

## Advertising *vis-à-vis* minors in Germany

Florian Geyer

### Overview

When assessing the legal admissibility of advertising directed at minors in Germany, a number of legal restrictions and requirements must be taken into account.

The most important provisions are laid down in the Act Against Unfair Competition (in German: *Gesetz gegen den unlauteren Wettbewerb – UWG*) and the Interstate Treaty on the Protection of Minors (in German: *Jugendmedienschutz-Staatsvertrag – JMStV*), which deals with the protection of minors in the media.

Other relevant rules are contained in various other laws, aiming at the regulation of advertising in different industrial sectors or with regard to certain products. Relevant laws include the Interstate Treaty on Broadcasting (in German: *Rundfunkstaatsvertrag – RStV*), the Tobacco Products Act (*Tabakerzeugnisgesetz – TabakerzG*), the Act on the Advertising of Medical Products (in German: *Heilmittelwerbegesetz – HWG*) or the Interstate Treaty on Gambling (in German: *Glücksspielstaatsvertrag – GlückStV*).

Violations of the youth protection laws may be prosecuted by a competitor of the advertiser or by a qualifying consumer or industry association. An association's right to initiate legal proceedings in a fair-trade dispute is governed by Section 8 of the Act Against Unfair Competition. Typically, before taking

a case to court, the claimant will send the opponent a cease and desist letter requesting it to cease the subject advertising and to commit contractually to a penalty in case the challenged advertising is repeated in the future.

In addition to the above-mentioned advertising restrictions, advertisers need to consider the Codes of Conduct of The German Advertising Standards Council (in German: *Deutscher Werberat – Werberat*), which is a self-regulatory institution established by the advertising industry. As these codes of conduct are self-regulatory and not enforceable statutory law, the *Werberat* cannot enforce these rules in court or impose sanctions. However, the *Werberat* can publish an advertiser's violations of its codes of conduct and any failure to comply with its request to stop a contested advertisement. The fear of adverse publicity would usually prompt an advertiser to comply.

### Act Against Unfair Competition

#### *Black List violations*

It is illegal to include into an advertisement a direct exhortation to children to purchase the advertised product or to persuade parents or other adults to buy the product for a child. The relevant provision is contained in the so-called Black List, which is an Appendix to Section 3 of the Act Against Unfair Competition. It lists several trade

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practices which are considered unfair in all circumstances.

The application of this particular Black List provision is limited to advertising and promotions *vis-à-vis* children. This is relevant because German law distinguishes between children (minors below the age of 14 years) and adolescents (minors who are 14 years old, but not yet 18). To date, there is no established case law on the question of what the term “*child*” as used in this Black List provision does exactly refer to. The provision implements EU-Directive 2005/29/EC into the German law. That means relevant terms must be interpreted in accordance with European Union (EU) law. The European Court of Justice (ECJ) ultimately defines the scope and meaning. To avoid legal challenges, it is advisable to follow a broad interpretation that includes all minors until this issue has been resolved. It should, therefore, be ensured that advertisements directed at minors do comply with the above-mentioned restriction.

The rule applies only if the subject commercial addresses a child (or parent/adult) directly. A direct invitation to purchase a certain product, or persuading the parent/adult to make the purchase, is generally assumed if the imperative form (“buy yourself”) is used. However, the use of the imperative is not a must. Other circumstances may lead to the conclusion that there is a direct invitation to purchase. For example, it has been considered sufficient if an advertisement is placed in media primarily aiming at children.

In addition to the above direct-approach requirement, the advertisement must be relating to a specific product. It is not entirely clear yet as to whether it is sufficient that the product is identifiable, or if characteristics of the product and its

price must be indicated to enable the consumer to make an immediate purchase decision. The German Federal Court recently decided a case where an advertising banner on a website did not contain the above-mentioned essential information. The court prohibited the ad and held that more details were not necessary in that particular case, because the advertisement contained a link to the web-shop where such additional relevant information was provided and an immediate purchase order could be placed.

