

1 ADVERTISING FRAMEWORK

1.1 How is advertising regulated in Germany?

Advertising in Germany is governed by statutory law, administrative regulations and industry self-regulation, all as interpreted and developed by case law in a large number of court decisions. In principle, all print, billboard, radio; broadcast, TV, movie, and online advertising and promotions targeting parties in Germany (whether originating from a source located abroad or in Germany) are subject to German law. Statutory law in the advertising and marketing sector includes the laws relating to:

- fair trade;
- consumer protection;
- general terms and conditions;
- distance (electronic) contracting;
- data protection;
- privacy;
- industrial and intellectual property;
- the antitrust laws;
- regulations governing audio-visual media services; and
- youth protection,

as well as regulations concerning particular products and services (such as food, tobacco and alcohol).

1.2 What types of communications are considered to be ‘advertising’? How is this determined?

‘Advertising’ includes any statement or claim made for the purpose of promoting the sale, distribution, lease, or other use of an advertised product or service, by influencing the consumer’s use or purchase behavior of the promoted product or service. The advertisement must enable the consumer to recognize, directly or indirectly, that the advertiser is promoting a product or service. This means that the addressee must be in a position to identify the promoted product or service.

1.3 What is the basic regulatory framework for advertising regulation?

The primary source of advertising regulation is the Law Against Unfair Trade Practices. This statute implements the EU Unfair Commercial Practices Directive (2005/29/EC), the Privacy and Electronic Communications Directive (2002/58/EC) and the Technical Standards and Regulations Directive (98/34/EC, now replaced by Directive 2015/1535/EU).

1.4 Are there certain types of advertising practices that are specifically regulated (eg, text message advertising)?

The Law Against Unfair Trade Practices regulates certain forms of advertising and promotion by means of electronic messages (based on the EU E-Commerce Directive(2000/31//EC)). It is illegal to unreasonably direct advertising to someone who does not wish to receive advertising. Marketing/advertising by telephone (‘cold calls’) directly to consumers is illegal, unless the

consumer has given express consent. If the marketing/advertising is directed to any party other than a consumer who has not expressly consented, it is illegal unless consent can be implied. Advertising through automatic calling machines, telefax or electronic mail is illegal if the receiving party has not expressly consented to such advertising. Very narrow exceptions apply.

1.5 Are there certain industries whose advertising practices are specifically regulated (eg, drug advertising)?

Health-related advertising (ie, advertising relating to medicinal products (drugs), medical devices and other products where the advertising concerns the diagnosis, cure, relief or abatement of a medical condition of human beings or animals, as well as advertising relating to plastic surgery without medical indication) is regulated by the Health Advertising Law:

- (a) In terms of basic rules, health advertising is considered misleading and is prohibited if:
 - the advertised product has not been approved for marketing;
 - it claims, in particular, an efficacy or effect which does not exist;
 - it advertises a guaranteed success or the absence of detrimental effects in case of long term use;
 - it conceals the intent of advertising;
 - it contains untrue or misleading statements regarding the composition or property of a medicinal product, medical device or other product or treatment; or
 - it contains incorrect information on the identity, education, ability or records of the manufacturer, inventor or related persons.
- (b) The law prescribes legible doctor and patient information.
- (c) Advertising to the public (as opposed to members or institutions of the medical or veterinarian professions, or parties permitted to trade with relevant products) is restricted and must bear special warnings. Any such advertising may not be directed to children below the age of 14 and may not be connected with promotional contests or sweepstakes promoting excessive use of medicinal products or medical devices.
- (d) The law regulates the extent to which members or institutions of the medical or veterinarian professions, or parties permitted to trade relevant products may be offered, or may accept, a benefit, gift or other promotional item.
- (e) Prescription drugs may not be advertised except to doctors, dentists, veterinarians, pharmacists and persons permitted to trade in such products.

1.6 Are any government pre-approvals required?

German law does not require government pre-approvals of advertising (except regarding certain classification requirements in the sector of youth protection concerning certain movies, video games and online media services).

On a voluntary, self-regulatory basis, the Central Association of the German Advertising Industry (www.zaw.de) offers certain pre-clearance and advisory services to its members. A membership list is available at <https://zaw.de/der-zaw/mitglieder/>.

1.7 Does the media pre-clear advertising?

The media normally pre-clear advertising (by in-house or external means) for their own protection against cease and desist claims. There is no legal or self-regulatory obligation to do so, and any such pre-clearance would only extend to obviously illegal content. The media pre-clearance does not normally cover clearance of third-party rights, which remains the primary responsibility of the advertiser.

