

2022 Commercial Media Institutions Advertising Policy Rule

Dutch Media Authority Policy Rule on the Permissibility, Recognisability and Delineation of Advertising and Teleshopping Messages in the Media Content provided by Commercial Media Institutions (2012 Commercial Media Institutions Advertising Policy Rule)

The Dutch Media Authority,

Having regard to Article 3.5b, 3.7, 3.8, 3.29a, 3.29d, 7.11 and 7.12 of the 2008 Media Act and Article 4:81 of the General Administrative Law Act,

Decrees:

CHAPTER 1. GENERAL

Article 1. Scope

This policy rule will apply to the media content provided by commercial media institutions within the meaning of the 2008 Media Act, including on-demand commercial media services (such as VOD services and video uploaders).

Article 2. Definitions

The following terms as used in this policy rule will have the following meanings:

- *Act*:

the 2008 Media Act;

– *media content*:

programme content (television and radio) and on-demand audiovisual media content (VOD services and video);

- *video*:

on-demand audiovisual media content that has been created by a user and has been uploaded by such user or another user to a video platform;

– *framing*:

framing within which advertising and teleshopping messages are placed, consisting of an opening and a closing announcement;

– *split screen*:

the simultaneous and parallel placement in one screen of editorial content and of advertising or teleshopping messages.

Article 3. Advertising of medical treatments

1. The media content must not contain any advertising or teleshopping messages for medical treatments (Article 3.7(2)(a) and 3.29d of the Act).
2. The term *medical treatments* as used here will be understood as: treatments available only on prescription.

CHAPTER 2. PROGRAMME CONTENT (TELEVISION AND RADIO)

Article 4. Clear distinction

1. Advertising and teleshopping messages must be clearly distinguished from the other programme content (Article 3.7(1) of the Act). This obligation will in any event be complied with if the framing uses:
 - a. a visible and/or audible reference to 'advertising', 'advertisement', 'teleshopping message', or words to that effect; or
 - b. any other visible and/or audible reference which, by its nature, sufficiently distinguishes the advertising and teleshopping messages from the other programme content, also given the public for which the advertising and teleshopping messages are intended.
2. Advertising and teleshopping messages in split screen or within a frame on a teletext page will be deemed clearly distinguished from the other programme content if:
 - a. they are placed in a separate still image which in split screen takes up no more than two thirds of the total screen available, and for teletext no more than twenty percent of the page;
 - b. they come with a constantly visible, clear reference to 'advertising', 'advertisement', 'teleshopping message', or words to that effect; and
 - c. the editorial part of the programme content remains completely visible and continues to be fully transmitted without interruption.
3. Advertising and teleshopping messages in split screen will be permitted during the programme content only to the extent that such content consists of a live report of an event or a report or coverage of a sports event.
4. The share of advertising and teleshopping messages in split screen will count towards the maximum amount of advertising as determined by or pursuant to the Act.

Article 5. Recognisability

1. Advertising and teleshopping messages must be recognisable as such (Article 3.5b(1) of the Act). This obligation will in any event be complied with if their shape and substance makes them clearly recognisable as advertising or teleshopping messages for the average public.
2. Advertising and teleshopping messages specifically targeting children below the age of 12 must be clearly recognisable by such audience through their shape and substance, appropriate for children's comprehension.

Article 6. Frequency in films, news and children's programmes

1. In programmes consisting of films and (commentary on the) news, advertising or teleshopping messages may be included no more than once per programmed thirty-minute timeslot. In programmes specifically intended for children below the age of 12, advertising messages may be included no more than once per programmed thirty-minute timeslot, provided that the programmed duration of the programme is more than thirty minutes (Article 3.11 of the Act).

2. The term *programmed timeslot* as used here will be understood as: the total time between the time of commencement and the end time of a programme, including advertising and teleshopping messages and other programme interruptions broadcast during that programme.
3. The term *programmed duration* as used here will be understood as: the length of the programme, excluding advertising and teleshopping messages and other programme interruptions.