#### ***Other relevant fair trade regulations***

If applicable, above-mentioned Black List restriction preempts other limitations set out in the Act Against Unfair Competition. In the course of a reform of the Act Against Unfair Competition in the year 2015, certain other provisions, which the courts had previously used to protect minors from unfair trade practices in advertising, were modified. It remains to be seen whether and/or to what extent relevant case law will remain applicable despite these modifications.

Under the reformed law, a trade practice remains to be considered unfair and, therefore, illegal if it exploits the young age or the commercial inexperience of a consumer. Although this rule applies generally and does not only protect minors, it is typically applicable to them, particularly if the advertisement is directly aimed at minors. As advertisements are always meant to influence consumers, it has to be decided on a case-by-case basis whether a given ad, in fact, exploits the inexperience of the targeted group. In making this assessment, *inter alia*, the exact age of the targeted group and the economic relevance of the possible purchase need to be

considered. If a purchase leads to ongoing cost, such cost must be disclosed in the advertisement and can play a role in the unfair exploitation context.

#### **Advertising in electronic media**

The German Interstate Treaty on the Protection of Minors (“Treaty”) has created a uniform set of rules for the protection of minors in electronic media, such as the Internet, television or radio (“Electronic Media”). It regulates particularly any advertising that may negatively affect or jeopardize the development or education of minors, or which violate the human dignity or other legal interests as protected by the Criminal Code. There are other relevant media-related rules and regulations contained in the Interstate Treaty on Broadcasting which governs the broadcasting landscape in Germany in general.

#### ***Limitations with regard to content***

As a general rule, advertising in the electronic media which is (also) directed at children or adolescents, or advertising in which children or adolescents are involved as actors, shall not harm the interests or exploit the inexperience of minors. An advertisement may harm the interest of minors if it shows illegal conduct or anti-social behavior. Further, the courts have held that an advertiser would exploit the inexperience of minors if it promotes a product by means of a sweepstake involving an extraordinarily high value of a prize (EUR 1 million) that is out of proportion to the purchase price of the advertised product (EUR 5). These and other fair trade concepts protecting minors apply regardless of whether the advertised product is particularly appealing to children or falls into the category of normal consumer products, such as a bicycle or chocolate.

Advertising in electronic media must also not harm children and adolescents physically or emotionally. That concerns any potential harm resulting from the advertising itself. Cases relating to the advertising of potentially harmful products are not covered by these rules but may be regulated by other laws. Physical or emotional harm of insignificant impact or duration is not necessarily relevant.

The following summarizes a number of further issues which may render an electronic media advertising unlawful under the treaty.

An advertisement must not:

- contain direct purchase appeals to minors, exploiting their inexperience or credulity;
- directly encourage children and adolescents to persuade their parents or others to purchase the advertised goods or services;
- exploit the special trust children or adolescents place in parents, teachers or other persons of trust; and
- unreasonably show children or minors in dangerous situations.

#### *Limitations as to how and where advertisements may be placed*

Advertising in electronic media which impairs the development of children or adolescents to become self-responsible and socially competent personalities must be kept separate from content directed at children or adolescents. An advertisement may fall under this provision either if the advertised product (telephone-sex hotlines) or the content of the advertisement (spots with violent scenes) is not eligible for minors.

The guidelines of the Interstate Treaty on Broadcasting declare it illegal to have product placements

in programs directed at children. Such programs must also not be interrupted by commercials or be designed as infotainment programs. This applies to any program which is primarily aimed at children due to its content, format or the time at which the program is broadcasted.

#### **Product-specific limitations**

##### *Alcohol*

Advertising for alcoholic beverages shall not be aimed at children or adolescents, it may not be specifically appealing to them by way of their presentation, nor may it show minors consuming alcohol. A commercial is likely to be considered to be aimed at this group if it is broadcasted in a timely context with programs specifically targeted at minors. The content of an advertisement can also lead to the conclusion that the advertisement is aimed at minors. For example, it must be considered if the look and feel of the spot is particularly appealing to this group. That may be the case if the people featured in the spot are acting "cool" or use language typically used by young people. Whether or not a model featured in the spot is actually of minor age is not in decisive. It is sufficient, if he/she looks minor.

