

UNFAIR COMPETITION: INTRODUCTION MISLEADING ADVERTISEMENT SUSTAINABILITY CLAIMS

Pascal Böhner
Rechtsanwalt



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Impact.
Passion.
IP.

AGENDA



I. Introduction

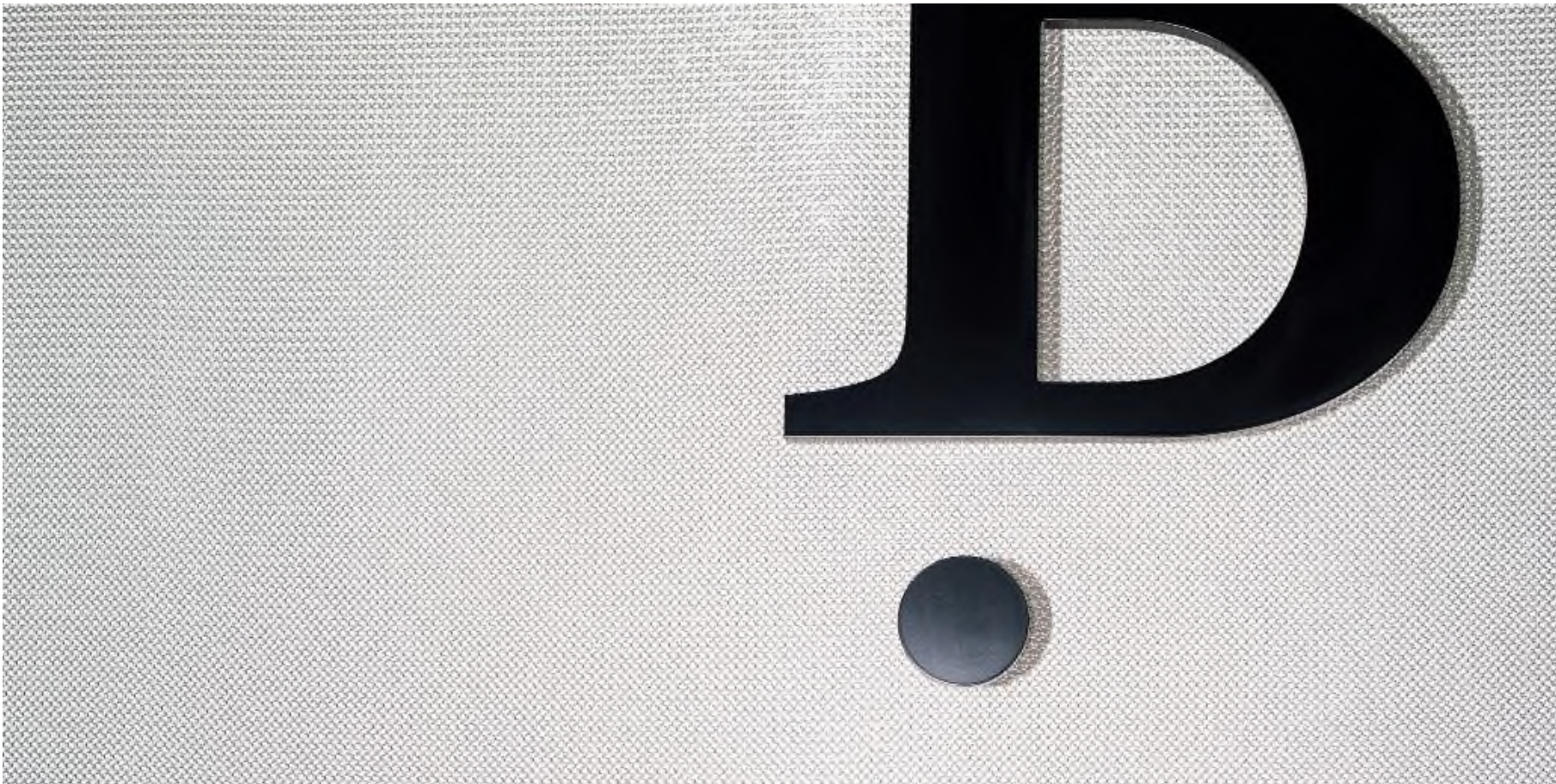
II. Misleading Statements

III. Sustainability/Green claims

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Introduction Act Against Unfair Competition „UWG“



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Introduction - Purpose of unfair competition law (cf. § 1 UWG)



- a) Protection of competitors
- b) Consumer protection
- c) Other market participants
- d) Protection of the general public ("interest in undistorted competition")

Introduction - Basics



„Consumer“ under the UWG (§ 3 (4) UWG "average consumer")

- Following the principle definition developed by the ECJ (ECJ GRUR-Int. 1998, 795 - Gut Springenheide)
- Model of the "reasonably well-informed consumer who pays attention to advertising in a manner appropriate to the situation“

Typical Unfair Practices



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Unfair Practices

Disparagement of competitors (§ 4 No. 1 UWG)

b.



