



4.7. DE – Germany – National legal summary¹³³

4.7.1. Applicable regulatory framework

Relevant legislation includes the following:

Primary legislation:

- *Medienstaatsvertrag*¹³⁴ – MStV (Interstate Media Treaty).¹³⁵
- *Jugendmedienschutz-Staatsvertrag* – JMStV¹³⁶ (Interstate Treaty on the Protection of Minors in the Media).¹³⁷
- *Telemediengesetz* – TMG¹³⁸ (Telemedia Act).
- *Jugendschutzgesetz* – JuSchG¹³⁹ (Youth Protection Act).
- *Gesetz gegen den unlauteren Wettbewerb* – UWG¹⁴⁰ (Act against Unfair Competition¹⁴¹).
- *Gesetz über die Werbung auf dem Gebiet des Heilwesens - Heilmittelwerbegesetz* – HWG¹⁴² (Law on Advertising in the Field of Healthcare).
- *Gesetz über Tabakerzeugnisse und verwandte Erzeugnisse, Tabakerzeugnisgesetz* – TabakerzG (Law on Tobacco Products and Related Products).¹⁴³
- *Staatsvertrag zur Neuregulierung des Glücksspielwesens in Deutschland - Glücksspielstaatsvertrag 2021* – GlüStV 2021¹⁴⁴ (Interstate Treaty on the New Regulation of Gambling in Germany – Interstate Treaty on Gambling 2021).

¹³³ The factsheet on Germany incorporates feedback received from Peter Matzneller, Consultant on Legal and European Affairs at the Joint Management Office of the Media Authorities (*die Medienanstalten*) during the checking round with the national regulatory authorities.

¹³⁴https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Medienstaatsvertrag_MStV.pdf.

¹³⁵https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Interstate_Media_Treaty_en.pdf.

¹³⁶https://www.kjm-online.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/JMStV_gaend_durch_ModStV.pdf.

¹³⁷https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Gesetze_Staatsvertraege/Interstate_Media_Treaty_en.pdf.

¹³⁸ <https://www.gesetze-im-internet.de/tmg/BJNR017910007.html>.

¹³⁹https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/ua_Leitfaden_Medienanstalten_Werbekennzeichnung_Online-Medien.pdf.

¹⁴⁰ https://www.gesetze-im-internet.de/uwg_2004/BJNR141400004.html.

¹⁴¹ https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html.

¹⁴² <https://www.gesetze-im-internet.de/heilmwergb/BJNR006049965.html>.

¹⁴³ <https://www.gesetze-im-internet.de/tabakerzg/BJNR056910016.html>.

¹⁴⁴ <https://www.gesetze-bayern.de/Content/Document/StVGlueStV2021/true>.



- Zweiter Staatsvertrag zur Änderung medienrechtlicher Staatsverträge, Zweiter Medienänderungsstaatsvertrag¹⁴⁵ (Second Interstate Treaty amending the Interstate Media Treaty).

Secondary legislation:

- *Satzung über die Schlichtungsstelle*¹⁴⁶ (Statute regulating the Arbitration Body pursuant to Article 99 of the Interstate Media Treaty).
- *Satzung zur Durchführung der Werbevorschriften des Medienstaatsvertrags der Landesmedienanstalten*¹⁴⁷ (Statute for the Implementation of the Advertising Regulations of the Interstate Media Treaty of the media regulatory authorities).

Self-regulatory instruments:

- *ARD-Werberichtlinien*¹⁴⁸ (ARD advertising guidelines) – for public service media.
- *ZDF-Werberichtlinien*¹⁴⁹ (ZDF advertising guidelines) – for public service media.

Other (legally non-binding):

- Leitfaden der Medienanstalten: Gewinnspiele auf Social-Media-Angeboten¹⁵⁰ (Guidance on sweepstakes in social media offerings).
- Leitfaden der Medienanstalten Werbekennzeichnung bei Online-Medien¹⁵¹ (Guidance on the labelling of advertising in online media).
- Politische Werbung in Rundfunk und Telemedien¹⁵² (Factsheet on political advertising).

¹⁴⁵ <https://www.land.nrw/media/25318/download?attachment>.

¹⁴⁶ https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/VSD-Satzung.pdf.

¹⁴⁷ https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/Werbesatzung.pdf.

¹⁴⁸ <https://www.daserste.de/ard/die-ard/ARD-Werberichtlinien-100.pdf>.

¹⁴⁹ <https://www.zdf.de/assets/zdf-richtlinien-werbung-100~original>.

¹⁵⁰ https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/DLM-Leitfaden_Gewinnspiele_Social_Media.pdf.

¹⁵¹ https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/ua_Leitfaden_Medienanstalten_Werbekennzeichnung_Online-Medien.pdf.

¹⁵² https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/ua_Leitfaden_Medienanstalten_Werbekennzeichnung_Online-Medien.pdf.



- *Journalistische Sorgfalt in Online-Medien*¹⁵³ (Factsheet on journalistic due diligence in online media).

4.7.2. Definitions and restrictions regarding commercial communications

This section aims at identifying the relevant definitions related to commercial communications stemming from related laws, rules and current practices, as well as ongoing reforms under the transposition and implementation of the revised Audiovisual Media Services Directive (AVMSD). Please note that this review includes definitions which are part of the revised AVMSD, inclusive of audiovisual commercial communications, advertising, surreptitious commercial communications, sponsorship and product placement, but also the definitions of supplementary and/or related concepts, such as the advertiser, sponsor and sponsored content, as well as misleading commercial communication, for the purpose of providing a comprehensive overview.

4.7.2.1. Definitions

Table 33. Definition of the main concepts related to commercial communications

Concept	Existence of a definition
Audiovisual commercial communications	Yes, also covered under the definition of advertising.
Television advertising	Yes, broadcast advertising, also covered under the definition of advertising.
Advertiser	No.
Surreptitious commercial communication	Yes.
Misleading commercial communication	Yes.
Virtual advertising	No.
Sponsorship	Yes.
Sponsor	No.
Sponsored content	No.
Product placement	Yes.

