

Act Against Unfair Competition

(OF JUNE 7, 1909; AS LAST AMENDED ON OCTOBER 25, 1994)

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Section 1 General Clause

Any person who, in the course of business activity and for purposes of competition, commits acts contrary to honest practices may be enjoined from these acts and held liable for damages.

Section 2 Agriculture

For the purposes of this Act, the term goods includes agricultural products, and the term commercial services and interests includes agricultural services and interests.

Section 3 Deceptive Advertising

Any person who, in the course of business activity and for purposes of competition, makes deceptive statements concerning business matters, in particular concerning the nature, the origin, the manner of manufacture, or the pricing of individual goods or commercial services or of the offer as a whole, concerning price lists, the manner or the source of acquisition of goods concerning the possession of awards, concerning the occasion or purpose of the sale, or concerning the size of the available stock may be enjoined from making such statements.

Section 4 Criminal Sanctions

(1) Any person who, with the intention of giving the impression of an especially favorable offer, makes statements in public announcements or in communications which are intended for a larger circle of persons, concerning business matters, in particular concerning the nature, the origin, the manner of manufacture, or the pricing of goods or commercial services, concerning the manner or source of acquisition of goods, concerning the possession of awards, concerning the occasion or purpose of the sale, or concerning the size of the available stock, which are knowingly false and capable of deceiving, shall be punished by imprisonment for a term not exceeding two years or with a fine.

(2) If the false statements indicated in subsection 1 are made in a business enterprise by an employee or an agent, the proprietor or director of the business enterprise shall be liable to punishment, together with the employee or the agent, if the act was committed with his knowledge.

Section 5 Generic Names

For the purposes of the provisions of sections 3 and 4, pictorial representations and other instrumentality's which are calculated and suited to replace the statements therein indicated, are to be considered equivalent to such statements.

Section 6 Sale of Goods From Bankruptcy Estate

(1) If, in public announcements or in communications which are intended for a larger circle of persons, the sale of goods originally belonging to the estate of a bankrupt is advertised, where the goods are no longer a part of this estate, every reference to the fact that the goods originated in the estate of a bankrupt is forbidden.

(2) Any person shall commit an infraction who refers intentionally or negligently in violation of subsection 1 in the advertisement for goods to their origin from a bankruptcy estate. The infraction shall be punished by a fine not exceeding DM 10,000.

Section 6a Advertising Direct Sales

(1) Any person who, in the course of business activity with the end consumer in connection with the sale of goods, refers to his capacity as producer may be enjoined from this practice unless he:

1. sells exclusively to the end consumer, or
2. sells to the end consumer at the same price as his wholesalers or retailers or commercial users are charged, or
3. unmistakably refers to the fact that the prices of sale to the end consumer are higher than the prices to the wholesaler or retailer or commercial user, or this fact is otherwise evident to the end consumer.

(2) Any person who, in the course of business activity with the end consumer in connection with the sale of goods, refers to his capacity as wholesaler in the sale of goods may be enjoined from this practice unless he

predominantly supplies only retailers or commercial users and the conditions of subsection 1 paragraph 2 or 3 are met.

Section 6b Purchase Authorizations

Any person who, in the course of business activity and for purposes of competition, issues authorization cards, identity cards, or other documents for the procurement of goods to the end consumer, or sells goods upon presentation of such documents, may be enjoined from this practice unless the documents authorize purchases only for a single visit and are separately issued for each shopping visit.

Section 6c Snowball Sales System

Any person who, in the course of business activity, strives himself or through others to induce non-merchants to purchase goods, commercial services or rights by promising them special advantages in the event that they induce others to conclude such transactions, who, in keeping with this method of soliciting customers are in turn to be granted such advantages for correspondingly soliciting further customers, shall be punished by imprisonment not exceeding two years or by a fine. Persons whose business does not, in terms of its nature or size, require a commercially run business establishment shall be deemed equivalent to non-merchants within the meaning of the foregoing sentence.