1.8 How does the government enforce advertising laws? What are the potential remedies?

In Germany, advertising regulations are not normally enforced by government bodies, but rather by competitors, consumer protection agencies, or industry trade associations who request enforcement of applicable German law (see question 1.9 below). These organizations include the Center of Protection against Unfair Competition in Bad Homburg, or Integritas (the self-regulatory body for pharmaceutical advertising) in Bonn. In order to qualify, the organization must meet certain statutory conditions (including a clear identification of the business purpose to prosecute fair trade and media law violations). Often, the organization represents a certain industry or professional sector and conducts targeted searches for fair trade violations.

If the cease and desist demand is successful, the prosecuting association is entitled to certain cost reimbursements.

In certain health and safety-related sectors (such as food, drugs, youth protection, product labeling etc), and in the sector of public utilities and communication, relevant public institutions (agencies and regulatory bodies) monitor the market and enforce fair competition and fair trade rules, as well as regulations pertaining to their specific competencies. Potential remedies in this sector are administrative orders, enforcement of such orders, and fines.

1.9 When does a competitor have a right of action? What are the potential remedies?

It is normal practice in Germany for a competitor or qualifying consumer or industry association claiming a violation of German fair trade laws to send a formal cease and desist request to the violating party, as a first step. The defendant party may either refuse to comply with the request or accept the request by issuing a formal cease and desist undertaking, including a penalty clause stating that any future violations will be subject to a penalty payment. If a cease-and-desist request is refused, the complaining party may ask a court to issue a cease-and-desist order by preliminary injunction (even without notice). A decision on such a motion is normally available in a matter of hours or days. The defendant party may contest the injunction order by filing an 'objection'. Any resulting court judgment is subject to appeal to the appellate court.

In practice, claimants would not normally pursue claims for damages in unfair advertising cases because the required proof and quantification of damages is generally difficult to establish in court.

Also, in theory, it is possible to ask that profits gained through an illegal trade practice should be surrendered to the government. In practice, however, this sanction has little relevance in unfair trade disputes.

There are not normally criminal sanctions, except in cases of intentional, fraudulent misleading of the public. For example, under the German Law Against Unfair Trade Practices, it is forbidden to mislead the public by providing untruthful information.

1.10 When do consumers have a right of action? What are the potential remedies?

Consumers do not have a right of action regarding cease-and-desist claims. However, they may indirectly prosecute violations of fair trade laws aiming at the protection of consumers by asking a qualifying fair trade protection association to take appropriate action against the advertiser (see questions 1.8 and 1.9 above). Either based on their own findings or upon notification received from a consumer, qualifying German fair trade or consumer protection organizations prosecute violations in their own name, in and out of court.

Recently, the German Law against Unfair Trade Practices has introduced a damages claim for consumers, by which they can claim damages suffered as a result of certain unfair trade practices, such as misleading advertising.

2 SELF-REGULATORY FRAMEWORK

2.1 Does Germany have a primary advertising self-regulation system?

Advertising self-regulation is becoming increasingly customary in Germany. The German Advertising Council (www.werberat.de/keyfacts) and certain industry organizations operating on a membership basis (such as the self-regulatory institutions created by members of the pharmaceutical industry) have gained significant authority. The German Advertising Council is a founding member of the European Advertising Standards Alliance ('EASA'), and closely co-operates in this sector with the International Chamber of Commerce ('ICC').

These bodies create 'best practice' rules which influence the interpretation of statutory and regulatory law by the courts.

In the case of the German Advertising Council, the aim is to provide an effective means of recourse against objectionable print or screen advertising for the public and for market competitors. The German Advertising Council provides a mechanism for dispute resolution between the public (including competitors, consumers, associations and agencies) and the advertiser. It is highly regarded for its fast and practical complaints procedure.

Decisions of the Council are binding only upon its members on a contractual basis, pursuant to its terms of membership.

2.2 Is there a self-regulatory advertising code? What are the key principles?

The German Advertising Council has adopted several self-regulatory advertising codes which are available in English at <https://www.werberat.de/en>, such as the Code of Conduct on Commercial Communication for Alcoholic Beverages and the Rules on Advertising and its Appraisal.

