

Advertising & Marketing 2019

Contributing editor
Rick Kurnit



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White

dan.white@gettingthedealthrough.com

Published by

Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between February and March 2019. Be advised that this is a developing area.

© Law Business Research Ltd 2019
No photocopying without a CLA licence.
First published 2014
Sixth edition
ISBN 978-1-83862-099-8

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Advertising & Marketing 2019

Contributing editor**Rick Kurnit**Frankfurt Kurnit Klein & Selz, PC

Lexology Getting The Deal Through is delighted to publish the sixth edition of *Advertising & Marketing*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia and Switzerland.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Rick Kurnit of Frankfurt Kurnit Klein & Selz, PC, for his continued assistance with this volume.



London
March 2019

Reproduced with permission from Law Business Research Ltd
This article was first published in April 2019
For further information please contact editorial@gettingthedealthrough.com

Contents

| | | | |
|---|-----------|--|------------|
| Introduction | 3 | India | 56 |
| Rick Kurnit Frankfurt Kurnit Klein & Selz, PC | | Safir Anand, Swati Sharma and Arushi Walia Anand and Anand | |
| Australia | 4 | Ireland | 64 |
| Julie Cox and Elisabeth White Baker McKenzie | | Conor Griffin, Duncan Grehan and Éadaoin McLoughlin Duncan Grehan & Partners Solicitors | |
| Austria | 12 | Japan | 72 |
| Georg Huber and Stefan Kofler Greiter Pegger Kofler & Partners, Attorneys-at-Law | | Chie Kasahara Atsumi & Sakai | |
| Brazil | 19 | Russia | 78 |
| Luiz Werneck and Talita Sabatini Garcia Inglez, Werneck, Ramos, Cury & Françolin Advogados | | Ilya Goryachev Gorodissky & Partners | |
| Canada | 26 | Sweden | 84 |
| Catherine Bate and Kelly Harris Miller Thomson LLP | | Katarina Lindgren and Filip Åhsberger Advokatfirman Fylgia | |
| France | 33 | Switzerland | 92 |
| Michel Béjot and Caroline Bouvier Bernard-Hertz-Béjot | | Sylvia Anthamatten Walder Wyss AG | |
| Germany | 41 | United Kingdom | 98 |
| Stefan Engels and Beatrice Brunn DLA Piper UK LLP | | Susan Barty and Poonam Majithia CMS | |
| Hong Kong | 48 | United States | 106 |
| Angus Forsyth Angus Forsyth & Co | | Rick Kurnit and Hannah Taylor Frankfurt Kurnit Klein & Selz, PC | |

Germany

Stefan Engels and Beatrice Brunn

DLA Piper UK LLP

LEGISLATION AND REGULATION

Legal framework

1 | What are the principal statutes regulating advertising generally?

In Germany, advertising is not governed by a comprehensive law. The Unfair Competition Act (UWG) constitutes the central framework of rules governing market behaviour and refers in particular to advertising. The UWG seeks to protect consumers, competitors and other market participants against unfair commercial practices. Also, a variety of sector-specific regulations apply to advertising and marketing for specific products and services, and within different communication channels. In addition, specific professional guilds have published codes of conduct to maintain the guilds' integrity. The codes are only obligatory for the members of those guilds.

Moreover, additions or restrictions may depend on the communication channel used.

Broadcasting is, in particular, subject to advertising limitation rules. Restrictions can be found in the State Broadcasting Treaty (RStV), the state media laws and the Interstate Treaty on the Protection of Minors (JMStV). In addition, the state media authorities have published a number of guidelines for advertising activities, product placement and sponsorship, particularly on television. However, these provisions only take effect in their administration and are not binding on the courts.

Advertising in the press is governed by the special provisions of the State Press Acts.

The Telemedia Act (TMG) contains rules regarding digital commercial.

Regulators

2 | Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

Since there is no comprehensive law governing commercial practices, the regulation and enforcement of rules on advertising lie with the respective supervising authorities or, when it falls within the scope of application of the UWG, with the competitors or qualified entities for the protection of consumer interests (see question 9). Different supervising authorities may exercise their powers independently.

Regulators' powers

3 | What powers do the regulators have?

