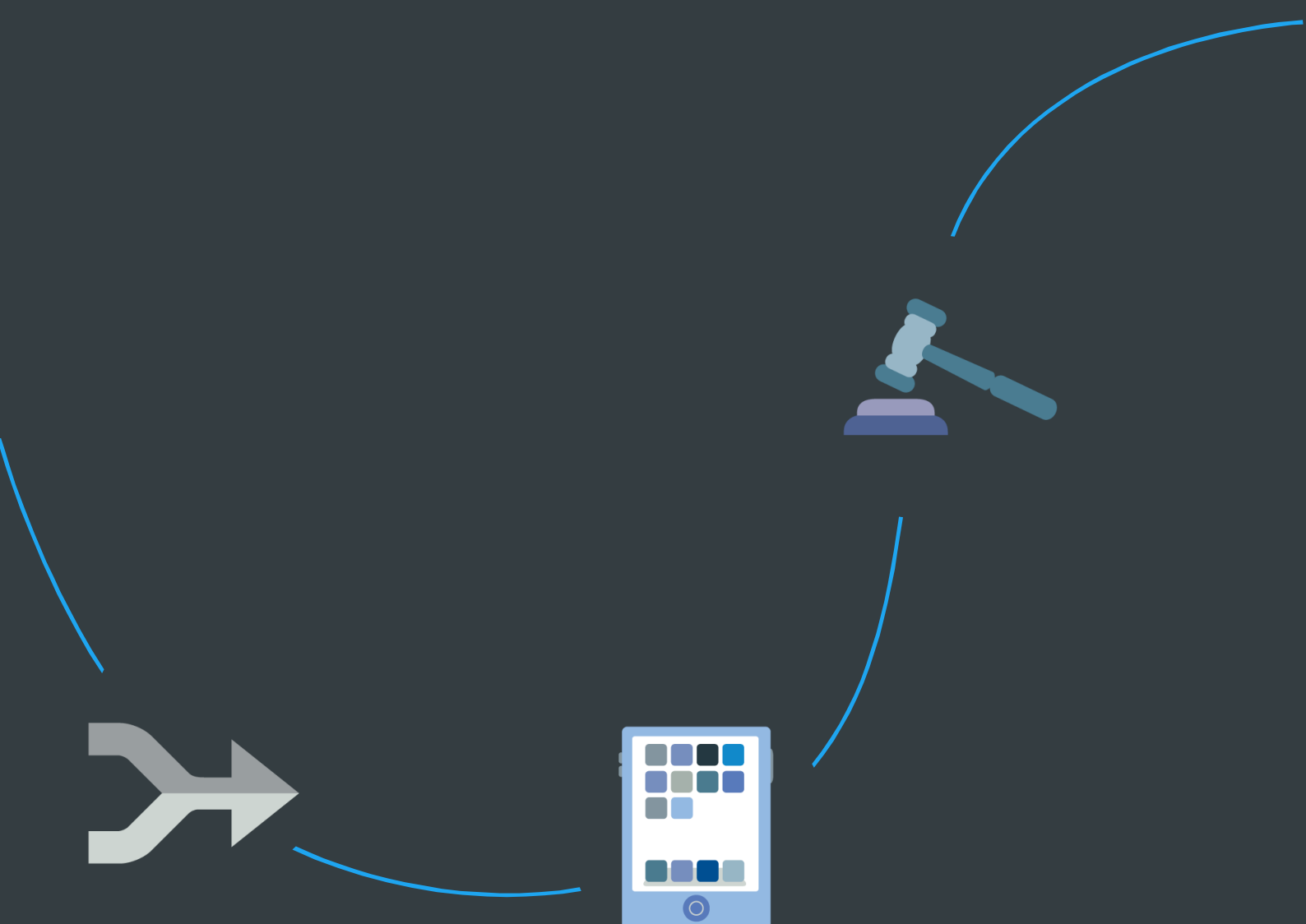
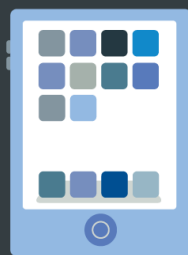


# Bird & Bird

## New Italian legislation on ambush marketing



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On 13 May 2020, the Italian law converting Law Decree no. 16 of 11 March 2020, containing "Urgent provisions for the organization and holding of the Winter Olympic and Paralympic Games Milan Cortina 2026 and the ATP Turin 2021 - 2025 finals, as well as on the prohibition of parasitic activities"<sup>1</sup> ("Law Decree 16/2020") came into force, introducing a general regulation of so-called ambush marketing.