Article 7. Separate advertising or teleshopping messages

In the programme content consisting of the report or coverage of sports events, separate advertising or teleshopping messages may be placed (Article 3.8(2) of the Act). In the other programme content, it will be permitted in exceptional situations only to place separate advertising or teleshopping messages up to a maximum of two per hour.

CHAPTER 3. ON-DEMAND AUDIOVISUAL MEDIA CONTENT (VOD SERVICES AND VIDEO)

Article 8. Recognisability

1. Advertising messages must be recognisable as such (Article 3.5b(1) of the Act). This obligation will be complied with if their shape and substance makes them clearly recognisable as advertising messages for the average public.
2. Advertising messages will in any event be recognisable as such:
 - a. if they come with a clearly visible and/or audible reference to:
 - ‘advertising’;
 - ‘advertisement’;
 - ‘advertorial’;
 - ‘paid promotion’;
 - ‘paid collaboration’; or
 - ‘paid partnership’; and
 - b. such mention or display is visible at the beginning of the video, during the promotion or constantly; and
 - c. if, in the case of videos, this reference is also included in the related description.
3. Advertising messages specifically targeting children below the age of 12 must be clearly recognisable by such audience through their shape and substance, appropriate for children's comprehension.

CHAPTER 4. FINAL PROVISIONS

Article 9. Short title and effective date

1. This policy rule will be referred to as the 2022 Commercial Media Institutions Advertising Policy Rule.
2. The 2012 Commercial Media Institutions Advertising Policy Rule will be repealed.

3. This policy rule will be made public by its publication in the Government Gazette and on the Dutch Media Authority website ([External link:www.cvdm.nl](https://www.cvdm.nl)).
4. This policy rule will come into effect on the day following its publication in the Government Gazette.

DUTCH MEDIA AUTHORITY, R. Eringa-Wensing, President

P.V. P. Eijssvoogel, Commissioner

EXPLANATORY NOTES TO THE 2022 COMMERCIAL MEDIA INSTITUTIONS ADVERTISING POLICY RULE

1. General

This policy rule applies to advertising messages and teleshopping messages in the media content of commercial media institutions. Media content is understood to include both programmes on television and radio and the offering of video on demand Services (VOD) services and videos that are uploaded on video platforms such as YouTube, Instagram and TikTok. In these explanatory notes, we will explain the rationale behind this policy rule, what is meant by advertising and teleshopping messages, what the difference is between different types of advertising, and who are governed by this policy rule. The article-by-article explanatory notes will explain the purpose and purport of the articles in this policy rule.

Amendments

On 1 November 2020, the 2008 Media Act was amended in view of the implementation of the European Audiovisual Media Services Directive 2018/1808/EU of 14 November 2018 amending Directive 2010/13/EU. This amendment of the law has led to the adoption of the 2022 Commercial Media Institutions Advertising Policy Rule.

This amendment has aligned the regulations for providers of on-demand media services with the regulations for providers of broadcasting services (television and radio) where possible. Another important consequence of the amendment to the Act is that 'video uploaders' which upload videos to video platforms may now become fall under the supervision of the Authority. This is the case if they meet the criteria as set forth in (the decision tree in) the 2022 Qualification of On-Demand Commercial Media Services Policy Rule. Video uploaders that meet these criteria will have to comply with the same rules as other on-demand commercial media services.

Article 8 of the present policy rule provides when advertising in the on-demand media content, including that of video uploaders, will be deemed recognisable as such. In the elaboration thereof - with a view to the existing practice for video uploaders -, we have also taken into account the Advertising Code for Social Media & Influencer Marketing of Stichting Reclame Code.

In addition, the revision of this policy rule also makes it clear to the commercial broadcasting services when advertising will be deemed sufficiently recognisable and when it will be deemed sufficiently distinguished from the other programmes.

