



ENFORCING RIGHTS – EMPOWERING CONSUMERS

Chances and limitations of collective enforcement instruments in Germany

verbraucherzentrale
Bundesverband



The Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband e.V. – vzbv) is the umbrella organisation for more than 40 consumer organisations throughout Germany and represents the interests of German consumers vis-à-vis policymakers, the private sector and in public. vzbv is also a founding member of BEUC, the European Consumer Organisation.

LIST OF ABBREVIATIONS

- vzbv** Verbraucherzentrale Bundesverband – Federation of German Consumer Organisations
- BfJ** Bundesamt für Justiz – Federal Office of Justice
- UWG** Gesetz gegen den unlauteren Wettbewerb – Unfair Competition Act
(https://www.gesetze-im-internet.de/uwg_2004)
- UKlaG** Unterlassungsklagengesetz – Injunction Act
(<http://www.gesetze-im-internet.de/uklag>)
- ZPO** Zivilprozessordnung – Code of Civil Procedure
(<https://www.gesetze-im-internet.de/zpo>)
- BGH** Bundesgerichtshof – Federal Court of Justice
- BGB** Bürgerliches Gesetzbuch – German Civil Code
(<https://www.gesetze-im-internet.de/bgb>)
- AGB** Allgemeine Geschäftsbedingungen – terms and conditions

BMJV Bundesministerium der Justiz und für Verbraucherschutz – Federal Ministry of Justice and Consumer Protection

BVL Bundesamt für Verbraucherschutz und Lebensmittelsicherheit – Federal Office for Consumer Protection and Food Safety

CPC (EC) Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws

VSchDG
EG-Verbraucherschutzdurchsetzungsgesetz – Enforcement of Consumer Protection in the European Union Act
(<http://www.gesetze-im-internet.de/vschdg>)

OLG Oberlandesgericht – Higher Regional Court

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HOW VZBV AND CONSUMER ASSOCIATIONS ENFORCE CONSUMER RIGHTS

When newspapers report about a new ground-breaking court decision that has strengthened the rights of consumers, this is often due to a lawsuit brought by a consumer association (Verbraucherzentrale) or the Verbraucherzentrale Bundesverband (vzbv¹ – Federation of German Consumer Organisations). Sometimes written warnings are sufficient and – companies change their commercial practices without a lawsuit being necessary. This booklet explains in more detail in which cases this happens as well as the legal basis on which consumer associations and vzbv take action and start litigation. Since 1965, consumer organisations dispose of collective enforcement instruments which they have used to make sure consumer rights are enforced in practice.

When do consumer associations take action?

Consumer complaints are a starting point for considering actions. For example, consumers report that they are suffering cold calls or that a high-performance computer is offered at a bargain price but is no longer available shortly after the shop opens. Since consumer organisa-

tions are limited in staff and financial resources, they are not able to follow up on every offence. Therefore, they bring exemplary actions to clarify legal questions of fundamental importance.

The consumer associations and vzbv also take action in order to prevent individual disputes from even arising. For example, if a fitness centre excludes liability in its **terms and conditions** or if a telecommunications services provider reserves itself the right to amend contractually agreed prices or services, consumer organisations can provide for these contractual clauses being changed. This means they can prevent a loss occurring to the consumer in the first place. In some cases lawsuits help to bring about legal clarity for consumers if the law allows for differing interpretations. This means that some cases can take political relevance. If the rulings reveal gaps in the legislation it is an important signal to the legislator that it needs to be revised.

How many lawsuits are filed every year?

vzbv and consumer associations file around 1,000 new lawsuits per year. A large number concern online advertising, for example disguised pricing or insufficient pre-contractual information about the right of withdrawal. Food labelling or misleading advertisement of air fares are also frequently subject to injunctions. More than half of the cases are successfully settled out of court, with companies signing a declaration to cease and desist.

Some of the cases must be abandoned, for example because warnings could not be delivered, companies have gone bankrupt or the websites subject to the complaint have been shut down. Proceedings in court are filed in around 20 to 25 per cent of cases where a warning letter has been sent.

Who funds the work of consumer associations?