The Rules on Advertising and its Appraisal cover general principles and, in particular, sensitive issues (such as tobacco and alcohol advertising, and advertising directed to minors). In terms of key points of these Rules, the following should be noted: Advertising must uphold prevailing notions of decency and morals, and observe the principles of fair competition and social responsibility. In particular:

- (a) Consumer trust must not be abused and inexperience or lack of knowledge must not be exploited;
- (b) Children and youths must not be subjected to physical or psychological harm;

- (c) Discrimination in whatever form—on grounds of race, ethnic origin, religion, gender, age, disability or sexual preference, or by reducing an individual to a mere sexual object should be neither fostered nor silently tolerated;
- (d) Violent, aggressive or antisocial behavior should be neither fostered nor silently tolerated;
- (e) Fear should not be instilled nor unhappiness or suffering be facilitated; and
- (f) Behavior that threatens consumers' safety and security should be neither fostered nor silently tolerated.

When evaluating advertising, the German Advertising Standards Council takes into account:

- the notion of a reasonably well-informed and rational consumer who is among the audience addressed by the advertisement in question;
- the tone and variety of issues covered in media editorial content as an expression of social reality;
- the nature of the medium used to disseminate the advertisement; and
- the situation in which the consumer is confronted with the advertisement.

2.3 Does the system have an enforcement or dispute resolution mechanism? How does it work?

There is no direct enforcement mechanism available: the German Advertising Standards Council is neither a public agency nor a court, and advertisers are not bound by its decisions save by membership or contract. However, if an advertiser fails to modify or discontinue an advertisement that has been objected to by the German Advertising Standards Council, the Council would issue a reprimand and make the case public.

Upon receipt of a complaint, the Council will ask the advertiser to comment. If the comment is not satisfactory and if the advertisement continues, the Council will make a formal decision. If the decision confirms that the complaint was justified, the advertiser will be formally asked to refrain from continuing the advertisement.

In cases of a suspected violation of German fair trade laws, the German Advertising Standards Council will forward the complaint to specialized fair trade prosecution organizations such as the Center for the Prosecution of Unfair Advertising, the Association for the Prosecution of Unfair Health Advertising, the Protection Association of the Alcohol Industry, the Federal Agency for the Protection of Children and Young People in the Media, the Commission for Youth Media Protection or, in exceptional cases, the Criminal Prosecutor.

If the complaint concerns editorial content, the German Advertising Standards Council would forward the complaint to the relevant self-regulatory bodies, such as the German Press Council, the Voluntary Self-Regulators of Multimedia Service Providers, the Voluntary Self-Regulators of the Film Industry, or the Voluntary Self-Regulators of Television.

2.4 Is the self-regulation system effective? Is it widely used and followed?

The various self-regulation systems available in Germany are generally effective and well accepted by members of the industry associations providing self-regulation rules, as well as by advertisers in general in respect of the self-regulation tools made available by the German Advertising Council. Since the cost of self-regulatory proceedings is normally considerably lower than the cost of litigation in court, the reason for using self-regulatory instruments is not only a greater degree of confidentiality but also a matter of saving costs.

The German Advertising Standards Council has an acceptance rate of 94% for its decisions, which has remained at a consistently high level over the past years.

2.5 Are the self-regulatory system's decisions reported?

Yes, the effectiveness of self-regulation largely depends on the public reporting of violations.

If the German Advertising Standards Council confirms that a complaint is justified, and the advertiser fails to comply with a cease-and-desist request, the Council will publish its decision in the press (www.werberat.de/pressemitteilungen).

2.6 Are there any key areas of focus, or key principles, that companies should be aware of?

Depending on the by-laws and self-regulation rules of a given industry association, the rulings delivered in a self-regulation procedure can be final and binding upon members. In the case of the procedures applied by the German Advertising Council, the outcome in procedures before the Council is open to recourse in the regular court system. One should be aware that the likelihood of becoming exposed to a cease-and-desist request of a competitor is considerably greater than the risk of being detected by an agency or other institution of public administration.

2.7 Are there any other self-regulatory systems that govern advertising practices in Germany?

The important self-regulatory efforts are as described above.

3 ADVERTISING LAW BASICS

3.1 What are the basic laws governing advertising claims in Germany (eg, consumer protection laws, IP laws, unfair competition laws)?

The basic laws governing advertising and marketing claims in Germany are:

- the Act Against Unfair Trade Practices;
- EU Regulation 1924/2006 on nutrition and health claims made on foods;
- the Law Relating to the Enforcement of EU Consumer Protection;
- the Price Declaration Regulation;
- the Law Relating to Cease-and-Desist Claims regarding Consumer Law and Other Violations;
- the Regulation Regarding Information Obligations of Service Providers;
- the Telemedia Act;

together with underlying EU Directives.

