

MARKETING DECEPTIONS IN GERMAN PRACTICES: AN EMPIRICAL AND LEGAL STUDY ON PUBLISHED CASES ON MARKETING DECEPTION

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Abstract

The field of marketing ethics has been investigated in many aspects. Much progress has been made in understanding why marketers use misleading practices. In contrast, practices of marketing deceptions are not comprehensively covered in literature. Misleading marketing practices are mostly revealed by the media which displays more forms of marketing deceptions than one will find discussed in research. This paper provides a systematic review of published cases on false marketing practices in Germany by analyzing –via content analysis– all cases in terms of published users, using types as well as in terms of violations against §5 UCA or against the even more undesirable blacklisted per se bans that were introduced in 2008 to implement EU regulations.

Key Words: marketing ethics, marketing deception, UCA, content analysis

1. INTRODUCTION

Concealing and misrepresenting the truth is a practice of deceiving (Mayer 2003). Among all business functions, marketing is said to be “the one most charged with unethical practices” (Lund 2000). This is mainly caused by marketing professionals’ interaction with the parties (such as organizational members, customers, competitors, and the general public) in the exchange process and the need to meet partly conflicting duties and responsibilities (Bartels 1967; Hunt/Chonko/Wilcox 1984; Chonko/Hunt 1985).

The field of marketing ethics has been researched intensively (Nill/Schibrowsky 2007). Between 1960 and 2008 over 500 articles were published in peer-review journals (Nill/Schibrowsky 2007; Schlegelmilch/Öberseder 2010). Most of them focused on marketing ethics in corporate decision making, norms and codes, social marketing or consumer ethics. In contrast, there are fewer publications covering ethical issues regarding marketing operations (functional areas of marketing). Schlegelmilch and Öberseder (2010) surmise these topics are too specific and limited to a sub-group of marketing scholars. From our point of view, there are discrepancies in marketing research and practice - especially in the field of misleading marketing functions: On the one hand, a growing relevance of marketing ethics in our profession can be observed when we consider published statements of ethics by marketing associations (AMA 2014; BMA 2014, CMA 2014). We can hereby assume that marketers do know what is considered to be an appropriate or a deceptive practice. On the other hand, we see more and more misleading marketing practices revealed by the media¹ which illustrates more forms of marketing deceptions than one will find discussed in marketing research or in German textbooks (Meffert/Burmann/Kirchgeorg 2012).

This paper summarizes interim results of an interdisciplinary study which focuses on published marketing deceptions of companies engaged in the German market. The study aims to map the presentation of misleading marketing practices in the German media landscape. Based on analyses of media reports, the following key questions were addressed: Which misleading marketing practices are covered by the media? Which business sectors or companies are often in the focus? What kind of marketing deceptions are published with regard to Sections 5, 5a UCA (Unfair Competition Act, please see appendix)? Are there in particular more violations of the abstract bans and of the even more undesirable blacklisted per se bans that were introduced in 2008 to implement EU regulations?

2. Legal background

German and European law deals with misleading marketing practices primarily in its acts on unfair competition². They contain rules on misleading advertisements. On the one hand, the law conceptually interdicts misleading practices (abstract bans: Section 5, 5a UCA), on the other hand, it explicitly blacklists certain misleading actions (Supplement to Section 3 subsection III UCA). The blacklist and some abstract bans in today’s UCA (Sections 5, 5a UCA) go back to the directive 2005/29/EG³ and were added to the UCA in 2008.

Blacklisted actions are deemed to be so undesirable that consumers need special protection against them. These actions are, in particular, certain bait and switch tactics (in the Supplement No. 5 and 6 of the blacklist) and the improper use of quality marks (in the Supplement No. 2 of the blacklist; see Blasek, 2009). To achieve the desired level of consumer protection, these

¹Such as: TV-broadcasts (e.g. ndr markt, wdr markt); websites: <http://www.lebensmittelklarheit.de>, <https://www.foodwatch.org>; <http://www.wettbewerbszentrale.de>, Lebensmittelzeitung, HORIZONT, Frankfurter Rundschau.

² Other laws and legislations govern misleading actions, too, e.g. legislation on prices, contract law, public law like food law or labelling requirements. These fields of legislation will be excluded for the analysis in this paper, they may be dealt with in an eventual later presentation.

³ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

practices are sanctioned as soon as the conditions of the blacklist apply; they fall under a per se ban. There is no legal necessity to classify blacklisted actions as unfair practices in order to prohibit them (Section 3 subsection III UCA). The unfairness of an advertisement is assumed as soon as the conditions mentioned in the blacklist apply.

Whenever the abstract bans (Section 5, 5a UCA) apply, an additional checking of the unfairness of the action is mandatory (Section 3 subsection I, II UCA). This is because the prior purpose of the UCA is to uphold fair and equal competition. Consequently, only advertising actions that have the potential to significantly interfere with the interests of competitors, consumers or other players in the market can be judged as unfair under the abstract bans of the UCA; actions with little relevance are neglected there. In B2C-business, two additional conditions must be fulfilled to judge an action under UCA: Firstly, it is necessary that the advertisement has led a consumer to a commercial decision that he would not have taken without it. The second condition is that the advertising company has neglected its due professional diligence (Section 3 subsection 2 UCA).