Unlike in other countries, Germany has a private collective enforcement system. However, the work of vzbv and consumer associations is to a large extend funded by public money. Public funding is the expression of the state's interest in ensuring that consumer associations and vzbv can carry out their work properly and that collective enforcement of rights is effective. Since consumer organisations use taxpayers' money, it is important that they carefully choose the cases, which all together account for a certain amount of the total annual funding. Therefore, in each individual case, they weigh the risk of incurring legal expenses against the prospects of success or against the interest of consumers in getting clarification of fundamental legal questions.

¹ A list of abbreviations can be found on page 1. This list also contains links to all laws mentioned. Most of them are available in English.



NUMBERS RELATED TO COLLECTIVE ENFORCEMENT

71 per cent of over 500 internet offers investigated by vzbv between 2002 and 2003 did not meet the legal information requirements: either details of the company or of the process to place an order were missing or were difficult to find. These infringements were found across all sectors.

71 warnings were issued by vzbv to sellers on eBay in 2007. The reason: customers were not properly informed about their rights such as the right of withdrawal or legal guarantees; in some cases the details of the trader were not correct. Some commercial traders disguised themselves as private sellers with statements such as “private seller” in order to circumvent consumer rights.

More than 80 companies with numerous different online offerings received warnings from vzbv between 2007 and 2012 for cases where consumers unintentionally entered a subscription. Since August 2012, companies are required to use a distinctly labelled “purchase” button for orders involving costs.

vzbv took action **in more than 160 cases** between 2009 and 2015 against misleading food labelling or infringement of the EU Regulation on Nutrition and Health Claims Made on Foods.

More than 70 warnings were issued by vzbv between 2008 and 2015 against airlines and travel agencies who were not complying with the pricing rules established by the 2008 EU Regulation on Common Rules for the Operation of Air Services in the Community.



ENFORCEMENT RIGHTS OF CONSUMER AND COMPETITION ORGANISATIONS IN GERMANY

**Cessation and desistance claim as set out in § 8 UWG
(Gesetz gegen den unlauteren Wettbewerb – Unfair Competition Act).**

**Cessation and desistance claim as set out in § 1 UKlaG (Unterlassungsklagengesetz – Injunction Act)
with regard to unfair contract terms.**

Cessation and desistance claim as set out in § 2 UKlaG

Claim for the disgorgement of profits as set out in § 10 UWG

**Recovery claim as set out in § 79 II 3 ZPO (Zivilprozeßordnung – Code of Civil Procedure)
(consumer associations and consumer organisations financed by public funds)**



QUALIFIED ENTITIES

In Germany, consumers themselves cannot file for injunctions under unfair commercial practices law. Their interests are represented by so-called qualified entities which have the right to launch proceedings.

A list of the associations entitled to bring a lawsuit is issued by the Bundesamt für Justiz (Bf) – Federal Office of Justice, www.bundesjustizamt.de). If an organisation applies for the inclusion in the list, it is checked whether the applicant satisfies the legal prerequisites and is able to guarantee proper performance of the task. One prerequisite is that the organisation has qualified staff able to advise consumers. The organisation must also have sufficient financial resources. In the case of consumer organisations such as the consumer associations and vzbv, which receive public funding, it is assumed that they satisfy the necessary prerequisites for the right to take action.

6 | Claims to cease and desist

CLAIMS TO CEASE AND DESIST

Cessation and desistance claims are the core of collective enforcement of rights. They are regulated in the Gesetz gegen den unlauteren Wettbewerb (UWG – Unfair Competition Act) and in the Unterlassungsklagengesetz (UKlaG – Injunction Act). Their scope of application extends to:

1. UNFAIR COMMERCIAL PRACTICES

Taking action due to unfair commercial practices is the consumer organisations' longest standing right. It was written into the UWG in 1965 because it became clear that unfair competition not only affects the interests of competitors but that in most cases consumers are affected as well.

2. UNFAIR CONTRACT TERMS

In 1977, consumer organisations' rights to take action were extended. Ever since, they have been able to take action against unfair contract terms. The objective of this abstract control procedure is to review commercial practices: ideally, unfair contract terms should never be used in the first place.

3. REGULATIONS FOR THE PROTECTION OF CONSUMERS

In 2000, at the initiative of consumer organisations, the possibilities to take action had been extended to cases in which consumer laws were infringed. Consumer organisations have increasingly made use of this right in recent years.