¹⁵³ https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/ua_Merkblatt_Journalismus_im_Internet.pdf.



Source: German response to European Audiovisual Observatory standardised survey

4.7.2.1.1. Audiovisual commercial communications

Article 2 paragraph 2, subparagraph 7, of the MStV does not refer to audiovisual commercial communication but to (the broader term of) advertising in general and includes various formats:

“advertising” means any form of announcement that serves to directly or indirectly promote the sale of goods and services, including immovable property, rights and obligations, or the appearance of natural or legal persons engaged in an economic activity, and in return for remuneration or a similar consideration, or as self-promotion, and is recorded on the radio or a telemedia channel. Advertising is, in particular, broadcast advertising, sponsorship, teleshopping, and product placement; Article 8 (9) and Article 22 (1) sentence 3 remain unaffected;

With the comprehensive reform of the former Interstate Broadcasting Treaty (*Rundfunkstaatsvertrag* – RStV) into an Interstate Media Treaty (MStV) in 2019, also in light of the implementation of the AVMSD in 2018 the term “advertising” was redefined and aligned with the definition of audiovisual commercial communication from the AVMSD (although it is still broader than the latter). It is now a broad term which also covers, *inter alia*, product placement and sponsorship so that rules under the MStV referring to advertising (illustrated under 4.7.2.2.) also cover advertising in the form of product placement and sponsorship (illustrated under 4.7.3.). The same broad definition now applies to advertising on video-sharing platforms (VSPs), Article 98 of the MStV is primarily relevant in this context, which declares Article 8 paragraphs 1, 3 sentences 1 and 2, paragraphs 7 and 10 of the MStV and Article 6 paragraphs 2 and 7 of the JMStV applicable for advertising in video-sharing services (see under 4.7.2.2. in detail).

Rules referring to advertising can be found in Articles 8, 22, 30 (paragraphs 5 and 6), 3 (paragraph 5), 35, 39, 40, 46, 70, 74, 80 and 98 of the MStV as well as in Article 45 of the MStV in conjunction with the ARD and ZDF advertising guidelines for public service media and in Articles 21 (sentence 1) and 74 of the MStV in conjunction with the Statute for the Implementation of the Advertising Regulations of the Interstate Media Treaty of the media regulatory authorities (Advertising Statute) for commercial media.

Insofar as VSPs or individual channels on VSPs are also to be classified as telemedia, Article 22, which contains rules on advertising, sponsorship and prize games, also applies. German law (still) does not explicitly rely on the terms used in the AVMSD nor is it limited to the providers addressed in the AVMSD. Generally, a distinction is made between two categories of media: broadcasting and telemedia. The very broad term of telemedia can thus cover a variety of online media regardless of their format in terms of content (audiovisual, audio, video, text, mixed forms, etc.) or integration as or into a service (websites, apps, social networks, etc.). According to the definition in Article 2 paragraph 1 sentence 4 of the MStV, telemedia:



means all electronic information and communications services, as far as they are not telecommunications services pursuant to Article 3 subparagraph 24 of the Telecommunications Act, which consist entirely in the conveyance of signals across telecommunications networks or telecommunications-supported services pursuant to Article 3 subparagraph 25 of the Telecommunications Act, or broadcasting pursuant to sentences (1) and (2).

The Advertising Statute of the German State Media Authorities contains concretisations of the advertising provisions of the MStV. It also applies to broadcast-like teledmedia, which are defined in Article 2 paragraph 2, subparagraph 13, of the MStV:

teledmedia with content that is similar to radio or television in terms of form and design and which is made available from a catalogue specified by a provider for individual demand at a time selected by the user (audio and audiovisual media services on demand); contents include, in particular, radio plays, feature films, series, reports, documentaries, entertainment programmes, information programmes, and children's programmes).

The Advertising Statute thus does not apply to VSPs themselves, but possibly to the individual channels on VSPs, as far as they fall under the definition of broadcast-like teledmedia.

Furthermore, Article 2, subparagraph 9, of the TMG defines audiovisual commercial communication as:

any form of communication using images with or without sound that accompanies or is included in a programme or a user-generated video in return for payment or for similar consideration or for self-promotional purposes where the purpose of the communication is to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity, including sponsorship and product placement;

Article 10c contains the obligation for VSPs to effectively agree with their users that they are prohibited from distributing unlawful audiovisual commercial communications. Article 6 contains specific obligations for audiovisual commercial communications in teledmedia which may also apply to VSPs and individual channels within VSPs.

4.7.2.1.2. Television advertising

Article 2 paragraph 2, subparagraph 8, of the MStV refers to the broader term of broadcast advertising which includes radio and television advertising:

'broadcast advertising' means any form of announcement in the exercise of a transaction, trade, handicraft, or liberal profession that is broadcast on the radio by a public-service or commercial broadcaster or a natural person either in return for remuneration or a similar consideration, or as self-promotion, with the aim of promoting the sale of goods or the provision of services, including immovable property, rights and obligations;



Rules referring to broadcast advertising can be found in Articles 8 (paragraphs 2, 3, 4 and 11), 9, 35 and 39 of the MStV, as well as Article 45 of the MStV in conjunction with the ARD and ZDF advertising guidelines for public service broadcasting only and in Articles 21 (sentence 1) and 74 of the MStV in conjunction with Articles 5, 6 and 13 of the Advertising Statute, for commercial media only including broadcast-like teledmedia (see under 4.7.2.1.1.).

4.7.2.1.3. Advertiser

The term “advertiser” is used in Articles 8 (paragraph 2) and 22 of the MStV without a definition.

4.7.2.1.4. Surreptitious commercial communication

Article 2 paragraph 2, subparagraph 9, of the MStV defines surreptitious advertising as follows:

‘Surreptitious advertising’ means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising purposes and might mislead the public as to the actual purpose of the representation. Such representation is considered to be intended for advertising purposes, in particular if it is done in return for payment or for similar consideration;

Article 8 paragraph 7 of the MStV prohibits surreptitious advertising and is also applicable to VSPs according to Article 98 of the MStV.

