

BIRD & BIRD

**EVOLUTION OF NEW ADVERTISING
TECHNIQUES**

GERMANY

GERMANY
- SUMMARY -

**This summary has been drafted by Bird & Bird Brussels
on the basis of the national report**

I. Television

1. Definitions

➤ **Broadcaster :**

Broadcaster is defined in most of the media laws of the German states (“Länder”) in a nearly identical way referring to a broadcaster as somebody broadcasting the whole or a single program under his own editorial responsibility

➤ **Advertising:**

“Advertising is any announcement by a natural or legal person or a collective of persons in connection with a trade, business, craft or profession which is broadcast by public or private undertaker whether in return for payment or similar consideration or as self-promotion in order to promote the supply of goods or services, including immovable goods, rights and obligations.”

➤ **Sponsoring : Directive (except for the words "direct or indirect financing")**

➤ **Tele-shopping : Directive**

➤ **Other relevant definitions:**

2. Advertising

a) **Rules on insertion in and between programmes**

The regulation is identical to the rules provided in the Directive. Nevertheless the rules are stricter for public broadcasters:

Television programmes longer than 45 minutes may contain advertising and teleshopping spots once; this applies also if the programme is divided. Advertising and teleshopping spots may be inserted only between the autonomous parts or in the intervals in case that the events and performances broadcasted contain intervals. The calculation of the programmes’ duration takes into account the scheduled duration.”

In exception to section 3, 1st sentence advertising and teleshopping spots may only be inserted in the intervals in case of the broadcast of sport events containing intervals.”

b) Rules on the maximum amount of advertising

For commercial broadcasters the rules of the Directive TVWF apply. For public broadcasters the rules are stricter: the total airtime for advertising on working days is limited to 20 minutes per working day on an annual average. In case that the maximum allowance has not been utilised, public broadcasters may catch up with a maximum of 5 minutes per working day. Advertising is allowed neither after 8 p.m., nor on Sundays nor on public holidays existing in all the German states.

Hourly allowance: § 15 Abs. 3 RStV rules that spot advertising within an hour must not exceed 20 %.

3. Tele-shopping

Tele-shopping is not allowed for public broadcasters. The rules on teleshopping spots and teleshopping windows are identical to the rules of the Directive TVWF. Tele-shopping broadcasts of a duration of less than 15 minutes are also allowed under the rules for long advertisements (included in max. advertising time).

4. Sponsoring

The reference to the sponsor may be presented with moving images. In addition to or instead of the sponsors' name, also the emblem/logo or a trademark may be inserted. The sponsor credit has to explain the sponsors connection to the sponsored program. However, no additional advertising statements concerning the sponsor, products or trademarks except an image slogan are allowed.

The duration of sponsor credits have to be adequately short (the amount of time necessary to clearly identify the reference of the financial relationship between broadcaster and sponsor.)

Sponsor credits have to be inserted at least at the beginning or at the end of the program. References to the sponsor within the program are allowed before and after each advertising break. A programme announcement may mention the sponsor.

Content and the scheduling of the program must not be influenced by the sponsor in such a way to affect the broadcasters responsibility and the editorial independence. Sponsored programmes must not encourage to sell, to purchase, or to rent or lease products or services of the sponsor in particular by special references. This is generally the case if:

- within the programme products or services are presented, generally recommended or described as favorable which are offered by the sponsor or a third party;

- within sport, cultural or similar programmes products, services, names, trademarks or activities on bill boards or other items may be identified, where the producer or provider is the sponsor or a third party.

According to the TV-Code (no.12 section 8) it is possible to integrate the name of a company, a product or a trade mark with the name of a programme if no undue advertising prominence is provided.

In sports programmes company names may be shown during technical information (timing).

5. Product Placement - Surreptitious advertising

German media regulation contains a definition of surreptitious advertising which is identical to the Directive TVWF. Product placement is allowed when it is justified by editorial needs, otherwise it is forbidden. As for prizes in games and shows: the provider can be mentioned twice and a short optical presentation of the prize is allowed.

6. New advertising techniques

a) Split screen techniques:

Are allowed and expressly regulated in Germany:

According to Art. 7 Abs. 4 RStV and the common advertising guidelines of the German federal media authorities for private broadcaster, split screen (Bildschirmteilung) is permitted under the following conditions:

- advertising has clearly to be separated by optical means from the rest of the program service, and shall be identified as such by the word “advertising” displayed on the part of the screen it occupies.
- The duration of the advertisement is fully counted for the purposes of the calculating of the overall time limits to be respected by broadcasters for teleshopping spots, advertising spots and other forms of advertising, as provided for in § 45 Abs. 1 und 2 RStV
- Split screen advertising shall not appear during religious programs and programs for children and young people.

b) Virtual advertising

It is permitted in accordance with the German broadcasting law (Rundfunkstaatsvertrag) since April 2000. According to Art. 7 Abs. 6 Satz 2 Rundfunkstaatsvertrag (RStV) and the common advertising guidelines of the German federal media authorities for private broadcaster (Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung) virtual advertising (virtuelle Werbung) is permitted under the following conditions:

- Only already existing advertising space at the venue can be replaced by virtual advertising.
- Static advertising cannot be replaced by moving images.
- The viewer must be informed at the beginning and the end of the program - either by optical or acoustical means – that virtual advertising has been used during the program.

c) Interactive advertising (digital television)

There is no specific regulation at this moment. If interactive advertising is offered in a non-broadcasting environment (ex. internet) other regulation applies. The "Mediendienstestaatsvertrag" guarantees data protection, consumer protection and protection of minors.

II. Radio

Radio is subject to similar rules as TV. The amount of advertising is restricted on public radio (maximum 90 minutes/day).

Internet, Mobile Phone, Cinema

There is no specific regulation applicable to advertising distributed on the Internet or by Mobile phone. General regulation on consumer protection applies as well as self-regulatory codes.

For cinema there are two important differences with other audio-visual media: tobacco advertising is allowed. Also there is no prohibition on product placement and surreptitious advertising.

III. Internet / Mobile Phone

There is no specific regulation for advertising communicated through the internet, but there is apart from the broadcasting regulation - special regulation for media services – “Mediendienste” (information- and communication services addressed to the public transmitted by electromagnetic vibrations).

According to § 9 MDStV, there are only three general advertising principles which apply for “Mediendienste”:

- § 9 (1) – advertising, addressed to children or young people, shall not harm their interests and shall not take advantage of their inexperience
- § 9 (2) – advertising must be clearly recognizable as such and must be clearly separated from the rest of the content. The use of subliminal techniques is forbidden
- § 9 (3) – for sponsoring in media services apply the same rules than for sponsoring in television (§ 8 RStV).

Live stream television programmes on the internet are not considered as a broadcasting service but as a "Mediendienst" and thus it falls not under the application of TV-regulation.

In addition general regulation and self-regulation on advertising and consumer protection also applies to these media.

GERMANY
- RAPPORT -

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TELEVISION

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IV. ADVERTISING

A. General regulation

1. General consumer protection regulation

Constitutional rights

The German Constitution (Grundgesetz, hereafter referred to as GG) protects the human dignity (Art.1 GG), protects against any discrimination on grounds of sex, race, nationality, language, origin, beliefs, religious or political views (Art. 3 GG). These fundamental principles have also to be respected in the field of advertising.

Law against unfair competition (hereinafter referred to as UWG)

Principal regulations on advertising were laid down as early as on 7 June 1909 by the law against unfair competition (Gesetz gegen den unlauteren Wettbewerb, UWG). This law is applicable to all forms of advertising without any difference to specific media. The law contains the general principles according to which misleading advertising (§ 3 UWG) and any actions offending public morals (§ 1 UWG) are unlawful and may be subject to legal claims for cessation and / or compensation of damages.

