

# FEDERAL LAW GAZETTE

## OF THE REPUBLIC OF AUSTRIA

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Part I

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### **79. Federal Act amending the 1984 Federal Act against Unfair Competition (*Bundesgesetz gegen den unlauteren Wettbewerb (UWG) 1984*) – amended version (2007) of the Unfair Competition Act (*UWG-Novelle 2007*)**

The *Nationalrat* has decreed the following:

The 1984 Federal Act against Unfair Competition (*Bundesgesetz gegen den unlauteren Wettbewerb (UWG)*), as published in the Federal Law Gazette (*BGBL.*) I No 448 and last amended by Article 6 of the Federal Act published in *BGBL.* I No 106/2006, shall be amended as follows:

1. § 1 and its heading shall read as follows:

#### **"Unfair commercial practices**

§ 1 (1) Any person who, in the conduct of business,

1. engages in an unfair commercial practice or other unfair action which is likely to materially affect competition to the detriment of businesses, or
2. engages in an unfair commercial practice which infringes the requirements of professional diligence and, in relation to the product concerned, is likely to materially affect the economic behaviour of the average consumer whom it reaches or to whom it is addressed,

may be made the subject of an action to cease and desist and, in case of fault, may be liable for damages.

(2) Where a commercial practice is directed at a group of consumers, the "average consumer" shall be the average member of the group. Commercial practices aimed at consumers which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the business operator could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.

(3) In particular, commercial practices which are

1. aggressive within the meaning of § 1a, or
2. misleading within the meaning of § 2

shall be deemed unfair.

(4) For the purposes of this Act,

1. "product" shall mean any goods or service, including immovable property, rights and obligations;

2. "commercial practice" shall mean any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a business, directly connected with the promotion, sale or supply of a product;
3. "to materially distort the economic behaviour of consumers" shall mean using 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;
4. "code of conduct" shall mean an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State of the European Union which defines the behaviour of business operators who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;
5. "invitation to purchase" shall mean 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;
6. "undue influence" shall mean exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision;
7. "consumer's transactional decision" shall mean any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, irrespective of whether the consumer decides to act or to refrain from acting;
8. "professional diligence" shall mean the standard of special skill and care which a business operator may reasonably be expected to exercise towards consumers, commensurate with honest market practice.

(5) In actions to cease and desist or actions for damages as referred to in subparas (1) to (3), the business operator shall be responsible for establishing the accuracy of factual claims in connection with a commercial practice where, given the particular facts and circumstances of the case, such a requirement appears appropriate in view of the legitimate interests of the business operator and other market participants."

2. *The following new § 1a and its heading shall be inserted after § 1:*

### **"Aggressive commercial practices**

**§ 1a** (1) A commercial practice shall be regarded as aggressive where, through harassment, coercion or undue influence, it significantly impairs a market participant's freedom of choice or conduct, or is likely to cause him to take a transactional decision that he would not have taken otherwise.

(2) When establishing whether aggressive commercial practices are taking place, account shall also be taken of any onerous or disproportionate non-contractual barriers by means of which a business operator seeks to prevent the consumer from exercising his contractual rights, particularly the right to terminate a contract or switch to another product or another business operator.

(3) The commercial practices listed in Nos 24 to 31 of the Annex shall be deemed aggressive in all circumstances."

3. § 2 and its heading shall read as follows:

### **"Misleading commercial practices**

§ 2 (1) A commercial practice shall be regarded as misleading where it contains false information (§ 39) or is otherwise likely, with regard to a product, to deceive a market participant in relation to one or more of the following elements in such a way that causes him to take a transactional decision that he would not have taken otherwise:

1. the existence or nature of the product;
2. the main characteristics of the product or the material features of tests or checks carried out on the product;
3. the extent of the business's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the business or the product;
4. the price or the manner in which the price is calculated, or the existence of a specific price advantage;
5. the need for a service, part, replacement or repair;
6. the nature, attributes and rights of the business operator or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;
7. the consumer's rights under warranties and guarantees, or the risks he may face.