Further provisions referring to surreptitious advertising can be found in Article 45 of the MStV in conjunction with Article 8 of the ARD advertising guidelines and Article 8 of the ZDF advertising guidelines for public service broadcasting only and in Article 21 (sentence 1) and Article 74 of the MStV in conjunction with Article 9 of the Advertising Statute for commercial media only including broadcast-like teledmedia (see under 4.7.2.1.1.).

4.7.2.1.5. Misleading commercial communication

The term “misleading commercial communication” exists in Article 8 paragraph 1, subparagraph 3, of the MStV without a definition.

Article 45 of the MStV in conjunction with Article 3.2 of the ARD and ZDF advertising guidelines (*ARD-Werberichtlinien*) and Article 3.2 of the ZDF advertising guidelines (*ZDF-Werberichtlinien*) also refer to this for public service broadcasting only.

Furthermore, Article 5 (paragraphs 1 – 4) and Article 5a (paragraph 1) of the UWG provide the criteria to recognise a misleading commercial communication, and Article 5a paragraph 1 of the UWG elaborates on misleading by omission. These rules in German



competition law as well as Articles 3, 5, 5a, 8 et seq. of the UWG contain rules on misleading commercial practices, which also cover misleading commercial communication. However, they are not specifically aimed at the media, but at all companies that promote their goods and services.

4.7.2.1.6. Virtual advertising

The term “virtual advertising” exists in Article 8 paragraph 6 of the MStV and the Advertising Statute, without a definition. Article 8 paragraph 6 of the MStV stipulates that virtual advertising may be inserted in programmes provided that the insertion is signalled at the beginning and at the end of the programme in question, and that it replaces advertising already existing at the site of transmission.

Article 45 of the MStV in conjunction with Article 7 of both the ARD and ZDF advertising guidelines also refers to this, for public service broadcasting only, as well as Articles 21 (sentence 1) and 74 of the MStV in conjunction with Article 8 of the MStV for commercial media only including broadcast-like teledmedia (see under 4.7.2.1.1).

4.7.2.1.7. Sponsorship

Article 2 paragraph 2, subparagraph 10, of the MStV defines sponsorship as follows:

‘sponsorship’ means any contribution by a natural or legal person or an association of persons not engaged in broadcasting activities, the provision of broadcast-like teledmedia or video-sharing services, or in the production of audiovisual works, to the direct or indirect financing of a broadcast programme, broadcast-like teledmedia, video-sharing services, user-generated videos or a programme, with a view to promoting the name, the trademark, the image of the person or association, their activities or their products;

References to sponsorship are made in Articles 10, 22, 39 and 40 of the MStV, as well as in Article 45 of the MStV, in conjunction with Articles 11.3, 12 and 13 of the ARD and ZDF advertising guidelines for public service broadcasting only, and Articles 21 (sentence 1) and 74 of the MStV, in conjunction with Article 14 of the Advertising Statute, for commercial media only including broadcast-like teledmedia (see under 4.7.2.1.1). With regard to VSPs the explanation under 4.7.3.1. applies.

4.7.2.1.8. Sponsor

The term “sponsor” exists in Article 10 paragraphs 2 and 3 of the MStV and the ARD (Article 11.3) and ZDF advertising guidelines (Article 13.2) for public service broadcasting, but without a definition.

With regard to VSPs the explanation under 4.7.3.1. applies.



4.7.2.1.9. Sponsored content

The term “sponsored content” exists in Article 10 of the MStV, without a definition of the concept:

the content of a sponsored broadcast programme or a sponsored television programme, as well as the scheduling of a sponsored programme, shall not be influenced by the sponsor in such a manner that the editorial responsibility and independence of the broadcaster are prejudiced.

The term can also be found in Article 45 of the MStV in conjunction with Article 13 of both the ARD and ZDF advertising guidelines, which refer to transmission of sponsored events for public service broadcasting only and in Articles 21 (sentence 1) and 74 of the MStV in conjunction with Article 14 of the Advertising Statute, for commercial media only including broadcast-like teledmedia (see under 4.7.2.1.1.).

4.7.2.1.10. Product placement

Article 2 paragraph 2 subparagraph 12 of the MStV defines product placement as follows:

“Product placement” means any form of advertising that consists of incorporating or referring to a product, service, or brand in return for remuneration or a similar consideration, so that it appears in a programme or user-generated video. The free provision of goods or services is product placement, provided that the goods or services in question are of significant value.

As the term “advertising” also covers product placement, the respective provisions of the MStV and Articles 6 and 10c of the also TMG apply (see under 4.7.2.1.1). Provisions explicitly referring to product placement can be found in Articles 8 (paragraph 7), 30 (paragraph 5), 33 (paragraph 5), 38 and 39 (paragraphs 1, 45, 70 and 117). Also, Article 45 of the MStV in conjunction with Article 9 of both the ARD and the ZDF advertising guidelines refers to product placement for public service broadcasting only, as well as Articles 21 (sentence 1) and 74 of the MStV in conjunction with Article 10 of the Advertising Statute for commercial media only including broadcast-like teledmedia (see under 4.7.2.1.1).

With regard to VSPs the explanation under 4.7.3.2. applies.

4.7.2.1.11. Other definitions

N/A.



4.7.2.2. Restrictions regarding commercial communications

The revised AVMSD introduces obligations for VSPs to, *inter alia*, respect certain requirements regarding commercial communications and this section aims at updating the information relative to these obligations and measures imposed under national legislation on media service providers, including VSP providers related to commercial communications.

Following the comprehensive reform of the former Interstate Broadcasting Treaty (*Rundfunkstaatsvertrag* – RStV) into an Interstate Media Treaty (MStV) in 2019, VSP providers must ensure that advertisements that are marketed, sold, or composed by said provider comply with certain requirements, according to Article 98 paragraphs 1 and 2 of the MStV. With regard to advertisements that are not marketed, sold, or composed by the VSP provider itself (e.g. within user-generated content), the VSP providers must also ensure compliance with these requirements by including and implementing the respective provisions in their general terms and conditions and by providing a function that allows users who upload user-generated videos to label audiovisual commercial communications (Article 98 paragraph 3 of the MStV in conjunction with Article 6 paragraph 3 of the TMG).