Rationale behind the rules

The starting point for commercial media institutions is that, in principle, advertising and teleshopping messages may be included in the media content. The way in which these are included is, however, bound by a number of rules as set forth in the Act. These rules ensure that the public knows when there is commercial influencing. Moreover, advertising and teleshopping messages on the programme channels (television and radio) must be clearly distinguished from the programmes.

If advertising is not in compliance with the rules of the Act and this policy rule, it constitutes prohibited surreptitious advertising. Such a violation may lead to sanctions imposed by the Authority, such as a warning or a fine.

What are advertising and teleshopping messages?

Advertising messages are communications unmistakably intended to encourage the public to purchase a certain product or service. These may also be communications that are intended to build goodwill among the public in respect of a certain trademark or business, also for purposes of encouraging the public to purchase products or services. The complete definition of an advertising message is set forth in Article 1.1(1) of the Act.

This means that advertising messages are intended to promote sales from the commercial media institution itself (read: the broadcaster, VOD service or video uploader). This may be pursued in many different ways, both explicitly and more implicitly. In addition, advertising messages may manifest themselves in the media content in different ways, varying from a communication in a commercial break on TV to a spoken message in a YouTube video. They may also form part of a bigger whole, such as a vlog, in which the advertising message is interwoven with the rest of the video.

Strictly speaking, to qualify as an advertising message, it is not necessary that the communication is placed against payment or that any commercial arrangements have been made. The test is whether the media institution has the aforesaid intention. This does not alter the fact that the Authority assumes that the media institution does, indeed, have this intention if it is paid (either financially or otherwise) for the message. In other words: as soon as there are any arrangements with a third party about the aforesaid promotion, the advertising nature will be assumed. Absent any such arrangements (or intention), the communication will not qualify as an advertising message. In such event, these rules on advertising messages will not apply.

In addition, there are teleshopping messages. These are communications in television programmes consisting of a direct offering of products or services to the public. This includes, for example, home shopping. The complete definition of a teleshopping message is set forth in Article 1.1(1) of the Act.

Difference with sponsoring and product placement

By their nature, advertising messages differ from sponsoring or product placement. For an advertising message, the primary criterion is the intention of the commercial media institution to encourage the public to purchase products or services. This is not the case for sponsoring and product placement.

Sponsoring is the situation where a third party provides a contribution to the commercial media institution. That contribution may either be financial or consist of products or services. The idea behind this is that the relevant third party contributes to the realisation of the programme or the on-demand media content. There can, however, not be any hidden commercial influencing. Therefore, the Act requires that it be clearly mentioned that the media content is sponsored, and by whom. Products or services from the sponsor may be mentioned or displayed in the media content. But neither the sponsor reference nor sponsored media content may be used to encourage the public to purchase products or services. A promotional context (such as in advertising messages) is, therefore, not permitted in the event of sponsoring.

Product placement is the situation where a product or service is mentioned or used in the media content by naturally embedding it in the storyline. Product placement always takes place against payment (either in cash or by way of a similar consideration, such as a free car). The products or services are promoted, for example by mentioning them, discussing them or actively using them in

the programme. Unlike advertising messages, however, product placement must not encourage the public to purchase products or services. A promotional context is, therefore, not permitted in the event of product placement either.

This policy rule applies to advertising and teleshopping messages only. The 2022 Commercial Media Institutions Sponsoring Policy Rule and the 2022 Commercial Media Institutions Product Placement Policy Rule elaborate further on the rules in respect of sponsoring and product placement.

Who are governed by this policy rule?

This policy rule applies to all commercial media institutions within the meaning of the Act. These include the classic broadcasting services (radio and television programme channels) and online streaming services (VOD services). Individual video uploaders which post videos on third-party platforms (such as YouTube and Instagram) may be governed by this policy rule. This is the case if the video uploader qualifies as an 'on-demand commercial media institution'. The criteria currently used by the Authority in its regulatory framework are as set forth in the 2022 Qualification of On-Demand Commercial Media Services Policy Rule.