Respect of public morals

Abundant jurisdiction defines when advertising is considered as offending public morals and / or misleading. Important rules developed by court decisions are that advertising should respect the laws and should not

- violate the fundamental rights laid down in the Constitution (see 1.1)
- insufficiently separate advertising from editorial content
- exercise a psychological pressure to buy,
- discriminate, discredit or disparage competitors,
- take advantage of the reputation of other products or other producers,
- be subliminal.

Prohibition of misleading advertising

Concerning misleading advertising the jurisdiction was rather strict defining advertising as unlawful if 15 % of consumers have been misled, or even less i.e. in case of

advertising for , pharmaceutical products. After the EU directive on misleading and comparative advertising has been recently amended, the German High Court seems to have given up with the former strict jurisdiction based on the uncritical consumer. In line with the European Court of Justice German Courts refer now to the critical, educated average consumer and no longer to a small minority of easily misled persons.

The change in what is considered as misleading today can be best shown with the change of jurisdiction concerning the same advertising slogan. In the past the High Court (Bundesgerichtshof) had ruled that the slogan for an electric shaver “The most purchased in Europe” was illicit and misleading German consumers because they could understand that the shaver was also the most purchased in Germany.

The High Court (BGH) has in the meantime given up this jurisdiction by ruling that the German consumers have become more European and would not wrongly understand the true slogan in the way that the shaver which is indeed the most purchased shaver in Europe would automatically be also the most purchased shaver in Germany. The Court made reference to the developing European integration in the Common market, to the easy travelling from one country to another and to the consumers’ growing knowledge of unique advertising strategies in a completely new media landscape with trans-frontier advertising.

Consumers and others may cancel agreements if misleading advertisements were essential for concluding the contract (§ 13 a UWG).

Comparative advertising is permitted in principle

The EC Directive 97/55/EG has been implemented in German law by modifying §§ 2 and 3 UWG.

German Civil Law (BGB)

The German Civil law lay down the principal rules to most of the important issues in a person’s life, defining legal capacity, different sort of contracts, compensation for damages, family affairs, heritage and other issues. This law has been recently amended in order to implement different EU directives as eg the directive on the purchase of goods of daily use (1999/44/EG). For the first time advertising is explicitly mentioned. § 434 BGB says that a product is faulty if it has not the specifications which the purchaser may expect considering the declarations of the seller or producer **especially made in advertising**. The buyer may eventually choose to request for fulfillment (reparation), cancellation or compensation (§ 437 BGB). According to § 443 BGB the buyer may also choose to claim for the rights mentioned in a guarantee or in the relevant **advertising**.

Considering former jurisdiction significant changes are not to be expected. In future however, it may be easier for consumers to take actions eg if their new car needs more petrol than what was said in advertisements (a consequence of EU Directive

1999/94/EEC re. consumer information concerning car marketing, see also below under I B 4).

2. Specific audiovisual regulation by the Interstate Treaty concerning Broadcasting (Rundfunkstaatsvertrag hereinafter referred to as RStV)

Broadcasting in the Federal Republic of Germany is subject to legislation of the Länder (states). Due to the transfrontier nature of broadcasting the Governors of the states usually decide on common regulations concerning broadcasting. Those Interstate Treaties receive legal force when implemented in the laws of the states. As the Treaty and the amendments thereto have been implemented in all states, the references made below refer to the Treaty (RStV) in order to avoid confusion due to different numbering in the different states laws.

The media authorities (Landesmedienanstalten) are the regulatory bodies responsible for licensing and regulating terrestrial, cable and satellite commercial channels in each German state. The media authorities are empowered by the §46 RStV to draw up and enforce guidelines on television and radio advertising and sponsoring (including teleshopping) hereinafter referred to as TV-Code. These guidelines have been modified from time to time and the latest version is dated 10 February 2000 serving to implement the latest RStV-amendment which implemented the EU Directive TVWF. It is laid down in the preliminary remarks that the guidelines serve to concretise the objectives of European Regulations which oblige European broadcasters to co-operate in respecting general legal principles regarding advertising.

The regulations of the media laws as laid down in RStV and the corresponding guidelines of the media authorities (TV-Code) are described hereunder.

a) Definitions (art. 1 directive)

Television Broadcasting

The media law defines television broadcasting as follows (§ 2 Abs.1 RStV):

“Broadcasting is the transmission to the public of performances of all kind in audio and video utilizing electromagnetic oscillation with or without wire or conductor. It includes performances which are transmitted encoded or which are receivable against specific payment.”

Television broadcasting in the meaning of this media law (RStV) is subject to a prior authorization granted for private broadcasters by the media authority (§ 20 RStV) of the relevant state (Land). Public broadcasting is legitimate according to the interstate treaties re. ARD (ARD-StV) and ZDF (ZDF-StV).

TV broadcasting is to be distinguished from similar services which might be also seen on TV screens like teleshopping channels, TV- or radio text services. In this case the interstate treaty on media services (Mediendienstestaatsvertrag, hereinafter referred to as Mediendienste-StV) is applied; an authorization from public authorities is not requested and advertising regulation (§§ 8,9 MediendiensteStV) is limited to some basic principles :

- respect of public order,
- protection of children and minors,
- advertising addressed to children and minors will not harm their interests, and will not take advantage of their inexperience
- advertising must be clearly identifiable, unambiguously separated from the rest of the content,
- advertising must not use subliminal technics,
- sponsoring in teletext has to respect the regulations laid down in §8 RStV.

Television broadcast is also to be distinguished from so called tele-services as telebanking, data-exchanges, internet applications or other pull-services (telegames, video-on-demand). These services, characterized by individualized utilization are regulated by the law on information- and communication services (IuKDG).

Broadcaster

Broadcaster is defined in most of the media laws of the German states (“Länder”) in a nearly identical way referring to a broadcaster as somebody broadcasting the whole or a single program under his own editorial responsibility (i.e. § 2 Abs.9 Nr.1 Nds. LRG, § 2 Abs. 9 LRG NRW, § 3 Abs. 13 RdfkG M-V).

Advertising

Following Art. 1 c of the Directive TVWF, the German media law (§ 2 Abs.2 Nr. 5 RStV) defines advertising as follows:

“Advertising is any announcement by a natural or legal person or a collective of persons in connection with a trade, business, craft or profession which is broadcast by public or private undertaker whether in return for payment or similar consideration or as self-promotion in order to promote the supply of goods or services, including immovable goods, rights and obligations.”

No. 1 of the TV-Code specifies that references to the own programming (i.e. program-announcements and –trailers, self-promotion) and references to auxiliary materials to programs (Begleitmaterialen) are not considered as advertising in the meaning of the TV-Code where the duration of advertising is subject to hourly and daily limitations.

b) Authorization to distribute advertising

The media law in its first section (§§ 1 – 10 RStV) defines the general principles applicable to both systems, the public- and the private broadcasters (i.e. content and identification rules concerning advertising as explained below under c.). The specific rules for each system are laid down in section 2 for the public broadcasting organisations (§§ 11 – 19 RStV) and in section 3 for private broadcasters (§§ 20 – 49 a RStV).

Public broadcasters

§ 12 RStV says that public broadcast is financed primarily by licence fees but also by advertising and other income. The maximum duration of advertising in public channels is more restricted than for private broadcasters (see under d). Advertising is only allowed for ZDF and the ARD programme broadcast to all German states (§ 15 Abs. 1 RStV). Other public television broadcast services for all states in Germany or regional public television services are not allowed to carry advertising (§ 15 Abs. 2 RStV).