This applies to VSPs within the scope of the AVMSD if they are established in Germany and to VSPs outside the scope of the AVMSD insofar as they are intended for use in Germany irrespective of the place of their establishment (Article 1 paragraph 8 of the MStV).

In addition to the explicit provision for VSPs implementing the respective requirements of the AVMSD, there continue to be provisions addressing telemedia or certain kinds of telemedia, including the rules on advertising. As VSPs as well as user channels on VSPs can be considered as telemedia, further obligations than just the ones that are explicitly declared applicable, as mentioned in Article 98 paragraph 1 of the MStV, can apply to them in their capacity as telemedia. However, these provisions, where relevant, then only apply to content (including advertising) for which the VSP provider is responsible, unlike under Article 98 which obliges VSPs also in respect of user-generated content.

4.7.2.2.1. Audiovisual commercial communications for alcoholic beverages, tobacco and tobacco related products, including electronic cigarettes and refill containers

According to Article 98 paragraph 1 in conjunction with Article 8 paragraph 10 of the MStV, advertising and teleshopping for alcoholic beverages shall not promote excessive consumption of such beverages.

The advertising prohibitions laid down in the Law on Tobacco Products and Related Products are directed at the manufacturer, the importer, the distributor and any natural or legal person who advertises or sponsors such products (Article 3 paragraph 2 of the *TabakerzG*).

According to Article 19 paragraph 3 in conjunction with paragraph 2 of the *TabakerzG*, it is prohibited to advertise tobacco products, electronic cigarettes or refill containers in information society services in the sense of Directive (EU) 2015/1535, which



regularly also includes VSPs (any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services). Furthermore, according to Article 20 of the TabakerzG, it is prohibited to provide audiovisual commercial communications within the meaning of Article 1(1)(h) of the AVMSD for tobacco products, electronic cigarettes or refill containers or for the benefit of undertakings whose main activity is the manufacture or sale of such products.

Furthermore, Article 19 paragraph 5 of the TabakerzG prohibits the sponsorship of an event or activity with the aim or the direct or indirect effect of promoting the sale of tobacco products, electronic cigarettes or refill containers if the event or activity involves more than one member state of the European Union, takes place in more than one member state of the European Union, or if the event or activity has any other cross-border effect. Since sponsorship is generally prohibited under these conditions, the transmission of such a sponsored event or other activity in a user-generated video on a VSP would also be inadmissible.

According to Article 10c paragraph 1 in conjunction with paragraph 2 subparagraph 1 of the TMG, VSP providers established in Germany are obliged to effectively agree with their users (in general terms and conditions or in a similar way) that they are prohibited from distributing unauthorised audiovisual commercial communications, which includes those mentioned in Article 20 of the TabakerzG (for tobacco products, electronic cigarettes or refill containers or for the benefit of undertakings whose main activity is the manufacture or sale of such products).

Finally, according to Article 6 paragraph 5 of the JMStV, advertising for alcoholic beverages shall not be aimed at children or adolescents nor specifically appeal to children and adolescents through its presentation, nor show them consuming alcohol. This provision applies in German law to all providers of telemedia (which may include VSPs) and concerns advertisements that are marketed, sold, or composed by said providers. Unlike other obligations imposed on VSPs in relation to advertising under Article 98 of the MStV, it is not specified here how telemedia providers have to implement these obligations; in particular, they are not required by law to provide a corresponding function for the labelling of user-generated videos by uploaders. In practice, however, in order to comply with this obligation, VSPs have started to provide a corresponding option with which users can indicate whether their videos are specifically aimed at children and adolescents, in order to then be able to exclude these videos for certain advertising content.

4.7.2.2.2. Audiovisual commercial communications for medicinal products and medical treatment available only on prescription in the member state

Article 10 paragraph 1 of the HWG stipulates that the advertising of prescription-only medicinal products is only permitted to doctors, dentists, veterinarians, pharmacists and persons who legally trade in these medicinal products. This excludes advertising via other channels, such as on VSPs.



In accordance with Article 10c paragraph 1 in conjunction with paragraph 2, subparagraph 2 of the TMG and Article 10 of the HWG, VSP providers are obliged to effectively agree with their users (in general terms and conditions or in a similar way) that they are prohibited from distributing unauthorised audiovisual commercial communications, which includes those for prescription-only medical products (both medicinal products available only on prescription and also medicinal products containing psychotropic active substances with a risk of dependence and intended to eliminate insomnia or mental disorders or to influence a person's mood).

4.7.2.2.3. Surreptitious audiovisual commercial communications

Article 98 in conjunction with Article 8 paragraph 7 of the MStV prohibits surreptitious advertising as well as similar practices.

4.7.2.2.4. Subliminal techniques in commercial communications

According to Article 98 in conjunction with Article 8 paragraph 3 sentence 2 of the MStV, advertising shall not use subliminal techniques.

4.7.2.2.5. Prejudice with regard to human dignity

Article 98 in conjunction with Article 8 paragraph 1, subparagraph 1, of the MStV states that advertising shall not prejudice respect for human dignity.

4.7.2.2.6. Inclusion or promotion of any discrimination (on the grounds of e.g. sex, racial or ethnic origin, nationality, religion, etc.)

According to Article 98 in conjunction with Article 8 paragraphs 1 and 2 of the MStV, advertising shall not include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age, or sexual orientation.

4.7.2.2.7. Encouragement of behaviour prejudicial to health or safety

Article 98 in conjunction with Article 8 paragraphs 1 and 4 of the MStV states that advertising shall not encourage behaviour prejudicial to health or safety.

4.7.2.2.8. Encouragement of behaviour grossly prejudicial to the protection of the environment

Article 98 in conjunction with Article 8 paragraphs 1 and 4 of the MStV stipulates that advertising shall not encourage behaviour grossly prejudicial to the protection of the environment.



4.7.2.2.9. Causing physical, mental or moral detriment to minors

Article 98 of the MStV and Article 6 paragraph 2 of the JMStV stipulate that advertising shall not cause any physical or moral detriment to children and adolescents.