Section 6d Repealed

Section 6e Repealed

Section 7 Special Sales and Offers

- (1) Any person who advertises or conducts sales in the retail trade which take place outside regular business, serve to accelerate the sale of goods and create the impression of special advantages being granted to buyers (special sales), may be enjoined from this practice.
- (2) There shall be no special event within the meaning of subsection 1 if individual goods designated by quality or price are offered and if these offers fit in with the normal business practices of the enterprise (special offers).
- (3) Subsection 1 shall not apply to special sales lasting twelve working days
 1. which begin on the last Monday in January and on the last Monday in July and at which textiles, clothes, shoes, leatherware or sports goods are offered for sale (winter and summer end-of-season sales);
 2. which mark the existence of an enterprise in a specific area of business after a period of 25 years (anniversary sales).

Sections 7a–7d Repealed

Section 8 Clearance Sale

- (1) If circumstances compel the clearance of an existing stock of goods (urgent necessity of clearance)
 1. due to damage caused by fire, water, storm or a similar occurrence that is not the fault of the organizer, or
 2. before execution of a rebuilding project requiring notification or authorization under building regulations,clearance sales may, to the extent needed to eliminate the urgent necessity of clearance, be conducted for up to twelve working days during or outside the periods defined in section 7 subsection 3. In the advertisement of a clearance sale in accordance with the foregoing sentence, the reason for clearing the stock of goods must be stated.
- (2) Clearance sales for the purpose of closing down the entire business may be conducted for up to 24 working days during or outside the periods defined in section 7 subsection 3, provided that in the three years preceding the start of such sale the organizer has not conducted a clearance sale for closing down the same kind of business, unless special circumstances exist that justify a clearance sale before expiry of this period. Subsection 1 second sentence shall apply *mutatis mutandis*.

(3) Clearance sales under subsection 1 first sentence paragraph 1 must be notified at least one week before the initial advertisement, and those under subsection 1 first sentence paragraph 2 and subsection 2 at least two weeks beforehand, to the competent official representative bodies of trade, craft and industry. Such notice must state the following:

1. the reason for the clearance sale,
2. the beginning and end of the clearance sale as well as its location,
3. the type, quality and quantity of the goods to be cleared,
4. in the event of a clearance sale under subsection 1 paragraph 2 the designation of the sales area affected by the building project,
5. in the event of a clearance sale under subsection 2, the length of operation of the business.

The notice must be accompanied by documented factual evidence of the reason for the clearance sale; in the event of a clearance sale under subsection 1 paragraph 2 confirmation by the building authority of the permissibility of the building project shall also be submitted.

(4) The information submitted may be verified by the official representative bodies of trade, craft and industry and by their officially appointed agents. For this purpose they may enter the business premises of the organizer during business hours. Any of them is entitled to inspect the files and make copies.

(5) A person may be enjoined from advertising or conducting the entire clearance sale if he

1. violates subsections 1 to 4,
2. places on sale goods which have been procured solely for such a sale (“Vorschieben” and “Nachschieben” of goods).

(6) A person may also be enjoined if he

1. improperly brought about the reason for the clearance sale or otherwise makes improper use of the possibilities of a clearance sale,
2. directly or indirectly continues the business whose closing-down was advertised or, as organizer of the clearance sale, begins within two years in the same town or in immediately neighboring localities to trade in the type of goods concerned, unless special circumstances exist that justify such continuation or commencement,
3. in the event of a clearance sale under subsection 1 paragraph 2 continues trading in the sales area concerned before completion of the building project notified.

Sections 9 to 11 Repealed

Section 12 Corruption of Employees

(1) Anyone who, in the course of business activity and for purposes of competition, offers, promises, or awards an advantage to an employee or agent of a commercial enterprise in return for unfair preference for himself or a third party in the acquisition of goods or commercial services, shall be punished by imprisonment not exceeding one year or by a fine.

(2) Similarly, any employee or agent of a commercial enterprise shall be punished who in the course of business activity solicits, allows to be promised to him or accepts an advantage in return for unfair preference for the third party in the acquisition of goods or commercial services.

Section 13 Claims for Injunctive or Damage Relief

(1) A claim for injunctive relief may be asserted against persons who violate sections 4, 6, 6c and 12.