Private broadcasters

§ 43 RStV says that financing of private broadcasters with licence fees is illicit but that they may be financed by advertising, teleshopping and other income , in particular by specific service fees (pay-tv) and also by own capital.

c) General rules on the content of TV advertising

The Media law in its first section applies to public as well as to private broadcasters. Generally, the following broadcasts without any difference of their editorial or advertising nature are illicit according to Art. 3 RStV. These illicit broadcasts are those :

- infringing the Criminal Code
- glorifying war
- obviously endangering morally children or minors
- violating human dignity
- impairing possibly the physical, mental or moral well-being of children or minors, except where it is ensured, by selecting the time of the broadcast or by other means that children or minors would not normally hear or see such broadcasts (the broadcaster may believe so if the programme is broadcast between 11 p.m. and 6 a.m.).

Concerning specifically advertising, the fundamental principle is laid down in § 7 Abs. 1, 1st sentence :

“Advertising and teleshopping should not mislead, harm the interests of consumers and not encourage behaviours endangering the health or safety of consumers and the protection of environment.”

The corresponding guidelines in the TV-Code for private broadcasters says (section 3):

(1) Specific legal regulations regarding advertising, sponsoring and teleshopping for consumers’ protection, environmental protection and competition regulations are applicable and the interdictions and restrictions of advertising contained therein are to be especially respected. Furthermore, the relevant guidelines regarding advertising of the German Advertising Council (Deutscher Werberat) in the 1998 version are applicable (enclosure).

(2) The regulations on protection of the youth, on advertising on tobacco in the law on foods and on items of daily use (Lebensmittel- und Bedarfsgegenständegesetz) as well as the advertising restrictions for medicines and healing items in the law concerning advertising on healing items (Heilmittelwerbeengesetz) are to be respected.

Concerning the protection of children and minor, the media law (§ 7 Abs. 1, 2nd sentence) rules:

“Advertising and teleshopping also addressed to children or minors or with children or minors as actors shall not harm their interests or take advantage of their inexperience. Furthermore, teleshopping will not exhort minors to contract for the purchase or rental or lease of goods or services.”

Section 4 of the TV-Code for private broadcasters precises:

“(1) Advertising addressed to minors is illicit, in particular if

1. minors are directly or indirectly requested to persuade their parents or others to purchase the product or service advertised;
2. the advertising exploits the special trust minors place in parents, teachers or other persons of confidence;
3. the advertising shows minors without valid justification in dangerous situations;
4. the advertising shows that criminal acts or other wrong doings which may injure or harm persons are worth to be imitated or are acceptable;
5. the advertising uses aleatory advertising technics (such as free lottery, quizz) in a way which might mislead the persons the advertising is addressed to, which might attract them with excessive advantages, which might exploit their passion for gambling or which might harrass them.
6. the advertising represents minors as sexual objects.

(2) Advertising which is also addresses to teenagers is illicit in particular if containing direct requests to purchase which are exploiting their inexperience and credulity.

- (3) Advertising which is also addressed to children is illicit in particular when
1. the advertising contains direct requests to purchase. Paraphrases of direct requests to purchase are considered identically;
 2. the advertising contains a wording related to the special advantages and specification of the product which does not correspond to the natural expressions of children;
 3. the advertising is inserted before or after the children programme in which the advertised product itself is appearing (see § 7 Abs. 3 RStV);
 4. the advertising contains characterizing elements, which appear also in the children programme before or after the advertising.

(4) The above rules are applied also for advertising in which children and teenagers are used.”

d) Rules on duration of advertising and insertion in or between programs

➤ **Identification of advertising**

The media law rules in his general section for public and private broadcaster (§ 7 Abs. 3 RStV):

“Advertising and teleshopping must be clearly recognizable as such. In television they must be separated from other programme parts by unambiguous visual means. In connection with advertising and teleshopping subliminal technics are not allowed.”

The private TV-Code (section 6) says:

1. *“The beginning of advertising in television must be unambiguously characterized by a visual signal (logo) and recognizable by the viewer. An identification of TV advertising at the end or in between advertising spots is not necessary. However, the identification of the advertisings’ end is necessary if otherwise the advertisements and the following programme is not unequivocally separated.*
2. *The advertising logo has to be significantly different from the station logo or those logos used for programme announcements.*
3. *The advertising logo should for a minimum duration of 3 seconds cover the entire screen. The logo may consist of a picture or moving images.*
4. *The logo must contain in writing the word “advertisement”. In case that a TV-broadcaster uses for a longer period of time a non confusing logo to identify advertisements and which is not used for other objectives in the programme, the broadcaster may renounce to have the word “advertisement” integrated in the logo.*
5. *The ongoing programme or elements of the following programme (images and/or sound) may not be a part of the advertising logo.”*

➤ **Insertion between programmes**

The regulation in both sections, for the public and private broadcasters are identical concerning the insertion between programmes. §§ 14 Abs. 2, 1st and 2nd sentence and § 44 Abs. 2, 1st and 2nd sentence RStV says:

“Television advertising and teleshopping spots should be inserted between programmes. Isolated advertising and teleshopping spots will remain the exception.”

However, they may be inserted during programmes according to the rules described hereunder.

➤ **Insertion during programmes**

Common rules for public and private broadcasters:

The regulation in both sections, for the public and private broadcasters are nearly identical concerning the insertion between programmes. §§ 14 Abs.2 and § 44 Abs. 2 RStV says that under certain conditions advertising and teleshopping spots may also be inserted during programmes if the integrity and the character of the programme are not affected and if the rights of right holders are not infringed.

Rules for public broadcasters:

The conditions for advertising breaks in public programmes are stricter than those for private channels. § 14 Abs. 3 and 4 RStV reads:

“(3) Television programmes longer than 45 minutes may contain advertising and teleshopping spots once; this applies also if the programme is divided. Advertising and teleshopping spots may be inserted only between the autonomous parts or in the intervals in case that the events and performances broadcasted contain intervals. The calculation of the programmes’ duration takes into account the scheduled duration.”

(4) In exception to section 3, 1st sentence advertising and teleshopping spots may only be inserted in the intervals in case of the broadcast of sport events containing intervals.”

Rules for private broadcasters:

The conditions for advertising breaks in private programmes are laid down in § 44 Abs. 3 and 4 RStV:

“(3) Television programmes consisting of autonomous parts, or sport programmes and transmissions of similar structured events and performances with intervals, advertising and teleshopping spots shall only be inserted between the autonomous parts or in the intervals. In other programmes a period of at least 20 minutes should elapse between successive breaks within the programme.

(4) Differently to section 3, 2nd sentence the transmission of audiovisual works such as films made for cinema and for television with the exception of serials, series, light entertainment programmes and documentary films may be interrupted once for each period of 45 minutes provided that their scheduled duration is more than 45 minutes. A further interruption shall be allowed if the scheduled duration exceeds at least by 20 minutes two or more complete periods of 45 minutes.”

➤ **Prohibition to insert advertising**

The regulation in both sections of the media law, for the public and private broadcasters are identical concerning prohibitions to insert advertising and teleshopping spots in broadcasts of religious services and children programmes (§§ 14 Abs. 1 and § 44 Abs. 1 RStV).

Additionally, the section on private broadcasters restricts the insertion of advertising for some categories of programmes if the duration is less than 30 minutes. § 44 Abs. 5 RStV reads as follows:

“In television, news programmes, programmes on political current affairs, documentaries and programmes with religious content with a scheduled duration of less than 30 minutes must not be interrupted by advertising or teleshopping.”

➤ **Duration**

Due to the fact that public broadcasters are financed primarily by license fees (§ 12 Abs. 1 RStV) the regulation on the duration of advertising is regulated significantly differently for public and private television broadcasters.

Rules for public TV broadcasters:

Daily allowance: According to § 15 Abs. 1 RStV the total airtime for advertising on working days is limited to 20 minutes per working day on an annual average. In case that the maximum allowance has not been utilised, public broadcasters may catch up with a maximum of 5 minutes per working day. Advertising is allowed neither after 8 p.m., nor on Sundays nor on public holidays existing in all the German states.

