COMPLIANCE OBLIGATIONS

(i) Advertiser/Advertising Agency

In addition to submission of the Self-Declaration certificate, the Portals require advertisers/advertising agencies to submit additional details in relation to the advertisement such as:

- a brief description of the advertisement in approximately 100-200 words, highlighting specific features or claims made in the advertisement;
- full script of advertisement (in a PDF file);
- URL or PDF of the actual advertisement;
- proposed date of first broadcast/publishing of the advertisement;
- letter of authorization for submission of the Self-Declaration;
- CBFC certificate, if applicable.

This creates an additional burden on Advertisers.

(ii) Platform

The Order states that advertisers are required to upload the Self-Declaration. It further states that "*Proof of uploading the self-declaration shall be made available by the advertisers to the concerned broadcaster/printer/publisher/T.V Channel/electronic media, as the case may be, for the records. No advertisements shall be permitted to be run on the relevant channels and/or in the print media/internet without uploading the self-declaration as directed above.*"<sup>7</sup>

A newspaper press notification issued by the MIB providing details on how to comply with the Self-Declaration states that: "**Publishers/broadcasters/internet platforms shall publish, broadcast or telecast an advertisement only if advertisers/advertising agencies submit a copy of the self-declaration for each specific advertisement.**"

The Press Release also notes that "*The authenticity of [...] certificates may be verified through Broadcast Seva portal of the [MIB]/PCI Portal.*" However, a perusal of the PCI Portal appears to limit access only to advertisers or advertising agencies.

ISSUES IN THE SELF-DECLARATION MECHANISM

While the deadline for compliance with the Self-Declaration mechanism through the Portal is June 18, 2024, there appear to be several challenges with its implementation.

■ What are advertisements?

While the term advertisement is not specifically defined in the Order, the definition of the term under the CPA<sup>8</sup>, is broadly worded and covers wide range of marketing activities. Given the wide definition, it is unclear whether the Self-Declaration mechanism should cover all such advertisements, including the following:

(a) Packages and labels of products/ QR codes on products;

(b) Testing an advertisement on small groups of people prior to releasing to the public;

(c) Social media posts which simply contain a brand name and don't make any claims;

(d) Teasers, advertisements and trailers of films and series.

There may be two types of advertisements: (i) user generated content which is in the nature of an advertisement (such as an influencer endorsing a product/ organic advertisement), and (ii) paid advertisements onboarded by the platform. It may not be possible for a platform to verify Self-Declaration in case of (i). It is also impossible for platforms to ascertain which user generated content is in the nature of advertisements in the first place.

It is also unclear whether all language variations and duration edits of a particular advertisement will require separate declarations.

#### ■ **Administrative burden**

A recent study by TAM Media Research and AdEx reported that there are nearly 3.4 billion digital ads, 1.3 million print ads and 100% million TV ads published from January to December 2023. Small and medium advertisers publish in regional publications. It will create a huge compliance burden for such businesses and publications. The Portals may not be able to accommodate the influx of such volumes of advertisements/ such traffic. This would adversely impact the entire advertising ecosystem. If for any reason the Portals are not available for upload, then the entire launch gets affected.

#### ■ **Broad strokes approach**

The Self-Declaration mechanism currently applies to all advertisers without any threshold. Micro and small businesses may be required to comply with the self-declaration requirement irrespective of the nature of product or service, leading to unreasonable burden. To illustrate: the Self-Declaration at present can apply to a home business such as a t-shirt or handicraft businesses.

If the Self-Declaration mechanism is held to apply to advertisements of all goods and services irrespective of the sector or industry, it may have a disproportionate impact, given the mischief sought to be addressed by the Order arose in the context of health claims.

#### ■ **Diverse nature of advertisements and advertising models**

The Order mandating Self-Declaration does not appear to consider the vast types of advertisements and advertising models prevalent, particularly on the digital medium. Considering the internet is borderless, it will be difficult to implement the proposed mechanism against foreign platforms and advertisers. The Self-Declaration requirement appears to be impossible to implement for certain unique advertising models.

Advertisements have evolved from the more traditional forms and are now deployed through various innovative models. There are various issues in complying with specific requirements of the Self-Declaration Mechanism such as details of script, URL (which may not exist prior to publication), file size concerns (limit of 1 MB), ultimate platform on which the advertisement is published etc. as set out below:

- *Programmatic advertisements:* In programmatic advertising, there is an automated process of buying and selling ad inventory in real-time through a complex ecosystem involving multiple platforms and technologies. In such cases, since the ultimate platform on which the advertisement is published is uncertain, the relevant stakeholders will not be able to comply with the Self-Declaration mechanism which requires details of the platform on which the advertisement is published.
- *Influencer advertisements:* Influencer advertising is resorted to by most brands today because of the organic manner in which influencers may advertise the product. To illustrate, a brand may send an influencer freebies / product to test, and the advertiser will make an organic post about their experience using the product. At the time of sending the product, the brand will not have a script or a URL, nor will they know if the influencer may actually post about the brand / product. Hence, the requirement in the Self-Declaration mechanism to input details of the script/URL cannot be adhered to.
- *Topical advertisements:* Brands may take charge of 'topical' advertising, for example, AMUL ads frequently take advantage of a topical/current affairs/contemporary subject and create an advertisement around it. The Self-Declaration requirement would be a slow process which may slow down such 'moment marketing.'
- *Livestream advertisements:* On several digital platforms, products and services may also be advertised through live stream events (including on an impromptu basis). These creative outreach programs may get affected if all advertisements are required to be self-declared prior to publishing.

#### ■ **General issues with Self-Declaration**

Given that self-declaration of advertisements is required to be undertaken before the same is published, and such declarations are publicly available, there are concerns regarding the confidentiality of submitted information, and its possible impact in undermining healthy competition in the market.

It is also unclear how much prior to the advertisement launch, the Self-Declaration needs to be obtained.

### **PROPOSED SOLUTION**

As stated above, there is an existing legislative framework governing misleading advertisements under general and industry specific laws. ASCI has recently tied up with the Department of Consumer Affairs to strengthen enforcement of advertising regulation in India. The various regulators under the existing laws may consider constituting a joint mechanism to harmonize compliance with the host of such laws, including submission of periodic compliance reports, publication of non-compliant brands, conducting awareness campaigns and streamlining consumer-complaint mechanisms.

Further, the concerns in the Order arose primarily from health-related concerns, as is evident from the fact that its directions were in enforcement of the *fundamental right to health*. In numerous places in the Order as well, the Bench has underscored that the consumer concern it is trying to address is consumer health. Hence, the wide ambit of the

Self-Declaration mechanism over advertisements wholly unrelated to consumer health seems disproportionate.

The Self-Declaration requirement does not in fact address the concern of ensuring that advertisements do not contain any misleading claims, since the documents submitted via the Self-Declaration do not get verified by a regulator. Given the disproportionate compliance burden, an alternative approach may be considered wherein for print and digital advertisement a one-time self-declaration may be taken from the advertiser (instead of for each ad). Or a self-declaration may be taken in relation to a particular product claim, including disclaimers etc. (rather than a separate declaration for each advertisement making the said claim). In so far as platforms are concerned, their only obligation could be to take-down non-complying content. Mechanism as existing for non-compliant digital advertisements under the Section 79 of the Information Technology Act read with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 may be considered for all other mediums. This is also in line with Section 21 of the CPA which provides a mechanism for takedown of misleading advertisements.

Several industry associations are impleading in this matter.

The next date of hearing in this matter is listed as July 9, 2024.

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