ENFORCING CESSATION AND DESISTANCE CLAIMS

Breach of law



Warning



Cease and desist declaration not signed



Cease and desist declaration



Infringement of the cease and desist declaration

Penalty for breach of contract

Action for an injunction

Ruling



Infringement of judgment

Fine

CEASE AND DESIST LETTER

It starts with a warning, in legal terms called cease and desist letter. Such a letter could, for example, request a company to cease publishing an advertisement which is subject to the complaint. Furthermore, the company must sign a cease and desist declaration subject to contractual penalties. If the company does not comply with its cease and desist declaration, it has to pay the contractual penalty as defined in the declaration. Therefore, the aim of such a declaration is to prevent the risk of recurrence. The company can emphasise its sincerity and the entity issuing the warning has the possibility of applying penalties from the very start.



If the company submits a cease and desist declaration the case has been settled out of court.

PENALTY FOR BREACH OF CONTRACT

With a glance into their database, consumer associations can check whether a company has already handed in a cease and desist declaration in another case. If another consumer association has already issued the company with a warning for the same practice of misleading advertising, the new case can – the respective consumers consent given – be transferred to the consumer advice centre that has issued the warning in the first place. It then matches the new complaint with the cease and desist declaration. If there is sufficient proof, the asso-

ciation can request from the company the payment of the contractual penalty of, for example, 5,000 euros, as stated in the cease and desist declaration, to the association. If the company refuses to do so, the consumer association can take action for payment.

ACTION FOR AN INJUNCTION

If a company refuses to sign a cease and desist declaration, the matter can be taken to court.

The court can prohibit the company from advertising in the form in question or declare unfair contract terms void. The court of first instance is the Landgericht (Regional Court) of the district in which the commercial establishment of the respondent is located. In addition, the court in whose district the anti-competitive action was committed is also competent. If, for example, an advertisement for a competition is placed from abroad and is accessed by a consumer in Berlin, the Landgericht of Berlin also has jurisdiction in this matter. These kinds of proceedings can be taken through three levels of jurisdiction and up to the Bundesgerichtshof (BGH – Federal Court of Justice). In these cases proceedings usually take three to four years.

LEGAL COSTS

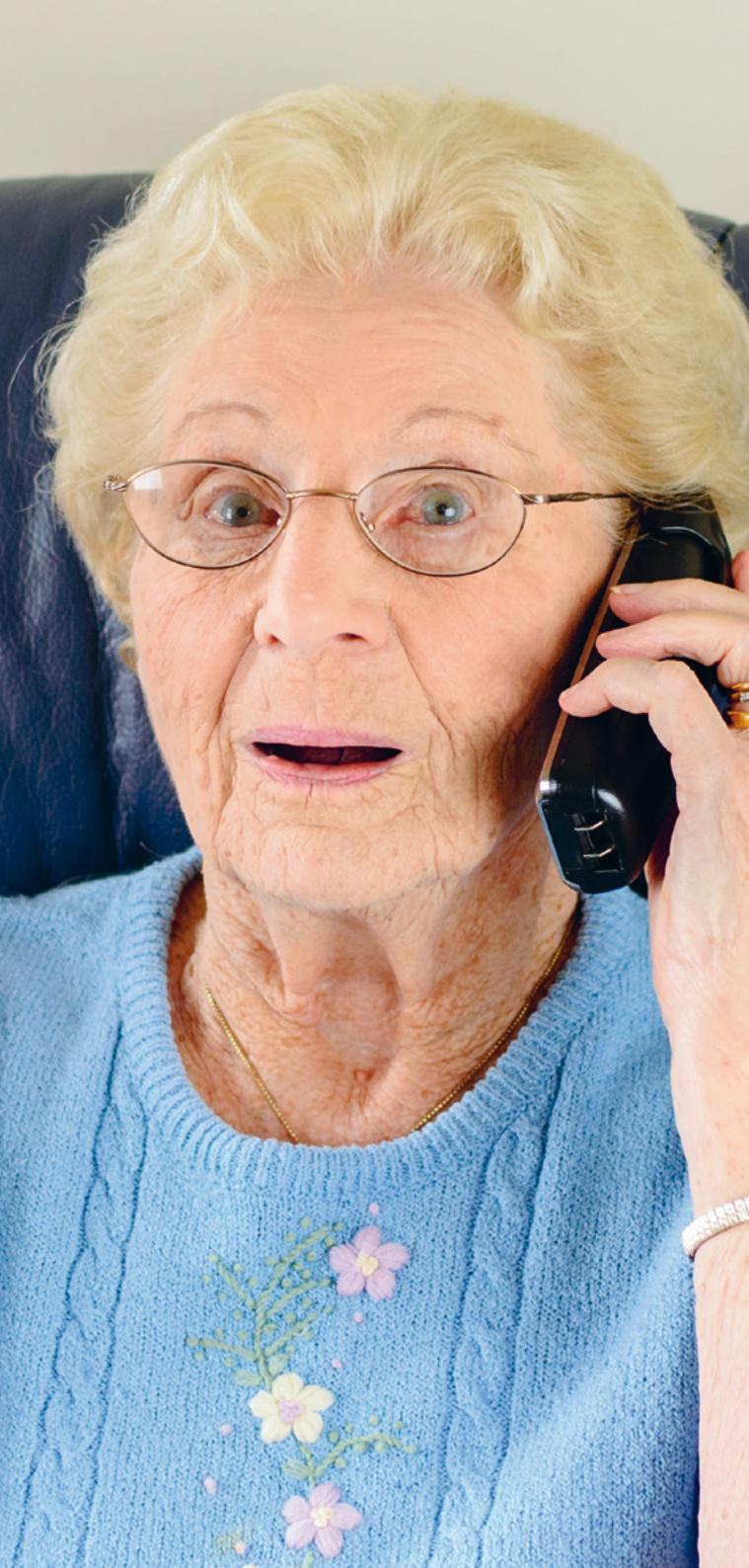
The party who loses the case bears the legal costs. The amount depends on the amount in dispute. For disputes under competition law the average amount is