→ The prerequisite is
the recognisability
of the competitor

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Unfair Practices

Protection against imitation (§ 4 No. 3 UWG)

b.



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Unfair Practices



Targeted obstruction (§ 4 No. 4 UWG)

- Interception of customers
- Enticement of employees
- Adoption of a programme
- Boycott
- Abuse of buyer power
- Price undercutting

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Unfair Practices

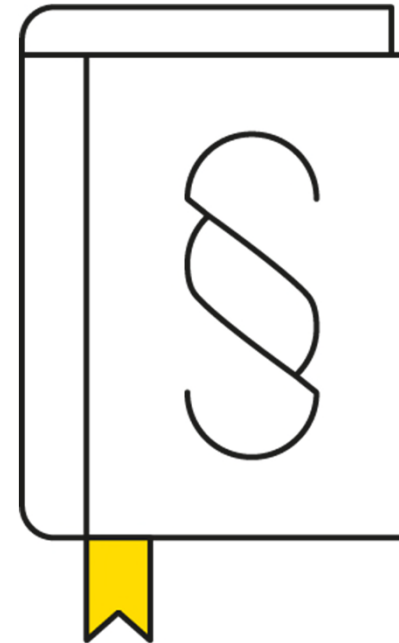
b.

Breach of law (§ 3 a UWG)

- Violation of market conduct rules

Such as

- Professional law (lawyers/doctors etc.)
- Labelling obligations
- Regulatory law, e.g. Medical Products, tobacco advertising, gambling

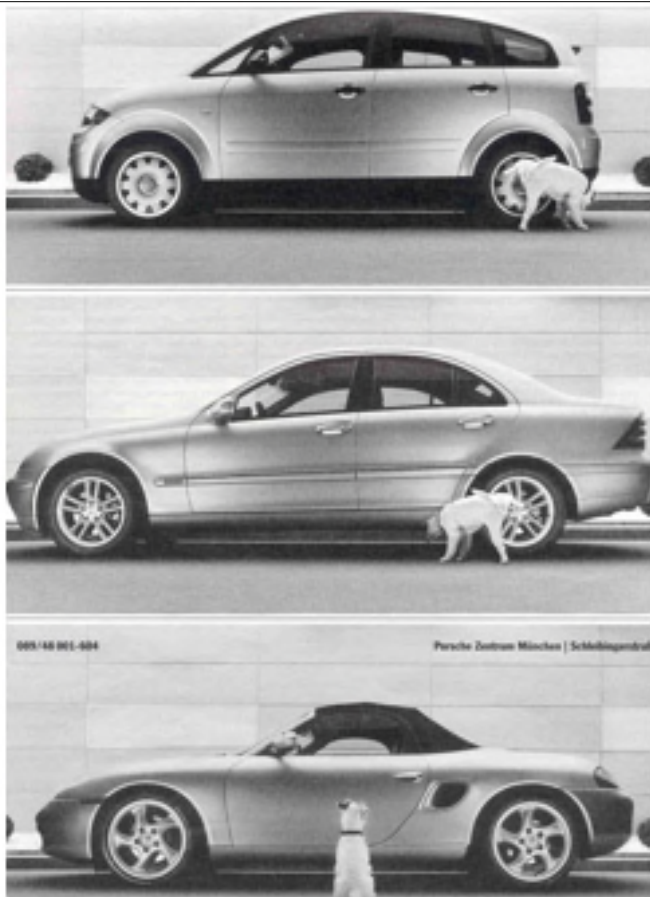


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Unfair Practices

Comparative advertising (§ 6 UWG)

b.