The rules on distribution of advertising and teleshopping messages are, however, not the same for all commercial media institutions. What rules apply will depend on their manifestation. The Act thereby distinguishes between radio and television programme channels on the one hand and on-demand media content on the other.

For radio and television programme channels, this is media content that is distributed on the basis of a chronological schedule. The commercial media institution responsible for the media content also determines the broadcast times. This type of media content includes television and radio programmes, but also teletext. Articles 3.5a up to and including 3.14 of the Act contain specific conditions on advertising and teleshopping messages for this media content. Chapter 2 of this policy rule explains a number of these statutory provisions.

And then there is media content that is distributed on demand (VOD services and video). This includes audiovisual media content (moving images, possibly containing audio), which can be purchased at the consumer's individual request and at a moment of their choice. Pursuant to Article 3.29d of the Act, a number of the aforesaid statutory rules apply to this media content as well. These include the rules on recognisability and surreptitious advertising (Article 3.5b of the Act), the affiliation with the Dutch Advertising Code or a similar regulation (Article 3.6 of the Act), and the prohibition on advertising of medical treatments (Article 3.7(2)(a) of the Act). Chapter 3 of this policy rule, explains a number of these statutory provisions.

The policy rule only discusses the advertising rules for radio and television programme channels and on-demand media content. These are not applicable to on-demand commercial audio services (such as podcasts). Those audio services have not been brought under the scope of the Act and are, thus, also beyond the scope of this policy rule (Article 3.29a of the Act). Advertising distributed solely outside the audiovisual media content does not come under this policy rule either. This may include pre-rolls of third parties (such as video platforms) that are not part of the video itself. Furthermore, this will apply to advertising included solely in the textual description of, or the commentary on, videos, provided that such text is not directly and automatically displayed when playing the video. Such audio services and advertising may, however, be subject to other regulations, such as the consumer protection regulations, which come under the supervision of the Netherlands Authority for Consumers and Markets. The Dutch Advertising Code (of Stichting Reclame Code) also contains provisions relating to this type of media content.

2. Article-by-article explanatory notes

Chapter 1. General

Article 1 (Scope)

This policy rule applies to commercial media institutions within the meaning of the Act. These include both the broadcasting services (linear) and the on-demand commercial media services, such as online VOD services and video uploaders (to the extent meeting the criteria of the 2022 Qualification of On-Demand Commercial Media Services Policy Rule).

Article 2 (Definitions)

The terms as used in this policy rule have the same meanings as in Article 1.1 of the Act. To the extent that any terms are used in this policy rule that are not described in the Act, those terms are defined in this article.

Article 3 (Medical treatments)

Article 9(1)(f) of the European Audiovisual Media Services Directive 2010/13/EU prohibits advertising of medicinal products and medical treatments available only on prescription. Articles 2.94, 3.7 and 3.19b of the Act only refers to the term medical treatment. This term is not explained in further detail. Before the Act was adjusted to the aforesaid directive, the Act contained a prohibition on advertising of medical treatments available on prescription. This addition was deleted with the adjustment of the Act. It does, however, not seem to have been a deliberate choice on the part of the legislator to define the term medical treatment differently.

Parliamentary history shows that, in the debate on the legislative proposal in 2009, the basic principle used was that, unless expressly stated otherwise by the legislator, conversion of the minimum requirements of the directive was intended. The explanatory memorandum to the adjustment of the Act did not mention anything about the medical treatment. Therefore, it seems likely that the legislator intended to maintain the same definition. The Authority has chosen to link up with the definition in the directive and to understand any reference to 'medical treatments' to refer to treatments available on prescription.

The Act has declared the prohibition on advertising messages for medical treatments applicable to on-demand commercial media services (VOD services and video) as well.

Chapter 2. Programme content (television and radio)

Article 4 (Clear distinction)

It is important for the public to know when it is watching, or listening to, an editorial programme and when advertising begins or ends. For that reason, advertising and teleshopping messages in linear programmes and teletext must at all times be clearly distinguished from the other programmes.