Furthermore, the abstract bans and the blacklist differ in terms of precision: the abstract bans leave more room for interpretation⁴; blacklisted actions tend to be described quite precisely, thus narrowing possible interpretations. Therefore, it is usually more difficult and arduous to plead for the applicability of the abstract provisions. The vague terms of the abstract provisions are likely to reduce legal certainty: one cannot completely be sure that a specific action is fair or unfair, until a court has taken a binding decision on it. Advertisers might therefore feel tempted to exploit the legal limbo as long as it exists - even if they are aware that their actions are more than likely to be judged as illegally misleading advertising.

3. METHODOLOGICAL APPROACH

In order to map the presentation of misleading marketing practices in the German media landscape, we followed a three step approach. Firstly, we decided on the types of practices that should be included in our analysis. Of interest were illegal misleading and legal misleading practices through the definition of marketing deceptions from a consumer perspective (Brennan 1998). Secondly, we decided on the sample of our investigation. Hereby, we focused on media sources, which published intensively marketing deceptions. Furthermore, we considered sources addressed towards consumers and/or marketing practitioners as well as TV-broadcasts and print and online reports. The sample consists so far of print and online reports (*Lebensmittel Zeitung*⁵, *Horizont*⁶, *Die Welt*, *Frankfurter Rundschau*) which range from 2010-2013 and TV-broadcasts (*NDR Markt*, *WDR markt*) across a time period from July 2013 - June 2014. Whereas the latter ones as well as *Die Welt* and *Frankfurter Rundschau* are addressed towards consumers in general, papers such as *Lebensmittelzeitung* and *Horizont* are addressed mainly to marketing practitioners. At that point it has to be mentioned that the sample does not meet the requirements for representative statements. Thirdly, we searched for published cases of misleading practices within the sample: Within pre-tests the search terms *misleading marketing*, *deceptions*, *deceptions in marketing* and *market test(s)* proved best in identifying relevant reports. Reports which covered cases that matched marketing deceptions from a consumer perspective were selected and reports about the same case were eliminated to the benefit of the earliest publication. This resulted in a final database of 188 reports on misleading

⁴ e.g. Section 5 subsection 3 clause 1 sanctions the omission “substantial characteristics” of goods or services, where substantiality is to be seen through the eyes of an average consumer.

⁵ *Lebensmittel Zeitung* (= food magazine) is one of the leading business newspaper in Germany with a focus on the consumer goods industry (food & nonfood). It covers topics such as: marketing strategy, assortment/sales concepts, international marketing strategies of German and international retailers and manufacturers within the industry. <http://www.lebensmittelzeitung.net/info/wirueberuns> (14.11.2014).

⁶ *HORIZONT* is a business newspaper covering especially advertising and media related topics and is addressed to managers working within these fields. <http://www.horizont.net/media/media/10/Factsheets-HORIZONT-Wochenzeitung-99652.pdf> (14.11.2014).

marketing practices (TV-broadcasts: 115; print and online reports: 73).⁷ Thereby, our analysis covered mostly consumer addressed reports, mainly published on TV. The content analysis was performed on the basis of textual passages (print and online reports) or prepared extracts of TV-broadcasts. All reports of deception were classified in a two-stage procedure:

- **Stage1:** We used a deductive procedure of classification. Every report was classified according to the named field of business and company name⁸ as well as to the functional areas of marketing. In the latter case, the topical classification schemes on marketing ethics by Nill/Schibrowsky (2007) and Schlegelmilch/Öberseder (2010) were used (see attachments). Some reports covered cross-functional topics and were then classified in more than one category.
- **Stage 2:** As the used categorization scheme did not capture the broad variety of practiced marketing deceptions, we continued with an inductive classification by which we derived categories from the data. Hereby, we focused on the mostly used marketing functions (PRODUCT, PRICE, SALES, PROMOTION).

4. RESULTS AND DISCUSSIONS

Looking at 188 reports of misleading marketing practices, we have identified over 20 different usage types for deception and about 30 different industries accused of practicing marketing deceptions by the media. Before the results will be illustrated below, we would like to point out that there are risks of media manipulation (selection of published cases, scandalization, disinformation, etc.) which have to be considered in the interpretation of the data. This counts especially for frequency distributions: media companies selectively assess the news value of evidences; the likelihood of reporting firms practicing falsely marketing depends inter alia on whether the company is well-known enough for newspaper reports (Jahn/Schramm/Spiller 2005). Therefore, our results will not display the reality of misleading practices and has to be rather viewed as a description of the media's narrations which is selective by implication.

Published cases of misleading marketing practices by the media

More than half of the published cases of misleading marketing practices characterizes consumer goods manufacturers (103), followed by retailers (33) and service providers (29). In 15 cases consumer durable goods manufacturers were accused of misleading consumers. There were only two reports related to the energy or media industry. We also discovered differences in reporting about subsectors:

- Reports mostly name companies operating in the *fast-moving consumer goods sector (FMCG)*: More than three-quarters of consumer goods related cases describe misleading practices by food manufacturers (80).⁹ Thus, the food industry might be within the focus of the media reports. 14 cases describe practices in marketing drugstore items. There were fewer reports of manufacturers of textiles or products with health benefits (food supplements).

⁷ Detailed sample structure: TV-broadcast (NDR Markt: 72; WDR markt:43); print & online reports (Lebensmittelzeitung: 34, Horizont: 8, Die Welt: 10, Frankfurter Rundschau: 21).