In addition, advertising is also governed by:

- the German Trademark Act; and
- EU Trademark Regulation (2017/1001),

as well as by relevant implementation and harmonization rules.

Finally, in terms of competition rules,

- the Law Against Competition Restraints,
- and related EU law is relevant.

3.2 Is substantiation required for advertising claims?

In advertisements that contain a specific claim relating to the characteristics of the advertised product or service, the advertiser may be required to substantiate such a claim. Substantiation requirements are contained in a number of laws and case law relating to specific products and services, particularly health and environmental (green) advertising. Even if there is no specific substantiation requirement, if a competitor, or competent fair trade association, challenges the accuracy of a given claim, the advertiser must prove the accuracy of its claim by substantiation of the alleged facts. This also applies for any test results to which the advertiser refers.

3.3 Are there certain types of advertising messages that do not require substantiation (ie, puffery)?

Puffery and otherwise clearly fanciful advertising messages that are clearly obvious and understood by the average consumer as ‘pie in the sky’ can be acceptable without substantiation, providing there is no misleading element or effect. Specific claims or factual statements relating to the properties and characteristics of an advertised product or service would not be permissible without substantiation.

3.4 What are the rules governing the use of disclosures in advertising?

Specific disclosures may be required to qualify a given claim or statement regarding the properties of the advertised product or service. There are no specific rules as to the content and format of a disclosure (apart from generally applicable rules ensuring legible content in terms of font size and legible print). Disclosures must be appropriate and sufficient to correct any false impression raised, or likely to be raised, by a claim or statement in the absence of the disclosure.

In addition, disclosures which are material for the consumer in its factual context as a basis for a commercial decision are necessary. According to the German Law against Unfair Trading Practices, this would include all information which may not be withheld from consumers on the basis of EU Regulations, or under legal provisions implementing EU Directives, for the purposes of commercial communication, including advertising and marketing.

Furthermore, in relation to consumers, where goods or services are offered with reference to their characteristics and price, the German Law against Unfair Trade Practices states that the following information shall be deemed to be material if not already apparent from the context:

- all main characteristics of the goods or services;
- the identity and the geographical address of the entrepreneur and, where applicable, the identity and geographical address of the entrepreneur on whose behalf it is acting;
- the final price, or in cases where the nature of the goods or services means that such price cannot be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot be calculated in advance, the fact that such additional charges may be payable;
- arrangements for payment, delivery and performance, as well as complaint handling policies so far as they depart from the requirements of professional diligence;
- the existence of a right of withdrawal or cancellation; and
- in the case of goods or services offered via an online marketplace, information as to whether the provider of the goods or services is an entrepreneur according to the provider’s own declaration to the operator of the online marketplace.

3.5 What are the rules governing the use of endorsements and testimonials in advertising?

Endorsements and testimonials must be truthful and not misleading. For instance, testimonials may be misleading if they are not qualified by information describing the relevance of the endorsement.

In German health advertising law, it is not permitted to include in advertisements to consumers any endorsements and testimonials of persons practicing in the health sector or as an academic, if such endorsement or testimonial is likely to increase the use of the advertised drug.

3.6 What are the rules governing the use of product demonstrations in advertising?

Product demonstrations must communicate a fair representation of the product's features and properties. Demonstrations must not mislead by, for instance, demonstrating applications and uses which are not possible based on the product's normal properties and abilities. Product demonstrations in advertising are subject to the same rules as any other form of advertising.

3.7 Is comparative advertising permitted? If so, are there any special rules that apply?

EU Directive 97/55 regulating comparative advertising has been adopted into German fair trade legislation. Comparative advertising is permitted subject to certain restrictions. Comparative advertising is permissible if it:

- concerns products or services serving the same purpose; and
- relates objectively to one or more features of a product or service which are:
 - essential;
 - relevant;
 - verifiable; and
 - typical for the product or service.

Comparative advertising is illegal if it diminishes, in an unfair manner, the reputation of a competitor or unfairly disparages or degrades the products or services of a competitor or its personal or business affairs. As applies to any other advertising, comparative advertising must be true and accurate.

3.8 Are there any special copyright or trademark rules that may impact comparative advertising (eg, whether a competitor's trademark or products may be used)?

The use of a competitor's trademark for the purpose of comparative advertising is permissible, as long as the advertising complies with the restrictions of comparative advertising (see question 3.7 above).

