

NOTE

This note is an explanation of the August 2021 law in Germany that amends the key commercial practice legislation the Unfair Competition Law (UWG), which represents in this context the transposition of the Unfair Commercial Practices Directive 2005/29/EC. This key directive has itself been amended by Directive 2019/2161; the transposition in Germany of those amends, and some other matters, is set out below. This is significant legislation both internationally and nationally and its implications are best trusted to national advisors, so what follows is, as usual, the clauses that relate to commercial communications, in a non-binding unofficial translation. The amendments enter into force May 28, 2022

Links

The UWG (Gesetz gegen den unlauteren Wettbewerb) in German (does not incorporate amends) [http://www.gesetze-im-internet.de/uwg\\_2004/BJNR141400004.html](http://www.gesetze-im-internet.de/uwg_2004/BJNR141400004.html)

And in English:

[http://www.gesetze-im-internet.de/englisch\\_uwg/index.html](http://www.gesetze-im-internet.de/englisch_uwg/index.html)

The amending act in German: The Law to Strengthen Consumer Protection in Competition and Trade Law (Gesetz zur Stärkung des Verbraucherschutzes im Wettbewerbs- und Gewerberecht):

[http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&jumpTo=bgbl121s3504.pdf](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s3504.pdf)

the Unfair Commercial Practices Directive 2005/29/EC

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029>

Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards the better enforcement and modernisation of Union consumer protection rules:

<https://eur-lex.europa.eu/eli/dir/2019/2161/oj>

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The amending act 'The Law to Strengthen Consumer Protection in Competition and Trade Law' makes some important revisions to Germany's Law Against Unfair Competition (UWG). These are not set out exhaustively, but focus on those elements that affect commercial communications. The UWG's key sections in this context are Sections 5-7 and the Annex I (to Section 3) which sets out commercial practices that are in all circumstances considered unfair, aka the 'blacklist'. Translations below are unofficial in the sense that all translations are – only the original text constitutes German law. The UWG's translation has standing, however, as it is published by the Ministry of Justice.

The UWG as it stands	The amends
Section 5	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:	2. Section 5 is amended as follows: a) Paragraph 1 sentence 2 becomes paragraph 2. b) The previous paragraph 2 becomes paragraph 3 and is worded as follows: “(3) A commercial act is also misleading if 1. 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., or

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

2. it is used to market a product in a member state of the European Union as identical to a product made available on the market in other European Union Member States, while that good has significantly different composition or characteristics, unless justified by legitimate and objective factors."

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*Note: the above point 1 is the same as the original clause, i.e. para (3). Point 2 above is transposed from article 3 of the 2019/2161 Directive Amendments to Directive 2005/29/EC, as follows:*

*in Article 6 (2), the following point is added:  
(c) any marketing of a good, in one Member State, as being identical to a good marketed in other Member States, while that good has significantly different composition or characteristics, unless justified by legitimate and objective factors;*

.....  
c) The previous paragraphs 3 and 4 become paragraphs 4 and 5.