⁸ Our empirical data contains company names as far as the gathered reports provided them. Some reports provided brand names only. In such circumstances we identified the owner of the brand. Nevertheless, there are reports included which did not name any company/brand. These cases were categorized under "company n.n.".

⁹ Sources reporting on FMCG: TV-broadcast (NDR Markt: 29; WDR markt:16); print & online reports (Lebensmittelzeitung: 20, Horizont: 3, Die Welt: 2, Frankfurter Rundschau: 10).

- In a sectorial comparison, retailers take second place. Here, food retailers have been accused the most by the media (11). Five cases were related to E-Commerce. For the other types of retailers we have identified less than four cases per type.¹⁰
- From all reports on marketing deceptions by service providers every fourth was related to a financial service provider (8). There were a few reports on restaurants, hotels as well as travel operators (four or five cases per subsector). For all the other subsectors we have identified only a few cases.¹¹

Regardless of the effect of media selectivity, the strong presence of FMCG manufacturers and food retailers might be explained by the very difficult market conditions. Low margins, an ongoing concentration among competitors, homogeneousness of products as well as a characteristic price-sensitive German customer put those companies under significant pressure (inverto 2012; PwC 2013). According to *Price, Waterhouse Cooper* those companies are pushed to the very limits of what is legally possible (PwC 2013). “Unrealistic or exaggerated advertising can be a tool to increase product attractiveness towards the consumer” [comment: translated by the authors] according to an interviewed marketing expert (Jürgens 2013). However, FMCG-marketing experts also point out that there are no significant differences in using marketing deceptions in a sectorial comparison: FMCG is just more in the focus of the media than other industries (Jürgens, 2013).

Most reports displayed company names. The average number of published deceptions per company operating in the FMCG sector is 1.7. Our analysis shows that the majority of companies were accused less than three times by the media. In contrast, we have observed large companies which were accused in more than four cases, like *Dr. Oetker*, *Henkel*, *Friesland Campina*, *Unilever* or *Ferrero*. At that point, our data does not give enough proof of evidence that the media promotes large companies as archetypal practitioners of marketing deceptions. We found well-known large companies being neither more nor less often accused of misleading practices. In a total number of 30 cases, the media accused food retailers of misleading practices in marketing their private labels. They also practiced deceptions in their traditional role as a distributor of products. With a total number of seven cases, Aldi and Lidl were named most often in reports. Within the service sector, no company was particularly conspicuous as measured by media coverage in our sample.

Published using types of misleading marketing practices by the media

In order to find out which misleading marketing practices are covered by the media, all reports were classified according to the topical classification schemes on marketing ethics by Nill/Schibrowsky (2007) and Schlegelmilch/Öberseder (2010) (see attachments).¹² Our analysis shows a high coverage of product-related marketing practices (99 cases s. figure 1.). Almost one quarter of the published cases relates to PROMOTION and 10% cover misleading PRICING practices. There were comparably fewer reports on SALES and subtopics such as ETHICAL ISSUES RELATED TO LAW, VULNERABLE CONSUMERS, GREEN MARKETING and the WEB.¹³

¹⁰ Such as: DIY-outlets, pharmacies, drug stores, furniture stores & carpet houses, garden centers and electronics retail outlets.

¹¹ Such business sectors as: constructions, leisure sector, craftsman, security companies, postal operators and telecommunication industry.

¹² This is not to say that one report cannot address more than one topic. Thus, the proposed topical areas are not mutually exclusive and one report might be placed in several functional categories at the same time.

¹³ There were no reports on: placement, ethical decision making, codes and norms, ethical issues related to consumers, international/cross-cultural marketing ethics, ethical issues related to marketing research and social marketing. This may be reasoned in the sample as some topics, like codes & norms are not typically discussed in the considered sources. Besides, unethical practices regarding placement are difficult to investigate. We believe it needs different research methods (oral or written interviews) to identify relevant practices in that field.

| Topical Area | Business Sector | | | | | | | Σ | |
|----------------------|-----------------|----|----|----|---|---|---|-----|--|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | | |
| PROD | 81 | 11 | 1 | 4 | 0 | 1 | 1 | 99 | 1= Consumer goods manufacturers |
| PRICE | 4 | 1 | 4 | 11 | 0 | 0 | 0 | 20 | 2=Consumer durable goods manufacturers |
| PROMO | 15 | 2 | 15 | 11 | 0 | 0 | 2 | 45 | 3=Service providers |
| SALES | 1 | 0 | 2 | 3 | 1 | 1 | 0 | 8 | 4=Retailers |
| VULNERABLE CONSUMERS | 4 | 0 | 0 | 0 | 0 | 1 | 0 | 5 | 5=Energy industry |
| GREEN MARKETING | 1 | 0 | 0 | 1 | 1 | 0 | 1 | 4 | 6= Media industry |
| LAW | 0 | 1 | 6 | 2 | 0 | 0 | 0 | 9 | 7= Others |
| WEB | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 2 | |
| SUM | 106 | 15 | 29 | 33 | 2 | 3 | 4 | 192 | |

Figure 1: Published using types of misleading marketing practices in different business sectors¹⁴

As this classification did not support us with enough insights regarding the published usage types of marketing deceptions, we additionally performed an inductive classification. The findings of this examination will be presented below for selected functional areas. Besides this, we have looked at the usage types also from an interdisciplinary perspective. Hereby, we researched for illegal practices according to § 3 Abs. 3 und §5 UCA.¹⁵

Misleading marketing practices related to product

Based on the empirical data, product-related marketing deceptions were mostly covered by the media (see figure 1) and include product elements such as safety, quality, packaging, design as well as labelling. Misleading practices in that field are difficult to recognize and to control by consumers (Jürgens, 2013). Looking at the companies accused of practicing misleading product strategies, the media covers intensively consumer goods manufacturers (81, s. figure 1). Over 60% of all published product-related cases represent misleading labelling practices, followed by marketing deceptions regarding safety and quality (see figure 2, left part).