Hourly allowance: § 15 Abs. 3 RStV rules that spot advertising within an hour must not exceed 20 %.

Rules for private TV broadcasters:

Daily allowance: According to § 45 Abs. 1 RStV the proportion of transmission time allocated to advertising, teleshopping spots and other forms of advertising excluding teleshopping windows in the meaning of § 45 a RStV will not exceed 20 % of the daily

transmission time. The transmission time for advertising spots will not exceed 15 % of the daily transmission time.

Hourly allowance: According to § 45 Abs. 2 RStV the proportion of advertising and teleshopping spots within an hour shall not exceed 20 %.

e) Surreptitious advertising

The media law classifies surreptitious advertising as illicit (§ 7 Abs. 6, 1.sentence RStV). The definition of surreptitious advertising is defined in Art. 2 Abs. 2 no. 6 RStV as follows:

“Surreptitious advertising is the visual or verbal mention or representation of goods, services, names, trade marks or the activities of a producer of goods or a provider of services in programmes if this is intended by the broadcaster to serve advertising and might mislead the public concerning the true objective of the representation. In particular, such mention or representation is considered to be intentional for advertising objectives if it is done in return for payment or for similar considerations”.

No. 9 of the private TV-Code says that the intention to serve advertising objectives may be established due to clues such as the intensity and the exclusivity of the representation.

f) Others (sanctions)

Infringements to regulation of the media law are subject to different sanctions as for example fines up to € 500.000 (§ 49 Abs. 2 RStV) or even more if the infringement coincided with an undue financial advantage. Only private broadcasters are subject to such sanctions.

B. Regulation for specific products

1. Alcohol

The media law does not contain any specific regulation on advertising for alcoholic products. However, the general regulation prohibiting advertising impairing consumers' and especially minors health may apply in particular cases.

The private TV-Code (section 3) refers to the guidelines of the German Advertising Council which are described in details below under section C (Self-Regulation).

2. Tobacco advertising totally banned in Radio and TV

In Germany a special law on food any products of daily use (Lebensmittel- und Bedarfsgegenständegesetz, hereunder referred to as LMBG) is relevant for the prohibition of tobacco advertising in television and radio. § 22 Abs. 1 LMBG says:

“Advertising in television and radio for cigarettes, tobacco products similar to cigarettes and tobacco products which are destined to make cigarettes by the consumer is prohibited.”

3. Medicines TV advertising restricted and necessity to present a warning

Prohibition concerning certain types of medicines addressed to persons other than health professionals.

Advertising for medicines is dealt with in a special law regulating for healing items (Heilmittelwerbegesetz, hereinafter referred to as HWG). Concerning medicines the law prohibits TV advertising :

- according to § 10 Abs. 1 HWG for medicines available only on prescription and
- according to § 10 Abs. 2 HWG for those medicines which are made to cure sleeplessness, psychic malfunctions or to influence the state of mind.

Numerous restrictions concerning the content of advertising

There are numerous restrictions concerning the content of advertising applicable to all forms of publicity. According to § 11 HWG advertising for medical products, procedures, treatment methods, objects or other preparations to persons other than health professionals may not contain:

1. expertise, references, scientific or professional publications or references thereto;
2. statements that the medicinal product, procedure, treatment method, object or other preparation is recommended, tested or used by doctors, dentists, veterinarians or other health professionals;
3. the description of or reference to case histories;
4. pictorial representations of persons in the work clothing or in the process of carrying out the activities of health professionals;
5. pictorial representations
 - a) of changes in the human body or parts thereof due to disease, affliction or injury;
 - b) of the effects of a medicinal products, procedure, treatment method, object or other preparation affects the human body or part thereof
6. foreign or professional terminology insofar these have not become part of the general German vocabulary
7. statements that tend to instill or exploit fear
8. promotional speeches that include offers for the supply or acceptance of addresses
9. publications that are not identified as advertisements in clear and understandable terms

10. publications that suggest that a certain disease, affliction, injury or pathological ailment in humans can be determined through self-diagnosis and treated with the advertised medicinal products, procedures, treatment methods, objects or other preparations, as well as the corresponding instructions in audiovisual media
11. statement by third parties, especially expressions of gratitude or acknowledgment or letters of recommendation, or references to such statements
12. promotional measures that are directed exclusively or primarily at children under 14
13. contests, raffles or other procedures with results that are determined by chance
14. the distribution of free samples of medicinal products or of vouchers for medicinal products
15. the unsolicited distribution of free samples of other products or objects or of vouchers for other products or objects

Necessity to show a warning at the end of audiovisual media

§ 4 Abs. 5 HWG rules that advertising in audiovisual media must be succeeded by the following text, which must be broadcast in television against a neutral background in legible characters and at the same time spoken aloud:

“For information on risks and side effects please read the package leaflet and consult y your doctor or pharmacist.”

4. Cars

In line with EU Directive 1999/94/EEC concerning consumer information about petrol consumption and CO₂ emissions legislation is in progress to implement this Directive in the German legal system. The law (EnergieverbrauchskennzeichnungsGesetz) is in force leaving it to the relevant authority to regulate the details by decree. However, advertising in audiovisual media seems not to be affected as the relevant information has to appear only in printed advertisements such as printed in papers, magazines or on flyers.

5. Media

There are no specific regulation on TV advertising for media.

However, the general rules and in particular those on the protection of minors apply. Therefore, advertising for films shown in cinema or promotion for films shown in television, for magazines or telephone numbers as for example those of erotic nature may be restricted to certain periods during a day in order to respect the legal principles in this field.

Furthermore, regulation exist concerning self- or cross-promotion. The relevant rules do not restrict advertising but have an impact to the question if the duration of such cross-promotion is to be calculated within the limited advertising time (20% per hour and day)

or if such promotions are considered as self-promotion for which time limits do not exist. The relevant rules in this respect are described hereafter, in section IV.

6. Religions, politics and parties, social issues and groups

General principle

The Media law (RStV) in its first section applicable as well as for public as for private broadcasters prohibits such type of advertising. Art. 7 Abs. 8 RStV says:

“Advertising of political, philosophical or religious kind is illicit.”

Exceptions

However, some exceptions are made by § 42 RStV with respect to private broadcast retransmitting all over Germany.

- According to section 1 of this paragraph adequate airtime has to be conceded to the protestant, catholic churches and Jewish communities at their request (in return the broadcaster may claim an adequate reimbursement of his own costs).
- According to section 2 of the same paragraph adequate airtime has to be conceded under certain conditions to political parties before the elections for the German or European Parliament.
- Social advertising is allowed (Art. 7 Abs. 8, 3rd sentence).

C. **Self-Regulation**

Self-Regulations has a long tradition in Germany and in advertising the tobacco industry is well known to have very detailed rules. It happened in the past that voluntary self-regulations have been implemented in the legal system becoming legal obligations. Therefore some business- or industry branches keep their rules out of the public and organize disputes and even penalties between competitors in confidential arbitration procedures. However, besides some specific industries several organisations are well known to deal especially with self-regulation. In the medical sector the organisation is "Integritas - the Association for Ethical Health Care Advertising".

German Advertising Council (Deutscher Werberat)

The self-regulation body which is the most famous is the German Advertising Council which is not only dealing with specific product lines but which regulates advertising in a more general sense.

This organisation has different functions. One is to act as an intermediary between the advertising industry and consumers complaining about advertising. In the year 2000, the Council has dealt with 1139 complaints and intervened in those cases when the principles of self-regulation were violated.

Another responsibility of the Council is to draw up Rules of Conduct on advertising. The Council is a member of EASA, the European Advertising Standard Alliance.