burden of proof shall fall upon the person who advertised with the price reduction.	
Section 5a	Amended Section 5a
<p>Misleading by omission</p> <p>(1) In assessing whether the concealment of a fact is misleading, consideration shall, in particular, be given to its significance for the transactional decision according to prevailing public opinion, as well as to the suitability of the concealment for influencing the decision.</p> <p>(2) Unfairness shall have occurred where a person, in a factual context and taking account of all the features and circumstances, omits material information</p> <ol style="list-style-type: none"> <li>1. which the consumer needs, according to the context, to take an informed transactional decision and</li> <li>2. whose omission is suited to causing the consumer to make a transactional decision which he would not have taken otherwise.</li> </ol> <p>The following shall also be regarded as an omission of information:</p> <ol style="list-style-type: none"> <li>1. the hiding of material information,</li> <li>2. the provision of material information in an unclear, unintelligible or ambiguous manner,</li> <li>3. the provision of material information in an untimely manner.</li> </ol> <p>(3) Where goods or services are offered with reference to their characteristics and price in such manner appropriate to the communication medium used that an average consumer can conclude the transaction, the following information shall be regarded as material within the meaning of subsection (2) if not already apparent from the context:</p> <ol style="list-style-type: none"> <li>1. all main characteristics of the goods or services to an extent appropriate thereto and to the communication medium used;</li> <li>2. the identity and the geographical address of the entrepreneur and, where applicable, the identity and geographical address of the entrepreneur on whose behalf he is acting;</li> <li>3. the total price, or in cases where the nature of the goods or services means that such price cannot be calculated in advance, the manner in which the price is calculated as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot be</li> </ol>	<p>3. § 5a is replaced by the following §§ 5a to 5c:</p> <p style="text-align: center;">"§ 5a Misleading by omission</p> <p>(1) Anyone who misleads a consumer or other market participant by withholding material information from them is also acting unfairly,</p> <ol style="list-style-type: none"> <li>1. information which the consumer or other market participant needs in the respective circumstances in order to make an informed business decision, and</li> <li>2. the withholding of which is likely to induce the consumer or other market participant to make a business decision that he/she would not otherwise have made.</li> </ol> <p>(2) Withholding is also considered to be:</p> <ol style="list-style-type: none"> <li>1. The hiding of material information,</li> <li>2. The provision of material information in an unclear, unintelligible or ambiguous manner and</li> <li>3. Failure to provide material information in a timely manner.</li> </ol> <p>(3) When assessing whether material information has been withheld, the following must be taken into account:</p> <ol style="list-style-type: none"> <li>1. The limitations of space or time imposed by the medium used to communicate the commercial practice and</li> <li>2. Any measures taken by the entrepreneur to make the information available to consumers by means other than the medium used to communicate the commercial practice.</li> </ol> <p>(4) Anyone who does not make identifiable the commercial intent of a commercial practice is also acting unfairly, unless this is directly apparent from the context, and where such failure to identify the commercial intent is suited to causing the consumer or other market participant to take a transactional decision that he/she would not have taken otherwise. An act in favor of a third-party entrepreneur does not have a commercial purpose if the acting party does not receive any remuneration or similar consideration for the act from the third party entrepreneur or does not accept a promise of such a consideration. Receipt or promise of consideration will be presumed unless the agent can credibly demonstrate that he/she has not received such.</p>

calculated in advance, the fact that such additional charges may be payable;

4. arrangements for payment, delivery and performance, as well as complaint handling policies so far as they depart from the requirements of professional diligence; and

5. the existence of a right of withdrawal or cancellation.

(4) Such information shall also be regarded as material within the meaning of subsection (2) as shall not be omitted in respect of consumers by virtue of EU Regulations or pursuant to legal provisions for the implementation of EU Directives for commercial communication, including advertising or marketing.

(5) When deciding whether information has been omitted, account shall be taken of

1. the limitations of space or time imposed by the medium used to communicate the commercial practice and

2. any measures taken by the entrepreneur to make the information available to consumers by means other than the medium used to communicate the commercial practice referred to in no. 1.

(6) Unfairness shall also have occurred where the commercial intent of a commercial practice is not identified, unless this is directly apparent from the context, and where such failure to identify the commercial intent is suited to causing the consumer to take a transactional decision which he would not have taken otherwise.

§ 5b

Material information

*(Note- translation of the clauses up to and including point 5 is largely taken from the Ministry of Justice's translation opposite, as these clauses are found under Section 5a of the UWG. The only significant change is that the amended version below deletes the requirement under point 4 to include complaint handling policies, as these are now required at pre-contractual (versus advertising) stage and therefore regulated under Directive 2011/83/EU. See recital 40 of Directive 2019/216)*

(1) Where goods or services are offered with reference to their characteristics and price in such manner appropriate to the communication medium used that an average consumer can conclude the transaction, the following information shall be regarded as material within the meaning of Section 5a (1), if not already apparent from the context:

1. All main characteristics of the goods or services to the extent appropriate thereto and to the communication medium used,

2. The identity and geographical address of the entrepreneur and, where applicable, the identity and geographical address of the entrepreneur on whose behalf he is acting,

3. The total price, or in cases where the nature of the goods or services means that such price cannot be calculated in advance, the manner in which the price is calculated as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot be calculated in advance, the fact that such additional charges may be payable;

4. Arrangements for payment, delivery and performance, insofar as they depart from the requirements of professional diligence,

5. the existence of the right of withdrawal or cancellation.

6. In the case of goods or services that are offered via an online marketplace, the information as to whether the provider of the goods or services is an entrepreneur according to his/ her own declaration to the online marketplace operator.