Marketing deceptions related to product labelling: The reports covered in particular cases in which consumer goods manufacturers used this means. Hereby the media disclosed a variety of misleading practices regarding: (a) usage of quality labels; (b) indications of origin (country of origin, regional origin); (c) product designation; (d) product similarities; (e) lists of ingredients/components; (f) used pictures as well as (g) claims on product packages. As illustrated in figure 2 (right part), about 30% of these reports on consumer manufacturers covered misleading lists of ingredients/components, which includes missing indications of contents (flavoring substances; percentage of alcohol) as well as misleading indications about percentage of sugar, information on vitamins and minerals or the actual ingredients used. About one quarter reveals misleading product designation. Hereby, marketers used names to confuse consumers with regard to the origin of the product (e.g. Himalaya salt which is produced in Pakistan or Parmesan cheese which is produced in Germany), to the quality of the product (Gourmet labels), to the ingredients (Hazelnut cake with 90% flavoring substances) or with regard to selling branded products under private labels. 17% of the reports described misleading usage of pictures and in about 10% misleading claims on product packages.

Eight cases reported on consumer goods manufactures misguided consumers by the indication of origin of products and the use of quality labels (14%). Quality labels win consumers' trust

¹⁴ The differences in the total number of cases results from reports which covered more than one topical area/industry.

¹⁵ One has to notice that the categorization cannot be distinct and must not be interpreted statistically: Misleading actions often violate more than one provision; or they can be subsumed under more than one criteria of a provision.

(Haenraets et al 2011) therefore their abuse is very likely to distort fair competition. To prevent this, a per se ban in No 2 of the blacklist prohibits the misleading use of quality labels. Unfortunately, its wording is too narrow so that many undesired actions are not banned, e.g. the use of quality labels that are issued by the vendor him- or herself and the use of quality labels that are paid for and not issued by a neutral third party after serious testing. Still, interested market participants – i.e. competitors, consumer advocates and centers for the protection against unfair competition – as well as courts are trying to ban the misleading use of quality labels with reference to Section 5 subsection 1 clause 2 no 3 UCA, which regulates the use of awards and honors in marketing. But unfortunately, as stated before, the abstract bans in Section 5 UCA leave much room for interpretation. Looking at the use of quality labels and their influence on consumers decisions, the per se ban seems much too narrow in its wording. It should ban the use of any quality label that has not been issued by a neutral third party after serious testing.

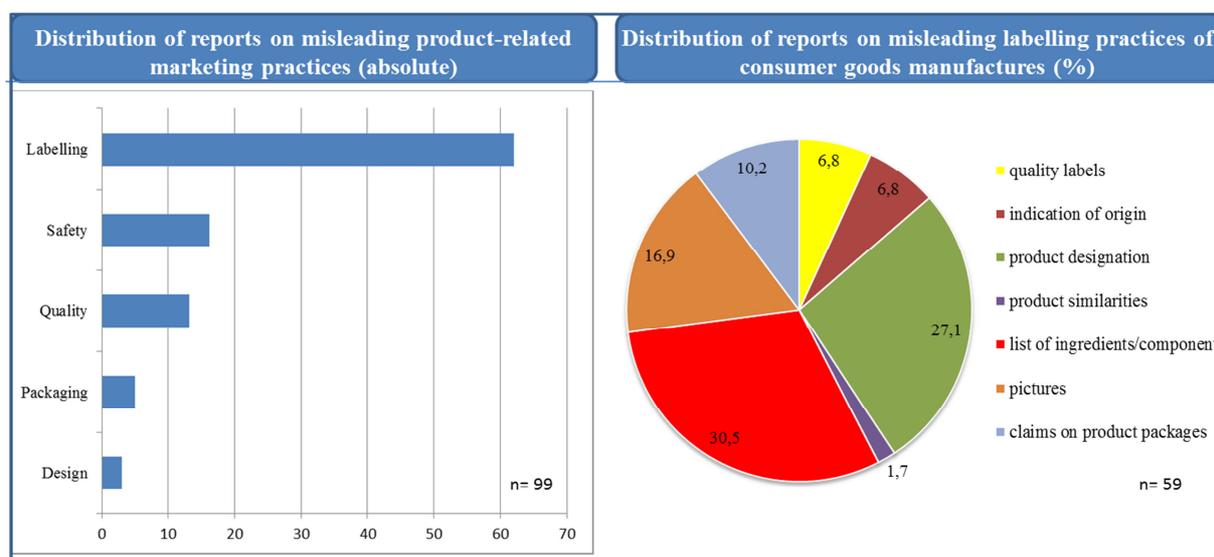


Figure 2: Reports on misleading product-related and labelling-related marketing practices

In 16 reports we have identified **Marketing deceptions related to Safety** which characterize harmful actions of marketers by offering products with safety deficiencies in securing one’s health or data security.