Enforcement of the provisions of the UWG is carried out mainly by the affected competitors as well as associations and qualified entities for the

protection of consumer interests. The primary focus is on the removal of the adverse effect and preventing future infringements. Competitors may also claim damages (see question 8 for the full range of remedies).

In their field of competence, the respective authorities may issue administration orders and prohibitions or impose fines of up to €500,000 according to section 49, paragraph 2 of the 18th RStV, and up to €300,000 according to section 20, paragraph 2 of the UWG.

Regulators' priorities

4 | What are the current major concerns of regulators?

One major concern of the state data protection authorities is the use of personal data for customised advertising campaigns, especially in the area of online marketing. Surreptitious advertising remains a central task for state media authorities, as well as for the UWG.

Industry codes

5 | Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

The legal provisions are flanked by various industry codes of practice. As one of the most important bodies in the area of advertising regulation, the German advertising council develops guidelines and codes of conduct for specific advertising activities and specific products and services (eg, covering alcoholic beverages or gambling). Such codes of conduct are based on the principle of self-regulation and therefore are on the whole not binding. Nonetheless, in the case of non-compliance, complaints may be issued. If the conduct objected to is not changed or removed, the advertising council may also issue a public reprimand. However, non-compliance can be seen as an indication of unfair competition.

This basically also applies to the various sector-specific guidelines, such as the code of conduct for the insurance industry.

Authorisation

6 | Must advertisers register or obtain a licence?

German law does not provide a general obligation for registering or licensing advertising activities. However, this might be different for certain business operations (eg, broadcasters and gambling providers require the permission of the competent authority). In cases such as these, advertising is only permissible if the operation itself is authorised.

Clearance

7 | May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

There is no general clearance procedure for advertising. In a few areas, the use of specific claims may be regulated by sector-specific laws. This

applies, for example, to the advertising of food products. When claiming that certain food products have health benefits, the respective claim must be approved by the European Commission.

In the event of the use of personal data, it may be advisable to seek prior consultation with the competent data protection authority.

PRIVATE ENFORCEMENT (LITIGATION AND ADMINISTRATIVE PROCEDURES)

Challenging competitors advertising

8 | What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging competitors' advertising?

When advertising activity is considered to be unfair within the terms of the UWG, the law provides for several remedies for the competitors concerned. The focus is on removal and to cease-and-desist from further infringements. The injured party may also demand information about the extent of the infringement and damages. Current practice is to issue a warning, together with the request to sign a declaration to cease and desist, within a short period of time (containing a penalty clause). A particular advantage of this approach is that an out-of-court settlement may be achieved within a few days.

Contractual penalties are also an effective means to prevent further violations. If the requested declaration is not given or is not given in due time, the claimant may file for an interlocutory injunction or bring an action before the competent court. The former allows the enforcement of an injunctive relief within a few days or weeks, while court proceedings in the main may take several months or several years (see question 12). Since the request for interim measures requires some urgency, the claims must generally be asserted within a short period of time following the violation. It must be noted that those procedures only provide for an interim measure. A final decision about whether the contested advertisement is lawful can only be achieved in the main proceedings. Further, if a preliminary injunction has been revoked, the defendant may demand compensation for any injury caused by the measure.

Public challenges

9 | How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

Under the UWG, only competitors or qualified entities for the protection of consumer interests are entitled to challenge advertising. Consumers may only report infringements to the latter. If the respective association is a qualified institution pursuant to the German Act on Injunctive Relief, or on the list of the Commission of the European Communities pursuant to Directive 98/27/EC, it may assert its own claims for the removal and cease-and-desist like a competitor (see question 8). However, these entities cannot claim for damages.

Except in the case of unfair competition, consumers may report potential inadmissible advertising to the competent supervising authority or inform the respective commercial association where such a body exists.

Regulatory proceedings can only be initiated by the competent authorities.

Burden of proof

10 | Which party bears the burden of proof?