(2) The commercial practices listed in Nos 1 to 23 of the Annex shall be deemed misleading in all circumstances.

(3) A commercial practice shall also be regarded as misleading where it is likely to cause a market participant to take a transactional decision that he would not have taken otherwise, and it involves:

1. any marketing of a product, including comparative advertising, which creates confusion with any products or distinguishing marks of a competitor firm;
2. non-compliance by the business operator with commitments contained in codes of conduct by which the business operator has undertaken to be bound, where
  - a) the commitment is not aspirational but is firm and is capable of being verified; and
  - b) the business operator indicates in a commercial practice that he is bound by the code.

(4) A commercial practice shall furthermore be regarded as misleading where, taking account of the limitations of the communication medium, it omits material information that the market participant needs in order to take an informed transactional decision and is thereby likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

(5) Information requirements established by Community law in relation to commercial communication, including advertising or marketing, shall in all instances be deemed to constitute "material information" as referred to in subpara. (4).

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

1. the main characteristics of the product, to an extent appropriate to the medium and the product;

2. the name and geographical address of the business and, where applicable, of the business on whose behalf it is acting;
3. the price inclusive of taxes or, where the price cannot reasonably be calculated in advance, the manner in which the price is calculated;
4. where appropriate, the 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;
5. the arrangements for payment, delivery, performance and the complaint handling policy, where these depart from the requirements of professional diligence;
6. the existence, where applicable, of a right of withdrawal.

(7) Claims for damages may only be filed against parties engaged commercially in the dissemination of public announcements where the latter were aware that the information was false, and in the case of media companies only where there was an obligation to check any announcement for its accuracy (§ 4 subpara. (2))."

4. *The following new § 2a and its heading shall be inserted after § 2:*

### **"Comparative advertising**

**§ 2a** (1) Comparative advertising shall be permissible where it does not infringe the provisions of §§ 1, 1a, 2, 7 or 9 subparas (1) to (3).

(2) Furthermore, comparative advertising which explicitly or by implication identifies a competitor, or goods or services offered by a competitor, shall be permissible only where:

1. for products with designation of origin, it refers in each case to products with the same designation; or
2. the comparison refers clearly and unambiguously to a special offer, the date when the special offer comes to an end and, where the special offer does not yet apply, to the beginning of the period for which the special price or other special conditions apply.

(3) Any person who, in the conduct of business, infringes the provisions of subpara. (2) may be made the subject of an action to cease and desist and, in case of fault, may be liable for damages.

(4) § 1 subpara. (5) shall apply *mutatis mutandis*.

5. *§ 3 subpara. (1), first half-sentence, shall read as follows:*

"(1) Where the false information contained in the misleading commercial practice is included in a notification published in a newspaper,"

6. *§ 4 subpara. (1) shall read as follows:*

"(1) Any person who, in the conduct of business, knowingly engages for competitive purposes in aggressive or misleading commercial practices in a public announcement or in any media (§ 1 subpara. (1) No 1 of the Media Act (*Mediengesetz – MedienG*)) shall be ordered by the court to pay a fine of up to 180 *per diems*."

6a. *In § 4 subpara. (2), first half-sentence, the words "printed publications" shall be replaced by the word "media".*

7. In § 4 subpara. (2), the words "the persons responsible under press law are" shall be replaced by the words "the media company is", and in subpara. (3) the words "press affairs" shall be replaced by the words "media affairs (§ 40 and § 41 subparas (2) and (3) of the Media Act (MedienG)". § 4 subpara. (4) shall be dispensed with.

8. § 5 and its heading shall read as follows:

#### **"Recovery**

**§ 5** Upon application by the plaintiff or the party entitled to sue, an order for recovery may be issued by analogy with §§ 33 and 41 of the Media Act."

9. In § 6 subpara. (2), the words "Federal Economic Chamber" and "Federal Chamber" shall be replaced by the words "Economic Chamber of Austria".

