



Amendment to the German Act against Unfair Competition (UCA) that Entered into Force on 10 December 2015

The EU Commission held that with its UCA Amendment 2008 Germany had insufficiently implemented Directive 2005/29/EC concerning unfair business-to-consumer commercial practices (UCPD). In order to avoid infringement procedures, the German legislators had to adapt the UCA. Speed was imperative, and therefore it took only about one year from the ministerial draft to the enactment of the Amendment on 10 December 2015.

The following seems to us to be the most relevant changes:

1. “Entrepreneurial Diligence” (Sec. 2 (1), no. 7, UCA 2015)

The term “professional care” (*fachliche Sorgfalt*) in Sec. 2 (1), no. 7, UCA was replaced by “entrepreneurial diligence” (*unternehmerische Sorgfalt*), but the definition stays the same. By this, Art. 2 (h) UCPD which defines “professional diligence” (*berufliche Sorgfalt*) is to be more precisely implemented.

2. New Definitions (Sec. 2 (1), nos. 8 and 9, UCA 2015)

The definitions were added of “material distortion of the economic behaviour of consumers” (*wesentliche Beeinflussung des wirtschaftlichen Verhaltens des Verbrauchers*) in Sec. 2 (1), no. 8, UCA and of “transactional decision” (*geschäftliche Entscheidung*) in Sec. 2 (1), no. 9, UCA). These new definitions were required for implementation of Art. 2 (e) and Art. 2 (k) UCPD. They read as follows:

Sec. 2 UCA 2015 – Definitions

(1) Within the terms of this Act, the following definitions shall apply:

8. “material distortion of the economic behaviour of consumers” means the use of a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;
9. “transactional decision” means any decision taken by a consumer or another market participant concerning whether, how and on what terms to conclude a transaction, make a payment, retain or dispose of a product or a service or to exercise a contractual right in relation to the product or the service, irrespective of whether the consumer or the other market participant decides to act.

It should be noted that according to the definition of “transactional decision” this also includes decisions in advance, such as e.g. to enter a shop.

3. Amendments of Sec. 3 UCA

In subsection (1) of the new Sec. 3 UCA, the criterion of tangible impairment of interests was omitted. Sec. 3 (1) UCA 2015 now reads as follows:

Sec. 3 UCA 2015 - Prohibition of Unfair Commercial Practices

(1) Unfair commercial practices shall be illegal.

The prerequisite of tangibility, which was a feature of illegal, unfair commercial practices, has been limited so as to be systematically and dogmatically consistent with those provisions in which this criterion is reasonable.

The tangibility of impairment of interests now only has to be examined in connection with commercial practices directed at **consumers** (Sec. 3 (2) UCA). In addition, tangibility remains a feature of that violation of a statutory provision that is no longer regulated in Sec. 4, no. 11, UCA 2008, but in Sec. 3a UCA 2015. These two new provisions read as follows:

Sec. 3 UCA 2015 – Prohibition of Unfair Commercial Practices

(2) Commercial practices directed at consumers or which impinge consumers shall be unfair when these do not conform with entrepreneurial diligence and are suited to **substantially impair** the commercial practice of a consumer.

Sec. 3a UCA 2015 – Violation of a Statutory Provision

A party shall have acted unfairly when said party contravenes a statutory provision also intended to regulate market behaviour in the interest of market participants and if the violation is suited to **tangibly impair** the interests of consumers, other market participants or competitors.

4. Revision of Sec. 4 UCA

Sec. 4 UCA has been entirely revised. It now includes additional rule examples of unfair behaviour, but is not limited to the protection of **competitors**. The provisions protecting consumers were cancelled in Sec. 4 UCA 2015 and can now be found to some extent in Sec. 4a, Sec. 5 and Sec. 5a UCA 2015. The provision regarding violation of a statutory provision in Sec. 4, no. 11, UCA 2008 has been moved to Sec. 3a UCA 2015.

Please find below a table showing in brief the amendments of Sec. 4 UCA.

Sec. 4 UCA 2008	Sec. 4 UCA 2015
No. 1	▶ Sec. 4a
No. 2	▶ Sec. 4 (2) (2)
No. 3	▶ Sec. 5a (6)
No. 4	▶ Sec. 5 and Sec. 5a
No. 5	▶ Sec. 5 and Sec. 5a
No. 6	omitted without replacement
No. 7	▶ Sec. 4 (1)
No. 8	▶ Sec. 4 (2)
No. 9	▶ Sec. 4 (3)
No. 10	▶ Sec. 4 (4)
No. 11	▶ Sec. 3a

5. Amendment of Sec. 5a UCA (Misleading by Omission)

Sec. 5a was substantially amended. Sec. 5a (2)-(4) UCA were revised and Sec. 5a (5) and (6) UCA were newly introduced.

Sec. 5a (5) UCA 2015 provides specific criteria for the assessment of whether information was withheld. Sec. 5a (5) UCA 2015 implements Art. 7 (3) UCPD. Sec. 5a (6) UCA 2015 stipulates that it is unfair if the commercial intent of a commercial practice is not identified. This provision partly implements Art. 7 (2) UCPD.

Sec. 5a (5) and (6) UCA 2015 read as follows:

Sec. 5a UCA 2015 – Misleading by Omission

- (5) In assessing whether information has been omitted, the following is to be taken into account
- 1 limitations of space or time imposed by the medium used to communicate the commercial practice and
 - 2 any measures taken by the trader to make the information available to consumers by other means than by the medium used to communicate according to no 1.
- (6) That party shall also have acted unfairly who fails to identify the commercial intent of the commercial practice should this not be directly apparent from the circumstances, and where this failure to identify is suited to cause the consumer to take a transactional decision that he would not have taken otherwise.

6. “Black List” (Annex to Sec. 3 (3) UCA)

The black list, which forms the Annex to Sec. 3 (3) UCA, provides examples of illegal commercial practices within the terms of Sec. 3 (3) UCA. This black list was editorially revised.

The most noticeable revision can be found in No. 13 – deception regarding the commercial origin. The term “competitor” was replaced by the term “specific manufacturer”. The new version reads as follows:

Annex to Sec. 3 (3) UCA 2015

Illegal commercial practices within the terms of Sec. 3 (3) shall cover

13. promoting goods or services similar to the goods or services of a **specific manufacturer**, when the intent is to deceive the consumer regarding the commercial origin of the goods or services promoted.

Consequently, it is now no longer necessary to examine whether the parties involved are competitors.

Please feel free to contact us should you have any questions regarding the UCA Amendment or any aspect of IP law.

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