According to German procedural law, generally, each party has to explain and prove the facts that act in their favour. This means that

the claimant bears the burden of proof for the claim's requirements. However, this does not apply if the defendant only has knowledge of a specific fact. In some cases, producing evidence is facilitated by legal presumptions. For instance, pursuant to section 5, paragraph 4 of the UWG, it is presumed to be misleading to advertise a price reduction in cases where the price concerned has been demanded for only an incommensurably short period of time. In the event of a dispute, the advertiser has to disprove this presumption. In the proceedings for interim relief, the applicant only needs to establish facts from which it may be presumed that the affected advertising is inadmissible.

Remedies

11 | What remedies may the courts or other adjudicators grant?

In the case of claims based on unfair competition, the courts may grant several remedies that are subject to compulsory execution, namely, petitions for injunction, verdicts or court settlements.

Length of proceedings

12 | How long do proceedings normally take from start to conclusion?

The length of proceedings is difficult to estimate reliably. Several factors have to be taken into account, such as the complexity of the case or the chosen procedure. A decision in the proceedings for preliminary legal protection may be obtained within days or weeks, while the proceedings in the principal action usually take months or even years. The duration significantly increases if an appeal is filed (see question 14).

Cost of proceedings

13 | How much do such proceedings typically cost? Are costs and legal fees recoverable?

The costs of the proceedings are proportionate to the value of the claim. In determining the value of a claim, several factors have to be taken into account, such as the extent and seriousness of the infringement. In addition, case law has developed 'flat fees' for typical violations, particularly regarding unfair competition. As an example, based on a value of €50,000, the court fees at first instance amount to €1,638 and attorneys' fees for both parties will be €8,814.20.

In principle, the costs are borne by the unsuccessful party. If both parties partially win, the costs will be shared proportionately.

Appeals

14 | What appeals are available from the decision of a court or other adjudicating body?

Verdicts in the first instance may be challenged with an appeal. An appeal on points of law may be filed against the final judgments delivered by the appeal instance. In addition, there is the possibility of a 'leapfrog' appeal. Further, interlocutory injunction orders can be challenged with a note of objection. Objections may also be raised to orders of supervising authorities, such as fines.

MISLEADING ADVERTISING

Editorial and advertising

15 | How is editorial content differentiated from advertising?

Editorial content is defined by law as content in the media (to which mass communication characteristics are inherent, such as press, broadcasting or internet) representing periodical printed matters in words and pictures. However, such content should be relevant for the

formation of public opinion. Advertising is generally understood as the making of representations in any form, especially in connection with a trade, business, craft or profession in order to promote the supply of goods or services. Under German law, the strict separation between advertising and editorial content is essential. To ensure the integrity of editorial content, advertising must be clearly identified. Pursuant to the general rules of the UWG, failing to identify the commercial intent of advertising and all other kinds of commercial practices is deemed to be a misleading omission and therefore unfair competition.

Additionally, the separation requirement is specifically regulated in section 7 of the RStV and the State Press Acts ('obligation to identify paid publications', mainly section 10). Within the scope of these provisions, advertising must be explicitly labelled as such and clearly separated from other content.

Advertising that requires substantiation

16 | How does your law distinguish between 'puffery' and advertising claims that require support?

It is important to distinguish between factual claims (claims that can be proved) and mere value judgements. The latter are not covered by the regulations of the UWG. The decisive factor when distinguishing between the two is the target public's viewpoint. If the respective statement is understood as a factual claim rather than mere puffery, it must be correct. This applies in particular to advertising using exaggerations, superlatives or unique selling propositions (like 'the best' or 'the greatest'). Where such claims are taken seriously by the relevant consumers, the advertiser must be able to prove his or her alleged exceptional position. This may, however, only be reviewed on a case-by-case basis.

Eye-catching advertising is understood as advertising using specially highlighted claims (by specific graphic representation) to attract consumers' attention. Case law has developed specific criteria for the admissibility of such advertisements: objectively incorrect claims are prohibited. Claims that are not objectively incorrect, but may lead to misconceptions, shall be accompanied by further information, usually presented in a footnote. The requirements regarding the content and format of this supplementary information depend on the respective product or service and the respective communication channel.

Rules on misleading advertising

17 | What are the general rules regarding misleading advertising? Must all material information be disclosed? Are disclaimers and footnotes permissible?