15,000 euros. Consumer advice centres have their own funding for legal costs in cases where they themselves send a warning letter. vzbv, for example, receives around 230,000 euros per year for those actions alone.

FINES

The case ends with an injunction. If this decision is infringed upon by the company, the respective consumer organisation may request the court to impose a fine onto the company. Particularly in cases of unfair advertisement for prize draws, consumer organisations had to notice over and over again that suppliers continued to advertise, suggesting that the people contacted have won a prize, only changing their original advertisement slightly.

Depending on the frequency and level of the infringements, fines usually vary within the range of 3,000 to 100,000 euros. Unlike in cases of contractual penalties, the money is paid to the Treasury. In practice, courts rarely impose a fine that equals the highest possible amount of 250,000 euros.



UNFAIR COMMERCIAL PRACTICES

Advertising has many faces: it includes posters, mailshots or visits of sales representatives. Advertising crosses our way on the streets, in shops and on the internet. It is subject to some legal rules and must not be unfair or misleading for consumers. Legal assessments are based on the concept of an average consumer in terms of information, awareness and comprehension. Both the business sector and consumer organisations monitor advertising.

Example

A consumer receives an unsolicited cold call to her home. The caller identifies himself as calling on behalf of a telecommunications company in order to offer her a particularly cheap broadband connection. However, the consumer does not even own a computer. Since she considers this to be a nuisance call, she reports the case to her local consumer association.

Approach

The advisor explains that a cold call without the express prior consent of the consumer constitutes a **breach of the Unfair Competition Act (UWG)**. She asks the consumer for exact details of the time of the call, the name of the caller and his employer, the telephone number of the caller and the consumer's own number, how the call developed and whether there were any witnesses. With the consent of the consumer, the advisor sends the complaint to the legal department of the consumer association which will check whether a warning can be sent to the company. In view of its own right to action, the consumer association can demand the company to cease its unfair practices (cf. pages 6 to 7).



LEGAL BASIS

Action for an injunction as set out in § 8 III 3 UWG |

According to this provision, qualified bodies are entitled to enforce cease and desist claims in cases of misleading or unfair advertising (cf. page 7).

