



## **Advertising legislation - Unfair Competition Act**

The Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb – UWG) came into force on 8 July 2004. Large sections of the new Act follow the principles valid up till now. Nevertheless, there is a series of changes, which may be significant for the day-to-day business of agencies.

### **1. Comprehensible to non-lawyers**

The first thing to note is that the new Act can also be read by non-lawyers. The regulations relevant for the practical work of agencies are contained in Sections 3 – 7 of the new Act.

Section 3 of the new Act contains a so-called general proviso, forbidding unfair competition in a quite general way.

Sections 4 – 7 then contain examples of unfair competition as forbidden under Section 3. In cases of doubt, the first thing is to check whether a planned item of advertising falls under Sections 4 – 7 and is thus not permitted. The best thing is therefore to consult the new text occasionally.

Since Sections 4 – 7 only contain examples of unfair competition, the list is not exhaustive. There are thus cases of unfair competition which are not explicitly listed in Sections 4 – 7. Therefore, even if you cannot find your planned advertising promotion in the catalogue of examples in Sections 4 – 7, you cannot be sure that is permissible. Legal advice must be taken here if necessary.

### **2. Special events, special offers and sales**

Under the previous regulations set out in Section 7 of the Unfair Competition Act (UWG), special events were prohibited. This prohibition primarily concerned temporary sales events at which particular purchase benefits, usually price reductions, were offered. There were exceptions to this prohibition: on the one hand, it was possible to make special offers; on the other, it was possible to hold end-of-season sales, anniversary sales, and clearance sales in cases of business closure or in certain circumstances of damage.

This entire set of regulations has been abolished without replacement by the new Act.

Any businessman can now hold as many temporary sales events as he likes at any time, featuring price or other purchase benefits (e.g. “30% reduction on everything for Easter!”) Now, for example, it is permissible to have a “clearance sale” for the watch department, and such like.



Naturally such announcements must not infringe other regulations, e.g. prohibition of misleading advertising. If your publicity says that you are giving up your entire business, then you must really do that.

Under Section 5, Paragraph 4 of the new Act, it is not permitted to advertise lower prices in conjunction with special events (nor elsewhere) if the higher price on which the reduction has been made was only in force for an unreasonably short time.

In conjunction with the new regulation, the Price Display Order has been so amended that price labels on goods at special events do not need to be replaced if - the promotion is temporary - the promotion has been announced in the advertising.

It is the Act's legislative intent to decontrol the expression "clearance sale." Thus any trader – e.g. towards the end of the summer – can hold a "summer sale", irrespective of the goods involved and without restriction to the previous period of 12 working days.

### **3. Coupled offers**

The new Act enshrines the previous judgement of the German Supreme Court on this advertising promotion. This means: - coupled offers are basically permissible; - goods and/or services can be coupled even if they do not have a functional connection; - such couplings may contain extras ("...and get a XXX free"), may be explicit couplings (in which the individual prices are stated) or implicit couplings (in which only an overall price is shown). It is thus not necessary to state an individual price.

Coupled offers are only prohibited if the advertising emphasises solely the free or reduced part performance, without at the same time indicating the price (or any other conditions) asked for the other part of the coupled offer, it being necessary for such indication to be a clear attribution (e.g. via an asterisk arrangement), made in an easily recognisable and clearly legible way.

Further, coupled offers are prohibited if an extra is offered with such powerful attractive effect that "as an exceptional case, the rationality of the subsequent decision takes a background place." Here we shall have to wait to see when the courts assume such an excessive attractive effect.

### **4. Competitions, draws, prizes**

The new Act initially declares that competitions are prohibited if the entry rules are not stated in a clear and unambiguous way. This reflects the previous regulation. A further prohibition extends to any case in which participation by a consumer in a competition is



dependent on the purchase of an item of goods or the use of a service (obligatory purchase in law). The wording of the legislation implies that this obligatory purchase in law is not objectionable if the competition is not directed to consumers, but for example is organised by a manufacturer for his dealers.

As previously, competitions will be permissible in future, e.g. in magazines, which need to be purchased in order that the game can be properly played. The law envisages a specific exception here.

It is furthermore the Act's legislative intent that forced purchase in law shall not subsist if participation without purchase of goods or services is possible as an alternative. We fear, however, that the courts could place limitations on this; they might hold, for instance, that such alternative participation must not be more complicated or dearer than the "normal" type. Here too we shall have to wait to see where the courts draw the line.

## **5. Vexatious advertising**

The new Act contains an explicit prohibition of inadmissibly vexatious advertising. Direct marketing using telephone calls, faxes and e-mails falls under this restriction.

The new legal situation in this regard may be briefly summarised as follows: - Telephone calls to consumers are only permissible if the consumer has given explicit agreement (opting-in). - They are already permissible to other market participants if their probable agreement can be assumed. - In the case of fax and e-mail communication, the advertiser's legal position has worsened. This advertising is even prohibited vis-à-vis commercial traders (and vis-à-vis consumers in any case) unless the addressee's permission is available. Assumed agreement is thus not sufficient here.

With respect to internet sales, a relaxation has been made here: e-mail advertising is permissible to customers whose e-mail address was acquired through an earlier sale, if - the advertising is for similar goods of the advertiser's own, - the customer has not expressed a wish to the contrary, and - the customer is informed clearly and unambiguously every time that he may express a wish to the contrary and that only costs as shown on the basic tariff will be incurred should he express such a wish.

## **6. Consumer protection**

It is a new development that the Unfair Competition Act now also serves the Consumer Protection Act. For this reason the Act prescribes at various points a duty to inform consumers clearly and



unambiguously about certain matters. In the case of sales promotions, such as price reductions, extras or gifts, the conditions under which they can be claimed must be stated clearly and unambiguously.

In the case of prizes and competitions, the entry rules must be stated clearly and unambiguously. It has already been mentioned in the previous section that, when sending advertising e-mails to customers already acquired, such customers must be informed clearly and unambiguously each time that they can decline to be sent such e-mails. "Clearly and unambiguously" in this context means not only that the text is comprehensible in itself, but it must be placed in an advertising e-mail in such a way that it can be seen without difficulty.

It is advisable to observe these duties of information carefully. The courts will certainly place great weight on declarations of this kind.

23 July 2004