The main provisions governing misleading advertising can be found in the UWG. Under these regulations, advertising is deemed to be misleading if it contains untruthful information or other information suited to deception regarding specific circumstances like the essential characteristics or risks of the products and services concerned. At the same time, advertising with facts that simply state the obvious is prohibited.

Section 5a of the UWG provides a duty to clearly and in due time disclose all essential information that is likely to affect the consumer's decision. Within the meaning of the law, 'essential information' should include the identity and postal address of the company concerned, service conditions, terms of delivery, final costs and the right of withdrawal and revocation. The scale of information that is to be disclosed mainly depends on two factors: the understanding of the targeted members of the public and the actual technical capabilities of the communication channel used. Regarding the former, the average (reasonably well-informed and reasonably observant and circumspect) customer's understanding is decisive.

In addition, the requirements depend on the respective communication channel. The limitation of information tools may lead to the limitation of information obligations. For instance, the use of reference to the advertiser's website may be sufficient to meet the obligations. In this context, any other measures taken by the trader to make the information available to consumers shall be taken into account when deciding whether essential information has been omitted (see section 5a, paragraph 5 UWG).

Although the required amount of information can only be assessed on a case-by-case basis, sector-specific rules may provide for mandatory information that must be disclosed (eg, when advertising credit and financial products).

Substantiating advertising claims

18 | Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

As mentioned in question 17, advertising claims shall not be inaccurate or misleading. This does not always require prior proof. However, in the event of a dispute the advertiser must provide the necessary evidence as to the accuracy of the advertisement being challenged.

Further, sector-specific law may require proof for claims about particular products and services, such as the Advertising of Medicines Act (HWG) regarding medicinal products. According to section 3, No. 1 of the HWG, advertising statements about therapeutic efficacy are only permissible if there is scientific proof to support the claim.

Survey results

19 | Are there specific requirements for advertising claims based on the results of surveys?

Advertising claims based on the results of surveys are subject to the general rules of the UWG. Since such advertising is not explicitly regulated, case law sets out the criteria about whether respective claims are misleading or not. Surveys must be representative and current. The claim must be clear so that it does not refer to the result of an independent study (see question 21). Under these conditions, advertising is even permissible if the survey has been commissioned by the advertiser itself. If the claim is based on comparisons with competing products, the rules on comparative advertising will also apply (see question 20).

Comparisons with competitors

20 | What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

Comparative advertising is explicitly regulated by section 6 of the UWG. It is legally defined as any advertising that explicitly, or by implication, identifies a competitor, or goods or services offered by a competitor. Such advertising is generally permissible, but may be deemed to be misleading where a comparison is used that does not relate to goods or services that meet the same needs or are intended for the same purpose, and that:

- does not objectively relate to one or more:
 - materials;
 - relevant, verifiable and representative features of the goods concerned; or
 - to the price of those goods and services;
- takes unfair advantage of, or impairs, the reputation of a distinguishing mark used by a competitor;
- discredits or denigrates the goods, services, activities or personal or business circumstances of a competitor; or

- presents goods or services as imitations or replicas of goods or services sold under a protected distinguishing mark.

Provided these conditions are met, the competitor's name may be used. Even the use of third-party trademarks is permissible, provided it does not lead in the course of trade to a risk of confusion between the advertiser and a competitor, or between the products or services offered or the distinguishing marks used by them.

Test and study results

21 | Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

The following requirements must be ensured:

- precise reference of the respective study is to be given;
- the result must be summarised correctly;
- the test must refer to the particular product being advertised; and
- the study must be conducted by an independent body.

If a product was rated best, the respective claim is generally permissible. Where a competing product has achieved a higher rating, the rank of the advertised product must be specified.

The popular consumer magazine *Stiftung Warentest* has published recommendations on advertising using test results.

Demonstrating performance

22 | Are there special rules for advertising depicting or demonstrating product performance?

For advertisements depicting or demonstrating a product's performance, the general principles for misleading advertising are applicable. Such advertising is therefore subject to the restrictions of the UWG and may be deemed to be unfair competition if the pictures are arranged in such a way to cause the observer to misunderstand.

In addition, advertising depicting product performance is subject to sector-specific regulations. The HWG prohibits the use of improper, repugnant or misleading pictures of the human body. The same applies to plastic surgery advertisements with 'before and after' pictures.