(2) In cases of section 1, 3, 4, 6 to 6c, 7 and 8, the claim for an injunction may be asserted

1. by business persons distributing goods or commercial services of the same or similar type on the same market, where the claim concerns an act through which competition on this market would be seriously impaired,
2. by associations having legal capacity whose purpose is to promote commercial interests, where a considerable number of business persons are members of such association, who distribute goods or commercial services of the same or similar type on the same market, if such associations are actually in a position according to their personnel, organizational and financial resources to promote commercial

interests in the meaning of their statutes, and where the claim concerns an act through which competition on this market would be seriously impaired,

3. associations having legal capacity whose functions as defined in their bylaws include the safeguarding of consumers' interests through information and advice. In cases falling under section 1, the associations may assert a claim for injunctive relief only to the extent that the claim concerns an act affecting consumers' essential interests,

4. Chambers of Industry and Commerce or Craft Chambers.

- (3) In cases falling under section 12, claims for injunctive relief may only be asserted by the businessmen, associations and chambers referred to in subsection 2 paragraphs 1, 2 and 4.
- (4) Where violations under subsections 2 and 3 are committed in a business enterprise by an employee or agent, the claim for injunctive relief shall also be valid against the proprietor of the business.
- (5) A claim for injunctive relief may not be asserted if such assertion is improper in the light of the overall circumstances, especially if it predominantly serves to establish against the violating party a claim to compensation for expenses or for the cost of legal action.
- (6) Liability for damages arising from violations shall be incumbent on:
1. anyone in cases falling under section 3 who knew or should have known that the statements made by him were deceptive. A claim for damages may be brought against editors, publishers, printers or distributors of periodic publications only if they knew that the statement made by them was deceptive;
 2. anyone who intentionally or negligently violates sections 6 to 6c, 7, 8 and 12.

Section 13a Right of Buyers to Withdraw from Contract

- (1) Where a person has been induced to buy as a result of an advertising statement under section 4 that is false and capable of deceiving and which is significant to the circle of persons for whom it is intended for the purposes of the conclusion of contracts, he may withdraw from the contract. If the advertising is based on a statement by a third party, the buyer shall be entitled to withdraw only if the other contracting party knew or should have known that the statement was false and capable of deceiving or if he adopted by his own measures the advertising involving such statement.
- (2) Withdrawal must be notified to the other contracting party without delay once the buyer gains knowledge of the circumstances establishing his right of withdrawal. The right of withdrawal shall be extinguished if withdrawal is not declared before the expiry of six months after conclusion of the contract. The right of withdrawal may not be waived in advance.
- (3) In the case of movables, the consequences of rescission are determined by section 3 subsections 1, 3 and 4 and section 5 subsection 3 first sentence of the Act on Withdrawal from Door-to-Door and Similar Transactions (Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften). A claim for further damages is not precluded. If the advertising originates with a third party, only the third party, and not the other party to the contract, shall be liable to the purchaser for the damage caused by the rescission unless the other party to the contract knew about the violation.

Section 14 Disparagement

- (1) Any person who, for purposes of competition, alleges or circulates facts concerning the business of another, concerning the person of the proprietor or the director of the business, concerning the goods or commercial services of another, which are suited to damage the operation of business or the credit of the proprietor, is liable to the injured party for damages caused provided that the truth of the facts is not proved. The injured party may also sue for an injunction prohibiting the allegation or circulation of the facts.
- (2) Where a confidential communication is involved in which the publisher or the recipient has a legitimate interest, the claim for injunctive relief shall be allowed only if the facts alleged or circulated are untrue. The claim for damages may be asserted only if the party making the communication knew or should have known of the falsity of the facts.
- (3) Section 13 subsection 4 shall apply *mutatis mutandis*.

Section 15 Criminal Sanctions against Disparagement

- (1) Anyone who, against his better knowledge, alleges or circulates facts contrary to the truth concerning the business of another, or concerning the person of the proprietor or the director of the business, concerning the goods or commercial services of another which are suited to damage the operation of business, shall be punished by imprisonment not exceeding one year or by a fine.
- (2) If the facts indicated in subsection 1 are alleged or circulated in a business enterprise by an employee or agent, the proprietor of the business is liable to punishment, together with the employee or agent, if the act was committed with his knowledge.