Marketing deceptions related to product quality: In 13 reports vendors were misleading about the quality of goods or services. Often food was the focus: ingredients or components were omitted (e.g. palm oil in potato crisps, plastics in honey or drinking water). These actions are usually sanctioned by specific provisions in food law and labelling requirements. The abstract bans of Section 5 subsection 2 clause 1 or Section 5a subsection 4 UCA respectively for omissions may be applicable, too. Per se bans do not exist in this field. Besides reports of inappropriate functionality, fast wear, impairments of taste, sensory or visual appearance as well as inappropriately performed work by service providers were identified.

Marketing deceptions related to packaging: It was also reported, that vendors were trying to win over consumers by deceiving them about the quantity of the merchandise. Next to slack packaging (Jobber, 2004), marketers sold “cheaper” XL-packages which implied higher doses per usage and reduced thereby the achieved money savings of consumers. The abstract bans of Section 5 subsection 2 clause 1 UCA is applicable to limit such misleading practices. In one case, a brewery sold a foreign product with the claim “returnable packaging”- in fact, they never sent the used bottles back abroad.

Marketing deceptions related to design: The application of food colorants has become the norm and is used, for example, in the production of yoghurt, cheese, olives or bread, etc. (wrđ markt 2014). To pretend to have a higher product quality or presence of ingredients, marketers also use flavoring substances and sensory marketing.

Misleading marketing practices related to promotion

The sample contains 45 reports on promotion-related marketing deceptions (see figure 1). These reports illustrate three different usage types of false advertising: misleading promotion by exaggerated claims, by concealed facts or by information manipulation/incorrect statements. The two latter forms were published most often with regard to consumer goods manufacturers, service providers as well as retailers. There were slightly more reports on concealing information by service providers than other business sectors.

Misleading promotion by information manipulation/incorrect statements: In 25 reports companies were accused of manipulating information in their promotion activities. Companies claiming product characteristics or potential results after usage which are not scientifically proven or simply do not exist. Furthermore, production methods (like “handmade”) or the accomplishment of quality standards (hotel stars) were advertised which are simply untrue.

Misleading promotion by concealed facts: Advertising can be deceived by withholding information (Jobber 2004). Such facts can give a misleading impression to the consumer, as these reports demonstrate: Aldi used the claim “From now on we will bake for you: bread and bread rolls every day”, but in fact they just warmed up delivered bakery products (Steiner 2010). Another retailer advertised three mattresses with a test result, concealing that this result was valid for just one mattress (Murmam 2012).

Misleading promotion by exaggerated claims: According to a study by Lab42, more than three in four consumers say most of the claims that brands make in advertisements are exaggerated. Furthermore, over 50% of consumers say they think ads should be more accurate or wish there were laws to regulate ads (Lab42, 2013). Despite these empirical findings, we have identified only four reports on exaggerating. This may be caused by the used classification scheme. Consumers might not differentiate between exaggeration and manipulation in the way we did.

Misleading marketing practices related to price

As a result of their literature review on marketing ethics, Nill/Schibrowsky (2007) and Schlegelmilch/Öberseder (2010) call attention for the need to carry out further research on ethical pricing issues. Price Fairness describes a subjectively perceived result of a price comparison (actual price versus reference price) by consumers (Mahadevan 2010). “Perceptions of unfairness are based on discrepancies or inequalities ... [and] is also associated with a strong emotional reaction” (Monroe/Xia 2006, p. 158). Our analysis reveals three different types of unfair and misleading pricing tactics by marketers: deceptive pricing, concealed price increase and resale price maintenance.¹⁶

About 20 reports were related to misleading pricing practices (see figure 1), whereby deceptive pricing was mostly covered by the media (15 cases). Three reports revealed price increases and one report each covered the other named practices. The media reports displays retailers as those companies being mostly involved in misleading pricing practices (10 cases).

¹⁶ Comment: There was one report on unfair pricing which could not be categorized as the practice did not quite fit these categories. For this purpose we opened a category “Other misleading pricing tactics”.

Deceptive Pricing occurs when consumers are misled by prices offered by companies (Jobber 2004). This includes practices such as (a) misleading price comparisons; (b) price gouging, (c) bait & switch or (d) misleading discounts. Misleading price comparison may occur when a company matches its prices against competitor prices by concealing further costs which are involved in later stages of the buying process. Companies also promote discount prices by using diverging basic price information (Beyerlein 2012).

Our sample contains several reports on vendors who charged prices considerably higher than the objective market value of their goods or services (=price gouging). From a legal perspective, this cannot be criticized, since vendors are generally not bound in their pricing policy (BGH GRUR 2003, 626, 627 – Adverse Auction II). They may freely set, rise or reduce the price of goods and services (free pricing system – market economy); prices need not necessarily correlate with the objective market value. Bait & switch characterizes a strategy by which very low prices are advertised for a product to attract consumers. Once in the store, consumers may be told that the product is not available any longer or that they do not match the discount criteria (belonging to a certain target group) and they are convinced to switch to a higher priced product (Jobber 2004).

From a legal perspective (price, see section 5 subsection 1 clause 2 no2 UCA, No 5,6, and 21 of the blacklist), advertising is misleading only when discounts are announced when there is in fact no real reduction of the price (=misleading discounts, e.g. vendors of carpets or mattresses), or when costs are concealed (e.g. hidden charges for airline tickets).