Third-party endorsements

23 | Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief or experience?

Advertising claims based on endorsements or third-party testimonials are subject to the general rules of the UWG, particularly regarding misleading advertising. Such advertising is generally permissible. However, sector-specific regulations may provide for stricter limitations. Broad restrictions for advertising medicinal products using third-party testimonials can be found in the HWG.

The use of testimonials or pictures of third parties must be approved by the persons concerned. The use of celebrities' photographs for advertising purposes without consent may be permissible under specific circumstances.

Adherence to a code of practice may be advertised if the advertiser is actually bound by the respective code and complies with the provisions.

Advertising using an actual existing quality mark is only permissible if the competent body has authorised the use. In all other cases, the use of quality marks for advertising purposes is misleading if the advertiser itself has awarded the mark or no objective verification has taken place.

Guarantees

24 | Are there special rules for advertising guarantees?

No special rules apply to advertising guarantees. Pursuant to the general provisions of the UWG, such advertising is permissible if it does not contain false or deceptive information. Further, it must be distinguished between statutory warranties and voluntary guarantees. Because the former are already granted by law, advertising would be deemed to be misleading. If a voluntary guarantee is granted, the advertiser must ensure that the consumer can easily determine whether a guarantee case exists, what rights he or she has under the guarantee against whom and in what form and within what period he or she can assert them (section 479 paragraph 1 German Civil Code).

Environmental impact

25 | Are there special rules for claims about a product's impact on the environment?

The admissibility of such claims will be determined in accordance with the provisions of the UWG. Terms such as 'environmentally friendly' are only permissible if the consumer is clearly informed about the advantage of the product or service. According to the rules for the use of quality marks, the use of eco labels must state the exact product or service for which the label has been awarded. Abusive use of a European eco label is a breach of competition law. Regarding other eco labels, advertising is only permissible if the environmental compatibility is clearly proven and the consumers are not misled. In some cases, the use of eco labels is regulated by contractual provisions.

Free and special price claims

26 | Are there special rules for describing something as free or a free trial or for special price or savings claims?

Special rules for information on prices can be found in the Ordinance Regulating the Indication of Prices (PAngV). This act requires, inter alia, the disclosure of the final prices including value added tax and other price components in relation to consumers. Violations of these provisions shall be treated as unfair competition.

Moreover, the general rules of the UWG apply. Describing products or services as 'free' or a 'free trial' is misleading advertising when actual costs are incurred. However, this shall not apply to the unavoidable costs of responding to the offer, or of collecting or paying for delivery, or of using the services.

The Drug Advertising Law (HWG) contains special regulations for the advertisement of remedies (eg, with 'free trials'). For example, the distribution of free samples of medicinal products is prohibited. For other grants and advertising gifts that advertise a company or product, the HWG contains individual case-related labelling requirements.

Advertising with discounts and price savings is permissible only if clear and comprehensive information about the conditions is provided, such as the duration of the sales period, the exact scope of goods and services covered or potential restrictions.

Further, it is misleading to advertise a price reduction where the price concerned has been used only for an incommensurably short period of time.

New and improved

27 | Are there special rules for claiming a product is new or improved?

Such advertising claims are governed by the general rules of the UWG. It would be misleading advertising to use a term such as 'new' or 'first-time' if the product or service had been introduced in the market some

time ago. The same applies to the use of the term 'improved'. The period of time for which such a claim is permissible depends on the particular market and the particular product or service and can only be reviewed on a case-by-case basis.

Claims of origin

28 | Are there special rules for claiming where a product is made (such as country of origin)?

In Germany there are no explicit regulations for claiming where a product is made (such as the country of origin). However, according to the UWG, the labelling must not deceive the customer about the origin of the product and raise false expectations regarding the quality. Depending on the nature of the information (a distinction is made between geographical indications and designations of origin), the legal community has different expectations of the advertised product, which may also affect the quality.

For example, advertising with designations of origin is allowed only for products that have undergone a treatment that is critical to the product quality in the respective country. In the case of industrial goods, the value of the industrial product is important. This is determined by the processing operation. The place of origin of such goods is thus the place where the goods are essentially manufactured. Under which conditions a production is essential, can be measured on the basis of a value added share. The value of the processing of a substance must not be significantly less than the value of the substance. According to the case law, this added value share is about 45 per cent.