A clear distinction is deemed to exist, first of all, if the framing uses a visible and/or audible reference to 'advertising', 'advertisement' or 'teleshopping message', or words to that effect. A clear distinction is also deemed to exist in the event of the use of another visible and/or audible reference (such as a jingle) which, by its nature or substance, sufficiently clearly distinguishes the advertising and teleshopping messages from the other programme content. This means that the reference in itself must sufficiently clearly convey the message that this is the transition from editorial content to commercial content (or *vice versa*). In this respect, it may be relevant whether the audio or image is used for that purpose only, and the duration and volume may play a role as well. Furthermore, in this

respect, the audience for which the advertising and teleshopping messages are intended must be considered. If the advertising is displayed around children's programmes, the media institution must ensure that the (minor) audience understands the purpose of the reference.

For advertising and teleshopping messages within a split screen or teletext, the distinction must be shaped differently. After all, there is no transition from editorial to commercial content (or *vice versa*), because the advertising is displayed simultaneously. Therefore, the distinction must mainly be visual in nature. In the event of a split screen, it is important that the audience can continue to follow the editorial programme fully and without interference. This means, *inter alia*, that the advertising must be broadcast parallel to the programme rather than overlaid. In addition, in the event of a split screen, the advertising may not take up more than two thirds of the screen, and for teletext no more than twenty percent of the page. Furthermore, the frame must remain a still image and the background must be clearly distinguished from the editorial content. A video overlay is not permitted because this will cause the distinction from the editorial content to blur, so that the editorial content can no longer be followed without interference.

The split screen technology is intended for those situations where regular programme-interrupting advertising is not, or not adequately, possible. According to the legislator, this is mainly the case for (sports) event without any natural breaks (Parliamentary Papers II, 2007/08, [31 356, no. 3](#), p. 68). For that reason, paragraph 3 of article 4 provides when the split screen technology can be used.

Finally, advertising and teleshopping messages in split screen will count towards the maximum amount of advertising (as set forth in article 3.8 of the Act).

Incidentally, the requirement that advertising messages must be clearly distinguished from the other programmes will not apply to on-demand commercial media services (VOD services and video).

Article 5 (Recognisability)

This article regards the advertising and teleshopping messages within the programme content. This advertising must be clearly recognisable for the average public by its shape and content. Teleshopping segments must be recognisable throughout the entire programme through visual and acoustic means (Article 3.5b(1) and 3.9(2) of the Act).

If the advertising particularly targets children below the age of 12, the commercial media institution must ascertain that this minor audience recognises the advertising as such. Therefore, it must consider the comprehension of children.

Article 6 (Frequency in films, news and children's programmes)

In children's programmes, films and (commentary on the) news, advertising or teleshopping messages may be broadcast no more than once per thirty minutes. In Article 3.11 of the Act, the legislator has distinguished between *programmed timeslot* and *programmed duration*. In this article, the Authority explains these two terms.

Both for children's programmes, films and (commentary on the) news, advertising is permitted no more than once per *programmed timeslot* of thirty minutes. In this respect, the total period between the time of commencement and end, including the time during which the programme is interrupted by advertising and self-promotion (the 'gross broadcast time'), is relevant.

For the *programmed duration*, only the duration of the programme itself (the 'net broadcast time') is relevant. This term is relevant only for children's programmes, because there advertising is permitted only if the duration of the programme in itself exceeds thirty minutes.

Article 7 (Separate advertising or teleshopping messages)

It follows from the Act that broadcasting separate (read: individual) advertising and teleshopping messages must remain an exception to the rule. When broadcasting sports events, these may, however, be placed separately. This is related to the fact that sports events do not always have natural breaks or that, during the event, there is insufficient time for multiple advertising messages.

In the other programme content, separate advertising and teleshopping messages are permitted in exceptional situations only, where they may be placed up to a maximum of two per hour.