According to the Council advertisement is a necessary and indispensable instrument for commercial competition and to inform the (potential) customer and user of goods and services. Without advertisement there is no effective competition and without competition a free enterprising order is inconceivable.

Advertisement is an expression and a proof of freedom in a society and needs freedom to fulfill its function appropriately. Therefore, advertisement enjoys the constitutional protection of freedom of speech and freedom of professional training.

This freedom, however, cannot be boundless. It finds its limits in the general rights and the protection-worthy concerns of others. Among these are especially the principles for protecting the human dignity and the non-discrimination, which are valid for public and social order. These principles have also to be respected in advertising.

Some of the existing Rules of Conduct issued by the German Advertising Council deal with advertising in TV and radio especially, other are applied to all form of advertising.

Rules of conduct on advertising with and for children in TV and radio

This guideline has served as a model for the public media authorities supervising private TV. They implemented to a large extent the voluntary rules into the private TV-Code. The self-regulation is worded as follows:

"In advertising with children and in advertising that is addressed specifically to children, the following principles in particular shall be observed in the design and realizing of advertising measures:

They should contain no statements by children about the special advantages and features of the product, that do not conform to the natural utterances of the child.

They should contain no direct requests for purchase or consumption addressed to children.

They should contain no direct requests by/and or to children to induce others to buy a product.

They should not exploit or abuse the special trust which children usually place in certain persons.

Aleatory advertising media (e.g. free raffles, prize competitions and puzzles etc.) should not mislead the potential purchaser, should not allure by the offer of excessive advantages, should not exploit gambling instincts and should not indulge in touting.

They should not present penal offences or other misconduct by which persons may be endangered or allow same to be published as worthy of imitation or approval.

The following additionally applies to television advertising with or specifically aimed at minors and to teleshopping, taking into account the EU Television Directive of 3 October 1989 as amended on 30 June 1997:

Juveniles shall not be directly exhorted to buy a product or service by exploiting their inexperience or credulity.

Juveniles shall not be directly exhorted to persuade their parents or others to purchase the goods or services being advertised.

The special trust juveniles place in parents, teachers and other persons shall not be exploited.

Juveniles shall not be shown in dangerous situations unless there is a legitimate reason for doing so."

Code of Conduct for the advertising of alcoholic beverage

"In particular, the principles set out below shall be observed in the design and conduct of advertising for alcoholic beverages and of teleshopping":

Abuse

1. Consumers shall not be called upon to indulge in the abuse or the excessive consumption of alcoholic beverages, nor should such consumption be trivialized or portrayed as commendable.
2. The impression should not be conveyed that abuse is impossible because of a low alcohol content.

This does not affect the obligation to state the alcohol content on bottle labels.

Juveniles and Athletes ("Leistungssportler")

3. Juveniles should not be urged to drink nor should they be portrayed as drinking, being invited to drink or inviting to drink.
4. No statements should be made in which juveniles are referred to as being insufficiently mature for the consumption of alcoholic beverages and which would thus provoke them into drinking. Nor should any statements be made to the effect that the person portrayed in the advertisement has already consumed alcoholic beverages as a juvenile.
5. No competitive sportsmen or athletes ("Leistungssportler") should be shown in the act of drinking or inviting others to drink.

Road Traffic and Safety

6. The drivers of motor vehicles should not be called upon to drink nor should they be shown in the act of drinking or of being called upon to drink, nor should any other kind of association be established between drinking and driving.
7. There should be no portrayal of situations in which safety regulations are violated.

Medical Statements

8. No reference should be made to medical recommendations or medical reports nor should there be any portrayal of persons in the professional clothing of carrying out the duties of a member of the medical profession, the nursing profession or of the pharmaceutical trade.
9. No statements should be made that refer to the cure, relief or prevention of disease.
10. No statements should be made claiming that alcoholic beverages have the effects of a medicinal drug.

Disinhibition, Anxiety, Conflict

11. No statements should be made that refer to disinhibiting effects of alcoholic beverages.

12. No statements or presentations should be made that refer to the cure or relief of conditions of anxiety.
13. No statements or presentations should be made that refer to the elimination or overcoming of psycho-social conflicts.

Abstinence

14. No presentations should be made that derogate abstention in general or in special cases.

As following also applies to television advertising and teleshopping, taking into account the provisions of the EU Television Broadcasting Directive of 3 October 1989 (version of 30 June 1997):

15. It should not link the consumption of alcohol to enhanced physical performance.
16. It should not create the impression that the consumption of alcohol contributes towards social or sexual success.

Guidelines regarding advertising with accident-risky pictures

Advertisement for machines and working-tools sometimes show, in their pictorial portrayals, situations which contradict accident-avoidance-guidelines. The German Advertising Council in cooperation with the industrial professional cooperative (legal accident insurance) recommends the following guideline:

In order to support the efforts to promote the safety and the prevention of accidents at work, all advertising-traders, advertising agencies and advertising medias have been asked to avoid the description of situations or behaviour, inconsistent with the accident-avoidance-guidelines or incompatible with the idea of the safety at work in their advertisements for machines, working-tools and similar.

Guidelines concerning advertising for car tyres

In connection with a complaint, the German Advertising Council has checked the advertisement of tyre-manufacturers for car-tyres on the market for the wet, cold and snowy season.

The following advertising-headline is considered as inadmissible by the German Advertising Council: "On the anti-aquaplaning-radials by X you are as safe as a fish in water".

The German Advertising Council shares the consideration published by the Association of the Technique Supervision Societies(MOT=TÜV) and regards the following advertising slogans as dangerous as these may induce car drivers to negligent behaviour:

- "A safe vehicle-control on snow and ice is guaranteed"
- "Effective protection against the feared aquaplaning is assured"
- "Hitherto not known suction on ice and a safe grip on deep snow"
- "Our tyres are the accident-brake"
- "Our tyre is a raintyre"

In the opinion of the German Advertising Council, the positive qualities of the developments in the area of car-tyres should definitely be emphasised, but not in a way that the car-driver is tempted to forget all those driving attributes which alone promise security in rain, fog, snow or ice.

Rules of Conduct re. discrimination and disparagement of persons

Considering the importance of this question and proceeding from its decisions hitherto, the German Advertising Council refers to the following:

Illustrations and statements in advertisements should not violate the human dignity and the general dignity and should not disparage or run down some persons or a group of persons. In particular the impression should not be given that some persons or groups of persons are inferior because of their sex, their origin or their opinions or that some persons or groups of persons are treated arbitrary unequally in society, profession and family.

In order to comply with these principles it is important that sexually provocative illustrations and words should be refrained from the portrayals of persons in advertisements.

As he is adjudicating if a violation against these principles has taken place, the German Advertising Council takes as a reference for his decision the impression an average observer would or could have. The legitimate concerns and opinions of minorities are taken into account appropriately

V. TELE-SHOPPING

A. General regulation

1. General law on consumer protection containing rules on distance sale, applicable to all media

The European Directive on Distance Selling was implemented in Germany by The Distance Selling Law ("Fernabsatzgesetz" dated 27. June 2000 hereinafter referred to as FernAbsG). It gives protection to consumers who conclude contracts by means of distance communications such as mail-orders including e-mails, catalogues, broadcasts, tele- and other media services as eg fax or internet (§ 1 Abs. 2 FernAbsG).

The regulations only apply to consumer contracts. They do not apply to business to business transactions. Some types of contracts are excluded from the scope of the regulations (distance learning, time-sharing lodging, bank-, finance-, assurance-, real estate businesses, delivery of food, drinks, meals and other goods of daily use by the supplier on a regularly basis to the place of residence or work of the consumer (§ 1 Abs. 3 FernAbsG).

