

Full title of law or regulation

This paper contains references to legislation, some case law and some commentary, that will help users to understand how the law is applied in the context of a stated price in advertising. The laws concerned are:

Price Indication Ordinance (PAngV):

DE: <https://www.gesetze-im-internet.de/pangv/BJNR105800985.html>

The Act Against Unfair Competition (UWG):

DE: [https://www.gesetze-im-internet.de/uwg\\_2004/index.html](https://www.gesetze-im-internet.de/uwg_2004/index.html)

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

The Directive on Unfair Commercial Practices (UCPD)

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:en:PDF>

Title of relevant section

Various - see below

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#### General Rules of UWG that are applicable

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UWG applicability

- The UWG contains a number of references to the conditions governing traders' communications to consumers, which may involve an indication of the price of the product
- Advertising which indicates price and does not mention the final price (including all fixed/ necessary costs) thus violating the Price Indication Ordinance could also constitute an unfair commercial practice in the form of a misleading action under s. 5 (1) Sentences 1 and 2, no. 2 or a misleading omission under s. 5a (2) and (3) no. 3 UWG. Indeed, in the past, price indications in advertising have been assessed on this basis.
- However, Case C-476/14 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-476/14>) has recently confirmed the *lex specialis* rule will apply, per Art. 3.4 UCPD, which cannot be applied in case of conflict with other, more specific, EU regulations); PAngV contains more specific aspects relating to the indication of the product selling price in advertising, so the UWG cannot apply as regards those aspects and need not be interpreted. Offers for products, at least as far as the obligation to provide the final selling price is concerned, are no longer subject to UCPD/ UWG (for the time being; this decision has been met with some criticism)
- The Directive on Unfair Commercial Practices (and so UWG) only applies when there is no specific provision under the Union's laws that govern particular aspects of unfair commercial practices, such as rules regarding the presentation of information to consumers. It provides consumers with protection when there is no specific sector-based law at the European level, and prohibits businesses from providing a misleading impression of the nature of the products (Recital 10 UCPD)

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Two forms of commercial practices applicable to price indication in advertising (in particular final price obligation)

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NO LONGER UNDER THE SCOPE OF THE UWG / UCPD (according to judgement C-476/14)

Key Point: The requirement to provide the final selling price including all necessary costs is not absolute here, but is also subject to specific circumstances, medium used, case-by-case assessment as to unfairness; in the case of invitation to purchase there is a question mark over whether UCPD Art. 7 (4) (c) can be interpreted to mean total price inclusive of all necessary costs. The UCPD article concerned follows:

4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:

(c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably 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 reasonably be calculated in advance, the fact that such additional charges may be payable;

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## The UWG Context: 2 forms of commercial practices

### 1. Misleading Action (s. 5 UWG)

- A commercial practice will be considered misleading if it contains false statements or other information likely to deceive in relation to 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
- AND is then suited to causing the consumer or other market participant to take a transactional decision which he would not have taken otherwise

### 2. Misleading Omission/ Invitation to Purchase (s. 5a (3) no. 3 UWG)

- Misleading Omission; s. 5a (3) UWG lists the information in the context of an invitation to purchase<sup>1</sup> which is regarded as material and may not be omitted, hidden or presented in such a manner (i.e. in an unclear, unintelligible, ambiguous or untimely manner (s. 5a (2) UWG)) as to deceive the consumer when a 'transactional decision' is taken
- Such material information (according to s. 5a (3) No. 3): "the total price... as well as, where appropriate, all additional freight, delivery or postal charges"
- In assessing whether omission of this material information (i.e. total price) constitutes an unfair commercial practice, it will always be necessary to carry out an analysis case by case of the impact of that omission on the consumer's behaviour and the transactional decision taken by him (s. 5a (1) and 5a (2.1/2) UWG) i.e. whether according to the context, the consumer needed to know this information (i.e. price + other components) in order to take an informed transactional decision AND omitting it is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise
- Such an analysis will also take into account the particular context (s. 5a (2) UWG) of the commercial practice in question, as well as the limitations of space or time imposed by medium of communication used (s. 5a (5.1) UWG) and whether other means of communication were used to make the information available to consumers (s. 5a (5.2) UWG).

Note: the price-related material information (according to s. 7 (4) (c) UCPD): "price inclusive of taxes... as well as, where appropriate, all additional freight, delivery or postal charges..." – so not "total price" as per s. 5a (3) no. 3 UWG; AG Opinion<sup>2</sup> from C- 476/14 has stated that there is nothing in this provision (i.e. s. 7 (4) (c) UCPD) to indicate that the price is meant to include freight costs (i.e. other components) and must be indicated as a final, total value (para. 73) and the material information relating to price need not, in the context of an invitation to purchase and whatever the circumstances, take the form of a total final price which includes not only the price of the product but also all the other components that will have to be paid by the consumer. National provisions cannot interpret it as meaning that separate reference to the price of the product and then to other price components (such as transfer) costs is prohibited, especially without a case-by-case assessment (paras 78, 79.2)

This opinion conflicts with PAngV (s. 1(1)) – which essentially prohibits separation of price and other components in an advert; at present court has confirmed (judgement C-476/14) that PAngV will prevail as the specialist law:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=181466&doclang=EN>

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<sup>1</sup> a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase

<sup>2</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CC0476>