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Misleading Statements



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Misleading Statements

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Misleading Statements



Legal basis: § 5 UWG

- (1) Unfairness is deemed to have occurred where a person engages in a misleading commercial practice which is suited to causing the consumer or other market participant to take a transactional decision which he or she would not have taken otherwise.
- (2) A commercial practice is regarded as misleading if it contains false statements or other information suited to deception regarding the following circumstances:

Misleading Statements



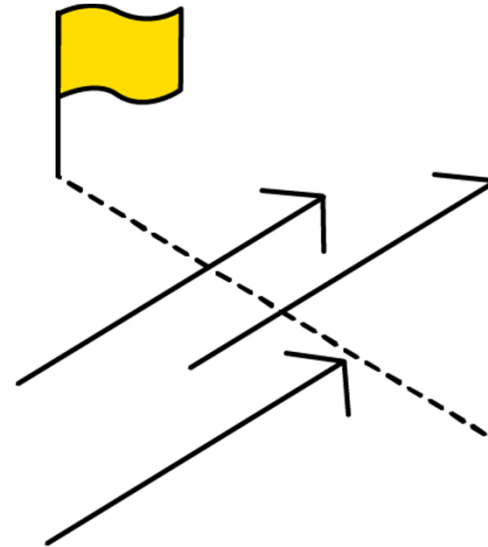
→ Essential goals:

- The principle of truth as a fundamental element of unfair competition law
- Protection in the vertical relationship (supply/demand)
- Consumers and other market participants
- „Arbitrator function“ of unfair competition law

Misleading Statements



- Information: objectively verifiable factual core:
- Misleading:
 - untrue („blatant lie") or
 - otherwise suitable for deception
- Relevant: understanding of consumers
- Reference point of misleading information, e.g.
 - Key features of the product
 - Key characteristics of the company



Misleading



→ Misleading by omission (**§ 5 a / b / c UWG**)

= Concealment of a fact despite a duty of disclosure
(e.g. conditions of utilisation)

This obligation to provide information exists if

- the concealed fact is of importance for the business decision and
- the concealment is suitable for influencing

→ Special regulation for consumers in § 5 a (2) - (4) UWG

Misleading Statements - Types



1. Ambiguous and misleading
2. Self-evident facts
3. Sole and top position advertising
4. Tying offers
5. Price reductions

Misleading

1. Ambiguous and unclear information



4x WASCHBARE NANOSILBER ATEMSCHUTZMASKE DIE ORIGINALE MUNDSCHUTZ MASKE 3LAGIG gesponsert von Antiviron

★★★★★ 25 Bewertungen



Produktbeschreibung & Produktdaten

4x Waschbare Antibakterielle Nase-Mund Schutzmaske mit integriertem exklusive Antibakterielle Nanosilber Fasern.

3 Lagig

Details:

- Antibakterielle Nanosilber Fasern
- Baumwollgewebe mit hoher Dichte
- 3 Lagig
- Antibakterielle Strickwaren
- 4er Set (4Stück im Set)
- Maße: 14,5 x 23 cm
- Designed in Germany!

Eng anliegend, passt sich unkompliziert an alle Gesichtsformen an.

Antiviral, staubdicht.
Schützt vor Tröpfcheninfektionen.

Enthält **3 Schichten Gewebe** mit speziellen Eigenschaften:

Außereschicht:

- Hochdichtes Baumwollgewebe in Weiß geeignet für alle Altersgruppen.

Mittlereschicht:

- Integrierte, exklusive antiviral Nano-Silber-Fasern.
- Die Silber-Nano-Technologie wirkt als Sicherheitsfilter und eliminiert Mikroorganismen, die durch die Außenschicht der Mund-Nasenschutz gelangt sind.

Innerschicht / Hautkontaktschicht:

- Die antiviral Strickware ist weich, Luftig und atmungsaktiv.
- Die Konzentration an Mikroorganismen ist auf der Schicht aus Strickware etwa 100mal geringer als bei herkömmlichen Gewebe.
- Diese ausgezeichnete Eigenschaft bleibt auch nach mehr als 30mal waschen beibehalten.

Misleading

2. Advertising with self-evident facts

- Milk "without additives and preservatives"
 - All milk must be legally free from these substances.
- Toothbrush "with massage bristles"
 - If only commercially available bristles are used
- Steinhäger Korn "double distilled"
 - Variety must be double distilled by law

Advertising with self-evident features is only permissible as long as these are not emphasised as special features.