The prerequisite is that they have been included in the list of the Bundesamt für Justiz (BfJ – Federal Office for Justice), that their task, according to their statutes, is to represent the interests of consumers through information and advice and that they have at least 75 members who are either physical persons or associations working in the field of consumer protection.

UNFAIR CONTRACT TERMS

Consumers can be confronted with standard contractual clauses in many everyday situations, such as buying a car or signing an insurance contract. In most cases, there is no possibility of negotiating these terms.

The Bürgerliches Gesetzbuch (BGB – German Civil Code) protects consumers from this one-sided form of contracts, phrased solely to the benefit of the company. Accordingly, clauses which present a disproportionate disadvantage to one of the parties, contrary to the requirement of good faith, are legally void. This applies even if the contract was signed without any objection by the consumer. However, many consumers are unsettled by contract terms and do not dare to enforce their rights.

Example

An employee of a fitness studio requests a consumer not to use the bottle of water he has brought along. The house rules include a general ban on bringing drinks. In case of a breach of these rules, the fitness studio reserves itself the right to terminate the contract. However, the consumer is given the opportunity to buy sports drinks and water in the bistro attached to the gym.

Approach

The consumer association asks the consumer to procure a copy of the house rules. After examining the relevant clause, it deems it void. Another company has already been presented with a legally binding court order to cease and desist due to a clause with identical provisions. However, the judgment is not binding on this fitness studio. The consumer can refer to it, but if the operator does not respond, the invalidity of the clause can only be clarified in a court action. The consumer association sends the contract to vzvb with the request to issue a warning. vzvb initially requests the company to sign a cease and desist declaration not to use the clause in its contracts any longer and not to refer to it (cf. pages 6 to 7).

LEGAL BASIS

 **Action for an injunction as set out in § 1 of the Gesetz über Unterlassungsklagen (UKlaG – Injunction Act)** | Whoever uses legally void provisions in their general terms and conditions or – for example as a trade association – recommends them for legal transactions, can be required to cease and desist and, in case of a recommendation, a claim to revoke that recommendation can be lodged against them. Competition and consumer organisations have the right to take action. This right exists since April 1977 when the Gesetz über die Allgemeinen Geschäftsbedingungen (AGB-Gesetz – General Terms and Conditions Act) came into force. Since 2002, the procedural part is regulated in the Injunction Act, while the substantive regulations of the General Terms and Conditions Act can nowadays be found in §§ 305 et seqq. BGB.

Effect of the judgment | The judgement in case of a different company using the same void terms and conditions does not have a direct horizontal effect on the company, but it does improve the negotiating position of the consumer. However, in order to bring this company to change its provisions as well, the consumer association would have to initiate cease and desist proceedings against this company as well.



Direct horizontal effect of judgements | A consumer discovers that higher fees are applied for using his bank account as an account with special conditions for over-indebted customers. On questioning this, the bank refers to a corresponding clause in its pricelist. The customer learns from his consumer association that the same bank was ordered to cease and desist from using such a clause by a court two years ago. The consumer can now refer to the judgement and demand the bank to repay the difference. In a legal dispute the court would have been bound to its judgement of the clause by the consumer association's previous suit.



In §§ 305 to 310 BGB, the German Civil Code sets out rules on how companies may include general terms and conditions in contracts and in which cases they are void. The aim is to protect consumers against the disadvantages of one-sided wordings in contracts in favour of companies.



INFRINGEMENTS OF CONSUMER LAW

The legal framework for relations between consumers and companies consists of the German Civil Code but also a series of other laws. In comparison to an entrepreneur, a consumer is not as well versed in commercial matters. Therefore, these laws contain provisions to protect the consumer from being put at a disadvantage. For example, if a mail order company phrases an incorrect information about the right of withdrawal or if it does not offer a proper way to be contacted, it is infringing upon formal requirements which are intended to protect the consumer against any detriment.

Example

A consumer books a flight via the internet. He has selected the provider which advertised the lowest air fares. During the booking process the original air fare increases by 30 euros as a service fee is added. In the fifth and last stage of the booking process, the price increases again: if the customer wants to use his normal credit card or another standard method of payment, this will cost another five to ten euros. Since he has already spent some time on this online reservation, he will angrily conclude the contract with the higher price.