Chapter 3. On-demand audiovisual media content (VOD services and video)

Article 8 (Recognisability)

This article regards the advertising messages in the media content of providers of on-demand commercial media services (VOD services and video uploaders). Advertising must be clearly recognisable for the average public by its shape and content.

Paragraph 2 provides when the Authority will in any event consider advertising messages recognisable. This is the case if all the criteria as set forth under a, b and c have been met. The list under a-c is, however, not exhaustive. The Authority may also find another way in which advertising is referred to recognisable as such. This may include the situation where the on-demand media content cannot be given a description as referred to under c. In such event, it will be up to the provider of the on-demand commercial media service to make the advertising message clearly recognisable for the average public in a general sense through its shape and content.

Subparagraph a

Advertising messages can be referred to vis-à-vis the public using the words 'advertising', 'advertisement', 'advertorial', 'paid promotion' or 'paid partnership'. These words may be spoken or displayed, as long as the reference is clear. For that reason, the mere inclusion of the word 'partner' or 'collab' will, in principle, not be sufficient, because, by their nature, these words indicate less clearly that the intention is to encourage the purchase of products or services. Mentioning that the media content has been realised with the help of a third party, or has been sponsored, will not be sufficient. Such a reference merely indicates that the media content is sponsored (see also the general explanation above).

Given the words listed, the following sentences, among others, may be used:

- 'This video/programme contains advertising for [advertiser]'
- 'This video/programme contains a paid collaboration with [advertiser]'
- '[Advertiser] has paid me to create this video'

These sample sentences are also mentioned in the Advertising Code for Social Media & Influencer Marketing of Stichting Reclame Code as examples of the way in which advertising can be made recognisable by video uploaders.

As stated above, it is permitted to use terms other than those listed under a of paragraph 2 of article 8. It will, in the first instance, be up to the provider of the on-demand commercial media service to assess whether the relevant text makes it sufficiently clear that the media content contains an advertising message (also given the terms used, the audience, the placement, duration, context, etc.).

Subparagraph b

The reference must be visible at the beginning of the relevant video, during the promotion, or constantly. That way, the viewer will be informed, at a relevant time, of the presence of advertising.

For some video platform services (such as YouTube and Instagram), the video uploader may indicate that the video contains advertising. The platform will then place its own notice within the video. If such a notice includes the words as stated in paragraph 2, under a, the reference will, in principle, be sufficiently clear. In a concrete situation, however, the Authority may decide that a certain notice of a video platform service is insufficient to make an advertising message recognisable. For example because it is not clear enough is or is not displayed for long enough. In such event, the specific notice will not suffice for the recognisability as referred to in this article.

Subparagraph c

In addition to subparagraphs a and b, subparagraph c provides that the reference for videos must also be included in their description. Inclusion of the reference in the description is to ensure that the public is, or at least can be informed at any given time of the presence of advertising. The term description may also be read as the caption or any other text that can be retrieved at any time and that is directly connected with the video (i.e. not on the channel or elsewhere on the website).

Paragraph 4 provides that, for advertising that particularly targets children below the age of 12, the commercial media institution must ascertain that this minor audience recognises the sponsoring as such. In this respect, the comprehension of children and the context in which the advertising is displayed must be taken into account. For the latter, it may, for example, be relevant how the advertising is embedded in the storyline and whether children's idols are featured (as defined in the Advertising Code for Food Products 2019, part of the Dutch Advertising Code).

Chapter 4. Final provisions

Article 9 (Short title and effective date)

The 2012 Commercial Media Institutions Advertising Policy Rule is repealed and superseded by the 2022 Commercial Media Institutions Advertising Policy Rule.

In addition to this policy rule, the 2012 Commercial Media Institutions Sponsoring Policy Rule and the 2014 Commercial Media Institutions Product Placement Regulation have been revised. This revised policy rule will be referred to as the 2022 Commercial Media Institutions Sponsoring Policy Rule and the 2022 Commercial Media Institutions Product Placement Policy Rule. The three aforesaid sets of policy rules will all be simultaneously published in the Government Gazette and will take effect at the same time.