10. § 6a and its heading shall be dispensed with.

11. In § 8 subpara. (1), the reference to "§§ 1, 2 4 and 7" shall be replaced by a reference to "§§ 4 and 7", and the word "getätigt" shall be replaced by the word "angewendet" [in English, both words would be rendered as "taken"].

12. In § 14 subpara. (1), the reference in the first sentence to "§§ 1, 2, 3, 6a, 9a, 9c and 10" shall be replaced by a reference to "§§ 1, 1a, 2, 2a, 3, 9a, 9c and 10"; in the second sentence, the reference to "§§ 1, 2, 6a, 9a and 9c" shall be replaced by a reference to "§§ 1, 1a, 2, 2a, 9a and 9c"; and in the third sentence, the words "misleading advertising as referred to in § 1 or § 2 subpara. (1)" shall be replaced by the words "aggressive or misleading commercial practices as referred to in § 1 subpara. (1) No 2 and subparas (2) to (4), § 1a or § 2".

13. In § 14 subpara. (2), the words "misleading advertising in contravention of § 1 or § 2 subpara. (1)" shall be replaced by the words "aggressive or misleading commercial practices as referred to in § 1 subpara. (1) No 2 and subparas (2) to (4), § 1a or § 2".

13a. § 14a and its heading shall read as follows:

#### **"Right to information**

**§ 14a** (1) Business operators which provide postal or telecommunications services and which, in the conduct of their business, process the names and addresses of their users in order to provide such services shall, in response to a written request (subpara. (2)) from one of the bodies with right of action as referred to in the second and third sentences of § 14 subpara. (1) or from the Association for the Prevention of Unfair Competition (*Schutzverband gegen unlauteren Wettbewerb*), make these details available in writing where there are reasonable grounds for suspecting that a user is engaging in unfair commercial practices as referred to in § 1, § 1a or § 2. They shall be obliged to provide information only in so far as these details are readily available or relate to a P.O. box within the country or a domestic telephone number which is not entered in a generally accessible directory.

(2) The party requesting information shall indicate in its request the reasons giving rise to its suspicions, and shall demonstrate that it requires the information referred to in subpara. (1) in order to take legal action against unfair commercial practices as referred to in § 1, § 1a or § 2, and that such information will be used exclusively for this purpose and is not obtainable from publicly accessible sources; failure to comply with these requirements shall result in the loss of the right to information.

(3) With the exception of the Federal Competition Authority (*Bundswettbewerbsbehörde*), the party requesting information shall suitably reimburse the service-provider required to provide such information for the costs incurred in this connection. It shall also indemnify the service-provider against any claims by its users arising as a result of the information being provided. It shall keep a copy of its written request for a period of three years."

14. *In § 18, the reference to "§§ 1, 2, 6a, 7, 9, 9a, 9b, 9c, 10 subpara. (1), 11 subpara. (2) and 12" shall be replaced by a reference to "§§ 1, 1a, 2, 2a, 7, 9, 9a, 9c, 10 subpara. (1), 11 subpara (2) and 12".*

15. *§ 19 subpara. (2) shall be dispensed with.*

16. *In § 21, the reference to "§§ 2, 7, 9, 9a, and 9b" shall be replaced by a reference to "§§ 2, 2a, 7, 9 and 9a".*

16a. *§ 25 subpara. (6) shall read as follows:*

"(6) Upon application by the successful party, the court of first instance shall specify the costs of publication and shall order the opposing party to reimburse them. The court may, at the request of the successful party, also order that the losing party pay in advance the likely publication costs within a period of four weeks. An order for the advance payment of costs shall not be issued where the losing party provides written evidence that its income and financial circumstances make it impossible to effect such payment. A request for payment of the likely publication costs shall suspend the running of the period within which the ruling must be published until the date on which the advance payment is received or such request is turned down. Following publication, the successful party shall notify the losing party of the costs actually incurred and shall reimburse, with interest, any excess amount paid by the latter."