- Often, the per se ban of offering goods or services as “without charge”, although costs are due, cannot be applied. Its scope is narrowed to the specific terms (e.g. “gratis” or “free of charge”). The analysis reveals that vendors usually do not announce their merchandise to be “for free” but hide pricing information (e.g. in the general terms and conditions). This does fall under the abstract prohibition of misleading in Section 5 subsection 1 clause 2 no 2 UCA, but this provision leaves more room for interpretation and requires a stronger reasoning. The per se ban in No 21 of the blacklist should therefore be extended to the implicit dilution of costs, too.
- Misleading discounts are banned by the per se bans in No 5 and No 6 of the blacklist, and by the abstract bans in Section 5 subsection 1 clause 2 No 2 UCA, too.

Concealed Price Increases describe a pricing tactic by which companies covertly reduce the package volume or reduce the product quality by keeping the price. Hereby, marketers aim to draw consumers’ attention away from the selling price (Simon/Fassnacht 2009). Within our research, the media exposed only consumer goods manufacturers as users of this practice.

Resale Price Maintenance refers to a practice in which resellers and suppliers commit on a defined selling price or price limit. Resellers may do so on the basis of a voluntary self-commitment or to limit negative consequences (Wörmer 1962). As this clearly characterizes an antitrust violation (§ 1 GWB), we have identified only one report dealing with this type of marketing deception.

5. CONCLUSION

Based on 188 reports on marketing deception this study aimed to map the presentation of misleading marketing practices in the German media landscape. In particular, we were interested in the various forms of misleading practices. Our study represents interim results with regard to the size and structure of the sample as well as to the used research method. In detail we see the need for further research in the following fields:

- The content analyses revealed over 20 different misleading practices within the field of product, promotion and pricing. Media reports covered mostly product-related deceptions with a greater emphasis on labelling (mainly deceptions regarding ingredients, product designation and pictures), product safety and quality. Almost one quarter of the published cases relates to promotion and 10% cover misleading pricing practices. There were comparably fewer reports on sales, ethical issues related to law, on vulnerable consumers, on green marketing or on web-related forms of deception and no report in the field of placement, market research or international marketing. Particularly in the field of web-related practices further research is needed (expansion of sample). Also, not all forms of marketing deceptions are published by the media: We assume that placement related deceptions are under-represented in the media landscape. To learn more about this form of deception further research on the basis of interviews is needed.
- There is a strong presence of FMCG manufacturers and food retailers within media reports. Practitioners explain this fact by tough market conditions. In contrast, interviewed marketers blame the media for focusing on that business sector (Jürgens 2013). From their point of view there is not much difference to other sectors in the use of misleading practices. In order to clarify this issue, the sample needs to be expanded by including more specific sources which address non-FMCG sectors. Also, to limit the risk of media manipulation, reports on judicial decisions on illegal marketing practices published by official bodies need to be included in the sample.
- The study displays intensified illegal misleading advertising about the nature of goods or services, the quantity, the price of a good or a service, the use of misleading quality labels. Unexpectedly, violations of the per se bans of very undesirable or modern forms of misleading advertising were not recorded. Our analysis did not prove a particular rise in violations of the provisions that were introduced in 2008 to implement EU regulations. The “new” general prohibitions and per se bans were not infringed more often than the provisions that had existed before. Some of the per se bans seem too narrow in their wording to be effective in protecting consumers by effectively preventing and banning misleading advertising. Many actions that do not fall under a per se ban are prohibited in the abstract provisions of the UCA. However, it is usually more difficult and arduous to plead for the applicability of these provisions. Since their wording is more general, there is more room for interpretation and legal certainty can only be achieved by final rulings of courts. The respective per se bans should therefore be extended (for suggestions regarding no 2, 21 and 27 of the blacklist see above under c, d and e).
- The selectivity of the media observed here may not necessarily be extrapolated into the future. In fact, the susceptibility for news scandals is moving into society. So, the conclusion that practice A is not as “dangerous” for the “consumers” than practice B because A appears to have fewer messages of value can be a risky fallacy.

Notwithstanding the need for further research on the topic we encourage marketing scholars to discuss misleading marketing practices especially in marketing textbooks. Unethical marketing practices need to be presented and analyzed from an ethical and legal perspective. We consider this as a strategy to reduce the legal grey zone that companies often refer to as an excuse for practicing false marketing and to improve the image of our profession.

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7. Attachments

Unfair Competition Act (Gesetz über den unlauteren Wettbewerb):

Section 2: Definitions

(2) Section 13 of the Civil Code shall apply *mutatis mutandis* to the term “consumer”.

Section 3: Prohibition of unfair commercial practices

(1) Unfair commercial practices shall be illegal if they are suited to tangible impairment of the interests of competitors, consumers or other market participants.

(2) Commercial practices towards consumers shall be illegal in any case where they do not conform to the professional diligence required of the entrepreneur concerned and are suited to tangible impairment of the consumers ability to make an information-based decision, thus inducing him to make a transactional decision which he would not otherwise have made. Here reference shall be made to the average consumer or, when the commercial practice is directed towards a particular group of consumers, to the average member of that group. Reference shall be made to the perspective of the average member of a group of consumers who are particularly vulnerable and clearly identifiable because of their mental or physical infirmity, age or credulity, if it is foreseeable for the entrepreneur that his commercial practice will affect the latter group only.