The use of a copyrighted work of a competitor is only permissible in accordance with the stipulations of the German Copyright Act. There are no exceptions for comparative advertising. In addition, when depicting a competitor's product for the purpose of (permitted) comparative advertising, the mere fact that the comparative advertising is permissible does not automatically allow the use of a copyrighted work which is contained in the depicted product.

3.9 Are there any special rules that govern claims relating to geographic origin (eg, that the product is 'made in France')?

Claims relating to geographic origin are addressed explicitly in the German Trademark Act, the EU Trademark Regulation and the German Act Against Unfair Trade Practices. It is forbidden to use geographical indications as a claim for goods or services which do not originate from that

geographical location (city, region, territory or country). Furthermore, in cases where the geographical indication stands for special properties or a special quality of a product, the geographical indication may only be used if the goods or services have these properties or this quality, notwithstanding the correctness of the geographical indication of origin.

In addition, EU Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs provides for the protection of certain registered designations of origin and geographical indications in relation to specific agricultural products and foodstuffs.

In respect of the claim ‘made in Germany’, apart from the fact that the claim must not be misleading as to the product’s origin, it must also be true in respect of the essential steps during the manufacturing process. For instance, if the product is designed and all its parts are manufactured in a different country and just assembled in Germany, the claim ‘made in Germany’ would be misleading and must be replaced, eg, by ‘assembled in Germany’.

3.10 Are there any special rules governing product packaging?

There is a general duty to affix the full name and postal address (not PO Box) of the manufacturer of the product, or its importer, on the outside of the packaging. Certain exceptions apply.

Packaging which misleads the consumer as to the size, content or quality of the product is prohibited.

There are also many rules regulating certain mandatory disclosures and indications, including the language to be used, which must be affixed to the packaging, depending on the type of the product.

3.11 Are there any special rules or guidance on the use of ‘dark patterns’?

Dark patterns are certain designs of user interfaces on websites. They are patterns of content or graphics that are subtly designed to entice users to perform certain actions.

Dark patterns could constitute a prohibited aggressive commercial act under the German Law Against Unfair Trade Practices. An ‘aggressive commercial act’ exists if it is capable of significantly impairing the consumer’s or other market participant’s freedom of choice by harassing, coercing or unduly influencing them. Pop-up windows, for example, which cannot be clicked away or can only be clicked away with great difficulty, are classified as harassment. It should be noted, that this only covers very drastic forms of dark patterns. Frequently, these are not covered because the materiality threshold is not exceeded. This is the case, eg, when certain buttons are visually highlighted. Although this subtly impairs freedom of choice, it still does not meet the requirements to be an aggressive commercial act.

Furthermore, dark patterns are prohibited if they contain an untrue statement about the time limit of an offer. However, it should be noted that this can be quickly circumvented. The reason is that it is explicitly based on the truthfulness of the content. This does not prohibit the display of a countdown, which implicitly builds up time pressure but does not explicitly claim that the offer will no longer be available after the countdown has expired.

The EU’s new Digital Service Act (‘DSA’) aims to combat dark patterns more consistently. It prohibits online platforms from using dark patterns. Users must not be deceived, manipulated or prevented from making free decisions through website design. However, it remains to be seen in practice which concrete practices will be classified as prohibited manipulation under the DSA.

3.12 Are there any special rules or guidance on artificial intelligence as it relates to advertising?

If artificial intelligence ('AI') is used in advertising, the question arises whether there is an obligation to disclose the use of AI, with the consequence that a failure to disclose could constitute 'misleading advertising' under the German Law Against Unfair Trade Practices. According to the German Law Against Unfair Trade Practices, it is illegal to withhold material information and thereby mislead consumers or other market participants. The use of AI in advertising may constitute material information in individual cases. For example, in the case of personalized advertising, it may be of interest to the addressees whether and to what extent they are addressed by an AI or by a human being. Significant legal changes for the treatment of AI by the EU are expected in the coming years.

Otherwise, the same rules apply to AI-generated advertising as to human-generated advertising.