Approach

Since numerous similar complaints were made, vzby started a campaign, issuing warnings to numerous players in the industry. vzby targeted this and other similar practices of airlines and travel agencies and started many proceedings in recent years. It objected to the infringement of the EU Regulation on Common Rules for the Operation of Air Services in the Community, (EC) No 1008/2008. The Regulation requires companies offering air transport services to include mandatory cost components, such as taxes and airport fees, in the final price displayed. Additional costs for optional services must be stated clearly and explicitly at the start of each booking process. They can only be agreed upon via opt-in, meaning the consumer has to consent explicitly, for example

by ticking a box. In our example, the travel agency or the airline infringed upon the Regulation with the increase in price triggered by a recurring service charge. Furthermore, since no standard method of payment was made available without incurring additional costs, the company acted in breach of § 312a IV 1 BGB.



LEGAL BASIS

Action for an injunction as set out in § 2 UKlaG |

If someone infringes laws aimed at protecting consumers, consumer or competition organisations can require him to cease and desist from this practice. This provision supplements § 1 UKlaG which regulates this right with regard to the use of contract terms. The above-mentioned EU Regulation on Common Rules for the Operation of Air Service in the Community is such a law. Laws regulating door-to-door sales, distance sales of goods, timeshare contracts and the laws concerning long-distance learning and investment banking are also included.

ENFORCING RIGHTS ACROSS NATIONAL BORDERS

In case of business transactions across borders, consumer associations can take action against foreign suppliers who are active in the German market as well as German companies who are targeting consumers in other EU Member States. Regarding the latter, vzvb acts on behalf of the Bundesministerium der Justiz und für Verbraucherschutz (BMJV – Federal Ministry of Justice and Consumer Protection). Foreign legislation applies in part.



Example

A Latvian airline uses a questionable price modification clause on its German website.

Approach

vzvb has successfully taken action for an injunction against this and other foreign airlines because of their use of unfair contract terms or the infringement of consumer law. The court had in part to request expert opinions in order to be able to assess the foreign legislation.

LEGAL BASIS

Action for an injunction as set out in §§ 1, 4a

UKlaG | Consumer organisations can start actions in Germany against an airline that has its company seat abroad in case it is using questionable contractual clauses vis-à-vis consumers who are residents of Germany. The German court seized of the matter has international jurisdiction according to Art. 5 (3) of the so-called Brussels I Regulation. This regulation deals with jurisdiction of courts and recognition and enforcement of decisions in civil and commercial matters. Consumer organisations' rights to act are however determined by German law. In contrast, the law of the country where the company has its seat is decisive for the assessment of the content of the clauses – in this case Latvian law.

Example

An online retailer based in Germany offered Hungarian household goods for sale on his Hungarian website. He excluded the right to withdrawal.

Approach

In this case consumers contacted the competent authority in Hungary. The Hungarian authority transferred the case to the Bundesamt für Verbraucherschutz und Lebensmittelsicherheit (BVL - Federal Office for Consumer Protection and Food Safety) in Germany, which was the competent authority at the time. The BVL authorised the vzvb to address this breach of law. Thereupon, vzvb issued a warning to the German company based on the infringement of the EU Directive on the Protection of Consumers in Respect of Distance Contracts (97/7/EC) implemented into Hungarian law. The company issued a cease and desist declaration.



LEGAL BASIS

Addressing intra-Community infringements according to EU Regulation on Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws (CPC), (EC) No 2006/2004 | This Regulation gives a legal basis for authorising a third party to take action to address intra-EU law infringements. German law makes use of this possibility as there is a clear political decision to maintain the current private enforcement system.

12 | Claims to cease and desist

The EG-Verbraucherschutzdurchsetzungsgesetz (VSchDG – Act on Enforcement of Consumer Protection in the European Community), dated 29 December 2006, implements the CPC Regulation into German law. The legislator lists so called designated bodies: associations for the promotion of commercial interests and consumer organisations – those, who would also be entitled to take action in cases of domestic affairs according to the UWG or the UKlaG. The German legislator even went one step further by making the authorisation of third parties in § 7 I VSchDG a mandatory provision. Before the competent authority takes action itself, it should authorise third parties to do so. According to § 7 III VSchDG the competent authority is empowered to name designated bodies and to conclude framework agreements with them. Furthermore the UKlaG was supplemented with § 4a, entitling organisations to take action in the case of EU infringements of certain laws. Details of authorisation, including the allocation formula and deadlines, are determined contractually in a framework agreement between the Federal Ministry of Justice and Consumer Protection (previously responsible: Bundesamt für Verbraucherschutz und Lebensmittelsicherheit – Federal Office of Consumer Protection and Food Safety), the Centre for Protection against Unfair Competition (Wettbewerbszentrale) and vzbv.