The law ensures that the consumer obtains full and accurate information about the commercial objectives and the identity of the supplier. § 2 Abs. 2 FernAbG rules that the following information have to be given to the consumer:

1. the identity of the supplier and the supplier's address,
2. a description of the main characteristics of the goods or services and the date of the conclusion of the contract,
3. where appropriate, the minimum duration of the contract,
4. a reservation made that different goods and/or services of equal quality and price may be provided and a reservation made that the promised goods and/ or services will not be provided in case of non-availability;
5. the price of the goods or services including all taxes or other price elements;
6. delivery costs where appropriate;
7. the arrangements for payment, delivery or performance;
8. the existence of a right of cancellation or to return the product;
9. the costs, of using the means of distance communication if the costs exceed the usual basic tariffs which the consumer should be aware of ;
10. the period for which the offer and in particular the price remains valid.

According to § 2 Abs. 3 the information listed in § 2 Abs. 2 no. 1-8 FAG above must be made available to the consumer in a durable data support (medium) at the latest, at the time of delivery of the goods or performance of the services.

In addition the supplier must also provide the consumer with the following information to be clearly distinguished from the other information:

1. the information about the conditions, details concerning the exercise of the right to cancel or to return as well as their legal consequences and the exclusion of the cancellation right,
2. the supplier's address to which complaints may be addressed and the legal address of the company and in case that the supplier is a legal person or an association or group of persons also the name of a legal representative,
3. the information on after sales services and conditions of guarantees,
4. conditions for canceling the contract where it is of an unspecified duration or a duration exceeding one year.

The law provides that the information set out in § 3 no.1 and no. 2 does not need to be sent to the consumers who order services provided directly by means of telecommunications when these are supplied on only one occasion and are charged by the telecom provider. In this case, however, the consumer must have the possibility to obtain the address of the company where he may forward a complaint to.

The consumer has the right to cancel the contract according to §361 a BGB. The delay of cancellation does not start before

- the information obligation has been executed according to § 2 Abs. 3 and 4 FAG,
- the date of arrival in case that goods are delivered,
- the day of the first delivery in case of repetitive delivery of goods of the same type and
- the contract has been concluded in case of services.

The right of cancellation expires (§ 3 Abs. 1):

1. in case that goods are delivered 4 months after their reception at the latest and
2. in case of services
 - a) 4 months after conclusion of the agreement at the latest
 - b) if the provider has begun the execution of the service obligations before the end of the cancellation period with the approval of the consumer or if the consumer himself has caused this

In case neither other agreements has been made nor other legal regulations, the consumer does not have the right to cancel certain types of contracts (§ 3 Abs. 2 FAG):

1. contracts which have been made on the customer's requirements or which are clearly destined to personal needs or which are not suitable for return due to the specific type of product or if this product is perishable and/or is over its date of use.,
2. contracts regarding the audio- or video fixations or software if the seal of the delivered data supports has been withdrawn.
3. contracts for the supply of newspapers, periodicals or magazines,
4. contracts for gaming and lottery services or

5. contracts which have been made at the occasion of an auction (§ 156 BGB).

In case the distance selling contracts are subject to financing, the credit contracts are not binding if the consumer exercises his cancellation right correctly (§ 4 FAG).

2. Specific audiovisual regulation

a) Definition

Teleshopping is defined by § 2 Abs. 2 no. 8 RStV in line with the EU directive TVWF as the broadcast of direct offers to the public in the view of selling goods or services including immovable property, rights and obligations in return for payment.

b) Authorisation

With the exception of teleshopping spots teleshopping is not allowed in public broadcasts (§ 18 RStV).

Tele-shopping channels containing exclusively teleshopping offers are not required to obtain a broadcasting license such as other broadcasters offering either a wide range of editorial programmes or specific editorial programmes as sport or music programmes. "Pure" teleshopping programmes are regulated by the law on media services (MediendiensteStV, see above I A 1 2.1)

c) General rules on content

The same principles as for advertising apply and the TV-Code (no. 16 section 3) refers explicitly to Art. 7 Abs. 1, 2nd sentence RStV and no. 4 section 1-4 of the TV-Code ruling that advertising and teleshopping, also addressed to children and young persons may not harm their interest or take advantage of their inexperience. Minors must not be encouraged to contract on the sale or rental or lease of goods or services including immovable property. The TV-Code dealing with the protection of children and teenagers with respect to advertising has to be respected (see above I A 2 c).

However some specific rules for teleshopping additionally apply such as the obligation to present clearly the relevant costs when ordering (TV-Code no. 16 section 2). Other specific teleshopping rules differ according to the format, teleshopping spots, -programs (windows), or others. These rules will be mentioned below when presenting the different teleshopping formats.

d) Rules on duration and insertion

Beside the exclusive teleshopping channel mentioned above under 2b) and which may not need a broadcast license, there are **3 types** of tele-shopping broadcast possible in the regular licenced broadcasting services:

Teleshopping windows with a minimum uninterrupted duration of 15 minutes

According to § 45 a RStV –in line with Art. 18a of the Directive TVWF- a maximum of 8 windows per day not exceeding 3 hours are allowed and must be clearly identified in vision and sound as teleshopping windows. The TV-Code precises the obligation to clearly identify teleshopping windows. They have to be clearly announced at the beginning in vision and sound and during the entire broadcast of the teleshopping window the identification “advertising programme” or “sales programme” has to be inserted (TV-Code no.16 section 1).

Tele-shopping spots

Teleshopping spots are generally broadcast in normal advertising breaks and treated by the media law in the same way as normal advertising spots. § 45 Abs. 2 RStV says that the duration of advertising- and tele-shopping spots within one hour may not exceed 20 % (= 12 minutes).

There are no specific rules to tele-shopping spots regarding their identification and the same rules as to normal advertising apply (clear identification at the beginning of the advertising break according to the TV-Code no.6 section 1). Exceptionally, isolated tele-shopping spots are permitted as this is the case also for normal advertising spots (§ 44 Abs.2, 2nd sentence RStV);

Tele-shopping broadcasts with a duration of less than 15 minutes

According to the TV-Code no.16 section 4 also such formats may be broadcasted and the obligation of identification as for long advertisements apply as defined in no.8 sections 2-4 of the TV-Code. The duration of such tele-shopping broadcasts have to respect the maximum of the daily advertising time (20 %).

B. Rules applicable to specific products

The requirements of advertising regulation apply in full to teleshopping..

VI. SPONSORING

A. GENERAL REGULATION

1. Law against unfair competition

There are no explicit regulations on sponsoring in the general laws outside the audiovisual sector. However, the general rules on advertising laid down in the law against unfair competition (see I.A.1.) are to be applied also to sponsoring.

2. Specific audiovisual regulation

a) Definition

According Art. 1e of the Directive TVWF, the German media law defines “Sponsoring” as follows (§ 2 Abs.2 Nr.7 RStV):

“Sponsoring in the meaning of the RstV is every contribution for the direct or indirect financing of a program of a natural-, legal person (organisation) or a collective of persons other than the broadcaster or the producer of the of audiovisual works in order to promote the name, trade mark, image of the person / organization or the collective of persons, their activities or performances“.

b) Authorization

Both systems, the public and private broadcasters are authorized to carry sponsoring. The interdiction for public channels to broadcast advertising after 8 p.m. does not apply to sponsor references, which may be broadcast all day notwithstanding when the sponsored program starts.