4 PRICE ADVERTISING

4.1 What are Germany's rules regarding price advertising?

Advertising involving the price of a product or service must comply with the Price Declaration Regulation, namely:

- (a) Prices advertised to consumers must include Value Added Tax ('VAT') and any other price components. Special rules apply in distance selling, eg, the obligation to indicate additional freight, delivery or shipping costs. Price change conditions are subject to restrictions;
- (b) Products shown in shops, displayed in shop windows or in catalogues must clearly state the price, either on or near the product;
- (c) Prices of products sold by weight, volume or size must be stated with their unit price and their price by a stated standard weight, volume or size;
- (d) Special rules apply to utilities, petrol, parking, restaurants, lodging establishments, bank loans and other financial services; and
- (e) Although it is permitted to show a normal price and a lower special discounted price, such advertising is not permitted if the 'normal' price has never been demanded or has been demanded for an incommensurate short period only. In addition, the lowest price of the past 30 days must be disclosed if a price reduction is advertised vis-à-vis a consumer.

4.2 What are Germany's rules regarding advertising 'free' products?

A 'free product' or 'free gift' is a temporary offer of a product or service, free of charge and independent of any obligation to purchase. A 'premium' is a temporary offer of a free or significantly discounted gift to be received when different goods or services are purchased. In Germany, free gifts and premiums are legal, subject to restrictions applicable in health advertising (always within the limits of general fair-trade principles as outlined above). Advertisers of free gifts must comply with bribery, subsidy and anti-trust regulations.

4.3 What are Germany's rules regarding sales and special offers?

'Special Sales', 'Off Season Sales', 'Below Cost Sales', 'Clearances' or special promotional periods during which goods or services are offered on special terms for a limited period of time are permitted, provided that any offered price reduction is a true price reduction that applies for a

considerable period of time (no short-term price swinging). Announcements must not be misleading regarding the original or reduced price. Offers must comply with the Price Declaration Regulation. Conditions for special offers must be clear and unambiguous as to their scope (eg, clear indication of any exceptions) and, if limited in time, state the period during which it is applicable.

4.4 What are Germany's rules regarding rebates?

A 'discount' is a price reduction offer, an additional quantity of an identical product or service purchased, or a cash value offered by means of a coupon or voucher which can be applied against the purchase price of an identical product or service. Discounts are permissible, but subject to fair trade limitations relating to advertising that is misleading, or exerts undue influence.

4.5 Are there other key restrictions which advertisers should be aware of regarding retail advertising practices?

- (a) **Promotions and sweepstakes:** Except in health advertising, there are no specific restrictions on promotional contests or sweepstakes. However, entrants must not be required to pay a stake or incur similar costs, and prizes may not be excessively enticing.
- (b) **Nuisance and harassment:** The unsolicited promotional delivery of unordered goods or of electronically transmitted advertising may be illegal, unless it occurs within a standing business relationship and the addressee expects such promotional communication. Except where the goods are of insignificant value, even if the addressee is informed that it has no obligation to pay for the goods received, such unsolicited distribution of goods can be considered an unfair business practice.

5 PROHIBITED PRACTICES

5.1 Are there any products or services that may not be advertised, or may not be advertised in certain media? (eg, guns, medicines etc)?

Restrictions apply to advertising of pharmaceutical products, health-related services and medical devices, tobacco products, alcohol and sex services. Certain restrictions apply to advertising in particular media and vis-à-vis children.

5.2 Are there any types of advertising practices that are specifically prohibited (eg, telemarketing to mobile phones)?

See question 1.4 above. In addition, all advertising in cases where it is apparent that the solicited market participant does not want such advertising is prohibited. Thus, eg, a sign at the recipient's mailbox indicating that advertising is not wanted ('no advertisements') or an explicit opt-out of any advertising must be respected.

5.3 Are there any laws or regulations governing indecency or obscenity that apply?

According to the Law against Unfair Trade Practices, all commercial (advertising) acts which are unconscionably pestering are considered illegal and thus prohibited. These could include indecent or obscene acts of advertising if the act itself is indecent or obscene. It has to be pointed out, however, that this stipulation does not aim at the content but only at the manner of the advertising act.

Causing a public disturbance by engaging in gross indecency is a criminal offence under the German Criminal Code. Less severe acts of obscenity can be sanctioned as an administrative offence under the German Act on Regulatory Offences. Advertising also needs to follow those rules.

Telemedia service providers have to comply with the German Network Enforcement Act, a more recent Act serving to improve enforcement of the law in social networks. The Act imposes certain reporting and intervention duties for telemedia service providers in cases of hate speech and other illegal acts of its users, and related complaints by others.

6 SPONSOR/ADVERTISER IDENTIFICATION

6.1 Are there special rules requiring that advertising identify who the advertiser/sponsor of the advertising is?

The full name and address of the advertiser must be disclosed in all advertising and offers which promote the properties and price of a product or service in a manner which enables the average consumer to make a purchase decision. The mere indication of an internet address is not sufficient.