The provisions of Law Decree 16/2020 - although currently relevant and urgent in view of the important sporting events that will take place in Italy in the coming years (in particular, the Olympic and Paralympic Winter Games Milan-Cortina 2026 and the ATP Tennis Finals Turin 2021-2025) - provide for a structural regulation of ambush marketing, applicable in general to any sporting event or exhibition of national or international importance.

We provide below a brief overview of ambush marketing in Italy and a summary of the main related provisions introduced by Law Decree 16/2020.

## 1. Overview of ambush marketing

Ambush marketing consists of the abusive association of an enterprise's image, brands or products with a major event of particular media appeal, in the absence of any sponsorship, licensing or similar relationship with the event organizer. In this way, the enterprise that carries out ambush marketing actions (the so-called "ambusher") unduly associates its brand with the event in order to exploit its media appeal, without bearing the related costs.

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<sup>1</sup> The title was amended by Law no. 31 of 8 May 2020 "Conversion into law, with amendments, of Law Decree no. 16 of 11 March 2020, containing urgent provisions for the organization and holding of the Winter Olympic and Paralympic Games Milan Cortina 2026 and the ATP Turin 2021 - 2025 finals, as well as on the prohibition of parasitic advertising", which replaced the words "parasitic advertising" with "parasitic activities".

The expression "ambush marketing" was coined in the early 1980s by marketing expert Jerry Welsh, with reference to the exploitation of commercial spaces not covered by the official sponsors of sports events. The practice is, in fact, particularly known in the sports field, yet it can occur in all situations in which there is an abusive exploitation of the media appeal of a particular event or manifestation.

Various types of ambush marketing have been identified and classified by certain commentators into the categories of direct, indirect and incidental ambushing. Such types of ambush marketing include, for instance:

- "predatory ambushing", or "ambush by association", which occurs when the ambusher deceptively presents itself as the official sponsor of the event, referring to the trademarks or other distinctive signs of the event;
- "coat-tail ambushing", consisting of the indirect recall of the event through different strategies, such as the distribution of gadgets at the event or free tickets for the event itself;
- "insurgent ambushing", when surprise marketing initiatives are carried out at or near the event site;
- "saturation ambushing", which consists of the intensification of promotional activities by the ambusher in order to saturate all advertising spaces left free by the official sponsor<sup>2</sup>.

Ambush marketing has been defined by Italian case law as a multi-offensive practice, as it damages several subjects and, in particular:

- the organizer of the event, as ambush marketing actions diminish the appeal and value of licenses or sponsorships; in fact, where the

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<sup>2</sup> See the Dossier of the Services and Offices of the Senate of the Republic and the Chamber of Deputies of 17 April 2020 on "Olympic and Paralympic Games 2026 and Tennis Finals 2021-2025, as well as on the prohibition of parasitic activities - D.L. 16/2020 - A.S. 1777".

ambusher manages to obtain the same results in terms of image that the licensees or official sponsors do, the latter will likely limit or reduce their offers, not considering such investment profitable<sup>3</sup>;

- the official sponsors or licensees of the event, who do not gain the expected profits as a result of the sponsorship or license, especially in the case - very frequently - where the ambusher is a direct competitor of the official sponsor;
- the public, which is misleadingly led to believe that a relationship of sponsorship or affiliation, or other links between the ambusher and the owner of intellectual property rights or the organization of the event, exist<sup>4</sup>.