Allowed: Black Forest hotel with "quiet rooms and beautiful views" (unless "untrue")



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Misleading

3. Sole and top position advertising

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Misleading

3. Sole and top position advertising

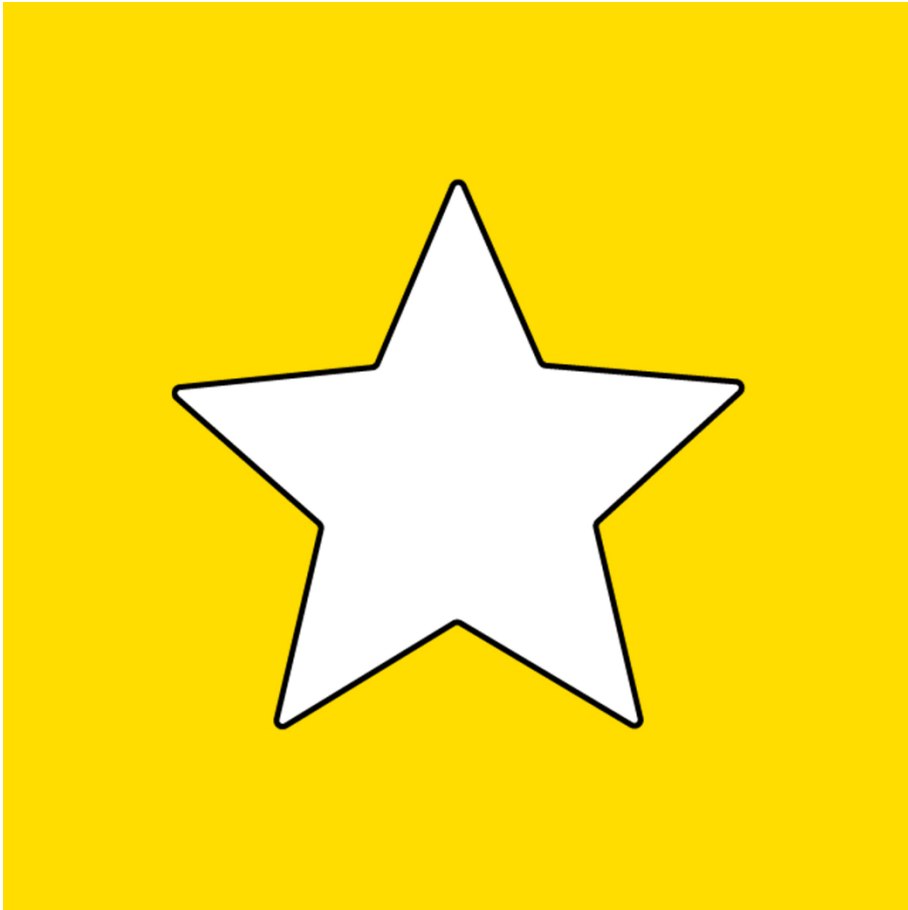


Examples:

- "Price hit of the year" (although prize from previous years)
- "Market leader" (newspaper company with the largest readership, not the largest circulation)
- "Test winner" (without recognised test victory)
- "Munich's largest furniture store" (size, product range and turnover)
- "The quietest Hoover of all time,,
- Differentiation from exaggerations and subjective value judgements
- Leading position only permissible if true, clear lead and prospect of a certain duration of the lead

Misleading

4. Tying offers



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Misleading

4. Tying offers



- Misleading (+) in the case of false information about linked products with regard to
 - Value
 - Object
 - Feature
 - Conditions for granting them
- But: No obligation to provide information regarding
 - Value of the individual services
 - Arg.: Market counterparty must and can make price comparisons



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Misleading

5. Price reductions



- Principle of price freedom
- Principle of price truthfulness and price clarity
- "UVP"/ "Recommended" price: Misleading if no longer up to date
- "instead" („statt“) prices
 - Moon price
 - Seriously demanding the original price?
 - Demanding the original price only for an unreasonably short time (§ 5 [4] UWG) - presumption of deception, reversal of burden of proof



→ Price reduction advertising is unfair if a corresponding normal price was not previously charged over a relevant period of time.

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Sustainability/“Green” Claims



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What is a "Green" claim?



- The term "Green" as used in the EU Directives encompasses different sorts of claims:

- **Environmental claims**

*claims that give the impression that a product or activity of a company has **few or no impact** on the environment or is **less harmful** for the environment than competitor goods or services.*

- **Ethical claims (social claims)**

*claims that give the impression that the production of a product or activity of a company has been done in accordance with certain **ethical standards**, for example with respect to general working conditions, animal welfare and/or corporate social responsibility (CSR).*

- **Lifespan claims**

claims that give the impression that a product can be used for a certain period of time, can be easily repaired, or will not break down easily.



The New "Green" European Legal Framework

The Green Claims Directive (Proposal)

Common methodology for substantiating green claims.