News shows and programs dealing with political current events may not be sponsored (Art.8 Abs. 6 RStV). Companies with activities in the field of production or selling of pharmaceutical products and medical treatments may sponsor programs in order to promote the image or name of the company but not for those medicines or medical treatments which are only available upon medical prescriptions (Art. 8 Abs. 5 RStV). Companies with the main activity in the field of producing cigarettes and other tobacco products are not allowed to sponsor programs (Art. 8 Abs. 4 RStV).

c) General rules on content

As references to the sponsorship is not calculated within the advertising limits (i.e. no hourly and daily time restrictions for sponsoring), § 8 Abs. 1 RStV imposes stricter regulations concerning the content of the sponsor-reference in the program. The reference to the sponsor may be presented with moving images. In addition to or instead of the sponsors’ name, also the emblem/logo or a trademark may be inserted.

According to no. 12 section 4 of the TV-Code the sponsor credit has to explain the sponsors connection to the sponsored program. However, no additional advertising statements concerning the sponsor, products or trademarks except an image slogan are allowed.

d) Duration and insertion

The duration of sponsor credits have to be adequately short (§ 8 Abs. 1). No. 12 section 4 of the TV-Code says that the reference to the sponsor must only take the amount of time necessary to clearly identify the reference of the financial relationship between broadcaster and sponsor.

Sponsor credits have to be inserted at least at the beginning or at the end of the program. References to the sponsor within the program are allowed before and after each advertising break (TV-Code no. 12 section 5).

e) No influence of the sponsor regarding the programme

§ 8 Abs. 2 RStV determinates that content and the scheduling of the program must not be influenced by the sponsor in such a way to affect the broadcaster responsibility and the editorial independence.

f) No encouragement to purchase sponsors' goods or services

§ 8 Abs. 3 RStV says that sponsored programmes must not encourage to sell, to purchase, or to rent or lease products or services of the sponsor in particular by special references. The TV-Code, no. 12 section 6 precise that this is generally the case if

1. within the programme products or services are presented, generally recommended or described as favorable which are offered by the sponsor or a third party;
2. within sport, cultural or similar programmes products, services, names, trademarks or activities on bill boards or other items may be identified, where the producer or provider is the sponsor or a third party.

g) Sponsoring of a programme title

According to the TV-Code (no.12 section 8) it is possible to integrate the name of a company, a product or a trade mark with the name of a programme if no undue advertising prominence is provided. However, in case that TV-magazines use the titles of editorial products (i.e. Spiegel TV), these programmes must not refer to the actual or coming publication of the print product. When presenting the name of the publishing house or of the print product no undue prominence should be made. References to the parent publications are generally not allowed. It is explicitly stated that § 45 Abs. 3 RStV which is dealing with auxiliary materials is not to be applied in this case concerning the parent publication (TV-Code no. 20 section 2).

h) Sponsoring of informational services (graphical inserts)

When graphics such as time, results etc. are shown during sport programmes it is possible to insert names of companies or products, product names or providers of technical equipment but only when these are by function directly in relation with these graphics. In particular this may be deemed if the hard- and/or software has been made available to show the results or to produce the inserts with the technical information. In this context reference is made to international regulations and standards concerning the inserts of timing- and data processing companies on the occasion of sport broadcasts (TV-Code no.19 section 2).

B. Regulations for specific products or specific programs

1. Regulations for specific products

Tobacco

Sponsoring is forbidden for those companies which principal activities are the manufacturing of cigarettes or other tobacco products (§ 8 Abs. 4 RStV).

Medicines or medical treatments only available on prescription

Sponsoring is forbidden for medical products and medicinal treatments available only on doctors' prescription. Companies with their principal activities in the field of manufacturing medicinal products or medical treatments may be a sponsor in order to promote the name or the image of the company but not promote for medicines or medical treatments available only on prescription (§ 8 Abs. 4 RStV).

Prohibited advertising – prohibited sponsoring

More generally the TV-Code prohibits sponsoring by those who cannot advertise according to media or other laws or which core business is with products or services for which advertising is prohibited (TV-Code no. 12 section 7).

1. As the media law explicitly prohibits political, philosophical and religious advertising, the TV-Code forbids explicitly sponsoring for such bodies.
2. As §§ 284 Abs. 4, 287 Abs.2 German Criminal Law prohibits advertising for gambling and lotteries without official license, also sponsoring for such activities are illicit.

2. Regulation for specific programs (sponsorable and unsponsorable programs)

Generally, sponsoring is only allowed with reference to a programme and not programme segments. According to the TV-Code also short programmes (i.e. weather forecast) may be sponsored. However, sponsoring of advertising is illicit as well as of long advertising

and tele-shopping windows (TV-Code no.12 section 2) and of programme announcements (TV-Code no.12 section 3, last sentence). But programme announcement may contain a reference to the sponsor of the programme.

News- and current affairs programmes cannot be sponsored (§ 8 Abs. 6 RStV).

VII. SELF-PROMOTION

1. Self promotion spots

The media law (§ 15 Abs.4 RStV for public and § 45 Abs.3 RStV for private channels) says that self-promotion is not subject to the advertising restrictions such as the maximum amount of advertising time per hour / per day.

Art. 45 section 3 RStV is in his essential part identical to § 15 Abs. 4 RStV and in line with Art. 18.3 of the Directive TVWF. It reads as follows:

“Announcements made by the broadcaster to its own programmes and to material, derived directly from such programmes and unpaid programme contributions in order to serve the public including calls for charity are not considered as advertising in the meaning of section 1 and 2.”

No. 15 of the media authorities’ TV-Code is worded as follows:

1. Self-promotion is references made by the broadcaster to the programmes he has obtained a licence for. Such references are not considered as advertising in the meaning of § 2 Abs. 2 Nr. 5 RStV.
2. Broadcasters’- and self-promotion are not subject to regulations on advertising. They serve the relations with the viewers. They may refer to the entire TV-programme and single programmes and to persons acting in those programmes or undertakings and other events outside the programme of the broadcasters.
3. Is not considered as self-promotion an advertising making reference to another broadcaster as a company or to his programmes and services.
4. References to the availabilities of recordings of the broadcasters’ programs on audio- or videotapes, records and similar sound- and images supports are not subject to advertising regulations.
5. References to books, records, videos and other publications as i.e. games and references to where they are available are not subject to advertising regulations if they explain or add something to the content of the programme.
6. Those references may only be broadcast if related to the programme or the announcements of the individual programmes or series on the relevant day of broadcast.
7. Other references which are not in line with those mentioned in section 2, 4, 5 and 6 are considered as advertising.

2. Self-promotion channels

§ 45 b RStV mentions self-promotion channels and states that the audio-visual regulations as the general principles on advertising and teleshopping are applicable referring to §§ 7,8,44 and 45a RStV. The same paragraph says that self-promotion channels may contain other advertising but insofar only within the limits of the daily and hourly restrictions on the maximum amount of advertising and teleshopping as defined in § 45 Abs. 1 and 2 RStV which are not binding to the broadcasters own self-promotion.

No. 17 section 1 of the TV-Code defines “Self-promotion channels” as separately licensed programmes where the content serve to present the image of a company to the public. Such channels do not serve primarily to promote the selling of goods and services (of the broadcaster).

Concerning the clear identification of self-promotion channels no. 17 section 2 of the TV-Code rules that by means of program presentation or station identity (logo) it has to be ascertained that self-promotion channels may be recognized as such.

VIII. OTHER PROMOTION TECHNIQUES

e.g. product placement, prize offers

Product Placement as such is neither defined in the media law nor in the TV-code issued by media authorities. The general rule is that the visual or verbal mention or representation of goods, services, names, trade marks or the representation of activities of a producer of goods or of a provider of services in the editorial programmes by the broadcaster with advertising intentions is prohibited (prohibition of surreptitious advertising, see above I A 2 e).

The TV-Code (no. 9) however states that such representations may be legitimate in some cases in particular if justified by editorial requirements. The TV-Code says:

- (1) The presence of commercial products or their producers, services or their providers outside the regular advertising is no surreptitious advertising, if this happens for overwhelming reasons related to programme content / dramaturgy or in order to assure information purposes.
- (2) Also in cases when the presence of products and services is legitime, the support of advertising interests should be avoided by editorial means when possible.