PROHIBITED AND CONTROLLED ADVERTISING

Prohibited products and services

29 | What products and services may not be advertised?

German law does not provide for absolute limitations for advertising products and services in general if the products and services themselves are permitted. An exception hereto applies to advertising for pornographic material, which is generally prohibited. Moreover, specific restrictions exist for advertising particular products and services, mainly depending on specific communication channels. For example, tobacco advertising is banned on German radio and television.

Prohibited advertising methods

30 | Are certain advertising methods prohibited?

The prohibitions on certain advertising methods mainly result from the general rules arising out of the UWG. Advertising activities are inadmissible whenever the freedom of decision of consumers is impaired, for example, through applying pressure or exploiting a consumer's credulity or fear.

Sending advertising emails without the prior consent of the recipient is generally prohibited. The same applies to telephone advertising ('cold calls'). If the commercial nature of these commercial practices is not clear, it is a misleading omission pursuant to section 5a, paragraph 6 of the UWG, and subliminal advertising is generally prohibited.

Regarding broadcasting, particular advertising methods are also subject to the specific rules of the RStV (see question 31).

Protection of minors

31 | What are the rules for advertising as regards minors and their protection?

Regarding advertising via broadcasting and telemedia (electronic information or communication services, such as online news portals),

advertising shall not directly exhort minors to buy a product or service by exploiting their inexperience or credulity, or directly encourage them to persuade their parents to purchase the goods or services being advertised (section 6, paragraph 2 JMStV). Further restrictions can be found in the German Minors Protection Act (JuSchG). Additionally, the general rules of the UWG are applicable (see also No. 28 Annex of section 3, paragraph 3 UWG).

Credit and financial products

32 | Are there special rules for advertising credit or financial products?

Advertising of credit or financial products must meet the specific requirements for clear and comprehensive information about the product. In this regard, the PAngV contains detailed provisions, particularly on the amount of mandatory information. For example, credit advertising must contain information on the net loan amount, the borrowing rate and the annual percentage rate using an easily understood example. Infringement of these rules is deemed unfair competition.

Further, such advertising is subject to the general rules of the UWG and therefore must not contain any misleading information. This applies in particular to claims about the risks and the earning potential of the investments being advertised.

Therapeutic goods and services

33 | Are there special rules for claims made about therapeutic goods and services?

Specific rules for therapeutic claims can be found in the HWG, the Medical Devices Act or the professional requirements for pharmacists at state level. Misleading advertising for therapeutic goods and services is also deemed to be unfair competition pursuant to the rules of the UWG. The HWG provides special rules for advertising outside the medical circle of experts. The act contains a list of broad restrictions for third-party endorsements and testimonials, advertisements using pictures and specific advertising methods. In addition, it is generally prohibited to advertise remote medical treatment. Further, advertising medicines that have not been approved for sale on the German market is forbidden.

Food and health

34 | Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

The use of health and nutrition claims for advertising is only permissible if the respective claim complies with the provisions of Regulation (EC) No. 1924/2006 on nutrition and health claims made on foods. While the latter must be authorised by the competent authority, the Regulation contains a list of approved nutrition claims. Advertisers should review the EU Register of permitted nutrition claims, authorised health claims and their respective conditions of use. Violations of this Regulation may be deemed to be unfair competition pursuant to the UWG.

Claims that make reference to weight control are generally permitted if they are scientifically substantiated and not misleading.

Specific advertising activities outside the scope of the Regulation are covered by the national rules of the German Food and Feed Code.

Alcohol

35 | What are the rules for advertising alcoholic beverages?

Advertising alcoholic beverages is subject to the general regulations of the JuSchG and the JMStV. Pursuant to section 6, paragraph 5 of the JMStV, advertising of alcoholic beverages shall not be aimed at minors,

nor specifically appeal to them through its presentation or show minors consuming alcohol. Further, the German Advertising Council has established a strict code of conduct for advertising alcoholic beverages.

Such advertising is also covered by the general regulations of the UWG.

Tobacco

36 | What are the rules for advertising tobacco products?

