

First Act Amending the Unfair Competition Act¹

Of 22 December 2008

The Bundestag has passed the following Act:

Article 1

Amendment of the Unfair Competition Act

The Unfair Competition Act of 3 July 2004 (Federal Law Gazette I, p. 1414), last amended by Article 5 of the Act of 21 December 2006 (Federal Law Gazette I, p. 3367), is amended as follows:

1. §1, sentence 1, reads as follows:

“This Act protects competitors, consumers and other market participants against unfair commercial practices.”

2. §2 is amended as follows:

a) Paragraph 1 is amended as follows:

aa) Point 1 reads as follows:

“1. “commercial practice” means any practice by a person for the benefit of their own or another undertaking, during or following a business transaction that is objectively connected with promoting the sale or procurement of goods or services or concluding or executing a contract for goods or services; goods also include immovable property and services also include rights and obligations;”

bb) In point 4, the full stop at the end is replaced by a semi-colon.

cc) The following points 5 to 7 are added:

“5. “code of conduct” means agreements or rules defining the behaviour of entrepreneurs who have undertaken to be bound by the code in relation to business sectors or individual commercial practices, without such obligations being imposed by law or administrative provisions;

¹ This Act transposes Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) (OJ L 149, p. 22).

6. “entrepreneur” means any natural or legal person involved in commercial practices as part of their trade, craft or professional activity and anyone acting for or on behalf of such a person;

7. “professional diligence” means the standard of special skill and care that an entrepreneur may reasonably be expected to exercise towards consumers, commensurate with honest market practices and/or the general principle of good faith in the entrepreneur’s field of activity.”

b) Paragraph 2 reads as follows:

“(2) The definition of the term “consumer” is as set out in §13 of the German Civil Code (Bürgerliches Gesetzbuch, BGB).”

3. §3 reads as follows:

“§3

Ban on unfair commercial practices

(1) Unfair commercial practices are prohibited if they are likely to seriously prejudice the interests of competitors, consumers or other market participants.

(2) Commercial practices involving consumers are prohibited in any event if they do not reflect the entrepreneur’s professional diligence and are liable to have a noticeable effect on the consumer’s ability to decide based on the information provided, thereby causing him to take a commercial decision that he would not otherwise have taken. The point of reference in this case is the average consumer or, if the commercial practice relates to a particular group of consumers, to an average member of this group. If the entrepreneur can foresee that his commercial practice will affect only a clearly identifiable group of consumers who are in particular need of protection due to their age, mental or physical infirmity or credulity, the point of reference must be the view of an average member of this group.

(3) The commercial practices in relation to consumers listed in the Annex to this Act shall always be prohibited.”

4. §4 is amended as follows:

a) The heading of §4 reads as follows:

“§ 4

Examples of unfair commercial practices”.

b) In the first part of the sentence before point 1, the words “within the meaning of §3” are deleted.

c) In point 1, the words “acts of competition” are replaced by the words “commercial practices”.

d) Point 2 reads as follows:

“2. is involved in commercial practices that are liable to exploit age, mental or physical infirmity, lack of commercial experience, credulity, fear or exigency among consumers;”.

e) In point 3, the words “acts of competition” are replaced by the words “commercial practices”.

5. §5 is amended as follows:

a) The heading reads as follows:

“§5 Misleading commercial practices”.

b) Paragraphs 1 and 2 read as follows:

“(1) Anyone undertaking a misleading commercial practice is acting unfairly. A commercial practice is misleading if it contains false statements or other information liable to deceive in relation to the following circumstances:

1. the main characteristics of the goods or services, such as their availability, nature, construction, benefits, risks, composition, accessories, method or date of manufacture, supply or provision, fitness for purpose, potential use, quantity, specification, customer service and complaint handling, geographical or commercial origin, results to be expected from their use or the results or material features of tests carried out on the goods or services;

2. the motivation behind the purchase, such as a particular price benefit, the price itself or the way in which it is calculated, or the terms under which the goods are supplied or the service provided;

3. the person, attributes or rights of the entrepreneur, such as his identity and assets, including intellectual property rights, the extent of his obligations, qualifications, status, licence, affiliations or connections, awards or distinctions, reasons behind the commercial practice or nature of the marketing;

4. statements or symbols in connection with direct or indirect sponsorship or approval of the entrepreneur or of the goods or services;

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

6. compliance with a code of conduct by which the trader has undertaken to be bound, if he refers to this commitment or

7. the consumer’s rights, particularly those embodied in guarantees or warranties where performance is impaired.

