

NOTE

The transposition of the Misleading and Comparative Advertising Directive [2006/114/EC](#) into Germany's [Unfair Competition Act](#) UWG

- Unlike the process in other member states, in Germany the key clause and lead rule in the 2006/114/EC Directive article 4a *Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met: (a) it is not misleading within the meaning of Articles 2(b), 3 and 8(1) of this Directive or Articles 6 and 7 of Directive 2005/29/EC* has not been transposed per se. The 'lead' rule in Section 6 of the UWG is not that Comparative advertising must not mislead;
- The misleadingness clauses in the UWG, however, incorporate some comparative elements:
 - Section 5(2) of the UWG states 'A commercial practice shall also be regarded as misleading if in connection with the marketing of goods or services, *including comparative advertising*, it creates a risk of confusion with other goods or services or with the trade mark or other distinguishing mark of a competitor.
 - And Section 5(3) states that Section 5(1), which covers misleadingness (see below), will also apply to comparative advertising: 3) Information within the meaning of subsection (1) sentence 2 shall also be regarded as including information which forms part of comparative advertising as well as pictorial illustrations and other events which are targeted at, and are suitable for, taking the place of such information.
- So the German regulatory regime covers the issue of Comparative advertising by saying not that Comparative advertising must not mislead according to these misleadingness rules, but that Comparative advertising must observe these rules (Section 6) and misleadingness rules incorporate comparative advertising;
- This distinction may not be hugely significant in the scheme of things, but it may be helpful to know the construct. Either way, Comparative advertising must observe the rules under Section 6, as well as the misleadingness rules under Section 5

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Section 5 Misleading commercial practices

(1) Unfairness shall have occurred where a person engages in a misleading commercial practice which is suited to causing the consumer or other market participant to take a transactional decision which he would not have taken otherwise. A commercial practice shall be regarded as misleading if it contains false statements or other information suited to deception regarding the following circumstances:

1. the main characteristics of the goods or services, such as availability, nature, execution, benefits, risks, composition, accessories, method or date of manufacture, delivery or provision, fitness for purpose, uses, quantity, specification, after-sale customer assistance, complaint handling, geographical or commercial origin, the results to be expected from their use, or the results or material features of tests carried out on the goods or services;
2. the reason for purchase such as the existence of a specific price advantage, the price or the manner in which the price is calculated, or the conditions on which the goods are supplied or the services provided;

3. the nature, attributes or rights of the entrepreneur such as his identity, assets, including intellectual property rights, the extent of his commitments, his qualifications, status, approval, affiliation or connections, awards or distinctions, motives for the commercial practice or the nature of the sales process;

4. any statement or symbol in relation to direct or indirect sponsorship or approval of the entrepreneur or of the goods or services;

5. the need for a service, part, replacement or repair;

6. compliance with a code of conduct by which the entrepreneur has undertaken to be bound when he makes reference to such commitment; or

7. the rights of consumers, particularly those based on promised guarantees or warranty rights in the event of impaired performance.

(2) A commercial practice shall also be regarded as misleading if in connection with the marketing of goods or services, *including comparative advertising*, it creates a risk of confusion with other goods or services or with the trade mark or other distinguishing mark of a competitor.

(3) *Information within the meaning of subsection (1) sentence 2 shall also be regarded as including information which forms part of comparative advertising* as well as pictorial illustrations and other events which are targeted at, and are suitable for, taking the place of such information.

(4) It shall be presumed to be misleading to advertise with a price reduction in a case where the price concerned has been demanded for only an unreasonably short period of time. In the event of dispute as to whether, and for what period of time, the price was demanded, the burden of proof shall fall upon the person who advertised with the price reduction.

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