The JuSchG, which was last amended in Germany in 2021, also covers since then online media. It includes the rule that “content impairing the development of children and adolescents” in films and game programmes must be labelled and service providers who store or provide third-party information for users with commercial intent must take appropriate precautionary measures to protect children and adolescents from such content (this may include the implementation of reporting and redress procedures). If content is impairing the development of children and adolescents, it requires an assessment of several risk factors. Article 10b paragraph 3 of the JuSchG identifies risk factors, in particular risks arising from communication and contact functions, purchase functions, gambling-like mechanisms, mechanisms to promote excessive media use behaviour, the disclosure of inventory and usage data to third parties without consent, and age-inappropriate purchase appeals, in particular through advertising (cross-)references to other media.

Furthermore, other restrictions apply to commercial communications in the presence of children and/or adolescents:

- Appeals to buy or rent goods or services directed at children or adolescents exploiting their inexperience and credulity: Article 98 of the MStV in conjunction with Article 6 paragraph 2, subparagraph 1, of the JMStV stipulates that advertising shall not contain direct appeals to buy or rent goods or services directed at children or adolescents exploiting their inexperience and credulity.
- Encouraging of children or adolescents to persuade their parents or others to purchase the goods or services being advertised: According to Article 98 of the MStV in conjunction with Article 6 paragraph 2, subparagraph 2, of the JMStV, advertising shall not directly encourage children or adolescents to persuade their parents or others to purchase the goods or services being advertised.
- Exploitation of the special trust children or adolescents place in parents, teachers or other persons of trust: Article 98 of the MStV in conjunction with Article 6 paragraph 2, subparagraph 3, of the JMStV states that advertising shall not exploit the special trust children or adolescents place in parents, teachers or other persons of trust.
- Showing children or adolescents in dangerous situations: Article 98 of the MStV in conjunction with Article 6 paragraph 2, subparagraph 4, of the JMStV provides that advertising shall not unreasonably show children or adolescents in dangerous situations.
- Foods containing nutrients and substances not recommended in the overall diet: according to Article 98 of the MStV in conjunction with Article 6 paragraph 7 of the JMStV, VSP providers shall take appropriate measures to effectively reduce the impact on children of advertising disseminated in the context of children's programmes for foods containing nutrients and substances with a nutritional or



physiological effect, in particular fat, trans-fatty acids, salt, sodium, sugars, excessive intake of which in the overall diet is not recommended.

- Advertising of content extremely harmful to minors: Article 6 paragraph 1 of the JMStV, in conjunction with Article 4 provides that advertising for content that has been indexed (media content that has been banned or restricted from distribution by the Federal Review Board for Media Harmful to Young Persons for reasons of the protection of minors)¹⁵⁴ is only permissible under the conditions that also apply to the distribution of the content itself. Advertising for content that is absolutely prohibited under the JMStV (in particular content relevant under provisions of criminal law, glorification of violence and war, violations of human dignity and child pornography) is prohibited. The List of Media Harmful to Young Persons (section 18 of the Youth Protection Act) may not be distributed or made accessible for the purpose of advertising. In advertising, it is prohibited to indicate that proceedings for the inclusion of an offer or a carrier medium with the same content in the list pursuant to section 18 of the Youth Protection Act are pending or have been pending. This provision applies in German law to all providers of telemedia (which may include VSPs) and concerns advertisements that are marketed, sold, or composed by said providers.
- Content impairing the development of children and adolescents: Article 6 paragraph 3 of the JMStV states that advertising content likely to impair the development of children or adolescents into independent and socially competent personalities must be carried out separately from offers aimed at children or adolescents. This provision applies in German law to all providers of telemedia (which may include VSPs) and concerns advertisements that are marketed, sold, or composed by said providers.
- Exploitation of inexperience of children and adolescents: According to Article 6 paragraph 4 of the JMStV, advertising which is also directed at children or adolescents or in which children or adolescents are placed as actors must not harm the interests of children or adolescents or exploit their inexperience. This provision applies in German law to all providers of telemedia (which may include VSPs) and concerns advertisements that are marketed, sold, or composed by said providers.

4.7.2.2.10. Other

Thematic placement: according to Article 98 in conjunction with Article 8 paragraph 7 of the MStV, thematic placement as well as similar practices shall be prohibited. The term “thematic placement” is concretised in Article 3, subparagraph 13, of the Advertising Statute and means the treatment of topics in the editorial content in the interest of or at the instigation of third parties, in particular if the provider receives or is promised a fee or similar consideration for this.

¹⁵⁴ <https://www.bzkg.de/bzkg/meta/en>.



Since November 2020, with the introduction of the MStV, there are new rules for media intermediaries, user interfaces and media platforms on signal integrity, transparency, non-discrimination and accessibility that have a direct or indirect influence on online commercial communication, but not specifically on VSPs. Further rules addressing new (online) advertising techniques so far only exist for broadcasting in the MStV and in the Advertising Statute. However, the state media regulatory authorities are publishing guidance documents which are intended to help influencers including channel operators on VSPs to understand their legal obligations with regard to online advertising. Such guidance can be found, for example, in the Guidance on the labelling of advertising in online media (*Leitfaden der Medienanstalten: Werbekennzeichnung bei Online-Medien*). It addresses some of the common new advertising practices in the online sector such as labelling obligations in the area of advertising links or tags, affiliate links, discount codes as well as reposts and categorises them according to the relevant legal framework.

4.7.3. Sponsorship and product placement

Certain obligations stem from the revised AVMSD vis-à-vis sponsorship and product placement and this part aims at identifying the rules and practices pertaining to these two specific categories of commercial communications.

4.7.3.1. Sponsorship

In accordance with Article 22 in conjunction with Article 10 paragraph 1 sentence 2 of the MStV, sponsorship is applicable to broadcasting only and was not declared applicable for VSPs. However, there are rules in other sectoral legislation which at least indirectly impact VSPs (and user-generated content provided on VSPs) such as the prohibition of sponsorship promoting tobacco products, the prohibition against sponsoring an event or activity with the aim or the direct or indirect effect of promoting the sale of tobacco products, electronic cigarettes or refill containers if the event or activity involves more than one member state of the European Union, takes place in more than one member state of the European Union, or the event or activity has any other cross-border effect.