(2) A commercial practice is also misleading if it leads to a risk of confusion with other goods or services or with the trademark or another distinguishing mark of a competitor in connection with the marketing of goods or services, including comparative advertising.”

c) In §5(3), the words “paragraph 2” are replaced by the words “paragraph 1, sentence 2”.

d) Paragraph 5 is deleted.

6. The following §5a is inserted after §5:

“§5a Misleading omissions

(1) When assessing whether the concealment of a fact is misleading, it is particularly important to take account of the importance of this fact to the commercial decision, based on generally accepted standards, and also to consider whether concealing the information is capable of influencing the decision reached.

(2) Anyone who influences the consumer's ability to reach a decision within the meaning of §3(2) by withholding information that is crucial in a specific case, taking account of all circumstances, including the limitations of the communication medium, is acting unfairly.

(3) If goods or services are offered in a manner appropriate to the communication medium used, with reference to their characteristics and price, so that an average consumer can take a transactional decision, the following information can be regarded as material within the meaning of paragraph 2, insofar as it is not already apparent from the context:

1. the main characteristics of the goods or services, to an extent appropriate to the latter and also to the communication medium used;

2. the identity and address of the entrepreneur, or, where appropriate, the identity and address of the trader on whose behalf he is acting;

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

4. payment, delivery and performance terms, as well as the complaints handling policy, if they are at odds with the requirements of professional diligence and

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

(4) Information that must not be withheld from the consumer on the basis of Community law or according to legislation transposing Community directives in relation to commercial communication, including advertising and marketing, shall also be regarded as material within the meaning of paragraph 2.”

7. §6 is amended as follows:

a) Paragraph 2 is amended as follows:

aa) In the part of the sentence before point 1, the words “within the meaning of §3” are deleted.

bb) In point 3, the words “a risk of” are inserted before the word “confusion”.

cc) In point 4, the words “the estimation” are replaced by the words “the reputation”.

b) Paragraph 3 is removed.

8. §7(1) and (2) read as follows:

“(1) Any commercial practice that causes an unacceptable nuisance to a market participant is prohibited. This applies in particular to advertising where it is apparent that the recipient does not wish to receive it.

(2) An unacceptable nuisance is always deemed to exist where

1. advertising uses a commercial communication medium for distance selling, which is not listed in points 2 and 3 and where consumers are persistently contacted, even though they clearly do not want this;

2. advertising involves a telephone call to a consumer who has not given explicit prior consent to this or to another market participant without at least his assumed consent;

3. advertising involves the use of an automatic calling machine, a fax machine or electronic mail, where recipients have not given their prior consent to this, or

4. advertising involves a communication in which the identity of the sender on whose behalf the communication is sent is disguised or concealed or where no valid address is given, to which the recipient may send a request for such communications to cease, without thereby incurring costs other than the transmission costs according to the basic tariff.”

9. §8(1) is amended as follows:

a) In sentence 1, the words “Anyone found contravening §3” are replaced by the words “Anyone found undertaking a prohibited commercial practice according to §3 or §7”.

b) In sentence 2, the word “contravention” is replaced by the words “such a contravention of §3 or §7”.

10. In §9, sentence 1, the words “Anyone found wilfully or negligently contravening §3” are replaced by the words “Anyone found wilfully or negligently undertaking a prohibited commercial practice according to §3 or §7”.

11. In §10(1), the words “Anyone found wilfully contravening §3” are replaced by the words “Anyone found wilfully undertaking a prohibited commercial practice according to §3 or §7”.

12. The following annex is added to the Act:

“Annex

(to §3(3))

Prohibited commercial practices within the meaning of §3(3) are

1. the entrepreneur falsely claiming to be signatory to a code of conduct;

2. using a trust mark, quality mark or equivalent without having obtained the necessary authorisation;

3. claiming a code of conduct has been endorsed by a public or other body when it has not;

4. claiming that an entrepreneur, a commercial practice undertaken by him, or goods or a service have been approved, endorsed or authorised by a public or private body

when they have not, or claiming that the terms and conditions for approval, endorsement or authorisation have been complied with when they have not;

5. offers of goods or services within the meaning of §5a(3) at a given price if the entrepreneur fails to disclose that he has reasonable grounds for believing that he will be unable to offer for supply himself or through a third party these or equivalent goods or services for an adequate period in adequate quantities and at the aforementioned price (bait advertising). If there are fewer than two days of stocks, it is incumbent on the entrepreneur to demonstrate their adequacy;