17. *The following subpara. (5) shall be added to § 27:*

"(5) No 14 of the Annex shall remain unaffected."

18. *The existing provisions of § 28 shall be designated as subpara. (1), and the following subpara. (2) shall be added:*

"(2) No 21 of the Annex shall remain unaffected."

19. *The following subpara. (4) shall be added to § 31:*

"(4) No 2 of the Annex shall remain unaffected."

20. *The following subpara. (3) shall be added to § 33a:*

"(3) No 7 of the Annex shall remain unaffected."

21. *The following subpara. (7) shall be added to § 44:*

"(7) §§ 1, 1a, 2, 2a, 3 subpara. (1), 4 subparas (1) to (3), 5, 6 subpara. (2), 8 subpara. (1), 14 subparas. (1) and (2), 18, 21, 27 subpara. (5), 28a, 31 subpara. (4), 33a subpara. (3), 45 and the Annex, as amended in the Federal Act published in *BGBl. I* No 79/2007, shall enter into force on 12 December 2007. §§ 4 subpara. (4), 6a and 19 subpara. (2) shall cease to apply on 12 December 2007."

22 *The following § 45 and its heading shall be added after § 44:*

**"Reference to Community law**

**§ 45** This Federal Act transposes the following Directives into Austrian law:

1. Directive 2005/29/EC on unfair commercial practices (OJ L 149, 11.06.2005, p. 22);
2. Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising (codified version) (OJ L 376, 27.12.2006, p. 21)."

23. *The following Annex and its heading shall be added after § 45:*

**"Annex**

**Misleading commercial practices**

1. The business operator falsely claiming to be a signatory to a code of conduct.
2. Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.
3. Falsely claiming that a code of conduct has an endorsement from a public or other body.
4. Claiming that a business (including its commercial practices) or a product has been approved, endorsed or authorised by a public or private body when it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.
5. Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the business operator may have for believing that he will not be able to offer for supply or to procure another business to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).
6. Making an invitation to purchase products at a specified price and then
  - a) refusing to show the advertised item to consumers, or
  - b) refusing to take orders for it or deliver it within a reasonable time, or
  - c) demonstrating a defective sample of it with the intention of promoting a different product (bait and switch).
7. Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient time or opportunity to make an informed choice.
8. Undertaking to provide after-sales service to consumers with whom the business has communicated prior to a transaction in a language which is not an official language of the Member State where the business is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.
9. Falsely stating or otherwise creating the impression that a product can legally be sold.
10. Presenting rights given to consumers in law as a distinctive feature of the business's offer.
11. Using editorial content in the media to promote a product where a business has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).

12. Making an inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product.
13. Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.
14. Establishing, operating or promoting a pyramid promotional scheme where a consumer is given the opportunity to receive remuneration derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.
15. Falsely claiming that the business operator is about to cease trading or move premises.
16. Falsely claiming that products are able to facilitate winning in games of chance.
17. Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.
18. Inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.
19. Claiming to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.
20. Describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.
21. Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed product when he has not.
22. Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.
23. Creating the false impression that after-sales service in relation to a product is available in a Member State other than the one in which the product is sold.

### **Aggressive commercial practices**

24. Creating the impression that the consumer cannot leave the premises until a contract is concluded.
25. Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.
26. Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified in law to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC and 2002/58/EC.
27. Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.
28. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.
29. Demanding immediate or deferred payment for or the return or safekeeping of products supplied by the trader, but not solicited by the consumer (inertia selling).



30. Explicitly informing a consumer that if he does not buy the product or service, the business operator's job or livelihood will be in jeopardy.
31. Creating the false impression that the consumer has already won, will win, or will on performing a particular act win, a prize or other equivalent benefit, when in fact
  - a) there is no prize or other equivalent benefit, or
  - b) taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost in excess of standard postal and telephone charges."

**Fischer**

**Gusenbauer**