Although the special provision on sponsorship does not apply to VSPs, the more general rule in Article 22 paragraph 1 of the MStV is applicable insofar as VSPs are to be regarded as telemedia. This provision covers (the broader concept of) telemedia, i.e. all electronic information and communication services that are not broadcasting or telecommunications or telecommunications-based services, which may include both VSPs and the individual user channels distributed via VSPs. It provides that advertising (i.e. including sponsorship) shall be clearly recognisable as such and shall be distinctly separate from the other parts of the offers provided. In the case of advertising of a political nature, subliminal techniques shall not be used and, in the case of advertising of a political, ideological, or religious nature, the advertiser or commissioning party (the sponsor) must



be clearly indicated in an appropriate manner. Article 8 of the MStV then refers to the applicability of Article 10 paragraph 1 sentence 2 of the MStV according to which, alongside or in place of the name of the sponsor, the company logo or a trademark, another symbol of the sponsor, a reference to their products or services or a similar distinctive sign may be shown in order to comply with this obligation to label.

4.7.3.2. Product placement

Article 98 in conjunction with Article 8 paragraph 7 of the MStV declares that the provisions on product placement that apply to broadcasting are also applicable to VSPs.

Article 8 paragraph 7 states that product placement is permitted, except in news programmes and programmes intended for political information, consumer programmes, regional window services according to Article 59, window services according to Article 65, programmes with religious content, and children's programmes. For other programmes that contain product placement, they are allowed providing that they respect certain conditions. Furthermore, there shall be clear information concerning product placement, meaning that it shall be identified at the beginning and at the end of a programme as well as at its continuation following an advertising break.

Article 8 paragraph 7 sentence 6 of the MStV further states that:

Obligatory identification shall not apply for programmes not produced by the broadcaster itself or produced or commissioned by a company affiliated to the broadcaster, if it is not possible to establish at reasonable expense whether they contain product placement; information to this effect shall be given.

Details of general obligations for VSP providers are the same as under 4.7.2.2, except that it should be pointed out that this part of the paragraph which is referred to in its entirety in Article 98 paragraph 1 of the MStV was clearly established with broadcasters in mind and programmes produced by such broadcasters or by third parties. As for VSPs, these general obligations will have to be read in conjunction with the VSP's obligation to provide a function that allows users who upload user-generated videos to label audiovisual commercial communications, as per Article 98 of the MStV and Article 6 of the TMG. Therefore, this functionality would only be one possible measure to be regarded as a reasonable measure for VSPs within the meaning of Article 8 (7) sentence 6.

4.7.4. Obligations regarding (v)blogs and (v)blogging

There are no specific provisions on (v)blogs, indeed this expression is not clearly defined in German law. However, as (v)blogs are regularly distributed online as telemedia (all electronic information and communications services, as far as they are not telecommunications services or broadcasting). Therefore, the following advertising rules from the MStV, the TMG and the JMStV apply:



- According to Article 22 paragraph 1 of the MStV, advertising shall be clearly recognisable as such and shall be distinctly separate from the other parts of the offers provided. Advertising shall not use subliminal techniques. In the case of advertising of a political, ideological, or religious nature, the advertiser or commissioning party must be clearly indicated in an appropriate manner.
- According to Article 6 paragraph 1 of the TMG, commercial communications in telemedia must be clearly recognisable as such and the natural or legal person on whose behalf commercial communications are made, must be clearly identifiable. Promotional offers such as discounts, giveaways and gifts as well as prize promotions and sweepstakes must be clearly identifiable as such and their terms and conditions must be easily accessible and clearly and unambiguously stated.
- Telemedia providers have to comply with the requirements of the JMStV when it comes to advertising. Pursuant to Article 6 paragraph 1, special provisions apply to advertising for services which have been “indexed” (i.e. put on a list of fully or partially prohibited content) according to the JuSchG. In addition, according to Article 6 paragraph 2 of the JMStV, advertising shall not cause any physical or moral detriment to children and adolescents, nor shall it exploit their inexperience or credulity, encourage them to persuade their parents to purchase goods/services, exploit the trust children/adolescents place in parents/teachers or other persons of trust or unreasonably show children or adolescents in dangerous situations.

Furthermore, German media law also provides for certain subcategories of telemedia, for which stricter rules apply due to their similarity to traditional media (television, radio or press). These are broadcast-like telemedia, television-like telemedia and telemedia with journalistic-editorial content. According to the definition in Article 2 paragraph 1, subparagraph 13, of the MStV, ‘broadcast-like telemedia’ means:

telemedia with content that is similar to radio or television in terms of form and design and which is made available from a catalogue specified by a provider for individual demand at a time selected by the user (audio and audiovisual media services on demand); contents include, in particular, radio plays, feature films, series, reports, documentaries, entertainment programmes, information programmes, and children's programmes.

Thus, this includes on-demand audiovisual media services as well as similar services in the sector.

Typical (v)blogs will neither be qualified as broadcast-like nor television-like telemedia, as the required catalogues or programmes with qualified content (radio plays, feature films, series, documentaries, etc.) and therefore the comparability with broadcasting offers will be lacking. However, this is highly dependent on the precise content and design of the (v)blog. If such a similarity to broadcasting can be assumed for individual (v)blogs such as certain channels on VSPs due to their specific design and content in the overall picture, the advertising rules applicable to private broadcasting would apply, i.e. Articles 8, 10 and 11 of the MStV.



4.7.5. Other relevant information

N/A.

4.7.6. Content-related rules regarding commercial communications for VSP providers

While certain restrictions regarding the content of commercial communications stem from the revised AVMSD and relate to issues connected to the protection of minors and restrictions on the advertising of certain products and services, this part deals with less explored notions, such as rules pertaining to gambling, environmental claims vis-à-vis products and services, etc.