The TV-Code deals with some special types of legitime "product presence" in editorial programmes as traditionally some products or services for the editorial programmes are acquired at no or less than full costs.

Representation of prizes in quiz- and game shows

No. 18 of the TV-Code says that with quiz- and game shows it is legitimate to mention twice the name of the company offering the prize and to show the prize also with animated images in order to identify clearly the product twice during a short period of time.

Self-regulation especially on the representation of prizes in quiz- and game shows have been issued by the public channels (no. 9 of ARD/ZDF advertising guidelines) saying that the person offering the prize has to be identified, that the representation of the prize has to be restricted to what is editorially necessary and that products or services made available by the sponsor of a programme should not be represented during the sponsored programme.

References to providers of goods and/or services

According to no. 19.1 of the TV-Code it is legitimate to broadcast credits at the end of a programme referring to providers of goods and/or services. However, the identification of the provider has to be as decent as sponsor credits (see above I C 2 b).

Special credits to providers of information services during sport programmes

According to no. 19.2 of the TV-Code it is legitimate during sport programmes to insert credits with the name of a company or the name of a product if there is a functional link between the information service (graphic) and the name of the company or its product (see above III A 2h).

Names of print publications in television programmes

According to no. 20 of the TV-Code it is legitimate to represent the name of the publishing house or of its product during a television programme if no undue prominence is given to it (see above III A 2g).

IX. NEW ADVERTISING TECHNIQUES

➤ **Split screen**

§ 7 Abs. 4 of the media law states that split screen advertising is legitimate if advertisement is clearly separated from the editorial programme and identified as such.

Split screen advertising is to be calculated in the limits of the spot advertising allowances (12 minutes per hour). No. 7.3 of the TV-Code rules that the duration of split screen advertising is calculated in full independence of the size of the split screen advertising.

No. 7.4 of the Tv-Code says that split screen advertising is prohibited in broadcast of religious services or during childrens' programmes.

With respect to the obligation of a clear identification no. 7.2 of the TV-Code says that this is deemed to be the case if the advertising window is separated during the whole time from the editorial part of the screen by the word "advertising".

➤ **Interactive advertising**

Considered in a primitive way interactive advertising as TV-advertising contains a telephone number/ an e-mail- or an internet-address (www...) offering additional product- or service information to the viewer.

Teleshopping-windows or teleshopping spots especially are using this technic in order to create the possibility that viewers may immediately purchase the advertised goods or services.

Considered in a broader sense interactive-advertising is at a very early stage in Germany. However, it has been recently reported (Medien Bulletin 10.01.2002) that an offer is on the market to combine the television picture with internet applications in the way that the viewer may use the TV remote control to click on icons appearing on screen to receive additional information about products or contents. Such additional information are not regulated by the media law (RStV) and the law on media services (MediendiensteStV, see above will be applicable with basic regulations on general advertising principles as protection on children and minors (see above I A 2.1.1). As the viewers are free to use this link or not media authorities regulating and controlling TV broadcast seem to request that the advertising link should be clearly identified as such.

Additionally it has to be said that such interactive advertising as any advertising has to respect the general regulations applicable to all advertising which means to respect public order (especially protection of minors) and to respect the rules prohibiting misleading advertising.

➤ **Virtual advertising**

Since April 2000 the media law has been permitting virtual advertising (§ 7 Abs. 6 RStV) if

- the use of such technics is indicated at the beginning and at the end of the programme concerned and
- only already existing advertising space is to be replaced.

The TV-Code rules that

- the viewers must be informed by optical- or audio means that virtual technics are/have been used,
- static advertisements may not be replaced by moving pictures.

It is not known that important broadcasting organisations are using this virtual technology. However, the legal framework guarantees that not only the advertising on the place of the event is considered as an unavoidable advertising but also the advertisements which have been exchanged by the programme providers.

In case virtual advertising should be practised by a broadcasting organisation or any other company subject to German law the general advertising principles will apply (respect of constitutional rights, public order, prohibition of misleading advertising).

RADIO BROADCASTING

I. Advertising

A. General regulations

1. General law on consumer protection containing rules on advertising, applicable to all media

In Germany advertising broadcast by radio is subject to the fundamental principles applicable to all advertisements as described above in the television chapter.

The media law (RStV) does also apply to radio. The TV-Code issued by the media authorities (Landesmedienanstalten) for private radio companies contains to a very large extent the same regulations as for television. Differences between TV- and radio regulation basically only occur when the different type of media makes such differences evident. In TV advertising breaks have to be clearly separated from the editorial programme by visual and acoustic means where as in radio acoustic means are sufficient for obvious reasons (although written information may be displayed by modern radio sets with a digital display). In order to compensate the impossibility to show pictures some regulation are more generous. In editorial radio broadcasts where the audience may win prizes, the products' or the companys' name may be inserted 3 times instead of 2 in the TV-Code regulation for TV.

2. Specific audiovisual regulations

a) Definition

Concerning public radio stations, however, an important difference concerns the authorized airtime for radio advertisements. **Art....** of the media law grants the possibility to a maximum average of 90 minutes per day subject to the authorization of the relevant state (Land).

Concerning teleshopping and sponsorship reference is made also to the chapter on television. The regulation on distance selling (FernabsatzG) extensively described above is also applicable in case teleshopping is broadcast in radio.

Although self-regulation as described in the TV chapter is also applicable to radio it can be mentioned that a specific regulation for radio only has been issued by the German Advertising Council :

b) Rules of conduct concerning advertising with traffic noises on radio

From time to time acoustic signals reproducing traffic noises are used in radio advertisements but are to be considered as dangerous in case a car driver could be distracted.

In order to support the efforts that are made to avoid traffic accidents, the German Advertising Council requires from the advertisers to refrain from inserting "critical" noises in radio advertisements. Among those there are:

- strong brake noises, especially squealing tyres
- crash- and accident-noises, which indicates a collision of motor vehicles
- aggressive horn-noises
- insertion of sirens or other comparable soundsignals.

INTERNET, CINEMA AND MOBILE PHONES

Competent Authority

In Germany there is no specific regulation for advertising distributed through the internet, in cinemas and by mobile phone. This does not mean these advertising messages are not regulated since the fundamental principles, general consumer protection regulation, regulation on misleading advertising, specific regulation for particular categories of products, regulation on distance selling (FernabsatzG) etc apply to advertising no matter which medium is used except those cases where advertising regulations are restricted to specific media.

There is no specific regulator for the internet, cinema and mobile telephony (as far as advertising is concerned). The self-regulatory codes of the German Advertising Council (Deutscher Werberat) apply to also to all non-broadcast media except when defined otherwise.

Particularities concerning advertising in cinema

1. An important difference concerns tobacco advertising which is not prohibited in cinema. Detailed self-regulation has been decided upon by the tobacco industry which is also applicable to tobacco advertising in cinema. Although, all the details of the self regulation are not available, some important restrictions have been published:

prohibition of advertising referring to health issues,
prohibition of advertising addressed to young persons,
prohibition of advertising containing elements which are typical for young persons,
prohibition of advertisements with famous persons, competitive sportsmen or athletes ("Leistungssportler"),
prohibition of advertisements related to competitive sport,
prohibition of advertisements with persons younger than 30 years old,
obligation to show a warning succeeding tobacco advertising in cinemas.

The respect of these self-regulation is guaranteed by arbitration procedures. Sanctions up to Euro 150.000 have already been pronounced in the past.

2. Another important difference is that co-financing is possible as the production of movies made for cinema is concerned. The regulations in the media law (RStV) and the TV-Code for private broadcasters on surreptitious advertising do not apply for cinema movies.