Section 16 Repealed

Section 17 Disclosure of Trade or Industrial Secrets

- (1) A prison sentence not exceeding three years or a fine shall be imposed on any employee, workman or apprentice of a business enterprise who during the term of his employment, without authorization, communicates to a third party a trade or industrial secret that has been confided to him or made available to him by virtue of his employment, if he does so for purposes of competition, for personal gain, for the benefit of a third party or with the intention of damaging the proprietor of the business.
- (2) The same punishment shall be imposed on anyone who, for purposes of competition, for personal gain, for the benefit of a third party or with the intention of damaging the proprietor of the business,
 1. obtains or secures a trade or industrial secret without authorization through
 - a) the use of technical means,
 - b) the creation of an embodied reproduction of the secret, or
 - c) the removal of an item in which the secret is embodied, or
 2. uses or communicates to anyone without authorization a trade or industrial secret which he has acquired or otherwise obtained or secured without authorization through a communication as described in subsection 1 or through an act of his own or of another person under paragraph 1.
- (3) The attempt shall be punishable.
- (4) In particularly serious cases, a prison sentence not exceeding five years or a fine shall be imposed. A particularly serious case shall be generally deemed to exist if the perpetrator knows at the time of communication that the secret is to be used in a foreign country or if he himself makes use of it in a foreign country.

Section 18 Improper Use of Technical Papers

A prison sentence not exceeding two years or a fine shall be imposed on anyone who, for purposes of competition or for personal gain, makes unauthorized use of or communicates to third parties models or instructions of a technical nature, in particular drawings, prototypes, patterns, cuts or recipes that have been confided to him in the course of business.

Section 19 Damage Liability

Violations of the provisions of sections 17 and 18 also result in liability for damages caused thereby. Where there are several parties, they are jointly and severally liable.

Section 20 Inducement or Offer to Violate

- (1) Anyone who for purposes of competition or for personal gain attempts to induce another to violate sections 17 or 18 or accepts the offer of another to commit such a violation shall be punished by imprisonment not exceeding two years or by a fine.
- (2) The same punishment shall apply to anyone who, for purposes of competition or for personal gain, offers to commit acts in violation of sections 17 or 18, or declares himself ready to commit such acts at the behest of another.
- (3) Section 31 of the Criminal Code shall apply *mutatis mutandis*.

Section 20a Acts Committed Abroad

As to violations of sections 17, 18, and 20, section 5 paragraph 7 of the Criminal Code shall apply *mutatis mutandis*.

Section 21 Limitation Period

- (1) The claims for injunctive or damage relief prescribed in this Act may be barred after six months from the time the person entitled to a claim obtained knowledge of the act and the identity of the party liable or, irrespective of this knowledge, after three years from the commission of the act.
- (2) In the case of claims for damage relief, the limitation period does not begin to run until the time when the damage accrued.

Section 22 Initiating a Criminal Complaint, Private Criminal Action

- (1) With the exception of cases arising under sections 4 and 6c, criminal prosecution shall be instituted only upon complaint. This shall not apply in cases arising under Sections 17, 18 and 20 if the prosecuting authority considers prosecution on its own motion necessary on account of a particular public interest in prosecution. In cases arising under Section 12 any of the businesses or associations designated in section 13 subsection 1 shall have the right to file a complaint.
- (2) In addition to the injured party (section 374 subsection 1 paragraph 7 of the Code of Criminal Procedure) any of the businesses or associations designated in section 13 subsection 1 is authorized to bring a private criminal action based on activity punishable under sections 4 and 6c as well as on activity which may be prosecuted only upon complaint under section 12.

Section 23 Publication of Judgment

- (1) When a punishment is ordered in cases falling under section 15, it shall be ordered upon request of the injured party that the judgment be published on demand.
- (2) The winning party in a suit for injunctive relief based on one of the provisions of this Act may be granted authorization in the judgment to publish the dispositive portion of the judgment within a certain time period at the expense of the losing party.
- (3) The nature of the publication shall be determined in the judgment.