6. offers of goods or services within the meaning of §5a(3) at a given price if the entrepreneur, with the intention of selling another product or service instead, demonstrates a defective sample or refuses to show what has been advertised or refuses to take orders for this or to perform the advertised service within a reasonable time;

7. falsely stating that particular goods or services are generally only available for a very limited time or are only available for a very limited time on particular terms, in order to elicit an immediate commercial decision from the consumer, thereby depriving him of the time and opportunity to make an informed choice;

8. provision of after-sales service in a language other than that in which negotiations prior to the transaction were conducted if the language originally used is not an official language of the Member State in which the entrepreneur is based; this does not apply if the consumer is notified before making the transaction that these services will be provided in a language other than the one originally used;

9. stating or creating the impression that goods or services can be legally sold when they cannot;

10. stating or creating the impression that rights to which consumers are entitled in law are a distinctive feature of the offer;

11. using editorial content paid for by the entrepreneur to promote sales, without this circumstance being clear from the content or from the nature of the visual or audio presentation (advertising disguised as information);

12. making false statements concerning the nature and extent of a risk to the personal safety of the consumer or his family if he fails to purchase the good or avail himself of the service;

13. promoting goods or a service that are similar to goods or a service offered by a competitor, when this is deliberately intended to mislead the consumer as regards the origin of the goods or service;

14. introducing, operating or promoting a sales promotion scheme which gives the impression that payment can be derived solely or principally by introducing other participants to the scheme (snowball or pyramid scheme);

15. claiming that the entrepreneur is about to cease trading or move premises when he is not;

16. claiming that a particular good or service is able to improve the prospects of winning a game of chance;

17. falsely claiming or creating the impression that the consumer has already won or will win a prize or will win a prize or acquire another benefit through a particular action, when this prize or benefit does not actually exist or when the possibility of winning a prize or another benefit depends on a sum of money being paid or costs incurred;
18. falsely claiming that goods or services can cure illnesses, dysfunction or malformations;
19. giving false information on market conditions or supply sources, in order to induce the consumer to purchase goods or services at terms less favourable than are generally available on the market;
20. offering a competition or prize draw, when neither the prizes described nor a reasonable equivalent are awarded;
21. offering goods or a service as “complimentary”, “free”, “without charge” or similar, when costs still have to be met in respect of this; not included here are costs that are inevitably connected with the acceptance of a supply of goods or services or the collection or delivery of the goods or use of the service;
22. including a request for payment with marketing material, in order to create the impression that the advertised goods or services have already been ordered when they have not;
23. wrongly stating or creating the false impression that the entrepreneur is a consumer or is not acting for purposes relating to his trade, business, craft or profession;
24. wrongly stating or creating the false impression that after-sales service in relation to goods or services is available in a Member State of the European Union other than that in which the goods or service are sold;
25. creating the impression that the consumer cannot leave particular premises without prior conclusion of a transaction;
26. where personal visits are made to homes, ignoring a request by the consumer to leave their home or not to return to it, unless the visit is justified in the interests of enforcing a contractual obligation;
27. measures intended to prevent the consumer from enforcing his contractual rights under an insurance policy by requiring him to produce documents when making his claim that are not necessary in order to validate the claim or systematically failing to reply to correspondence enforcing this claim;
28. including in advertising a direct appeal to children to purchase the advertised goods or services themselves or persuade their parents or other adults to do so for them;
29. requesting payment for goods or services that have not been ordered or asking for unordered items to be returned or kept safe, insofar as this does not concern substitute delivery permitted under the regulations governing transactions in distance selling, and
30. expressly informing a consumer that if he does not purchase the goods or services, the entrepreneur’s job or livelihood will be in jeopardy.”

Article 2
Permission to publish

The Federal Ministry of Justice may publish the wording of the Unfair Competition Act as amended following the entry into force of this Act in the Federal Gazette.

Article 3
Entry into force

This Act shall enter into force on the day following its promulgation.

The constitutional rights of the Bundesrat are maintained.

This Act is hereby adopted. It shall be promulgated in the Federal Gazette.

Berlin, 22 December 2008

The Federal President
Horst Köhler

The Federal Chancellor
Dr Angela Merkel

The Federal Minister for Justice
Brigitte Zypries