On publicly available online advertising, an advertiser has to provide specific identifying information that is easily recognizable, directly accessible and consistently available. These criteria are met when it can be found under a clear headline such as 'contact' or 'imprint' on the homepage or not more than two clicks away from the homepage. The imprint must include:

- Full (company) name, postal address (not PO Box), and contact email address of advertiser, and, if the advertiser is a legal entity, the form of organization and the full name of the legal representative (CEO, Managing Director);
- Location of the commercial register in which the advertiser is registered, including its registration number; and
- VAT Identification number, if applicable.

Additional requirements apply in certain circumstances.

In the case of email advertisements, the name of the sender must be apparent in the header of the email. For further information with regard to email advertising see question 1.4 above.

Advertising in social networks (eg, posts by influencers) needs to be marked as such, if the person posting the messages receives compensation for this activity. German courts take a rather strict approach to such marking; '#ad' or '#sponsored' would not be sufficient. Recent case law requires the full term in German language, such as #werbung (advertisement), and there are also restrictions on the positioning of such disclosure.

7 BRANDED CONTENT

7.1 Are there any special rules governing the integration of advertising content and entertainment (or editorial) content?

As a rule, advertising content must be separate from editorial content. Advertising must be clearly recognizable as advertising; eg, there must be a mark stating that the content is an advertisement.

7.2 Are there any special disclosure or other obligations when integrating advertising content with other content?

Advertising in an editorial context must be marked 'Advertising': see question 7.1 above. See also question 6.1 above.

8 SOCIAL MEDIA

8.1 Are there any special rules governing the use of social media for advertising purposes?

There is no distinction made between advertising through standard channels and marketing published through social media or other channels. Social media advertisements must comply with:

- German Law against Unfair Trade Practices;
- distance selling rules;
- consumer protection rules;
- labeling requirements; and
- clearance of third-party rights (eg, trademarks, company names, designs, etc) and data protection rules.

There are no important specific legal bodies regulating social media advertising (nor offline advertising for that matter). Since social media advertising is considered as a channel for advertising just like any other channel, the rules of the German Advertising Council also apply to advertising in social media.

Although the law does not focus on social media (but encompasses it), companies' microsites on social media platforms have to meet all the requirements set out for regular company websites (see question 6.1 above).

Advertisements for which supporters, followers, or 'likes' are bought on social media in order to artificially inflate a product's relevance or popularity can be considered unfair advertising. The same applies to fake accounts or fake comments, as this might mislead the public. 'Guerilla-marketing' or so-called 'viral marketing' (eg, where an advertiser posts a supposedly independent clip on YouTube endorsing its own product) may also be considered unfair advertising if the advertising character and/or the advertiser are hidden from the consumer.

8.2 Is an advertiser responsible for advertising claims made in user generated content (eg, statements that a consumer makes on an advertiser's Facebook page)?

The liability of internet service providers offering promotions is regulated by the Telemedia Act, implementing the European E-Commerce Directive. Service providers are not liable for the information transmitted if the provider has not initiated the transmission, selected the receiver of the transmission, or selected or modified the content contained in the transmission.

There is service provider liability in all other cases. The scope of liability is quite broad, including responsibility to take steps to avoid and prevent illegal acts.

Service providers are not generally obliged to monitor their websites, but must act if made aware of a breach on their website. See also question 5.3 with respect to providers of social networks.

8.3 Are there any key court or self-regulatory decisions that advertisers should be aware of regarding the use of social media and user generated content?

Recent decisions at the appellate court level impose strict disclosure requirements in social media networks for posts which have a promotional character. The character of promotional communication must be clear and obvious to the consumer at all times. This applies, in particular, to so-called ‘influencer marketing’.

In a decision handed down in 2017 (C-132/17), the European Court of Justice decided that a YouTube video channel is not an audiovisual media service, so that the advertiser was not entitled to rely on certain exemptions from marking requirements in advertising. However, due to an amendment of the EU Audiovisual Media Services Directive (2010/13) at the end of 2018, it now also covers video-on-demand and video-sharing platforms such as YouTube, Netflix or Facebook. This means that YouTube videos are subject to the same information and labeling obligations as television broadcasters.

9 RIGHTS OF PRIVACY/PUBLICITY

9.1 What are the rules governing the use of an individual’s name, picture, likeness, voice and identity in advertising?

In principle, everyone in Germany is protected by the so-called ‘right in one’s own image’ in accordance with the provisions of the Art Copyright Law. In short, the Art Copyright Law says that pictures of an image of an individual may not be published or distributed except with that person’s consent.