(3) The commercial practices towards consumers, listed in the Annex to this Act, shall always be illegal.

Section 5: Misleading commercial practices

(1) Unfairness shall have occurred where a person uses a misleading commercial practice. A commercial practice shall be deemed to be misleading if it contains untruthful information or other information suited to deception regarding the following circumstances:

1. the essential characteristics of the goods or services, such as availability, nature, execution, benefits, risks, composition, accessories, method or date of manufacture, delivery or provision, fitness for purpose, uses, quantity, specification, after-sale customer assistance, complaint handling, geographical or commercial origin, the results to be expected from their use, or the results or material features of tests carried out on the goods or services;
2. the reason for purchase such as the existence of a specific price advantage, the price or the manner in which the price is calculated, or the conditions on which the goods are supplied or the services provided;
3. the nature, attributes or rights of the entrepreneur such as his identity, assets, including intellectual property rights, the extent of his commitments, his qualifications, status, approval, affiliation or connections, awards or distinctions, motives for the commercial practice or the nature of the sales process;
4. any statement or symbol in relation to direct or indirect sponsorship or approval of the entrepreneur or of the goods or services;
5. the need for a service, part, replacement or repair;
6. compliance with a code of conduct by which the entrepreneur has undertaken to be bound when he makes reference to such commitment; or
7. the rights of consumers, particularly those based on promised guarantees or warranty rights in the event of impaired performance.

(2) A commercial practice shall also be deemed to be misleading if in connection with the marketing of goods or services, including comparative advertising, it creates a risk of confusion with other goods or services or with the trade mark or other distinguishing mark of a competitor.

(3) Information within the meaning of subsection (1), second sentence, shall also be deemed to include information forming part of comparative advertising as well as pictorial illustrations and other events that are targeted at, and are suitable for, taking the place of such information.

(4) It shall be presumed to be misleading to advertise with a price reduction in a case where the price concerned has been demanded for only an incommensurably short period of time. In the event of dispute as to whether, and for what period of time, the price was demanded, the onus of proof shall fall upon the person who advertised with the price reduction.

Section 5a: Misleading by omission

(1) In assessing whether the concealment of a fact is misleading, consideration shall be given in particular to its significance for the transactional decision according to prevailing public opinion, as well as to the suitability of the concealment for influencing the decision.

(2) Unfairness shall have occurred where a person influences a consumer's ability to take a decision, being a consumer within the meaning of Section 3 subsection (2), through omission of information that is material in its factual context, taking account of all its features and circumstances, including the limitations of the communication medium.

(3) Where goods or services are offered with reference to their characteristics and price in such manner appropriate to the communication medium used that an average consumer can conclude the transaction, the following information shall be deemed to be material within the meaning of subsection (2) if not already apparent from the context:

1. all main characteristics of the goods or services to an extent appropriate thereto and to the communication medium used;
2. the identity and the geographical address of the entrepreneur and, where applicable, the identity and geographical address of the entrepreneur on whose behalf he is acting;
3. the final price, or in cases where the nature of the goods or services means that such price cannot be calculated in advance, the manner in which the price is calculated as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot be calculated in advance, the fact that such additional charges may be payable;
4. arrangements for payment, delivery and performance, as well as complaint handling policies so far as they depart from the requirements of professional diligence; and
5. the existence of a right of withdrawal or cancellation.

(4) Such information shall also be deemed to be material within the meaning of subsection (2) as shall not be omitted in respect of consumers or by virtue of Community Regulations pursuant to legal provisions for the implementation of Community Directives for commercial communication including advertising or marketing.

Annex to Section 3 subsection 3 (contains misleading and aggressive commercial practices)

Illegal commercial practices within the meaning of Section 3 subsection (3) shall cover:

1. the false statement by an entrepreneur that he is a signatory to a code of conduct;
2. displaying a trust mark, quality mark or the equivalent without having obtained the necessary authorisation;
3. making the false statement that a code of conduct has an endorsement from a public or other body;
4. making the false statement that an entrepreneur, a commercial practice by that entrepreneur, or goods or services have been approved, endorsed or authorised by a public or private body; or