CROSS-BORDER ENFORCEMENT OF RIGHTS: ASSESSMENT AND LIMITS

Online shopping is becoming more and more widespread. This means that consumers also carry out legal transactions across borders. Issues of applicable law have not yet been completely clarified. Furthermore, some resourceful suppliers continue to market questionable online offers successfully and continue to avoid prosecution by moving their registered offices abroad.



CESSATION AND DESISTANCE CLAIMS: ASSESSMENT AND LIMITATIONS

Cessation and desistance claims are an essential instrument to maintain fair competition. With around 1,000 lawsuits each year, vzvb and consumer associations are already helping the development of jurisprudence in the field of consumer law, reviewing current legislation with regard to its practicability and hence close the gap between concepts and commercial reality. The associations combatting unfair competition, in particular the Wettbewerbszentrale (Centre for Protection against Unfair Competition), assume this function to a considerable extent too.

The procedure is often laborious since. For instance, there is no systematic control mechanism as to whether an unfair commercial practice or unfair clause has, in fact, been changed following a declaration to cease and desist. In general, vzvb can only verify this via new consumer complaint. It is also impossible to prevent a void clause from being replaced by an individual agreement which matches the void clause in legal and economic terms.

Finally, it should be noted that a court ruling is only binding on the parties to the dispute. Therefore it cannot be expected that the whole industry will follow the suit, even in case of judgements from the highest courts. Unfortunately “self-purification” of business does not work to the desired extent.

At the same time, current high standards of consumer protection would not exist without these legal instruments. In numerous cases they have produced specific claims for payment to customers; for example, banks have repaid customers unfair bank charges or overpaid interests due to a void interest calculation clause for a mortgage. In many cases these instruments were the driving force behind a legislative review, for example amendments to the Reisevertragsgesetz (Travel Contract Act) or the Versicherungsvertragsgesetz (Insurance Contract Act).

Since actions for injunction are aimed at rectifying legal transactions for the future, it reaches its limits when consumers suffer damages from unfair commercial practices. If a consumer cannot purchase a special offer advertised in a leaflet because the shop did not have sufficient stocks of the special offer, the dealer is not obliged to procure it. If an energy provider increases the prices without apparent reason – just based on a void ‘subject to change’ clause in its contracts – this does not automatically result in an obligation to refund the customer. The consumers affected must claim their money

back themselves. The same applies to a kerosene surcharge billed by a travel agency. For small claims this frequently results in consumers abstaining from putting in a claim for compensation. Companies can then keep these profits even though they acted against the law.

RECOVERY

Consumer associations and vzby can enforce consumers' claims for payment via recovery actions (Einziehungsklage). The consumers cede their claims to the consumer association so that it can collect the money for them. The money collected is then paid to the consumer concerned.

Example

A group consisting of 13 people had booked a flight from Oslo to Munich with a German airline. The plane was supposed to take off at 1.55 p.m. and land in Munich at 4.30 p.m. The group learned that the flight had been cancelled from a notice placed on the check-in counter.

No customer services or support staff were available for the group at the airport in Oslo. However, with the help of other airport personnel they were able to rebook onto other flights of a Scandinavian airline. The group then finally left at 3 and 4 p.m. and landed in Munich at 10.00 p.m. – five and a half hours later than planned.

Approach

The group later complained to the airline and the Federal Aviation Office – with partial success. The company reimbursed the passengers with the costs which incurred for meals. However, further claims were rejected because the technical problems which led to cancellation of the flight were not foreseeable by the company.

The consumers contacted vzby. They demanded compensation to the amount of 400 euros per person. The legal basis was the EU Regulation Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights, (EC) No 261/2004, providing for cancelled flights according to distance. The exception is when cancellations are due to extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

The passengers ceded their claims to vzby, which then sued for payment of the sum in question. The question to be clarified in principle during the case was: in how far can an airline be relieved of its liability when it claims a technical fault being the cause for the cancellation of a flight?