The only exception applies to pictures that depict an event of a historic nature, past or present. This includes pictures of ‘persons who are part of contemporary or past history.’ In this context, the courts make a distinction between ‘absolute’ and ‘relative’ persons of current or past history. ‘Absolute’ persons of current or past history are those whose participation within public life subjects them generally to public information interest (such as actors, politicians, top sports stars and also well-known persons in business and commerce). With respect to these absolute persons of current or past history, the courts assume a permanent public interest. For this reason, the publication or distribution of their likeness is not subject to their consent, provided that the distribution or publication serves a particular public information interest. If that is the case, the distribution or publication may also serve a commercial interest, but there must always be a substantive, topical or editorial concept and context (see the *Beckenbauer/Football Calendar* case). If there is no such editorial concept, and if the individual depicted becomes degraded to a mere object of commercial interest, then the individual’s consent is required.

‘Relative’ persons of current or past history are subject to a public information interest with respect to a specific event only. Free distribution and publication is limited to coverage of that particular event.

The legal evaluation depends on the nature of use of a picture and the role an individual image plays in that context.

The regular statutory privacy protection of a person's image is limited to 10 years from the individual's death. In addition, there is a posthumous privacy claim against gross defamation and degradation. That claim exists so long as there is a justified interest (ie, as long as there is active memory of the deceased, not if personal memory has faded.) Mere commercial use as such is not a gross defamation or degradation in the sense of this posthumous right.

Remedies include cease and desist claims and claims for damages.

9.2 Are there situations when permission is not required?

Yes—see question 9.1 above.

10 SPECIAL CLEARANCE

10.1 Are there any specific rules governing the types of materials that must be cleared before they may be used in advertising (eg, historic places)?

Clearance is required for all protected works and images, as well as trademarks, names, and other proprietary property.

In terms of copyright works, the German Copyright Act contains a number of rules that describe the circumstances in which a work can be used freely, including incidental works and works located permanently in public roads and ways or public open spaces. In the case of buildings, this authorization only extends to the façade as seen from a publicly accessible viewpoint. Different rules apply for works of art which are only installed for a certain amount of time.

10.2 Is it permissible to use other companies' recognizable products in advertising (eg, an actor wearing branded training shoes)?

Advertising must be recognizable as such. It is illegal to conceal the advertising nature of any commercial practice.

Special requirements apply to product placement and online advertising. Product placement is prohibited in broadcasting programs for children and certain other types of programs.

While the advertiser may rely on the principle of exhaustion of trademark (and/or other IP) rights, if the other company's recognizable product used in advertising has been purchased in existing sales channels, exemptions to this rule exist. For example, where the use of the product carrying the third-party mark takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the third-party brand, the use of the third-party product can still be an infringement. The crucial point is whether use of the mark in the context of one's own product exploits the reputation of the well-known mark or dilutes its characteristics in the market.

Similar rules apply with respect to third-party copyrights, design rights and/or patents.

For comparative advertising see question 3.8 above.

11 CULTURAL CONCERNS

11.1 Are there any rules that are particular to the culture of Germany which affect advertising (eg, Swedish gender equality law)?

With the exception of rather strong protection for the personal image, the advertising environment in Germany appears to be standard and comparable to the rules in other highly commercial countries.

11.2 Are there any other cultural norms that should be considered (eg, religious concerns)?

There are no particular cultural norms above and beyond the ordinary statutory fair trade rules.

12 MISCELLANEOUS

12.1 Is there any other general advice or cautions you would give to advertisers operating in Germany?

Promotions, such as sweepstakes and contests, often involve the collection, processing, or use of personal data, which is strictly regulated by data protection laws such as the EU GDPR, one important aspect of which is the information and disclosure requirement.

Wherever consent is required, the consent must be informed; ie, the data subject needs to be informed about:

- the purpose of the use (eg advertising);
- the advertiser's name;
- the range of specific products or services to be advertised; and
- the means of advertising (eg, email, mail, telephone).

The consent must cover all the above aspects and be given explicitly (opt-in only, no opt-out or pre-checked consent boxes) in order to be valid.

For certain forms of advertising (eg, advertising via telephone, fax and email), express consent is necessary.

Where the data subject has informed the advertiser that they no longer wish to receive advertisements, this must be respected, as otherwise the advertising is illegal and can trigger heavy fines and civil lawsuits.