Section 23a Assessment of Litigation Costs

When assessing the value of the litigation for claims to enjoin a party from violating sections 1, 3, 4, 6a to 6c, 7 and 8, the court shall take into account for purposes of lowering the value of the litigation whether it is a simple case with regard to its nature and extent or whether the burden of the litigation costs according the full value of the litigation on one of the parties would be unaffordable considering the party's financial and income situation.

Section 23b Reduction of Litigation Costs

- (1) If a party to a civil dispute in which a complaint was filed under this Act presents a credible showing that the payment of costs calculated according to the full amount in controversy would substantially endanger his economic position, the court may direct pursuant to a motion by such party that the obligation of this party to pay court costs be measured by an amount in controversy that is adjusted according to said party's economic position. The court may make its order contingent on the fact that the party also makes a credible showing that the costs of the legal dispute to be borne by him will not be directly or indirectly paid by a third party. The effect of the order is also that the benefited party shall have to pay the fees of his attorney based only on such portion of the amount in controversy. To the extent that this party is charged with court costs or assumes these costs, the court fees paid by the opposing party and the fees of his attorney must be reimbursed by this party based only on such portion of the amount in controversy. To the extent that the opposing party is obligated to pay or assumes the out-of-court costs, the attorney for the benefited party can recover his fees from the opposing party based on the amount in controversy applicable to the latter.
- (2) A motion pursuant to subsection 1 shall be read into the record before the clerks of the courts. It shall be made prior to the trial on the merits. After this time, it shall be valid only if the agreed or court-determined

amount in controversy is thereafter increased by the court. Prior to a decision on the motion, the opposing party must be heard.

Section 24 Jurisdiction

- (1) For actions brought under this Act, the court shall have jurisdiction in whose district the defendant has the seat of his business or, lacking same, his domicile. For parties who have neither a seat of business nor a domicile in this country, the court in the place of their domestic residence shall have jurisdiction.
- (2) Additionally, only the court in the district where the act was committed shall have jurisdiction for complaints brought under this Act. The first sentence shall only apply to actions brought by the business persons, associations or chambers referred to in section 13 subsection 2 paragraphs 1 to 4 if the defendant does not have his domestic residence in this country.

Section 25 Preliminary Injunctions

In order to preserve the rights to an injunction set forth in this Act, preliminary injunctions may be issued, even when the conditions set forth in sections 935 and 940 of the Code of Civil Procedure are not fulfilled.

Section 26 Repealed

Section 27 Venue

- (1) Civil disputes in which the suit presents a claim based on this Act are assigned, insofar as the Regional Courts (Landgerichte) have jurisdiction as the courts of first instance, to the commercial chambers of these courts; disputes in which an end consumer asserts a claim under section 13a, which claim does not originate from a mutual commercial transaction under section 95 subsection 1 paragraph 1 of the Judiciary Act (Gerichtsverfassungsgesetz), shall be exempted from this provision.
- (2) The Land Governments shall be empowered to establish by regulation for those districts which have several Regional courts (Landgerichte) one such court as the court for competition disputes when this serves the administration of justice for competition matters, in particular to assure uniform judicial decisions. The Land Governments may delegate this authority to their respective authorities for judicial administration.
- (3) The parties may be represented before the court for competition disputes also by attorneys who are admitted to practice before the court which, in the absence of the regulation contained in subsection 1, would have jurisdiction over the complaint. The same shall apply to presentation before the Higher Regional Court (Oberlandesgericht).
- (4) The additional costs arising for a party as the result of representation pursuant to subsection 3 by an attorney not admitted to practice before the trial or appeal court cannot be recovered.