Advertising tobacco products and electronic cigarettes is strictly regulated in Germany. In May 2016, the Tobacco Products Directive (Directive 2014/40/EU) was transposed into national law by the Tobacco Act. The Act provides for restrictions on any communication channel. While tobacco advertising is completely banned on television and radio, advertising in print media is restricted to media that are only available for tobacco distributors or that mainly contain information about tobacco products. A sole exception is still made for billboard advertising, which is generally permissible.

Similar to the advertising of alcoholic beverages, advertising for tobacco shall not be addressed to minors.

Gambling

37 | Are there special rules for advertising gambling?

In Germany, the operation of gambling is strictly regulated. The same applies to its advertising, which is in particular subject to the regulations of the State Treaty on Gambling (GlüStV). Pursuant to section 5, paragraph 2 of the GlüStV, advertising shall not be aimed at minors or comparably vulnerable target groups. Misleading claims, in particular regarding the chances of winning or the nature or amount of the winnings, are prohibited. Public gambling advertisements on television, the internet or telecommunications systems are forbidden. However, according to section 5, paragraph 3, sentence 2 of the GlüStV, the states may grant exemptions for lotteries, sports and horse race betting. They also adopt joint regulations to define the nature and scope of permissible gambling advertising.

Lotteries

38 | What are the rules for advertising lotteries?

As a sub-category of gambling, lotteries are subject to the general provisions of the GlüStV. Besides the above-mentioned restrictions, advertising lotteries may be permissible in accordance with the Joint Advertising Guideline of the States Regarding Gambling. This applies to lotteries that are organised no more than twice a week and those with a low-risk potential.

Promotional contests

39 | What are the requirements for advertising and offering promotional contests?

Advertising activities for promotional contests and games are generally permissible if they are transparent and not misleading. They should provide information on the terms and conditions of participation, particularly the costs, and the announcement of the solution. False statements or non-disclosure of mandatory information are prohibited.

Additionally, further restrictions apply to broadcasting of competition programmes and games. Besides the general requirement of transparency and the prohibition of misleading claims, according to the RStV, it is necessary to protect the interests of the participants (child protection, in particular, should be ensured).

Indirect marketing

40 | Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

Indirect marketing is highly restricted in broadcasting and internet media. Section 8 of the RStV contains specific provisions for commercial sponsorship. Sponsored programmes shall be clearly identified as such by the name, logo or any other symbol of the sponsor at the beginning or at the end of the programmes. Sponsors shall not have any influence on the content and scheduling. Product placement is only permissible under stringent conditions: it must be clearly indicated at the beginning and at the end of the programme and it must always be clearly distinguishable from editorial content. Product placement is completely banned on children's programmes.

Further, indirect marketing is subject to the general rules of the UWG. It may be deemed unfair competition if the advertising character is not clearly recognisable.

Other advertising rules

41 | Briefly give details of any other notable special advertising regimes.

Section 7, paragraph 9, sentence 1 of the RStV declares political, religious and ideological advertising inadmissible. However, this does not apply to public service announcements and charity appeals. Further, the law provides for exceptions, including religious programmes in the private media, or political advertising for parties during their participation in parliamentary elections.

SOCIAL MEDIA

Regulation

42 | Are there any rules particular to your jurisdiction pertaining to the use of social media for advertising?

The use of social media for advertising purposes is not governed by a comprehensive act. However, specific provisions of the Telemedia Act (TMG) and the Federal Data Protection Act (BDSG) are of particular importance in this regard (see question 44).

In addition, the general rules of the UWG apply to advertising using social media channels. Here, it is of significance to note that German courts recently ruled on limits to influencer marketing: they decided that the marking of advertising posts on social media platforms with hashtags such as '#ad' or '#sponsoredby' do not suffice, since section 5a, paragraph 6 of the UWG prohibits the disguise of the nature of advertising.

43 | Have there been notable instances of advertisers being criticised for their use of social media?

One recent development of particular public interest was the use of personal data for highly targeted advertising on social media platforms (eg, 'custom audiences'). Some propose that such data transfer between advertising companies and platform operators is not permissible without explicit prior consent of the persons concerned. However, there is no clear decision yet.