4.7.6.1. Advertising of, or on behalf of associations that are wholly or mainly concerned with religion, faith and other belief systems

According to Article 22 paragraph 1 sentence 2 of the MStV, in the case of advertising of a political, ideological or religious nature, the advertiser or client must be clearly indicated in an appropriate manner. This provision applies in Germany to all providers of telemedia which may include VSPs.

4.7.6.2. Gambling, betting, betting tipsters, etc.

The relevant rules on gambling and betting are included in the GlüStV 2021, recently extensively amended with regard to aspects of the online sector, providing, i.a., rules for the organisation, conduct and brokerage of games of chance in public.

The provision relevant for VSPs is Article 5 which contains rules for commercial communications and applies to all games of chance. Accordingly, advertising and sponsorship for prohibited games of chance (i.e. for which the required licence has not been obtained in Germany) is prohibited regardless of where and how the advertising takes place (Article 5 paragraph 7). For permitted games of chance, however, pursuant to Article 5 paragraph 1, providers may advertise (including sponsorship) in principle. They may also entrust third parties with carrying out the advertising. But in addition, the licence, which is granted by the competent state authorities pursuant to Article 4, must as a prerequisite already specify rules on the design of advertising as well as on mandatory information for public games of chance, in particular on television and on the internet, including television-like telemedia and video-sharing services.

Article 5 paragraph 2 further regulates general requirements for advertising (e.g., games of chance shall not be excessive) and special features shall be highlighted for individual games of chance. Advertising may not be directed at minors or comparably vulnerable target groups; as far as possible, minors shall be excluded as recipients of



advertising. Article 5 paragraph 6 further supplements this to the effect that no variable remuneration, in particular remuneration dependent on turnover, deposits or stakes, may be agreed or paid for advertising for games of chance on the internet in which banned players are not permitted to participate pursuant to Article 8 paragraph 2 (in the GlüStV there is a player ban system for the prevention of gambling addiction), in particular in the form of affiliate links. Finally, between 6 a.m. and 9 p.m., no advertising is allowed on the internet for virtual slot machine games, online poker and online casino games (Article 5 paragraph 3).

4.7.6.3. Environmental or “green” claims for products

There are no specific provisions regarding environmental or “green” claims. However, Article 98 in conjunction with Article 8 paragraph 1, subparagraph 3, of the MStV contains a prohibition against misleading advertising and advertising prejudicing the interests of consumers. As so-called greenwashing (i.e. false or deceptive claims about the sustainability of products) can be misleading advertising in this sense, these provisions may also be relevant in this case.

Details of general obligations for VSP providers are the same as under 4.7.2.2.

4.7.6.4. Other

N/A

4.7.7. Self- and co-regulation and enforcement

This section aims at identifying the legal framework and practice for self- or co-regulatory schemes and measures regarding commercial communications on VSPs, including the identification of the body or bodies in charge of self- and co-regulation and enforcement powers with regard to commercial communications and VSPs, as well as the scope of their activities with regard to commercial communications and VSPs.

There are no explicit or specific references to systems of self- and co-regulation included in German media law in the context of commercial communication on VSPs. There are systems of co-regulation enshrined in the law applicable to telemedia (which may include VSPs), however, these do not relate to commercial communication, but to due diligence obligations and youth media protection. There are also systems of self-regulation in the field of commercial communications that apply across all media and thus also to VSPs, but these are instruments pertaining to the private sector and not enshrined in law. The most important instrument of self-regulation is the cross-media activity of the German Advertising Council, which, however, is purely driven and prompted by the private sector.



The advertising code of the German Advertising Council, which contains basic rules and specific codes of conduct for certain areas, is updated regularly.

Also worth noting are initiatives that various VSPs are taking on their own. For example, YouTube, in its help section on labelling videos as advertising (paid product placements, sponsorships and recommendations), offers explanations for creators on how and under what conditions videos must be labelled in order to make the labelling mechanism created by YouTube transparent. These explanations were updated for Germany in January 2021. However, they are pure self-regulation.

On the part of the media regulatory authorities, an increasing number of guidance documents are being published, especially for the area of online media, in order to make the partly complex legal framework that is applicable to this sector more comprehensible for practitioners. It should be emphasised that such guidance merely clarifies and explains the existing legal framework and does not provide any further concretisation or legally binding interpretation.

Guidance is predominantly aimed less at platforms such as VSPs or their providers than at the creators of user-generated content who operate on these platforms and also fall under the obligations of German media law. For VSPs, however, this is nevertheless very relevant insofar as they depend on the (competent) cooperation of their users to fulfil their own legal obligations.

4.7.7.1. Self- and co-regulatory bodies

4.7.7.1.1. Context of establishment and legal background

N/A.

4.7.7.1.2. Stakeholders involved

The self-regulation organisation Deutscher Werberat (DWR), the German Advertising Standards Council, provides a mechanism for conflict settlement between the public and commercial advisers and draws up voluntary codes of conduct for advertising.

4.7.7.1.3. Scope and objectives

Self-regulation in the field of commercial communications applies across all media and thus also to VSPs. It includes measures targeting HFSS foods and beverages, inappropriate ACCs for alcoholic beverages and ACCs which encourage behaviours grossly prejudicial to the protection of the environment.



4.7.7.1.4. Code(s) of conduct

The German Advertising Standards Council has produced several codes of conduct,¹⁵⁵ including specific codes on food and beverages, alcoholic beverages and advertising with children and adolescents in television, radio and telemedia.

4.7.7.1.5. Role of the (self-)regulatory bodies

N/A.

4.7.7.1.6. Period of activity (if limited)

N/A.

4.7.7.1.7. Role of the regulatory authority in a co-regulatory system:

N/A.

4.7.7.1.7.1. *Regulatory body*

N/A

4.7.7.1.7.2. *Co-regulatory scheme*

N/A

4.7.7.1.7.3. *Relationship and roles of stakeholders*

N/A

4.7.7.2. Monitoring/evaluation, compliance and sanctioning powers

N/A

4.7.8. Cross-sector and cross-border collaboration

According to Article 111 of the MStV, in fulfilling their tasks, the state media authorities shall cooperate with the Regulatory Authority for Telecommunications and with the Federal Cartel Office. In response to an enquiry by the Regulatory Authority for Telecommunications or the Federal Cartel Office, the state media authorities shall provide findings which are

¹⁵⁵ <https://werberat.de/content/english-keyfacts>.



required for these authorities to fulfil their tasks. This applies accordingly to the cooperation with the state competition authorities and the gaming supervisory authorities.