(2) If an entrepreneur offers consumers the opportunity to search for goods or services offered by different entrepreneurs or by consumers, the following general information is considered to be material, irrespective of where

	<p>transactions may be concluded:</p> <ol style="list-style-type: none"> <li>1. the main parameters determining the ranking of the goods or services presented to the consumer as a result of the search query and</li> <li>2. The relative weighting of the main parameters for determining the ranking as opposed to other parameters.</li> </ol> <p>The information according to sentence 1 must be directly and easily accessible from the display of the search results. Sentences 1 and 2 do not apply to operators of online search engines within the meaning of Article 2 point 6 of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ L 186 of 11.7.2019, p. 57).</p> <p>(3) If an entrepreneur makes reviews available that consumers have made with regard to goods or services, information on whether and how the entrepreneur ensures that the published Reviews originate from consumers who have actually used or purchased the goods or services.</p> <p>(4) Information provided to the consumer on the basis of EU regulations or legal provisions for the implementation of EU directives for commercial communication including advertising and marketing shall also be regarded as material within the meaning of Section 5a (1) and may not be withheld.</p>
	<p>Section 5c has not been translated as it largely contains more technical legal issues not directly related to the content of commercial communications.</p>
<p>The Annex 'blacklist'</p>	
<p>Annex to Section 3; key clauses related to marketing communications</p> <p><i>Thirty B2C commercial practices known as the Black List - specific misleading and aggressive commercial practices which are to be regarded as unfair and unlawful under any circumstances, as per s. 3 (3) UWG). The full list is <a href="#">here</a>; the most relevant extracts in this context are:</i></p> <p>5. Making an invitation to purchase goods or services within the meaning of Section 5a subsection (3) at a specified price when the entrepreneur does not disclose that he has reasonable grounds for believing that he will not be able to supply these, or equivalent, goods or services, or procure such supply, at such specified</p>	<p>Key clauses amended or added</p> <p><i>The additional clauses in the amending act cover some important commercial aspects such as:</i></p> <ul style="list-style-type: none"> <li>• <i>Misleadingness related to the availability of goods or services in another member state</i></li> <li>• <i>The resale of tickets acquired by means of automated processes that circumvent restrictions of the original sale</i></li> <li>• <i>Misleadingness about the authenticity of consumer reviews and the faking of same</i></li> </ul> <p><i>These are transposed from Directive <a href="#">2019/2161</a> and do not directly relate to commercial communications so we do not include them here. There is one clause 11a that relates to covert advertising in the context of</i></p>

<p>price for a period that is, and in quantities that are, reasonable (bait advertising). Where stocks are available for less than two days, it shall be incumbent on the entrepreneur to furnish proof of reasonableness;</p> <p>6. Making an invitation to purchase goods or services within the meaning of Section 5a subsection (3) at a specified price in a situation where the entrepreneur, with the intention of promoting different goods or services instead, then demonstrates a defective example of the goods or services, or refuses to show the consumer the goods or services advertised, or refuses to take orders for the goods or services or to perform the advertised service within a reasonable time</p> <p>7. Making the false statement that certain goods or services will only be available generally or on particular terms for a very limited time, in order to elicit an immediate transactional decision from the consumer without the latter having the time and the opportunity to make an information-based decision</p> <p>11. Using editorial content for the purpose of sales promotion where the entrepreneur has paid for this promotion, without such connection being clearly identifiable from the content or by images or sounds (advertorial)</p> <p>23. Making the false statement, or creating the false impression, that the entrepreneur is a consumer or is not acting for purposes relating to his business, trade, craft or profession</p> <p>28. Including in an advertisement a direct exhortation to children to purchase the goods or services marketed or to persuade their parents or other adults to do so</p>	<p style="text-align: center;"><i>search results</i></p> <p>11a. Covert advertising in search results. The display of search results based on a consumer's online search query without clearly disclosing any paid advertising or special payments that serve to achieve a higher ranking of the respective goods or services within the search results;</p>
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Some implications

Some interpretation is that the clauses in the amending act under the revised Section 5a Misleading by Omission will apply to Influencer marketing. See the opening from [this article](#) from World Trademarks Review/ Lexology: *The question of whether and how social media influencer posts relating to third-party products should be classified as advertising has been widely discussed, with an alarming lack of consistency among lower-court decisions. The Ministry of Justice sought to clarify this dilemma by amending the Unfair Competition Act, namely to make the relevant provisions applicable depending whether the advertising has been paid for or not, however, these amendments will only come into force in May 2022. In the meantime, some decisions issued by the Federal Supreme Court (BGH) aim to provide some guidance.*

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