- making the false statement that the terms of the approval, endorsement or authorisation have been complied with;
5. making an invitation to purchase goods or services within the meaning of Section 5a subsection (3) at a specified price when the entrepreneur does not disclose that he has reasonable grounds for believing that he will not be able to supply these, or equivalent, goods or services, or procure such supply, at such specified price for a period that is, and in quantities that are, reasonable (bait advertising). Where stocks are available for less than two days, it shall be incumbent on the entrepreneur to furnish proof of reasonableness;
 6. making an invitation to purchase goods or services within the meaning of Section 5a subsection (3) at a specified price in a situation where the entrepreneur, with the intention of promoting different goods or services instead, then demonstrates a defective example of the goods or services, or refuses to show the consumer the goods or services advertised, or refuses to take orders for the goods or services or to perform the advertised service within a reasonable time;
 7. making the false statement that certain goods or services will only be available generally or on particular terms for a very limited time, in order to elicit an immediate transactional decision from the consumer without the latter having the time and the opportunity to make an information-based decision;
 8. making after-sale customer assistance available in a language which is not the language in which the negotiations were conducted before conclusion of the transaction, if the language originally used is not an official language of the Member State where the entrepreneur is located; this shall not apply if the consumer is informed before conclusion of the transaction that such services will be made in a language different from the language originally used;
 9. making the false statement, or creating the false impression, that goods or services can be sold with legal effect;
 10. making the false statement, or creating the false impression, that legally existing rights form a distinctive feature of the offer;
 11. using editorial content for the purpose of sales promotion where the entrepreneur has paid for this promotion, without such connection being clearly identifiable from the content or by images or sounds (advertorial);
 12. making a false 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 goods or services offered;
 13. promoting goods or services similar to the goods or services of a competitor, with the intention of deceiving the consumer regarding the commercial origin of the goods or services promoted;
 14. establishing, operating or promoting a sales promotional scheme creating the impression that compensation can be obtained solely or primarily from introducing other participants into the scheme (scheme with a snowball effect or pyramidal structure);
 15. falsely claiming that the entrepreneur is about to cease trading or move premises;
 16. claiming that certain goods or services are able to facilitate winning in games of chance;
 17. making the false statement, or creating the false impression, that the consumer has already won, or will win, a prize, or that he will obtain another benefit although such prize or benefit in fact does not exist, or that in any event the possibility of obtaining a prize or other benefit is subject to the consumer paying money or incurring a cost;
 18. falsely claiming that goods or services are able to cure illnesses, dysfunction, or malformations;
 19. giving false information on market conditions or sources of supply with the intention of inducing the consumer to purchase or use goods or services at conditions less favourable than general market conditions;
 20. offering a competition or a promotional contest without awarding the prospective prizes or a reasonable equivalent;
 21. offering goods or services as being “gratis”, “free”, “without charge”, or using a similar expression, although costs are to be paid therefor; this shall not apply to the unavoidable cost of responding to the offer of goods or services or of collecting or paying for delivery of the goods or of using the services;
 22. transmitting marketing material together with a document seeking payment and creating the false impression that the goods or services marketed have already been ordered;

23. making the false statement, or creating the false impression, that the entrepreneur is a consumer or is not acting for purposes relating to his business, trade, craft or profession;
24. making the false statement, or creating the false impression, that after-sale customer assistance in relation to goods or services is available in a Member State of the European Union other than the one where the goods or services are sold;
25. creating the impression that the consumer cannot leave certain premises before prior conclusion of a contract;
26. ignoring, while conducting a personal visit to the home, a request made by the person being visited to leave or not to return, unless such visit is justified for the purpose of lawful enforcement of a contractual obligation;
27. measures to dissuade the consumer from exercising his contractual rights in an insurance relationship by requiring him to produce such documents, on assertion of his claim, as are not needed as proof of that claim, or failing systematically to respond to correspondence asserting the said claim;
28. including in an advertisement a direct exhortation to children to purchase the goods or services marketed or to persuade their parents or other adults to do so;
29. demanding payment for goods or services not ordered, or demanding the return or safekeeping of items not ordered, except where they are a permissible substitute under the provisions on distance contracts; and
30. explicitly stating that the entrepreneurs work or livelihood will be in jeopardy if the consumer does not purchase the goods or services.

German Civil Code (Bürgerliches Gesetzbuch)

Section 13 of the Civil Code: Consumer: A consumer means every natural person who enters into a legal transaction for a purpose that is outside his trade, business or profession.

Topical classification scheme on marketing ethics by Schlegelmilch/Öberseder (2010)

1. Ethical issues related to product [PD]: product safety, product quality, product design, packaging, labelling and ethical products.
2. Ethical issues related to price [PR]: price fair-ness, price fixing, price discrimination, price gouging and misleading pricing.
3. Ethical issues related to place [PL]: exclusive distribution rights, channel control and slot-ting allowances.
4. Ethical issues related to promotion [PM]: advertising ethics, product placement, direct marketing and sales promotion.
5. Ethical issues related to sales [SA]: ethical conflicts of salespeople, ethical values and behaviour of salespeople.
6. Corporate ethical decision making [DM]: corporate ethical decision making, ethical values and ethical behaviour of managers, CSR and marketing.
7. Codes and Norms [N&C]: marketing ethics theory, ethical norms and codes of ethics.
8. Ethical issues related to consumers [CO]: consumer ethical decision making, ethical values and ethical perceptions of consumers.
9. Ethical issues related to vulnerable consumers [VC]: ethical aspects of marketing decisions regarding children, the elderly and poor people.
10. International/Cross-cultural marketing ethics [ITL]: unethical conduct of multinational corporations, cross-national comparisons of various topics such as corporate ethical decision making and consumer ethical decision making.
11. Ethical issues related to marketing research [MR]: ethical responsibility and conduct of marketing research enterprises and their customers, such as embellishing results, privacy issues, etc.
12. Ethical issues related to marketing education [EDU]: integration of ethical questions in marketing education.

13. Ethical issues related to social marketing [SM]: concept and definition of social marketing, ethical dimensions of social marketing, social responsibility of marketing managers and cause-related marketing.
14. Ethical issues related to green marketing [GM]: social responsibility and costs of green marketing.
15. Ethical issues related to law [LA]: relationship between law and ethics within the marketing field.
16. Ethical issues related to internet [ITN]: web privacy, identity theft, phishing and online auctions.
17. Ethical issues related to religion [RE]: impact of religion and religious values on marketing ethics.
18. Literature Reviews [LI]: marketing ethics literature reviews