At the cross-border level the German state media authorities also cooperate within the European Regulators Group for Audiovisual Media Services (ERGA) and the European Platform of Regulatory Authorities (EPRA).

4.7.9. Update on plans and practices related to new obligations of VSPs

The legislative procedures that have adapted the legal framework for VSPs, in particular the establishment of the new MStV, the reforms of the JuSchG and the JMStV as well as the amendments to the TMG and the Network Enforcement Act,¹⁵⁶ have been completed.

Furthermore, on 22 October 2021, the Second Interstate Treaty amending the Interstate Media Treaty (*Zweiter Staatsvertrag zur Änderung medienrechtlicher Staatsverträge*)¹⁵⁷ was agreed upon. It includes initial adjustments to the MStV (the First Interstate Treaty amending the MStV never actually entered into force) and is mainly aimed at implementing Directive (EU) 2019/882 on barrier-free accessibility requirements. This second amendment is currently in the process of ratification in the parliaments of the Länder and will enter into force as soon as the last ratification has been deposited, at the latest by the end of 2022.

In addition, the Statute regulating the Arbitration Body pursuant to Article 99 of the Interstate Media Treaty (*Satzung über die Schlichtungsstelle gemäß § 99 Medienstaatsvertrag*)¹⁵⁸ came into force on 15 April 2021. According to the Telemedia Act, VSPs are obliged to provide a complaints mechanism so that users can flag up specific illegal content. As part of this complaints procedure, Article 99 of the MStV provides that the state media authorities are to establish a joint body for the settlement of disputes between complainants, or users and providers of video-sharing services affected by the complaint about measures that the providers of video-sharing services have implemented or omitted in the procedure pursuant to the TMG. For this purpose, the state media authorities have to regulate further details in joint statutes. The Statute regulating the Arbitration Body pursuant to Article 99 of the Interstate Media Treaty specifies not only the composition and organisation of the Arbitration Body but also the workflow and procedural principles of the arbitration procedure.

¹⁵⁶ This has already been covered extensively in the German Country Report in: *Mapping of national rules applicable to video-sharing platforms: Illegal and harmful content online*, European Audiovisual Observatory, Strasbourg, 2021, <https://rm.coe.int/mapping-on-video-sharing-platforms-2021-full-report/1680a43575>.

¹⁵⁷ <https://www.land.nrw/media/25318/download?attachment>.

¹⁵⁸ https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/VSD-Satzung.pdf.



There are currently no other ongoing legislative procedures to amend the legal framework for VSPs. Rather, it is currently a matter of implementing the rules in practice. On the part of the media regulatory authorities, it can be observed that they are increasingly publishing guidance documents, especially for the area of online media, in order to make the partly complex legal framework that is applicable to this sector more comprehensible for practitioners, especially laypersons. Recently published guidance or revised guidance for the online sector concerned includes, in particular, a guide to sweepstakes in social media offerings,¹⁵⁹ a guide to advertising labelling in online media,¹⁶⁰ a factsheet on political advertising¹⁶¹ and a factsheet on journalistic due diligence in online media.¹⁶² It should be emphasised that such guidance merely clarifies and explains the existing legal framework and does not provide any further concretisation or legally binding interpretation. These guidance documents are predominantly aimed at the creators of user-generated content who operate on platforms and fall under the obligations of German media law and only to a lesser extent at the platforms, such as VSPs or their providers. For VSPs, however, this is nevertheless very relevant insofar as they depend on the (competent) cooperation of their users to fulfil their own legal obligations. The regulations on commercial communications are an illustrative example of this: the mechanism that VSPs have to provide, which allows users to indicate whether the content they upload contains advertising, presupposes with regard to its practical effectiveness that uploaders also know what advertising is and when it is subject to labelling obligations (e.g., criteria for sponsorship, product placement, etc.). This is explained, for example, in the guidance of the media regulatory authorities on advertising labelling in online media.

4.7.10. Studies, reports and research

The following reports have been prepared in relation to audiovisual commercial communications:

- Leibniz-Institut für Medienforschung Hans-Bredow-Institut: Hofmann/Kettemann (eds.), Plattformregulierung im Superwahljahr 2021, Ergebnisse rechtswissenschaftlicher, sozialwissenschaftlicher und datenwissenschaftlicher

¹⁵⁹ https://www.die-mediananstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/DLM-Leitfaden_Gewinnspiele_Social_Media.pdf.

¹⁶⁰ https://www.die-mediananstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/ua_Leitfaden_Mediananstalten_Werbekennzeichnung_Online-Medien.pdf.

¹⁶¹ https://www.die-mediananstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/ua-Checkliste_politische_Werbung_2021-07-20.pdf.

¹⁶² https://www.die-mediananstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/ua_Merkblatt_Journalismus_im_Internet.pdf.



Studien zu Parteien und Plattformen im Bundestagswahlkampf, Arbeitspapier des Hans-Bredow-Instituts, Projektergebnisse Nr. 61,¹⁶³ 2022.

- Kommission für Jugendmedienschutz (KJM): Enke/Bigl/Schubert/Welker, Studie zu Werbepraktiken und direkten Kaufappellen an Kinder in sozialen Medien. Ein Forschungsprojekt im Auftrag der KJM,¹⁶⁴ 2021.

4.7.11. Data compilation

This factsheet is based on data compiled by Christina Etteldorf, Senior Research Scientist, Institut für Europäisches Medienrecht (EMR).

¹⁶³ <https://doi.org/10.21241/ssor.76248.v2>.

¹⁶⁴ https://www.kjm-online.de/fileadmin/user_upload/KJM/Publikationen/Studien_Gutachten/210811_Abschlussbericht_KJM.pdf.