The Empowering Consumers (“Greenwashing”) Directive (Directive (EU) 2024/825 of February 28, 2024)

Harmonized set of rules on sustainability claims applicable to all companies operating in the EU/EEA by amending certain key provisions of the 2005/29 Unfair Commercial Practices Directive.

Transposition deadline : September 27, 2026

➤ ***Both Directives are intended to contribute to the EU’s green transition towards a circular, climate-neutral and clean economy by enabling consumers to make informed purchasing decisions based on reliable information about the sustainability of products and traders.***

The New "Green" European Legal Framework



Green Claims Directive (Proposal) – How?

- The rules would apply to *explicit* environmental claims, i.e. claims in *textual form* or contained in an *environmental label*
- Green claims based on the use of carbon credits (carbon offsetting schemes) are prohibited, except for residual emissions
- Companies must substantiate environmental claims
- Comparative and future claims require extra substantiation

The New "Green" European Legal Framework



Green Claims Directive (Proposal)

How?

- Companies would be required to give consumers full background information
- Companies would only be allowed to use approved environmental labels
- Companies would have to obtain a prior certification from a national verifier
- Non-compliant companies would face significant penalties

The New "Green" European Legal Framework



Empowering Consumers Directive

Broad Definition of “environmental claims”:

- any message or representation which is not mandatory under Union law or national law, including text, pictorial, graphic or symbolic representation, in any form, including labels, brand names, company names or product names, in the context of a commercial communication; if it...
- states or implies that a product, product category, brand or trader has:
 - a **positive impact** on the environment;
 - **no impact** on the environment;
 - is **less damaging** to the environment than other products, brands or traders, respectively; or
 - has **improved** its impact over time.



The New "Green" European Legal Framework



Empowering Consumers Directive

A claim will be considered **misleading if** it:

- Contains false information; or
- Contains correct information but it deceives or is likely to deceive the average consumer regarding, among others, its environmental or social characteristics; or
- Advertises irrelevant benefits that do not result from any feature of the product or business.
- An environmental claim related to *future* environmental performance of a company or product (so-called “future claims” or “forward-looking claims”) will be misleading if it does not include:
 - clear, objective, publicly available, and verifiable commitments set out in an implementation plan;
 - measurable and time-bound targets.
 - In addition, the objectives and implementation plan should be verified by an independent third party and made available to consumers (e.g., through QR Codes or links).
- Specific rules for a *comparative* claim

Examples Germany – „Climate Neutral“

Düsseldorf Court of Appeal, Urt. v. 6.7.2023 – 20 U 72/22



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Environmental Advertising Claims – Examples Germany



“Climate Neutral”

– What does “Climate Neutral” mean?

- CO₂ is either saved elsewhere in production and distribution or compensated for by climate projects, or that no or hardly any relevant CO₂ is emitted

– To what exactly does the claim refer to:

- a specific product?
- all products of the advertiser?
- all steps or only parts of the product’s lifecycle (manufacturing, transport, use, recycling)?

Environmental Advertising Claims – Examples Germany



“Climate Neutral”

- Is “Climate Neutral” achieved through **reduction** or only **compensation**
- Use of the claim entails further duties of **information to consumers**
 - claim must have sufficient **prior substantiation** which has to be made available to consumers
 - Is “climate neutral” achieved through **reduction or compensation**?
 - Information must be readily available and easily accessible
 - a reference to the compensation outside the advertisement, for example on the website, is not sufficient; reference to the compensation must be made in the advertisement itself, provided that there are no spatial or temporal restrictions to the contrary.



Substantiating Specific Green Claims: Plastic-free

- Use of claim should not relate to the product only, but also packaging
- Verbraucherzentrale Bundesverband e.V. v. Henkel AG & Co. KGaA
(Case no. 2-03 O 397/19), Düsseldorf Regional Court:
 - Henkel claiming that its "Pril Kraftgel" dishwashing liquid was "plastic-free" was misleading, as the product contained a plastic bottle cap and a plastic label.
- Verbraucherzentrale Bundesverband e.V. v. Tchibo GmbH
(Case no. 33 O 72/19), Hamburg Regional Court
 - The court found that Tchibo's advertising claiming that its "Coffee-to-go" cups were "100% biodegradable and compostable" and "plastic-free" was misleading, as the cups were made of paper coated with a thin layer of plastic and could not be fully composted.



Thank you!

BARDEHLE PAGENBERG
Partnerschaft mbB
Prinzregentenplatz 7
81675 München

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