Section 27a Mediation Boards

- (1) The Land Governments shall set up mediation boards at the Chambers of Industry and Commerce for settling civil disputes in which claims are asserted on the basis of this Act (mediation boards).
- (2) When petitioned by an end consumer or a consumer association referred to in section 13 subsection 2 paragraph 3, the mediation boards shall be staffed by a lawyer qualified as a judge under the German Judiciary Act, as chairman, and an equal number of businessmen and consumers, as additional members; in other cases they shall be staffed by the chairman and at least two expert businessmen as additional members. The chairman should be experienced in the area of competition law. The additional members shall be appointed by the chairman for each dispute from a list of members to be compiled annually for the calendar year. The appointment should be made with the consent of the parties. Sections 41 to 43 and section 44 subsection 2 to 4 of the Code of Civil Procedure shall apply *mutatis mutandis* to the exclusion or rejection of members of the mediation board. The Regional Courts (Landgerichte) (chamber for commercial matters or, if such is lacking, the civil chamber) with jurisdiction at the seat of the mediation board shall rule on petitions for rejection.
- (3) Where civil disputes under sections 13 and 13a are involved, the mediation board may be petitioned by each party to provide for an exchange of views on the dispute with the opposing party to the extent that the competitive acts in question relate to business dealings with the end consumer. In other civil disputes under sections 13 and 13a, the mediation board may be petitioned if the opposing party agrees.

- (4) In determination of the jurisdiction of the mediation board, section 24 shall apply *mutatis mutandis*.
- (5) The chairman of the mediation board may order the personal appearance of the parties. The mediation board may impose a fine on a party which is absent without grounds. Immediate appeal, pursuant to the provisions of the Code of Civil Procedure, to the Regional Court (Landgericht) (chamber for commercial matters or, if such is lacking, the civil chamber) with jurisdiction at the seat of the mediation board is available in opposition to an order for personal appearance and a determination of a fine.
- (6) The mediation board must strive for an amicable settlement. It may make a written settlement proposal with grounds attached. The settlement proposal and the grounds given may be published only with the approval of the parties.
- (7) If a settlement is reached it must be entered in a separate document and, under the date on which it was reached, be signed by the members of the mediation board who took part in the proceedings, as well as by the parties. Compulsory compliance with the settlement reached before the mediation board is available; section 797a of the Code of Civil Procedure shall apply *mutatis mutandis*.
- (8) The mediation board may refuse to initiate settlement negotiations if believes that the claim which has been filed is obviously without basis or that it has no jurisdiction.
- (9) By petitioning the mediation board, the running of the period of limitations shall be interrupted in the same manner as when a complaint is filed. Interruption shall last until conclusion of the proceedings before the mediation board. If a settlement is not reached, the mediation board must determine the time at which the proceedings are ended. The chairman must notify the parties of this. If the petition to the mediation board is withdrawn, the interruption of the period of limitations shall be considered not to have taken place.
- (10) If a complaint is filed in a legal dispute of the type described in subsection 3 first sentence without any prior petition to the mediation board, the court may, subsequent to a motion and having established a new date for continuing the proceedings, commission the parties to petition the mediation board to seek an amicable settlement prior to this new date. In proceedings concerning a motion for the issue of a preliminary injunction, such order shall be allowed only with the consent of the opposing party. Subsection 8 shall not apply. If proceedings are pending before the mediation board, a complaint filed by the opposing party, subsequent to the petition for mediation, for a declaratory judgment that the claims asserted are not valid shall not be permissible.
- (11) The Land Governments shall be authorized to issue regulations necessary for the execution of the above provisions and the organization of the proceedings before the mediation board, in particular concerning the supervision of the mediation board, concerning its membership granting adequate proportional participation on the board by businessmen not members of Chambers of Industry and Commerce (section 2 subsections 2 to 6 of the Act for the Temporary Regulation of the Act on Chambers of Industry and Commerce dated 18 December 1956, Federal Law Gazette I, p. 920), and the enforcement of fines as well as determinations concerning the assessment of fees by the mediation board. When staffing mediation boards, account shall be taken of such nominations of end consumers referred to in subsection 2 first sentence as are made by consumer centers that are set up with public funds for a Land.

Section 28 Repealed

Section 29 Repealed

Section 30 Entry into Force

- (1) This Act shall enter into force on October 1, 1909.
- (2) At the same time, the Act on the Repression of Unfair Competition dated May 27, 1896 (Official Journal, p. 145) shall cease to be in force.