##### *Tobacco*

Pursuant to the Tobacco Products Act, it is illegal to provide information on tobacco products in advertising, which by nature is particularly suitable to induce adolescents or young people ("*Heranwachsende*", commonly referred to as young people below the age of 21 years) to consume such products or to encourage them to continue such use. This requires that the primary target group is adolescents and young people. This is typically the case when the focus of the advertisement is on

youth-specific elements and situations. It is not sufficient if people below the age of 21 are just part of the target group but not the primary target.

##### *Pharmaceutical advertising*

Pharmaceutical advertising that is directed exclusively or primarily at children under the age of 14 is prohibited. There are no further requirements such as exploitation, or that children are inexperienced with regard to the advertised product. There is an assumption that there is always lack of experience in this context.

##### *Gambling*

It is illegal to advertise public gambling offers if the advertisement is directed at minors. This is particularly the case if the advertisement contains content which is especially appealing for minors, or if minors are shown participating in public gambling.

#### **The German Advertising Standards Council (*Deutscher Werberat*)**

##### *Function*

In addition to complying with the above-mentioned legal regulations, it is advisable for advertisers to comply with the codes of conduct issued by the *Deutsche Werberat*. The *Werberat* is a self-regulatory institution, founded by relevant participants in the advertising market, including organizations of advertisers, the media, advertising agencies, advertising professions and research businesses. Any member of the public may file a complaint with the *Werberat* if it feels that an advertisement is objectionable or offensive, even if it does not actually break the law.

### Self-regulatory rules

The *Werberat* gets involved in case of an alleged violation of its self-regulatory rules which apply to all sectors of the industry and to all media. There are specific rules aiming at the protection of minors with regard to the promotion of alcoholic beverages and rules regulating advertising with and for children on radio and television.

### Code of conduct regarding alcoholic beverages

The Code of Conduct on Alcoholic Beverages reflects what is stipulated in Article 15 of EU-Directive 89/552/EC and contains further limitations. Besides general restrictions with regard to alcohol advertising, it includes the following rules aiming at the protection of minors.

Advertising for alcoholic beverages shall:

- neither promote drinking of alcoholic beverages by minors, nor show minors in the act of promoting the drinking of such beverages;
- not be conveyed by media whose editorial content addresses mainly minors;
- not make any claim or representation to the effect that minors are not old enough to consume beverages as such statements may provoke drinking;
- not show persons when stating that they drank alcoholic beverages as minors; and
- not be shown in sports outfits worn by sports teams which comprise minors, nor be conveyed in advertising and

sponsoring campaigns that are directly related to minors.

### Rules of conduct on advertising with and for children on radio and television

All advertising in electronic media featuring children or which are specifically addressed to children shall observe the following principles:

- They should not contain statements by children about special advantages and features of the advertised product that do not conform to the natural utterance of the child;
- they should not contain direct requests as to purchase or consumption addressed to children;
- they should not contain 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 measures (e.g. free raffles, prize competitions and puzzles etc.) should not mislead the potential purchaser, should not allure by means of an 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;
- 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; and
- juveniles shall not be shown in dangerous situations unless there is a legitimate reason for doing so.

### Sanctions

Upon receipt of a complaint, the *Werberat* decides internally on its merits. The *Werberat* will express any concerns to the advertiser. If the advertiser fails to modify or discontinue the objected-to advertisement, the *Werberat* would issue a reprimand and can make the case public by informing the editorial departments of the German mass media about the reprimand. The information is reported and often commented upon in the press. There are no other remedies available for the *Werberat*. In particular, the *Werberat* has no legal authority to force the advertiser to cease using the advertisement or to impose a fine.

### About the author

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