Some viral marketing campaigns (eg, via YouTube) have been an object of complaint as their advertising nature was not clearly recognisable in all cases.

44 | Are there regulations governing privacy concerns when using social media?

Privacy concerns are regulated by the TMG and the General Data Protection Regulation (GDPR). These provisions are designed in particular to ensure transparency in the use of personal data.

Since the entry into force of the GDPR in May 2018, companies that use social media for advertising purposes must comply with the stricter requirements compared to the previous law. They have to base their activities more frequently on the 'legitimate interest' in accordance with article 6, paragraph 1, lit. point f GDPR because the requirements for the effective consent of the person affected are significantly increased. For example, the declaration of consent must be voluntary. Under the GDPR, any disadvantage connected with a refusal of consent results in 'involuntary' consent (eg, where the processing of the data for advertising purposes is not required for the purpose of contract execution).

The declaration of consent is revocable at any time without giving reason. Users have extensive rights to information, correction and deletion of their data. It should also be noted that previously given declarations of consent continue only if the requirements of the GDPR are complied with.

Further, the user shall be informed about the body responsible for the content of the social media site by it stating its full imprint (in general, name, address, legal form, representative and email address). In individual cases, additional disclosures may be required pursuant to section 5 of the TMG.

**Stefan Engels**

stefan.engels@dlapiper.com

Beatrice Brunn

beatrice.brunn@dlapiper.com

Jungfernstieg 7
20354 Hamburg
Germany
Tel: +49 40 1 88 88 0
Fax: +49 40 1 88 88 111
www.dlapiper.com

Other titles available in this series

| | | | |
|--------------------------------|--|--|-------------------------------------|
| Acquisition Finance | Distribution & Agency | Islamic Finance & Markets | Real Estate M&A |
| Advertising & Marketing | Domains & Domain Names | Joint Ventures | Renewable Energy |
| Agribusiness | Dominance | Labour & Employment | Restructuring & Insolvency |
| Air Transport | e-Commerce | Legal Privilege & Professional Secrecy | Right of Publicity |
| Anti-Corruption Regulation | Electricity Regulation | Licensing | Risk & Compliance Management |
| Anti-Money Laundering | Energy Disputes | Life Sciences | Securities Finance |
| Appeals | Enforcement of Foreign Judgments | Litigation Funding | Securities Litigation |
| Arbitration | Environment & Climate Regulation | Loans & Secured Financing | Shareholder Activism & Engagement |
| Art Law | Equity Derivatives | M&A Litigation | Ship Finance |
| Asset Recovery | Executive Compensation & Employee Benefits | Mediation | Shipbuilding |
| Automotive | Financial Services Compliance | Merger Control | Shipping |
| Aviation Finance & Leasing | Financial Services Litigation | Mining | Sovereign Immunity |
| Aviation Liability | Fintech | Oil Regulation | Sports Law |
| Banking Regulation | Foreign Investment Review | Patents | State Aid |
| Cartel Regulation | Franchise | Pensions & Retirement Plans | Structured Finance & Securitisation |
| Class Actions | Fund Management | Pharmaceutical Antitrust | Tax Controversy |
| Cloud Computing | Gaming | Ports & Terminals | Tax on Inbound Investment |
| Commercial Contracts | Gas Regulation | Private Antitrust Litigation | Technology M&A |
| Competition Compliance | Government Investigations | Private Banking & Wealth Management | Telecoms & Media |
| Complex Commercial Litigation | Government Relations | Private Client | Trade & Customs |
| Construction | Healthcare Enforcement & Litigation | Private Equity | Trademarks |
| Copyright | High-Yield Debt | Private M&A | Transfer Pricing |
| Corporate Governance | Initial Public Offerings | Product Liability | Vertical Agreements |
| Corporate Immigration | Insurance & Reinsurance | Product Recall | |
| Corporate Reorganisations | Insurance Litigation | Project Finance | |
| Cybersecurity | Intellectual Property & Antitrust | Public M&A | |
| Data Protection & Privacy | Investment Treaty Arbitration | Public Procurement | |
| Debt Capital Markets | | Public-Private Partnerships | |
| Defence & Security Procurement | | Rail Transport | |
| Dispute Resolution | | Real Estate | |

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)