## 2. Ambush marketing in Italy before Law Decree 16/2020

Ambush marketing has long been recognised by Italian case law in the context of unfair competition, trademark and other distinctive signs infringement, as well as misleading advertising.

In particular, in the context of unfair competition under Article 2598 of the Italian Civil Code, ambush marketing conducts have been regarded as, depending on the case, parasitic competition, misappropriation or appropriation of merits.

In cases in which the ambusher also uses the trademarks or signs of the event, the infringement of trademarks or other distinctive signs may also occur.

In addition, the ambusher's conduct may also result in misleading advertising and, in the context of self-regulation, as a violation of the Code of Marketing Communication Self-Regulation.

Finally, ambush marketing may constitute a misleading commercial practice towards consumers under Article 21 of the Consumer Code.

Recently, the Court of Milan, with a unique decision in the Italian case law on ambush marketing, ordered a compensation for damages amounting to 1.8 million Euros plus interest for unfair competition acts which were, indeed, regarded as ambush marketing practices (see [Bird & Bird with](#)

[TIM S.p.A. wins important ambush marketing case, Italian only](#)).

On the legislative level, it is worth remembering that, in the past, the Italian legislator had already decided to regulate the figure of ambush marketing with *ad hoc* provisions. Specifically, in view of the "Turin 2006" Winter Olympics, Law no. 167/2005 provided for the prohibition, effective until 31 December 2006, to "*undertake parasitic marketing activities ("ambush marketing"), meant as activities parallel to those carried out by economic or non-economic entities, authorized by the organizers of the sports event, in order to obtain an economic profit*"; another attempt to regulate ambush marketing, albeit with limited effectiveness, is represented by Law Decree no. 43/2013, which provided for the adoption of measures aimed at repressing ambush marketing actions on the occasion of Expo 2015; however, the Decree of the President of the Council of Ministers that was supposed to identify such measures has never been issued.

## 3. The framework introduced by Law Decree 16/2020

Article 10 of Law Decree 16/2020 prohibits parasitic, fraudulent, misleading or deceptive advertising and marketing activities in relation to the organization of sports events or exhibitions of national or international importance, not authorized by the organizers and aimed at obtaining an economic or competitive advantage. Specifically, the following conducts are considered parasitic advertising and marketing activities:

- the creation of a link, even indirect, between the brands or other distinctive signs and the event, capable of misleading the public as to the identity of the official sponsors;
- misrepresentation or false declaration to be an official sponsor of the event;
- the promotion of trademarks or other distinctive signs through actions not authorised by the event organiser, likely to attract the public's attention and create the impression that the ambusher is the sponsor of the event;
- the sale and advertising of products or services that are abusively distinguished, even only in part, by logos or other distinctive signs of the event that are likely to mislead the public.

<sup>3</sup> See Court of Venice, 16 December 2005.

<sup>4</sup> See Court of Milan, order of 15 December 2017.

In order to safeguard the economic interests of parties other than the event organizer, Law Decree 16/2020 expressly provides that the above mentioned provisions are without prejudice to sponsorship contracts entered into with single athletes, teams, artists or authorized participants to the event.

Article 11 of Law Decree 16/2020 provides for a limitation in time for the prohibition of ambush marketing, providing that it shall operate from the date of registration of the logos, brands or official trademarks of the sports or trade fair event and up to 180 days after the official end date of the event.

The enforcement of the prohibition of ambush marketing is entrusted to the Italian Antitrust Authority ("*Autorità Garante della Concorrenza e del Mercato – AGCM*"), which may impose fines of up to 2.5 million Euros, unless the parasitic conduct constitutes a crime or a more serious administrative offence.

In any case, this is without prejudice to the application of the other law provisions aimed at protecting those affected by ambush marketing practices. Therefore, civil remedies (in particular, those provided for in the context of unfair competition) and consumer protection provisions remain applicable.

Finally, Law Decree 16/2020 modifies Article 8 of the Italian Intellectual Property Code by also including images reproducing trophies in the list of well-known signs that can be registered as a trademark only by entitled persons or with their consent.

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