No judgment was issued in this case because the airline paid before the court issued its ruling.



LEGAL BASIS

Recovery action as set out in § 79 II 3 ZPO (Zivilprozessordnung – Code of Civil Procedure) | The recovery action was created in order to bundle claims of consumers. It was intended to be used for cases in which low individual financial damage makes it not worthwhile for consumers to start proceedings themselves. The right of action was initially incorporated into the Legal Advice Act in 2002. Since the Legal Services Act came into force in 2008, the recovery action is regulated in the Code of Civil Procedure.

The risk of legal costs is borne by the association, it being the plaintiff.



RECOVERY CLAIM: ASSESSMENT AND LIMITATIONS

Practical experience has shown that this instrument is not suitable for bundling a number of small sums in one claim. Organizing recovery claims for a large number of consumers with regard to dispersed damages is very complex: the plaintiff has to come to an individual agreement with each and every consumer and must determine the amount of the claim individually or provide supporting documents. These efforts bear no relation to the results. Even if the case is won, only consumers represented in the litigation benefit from the result. Others would end up with nothing or their claims have reached their period of limitation.

Therefore vzbv has used recovery claims more as a test run in order to clarify fundamental legal issues for a number of consumers. For example, the Court of Justice of the European Union clarified that consumers who exchange a defective product within the legal guarantee period of two years – in the specific case the product was an oven – do not have to pay compensation for loss of value because of their use.

A lawsuit always presupposes a claim for compensation. It is therefore not suitable for fending off disputed claims. Whenever gas customers rejected a price increase from their gas supplier, consumer associations used to try to achieve declaratory judgment. The aim of these actions was to be able to keep contracts at the price originally agreed upon. Like in the case of recovery claims, the workload involved for a relatively high number of consumers was disproportionately high. Furthermore, consumer associations did not act as plaintiffs.

In contrast to actions for injunctions, the jurisdiction of the court depends on the value of the amount in dispute; hence a claim can only be submitted to the Landgericht (Regional Court) for sums above 5,000 euros.



DISGORGEMENT OF PROFITS

In 2004, a claim for the disgorgement of profits was incorporated in the UWG (Unfair Competition Act). **This gave consumer organisations the right to claim profits** that companies had collected through the intentional use of unfair advertising. The sum obtained is paid to the Federal Treasury.

Example

A ring tone provider had been warned for a misleading TV advertisement. Consumers who expected to order only one ring tone on the basis of the advertisement had, in fact, signed up for a subscription. Despite making a declaration to cease and desist, the company continued to advertise their product in this manner via an online order form. Through an in-court settlement, vz bv was able to make the company pay 18,500 euros to the Federal Ministry of Justice for profits unlawfully collected via this misleading advertisement.

Example

A nationwide discount supermarket chain advertised a mattress using an outdated test result from the German product testing organisation Stiftung Warentest. After the court ordered it to cease and desist from this practice, vz bv claimed the extra profit collected through the advertisement. The court ordered the company to reveal information on its sales trends before and after the ad campaign. The company subsequently paid 25,000 euros.

Approach

In order to make a claim for the disgorgement of profits, the company is requested to reveal its sales figures before, during and after the sales campaign. This information must be identified through targeted questions relating to specific commercial transactions. If the company does not provide the requested information voluntarily, the right to information is enforced in a first step in a step-by-step action. The court delivers a judgment on this action. If an appeal is lodged against the judgment (appeal, appeal on point of law), it can take several years before the action for payment can be submitted. In case of fraudulent operators specialised in so-called “online cost traps” there is a risk of the company no longer existing by the time the ruling is enforced. This fact considerably increases the litigation risk for the organisation.



LEGAL BASIS

Disgorgement of profits as set out in § 10 UWG |

Consumer organisations and organisations against unfair competition can seize profits in cases of intentional infringements of the UWG. The revenues are paid to the Treasury. The background in terms of legal policy is that a company which aims at a competitive advantage through unfair commercial practices should not retain the profits gained thereby. It is not uncommon for numerous consumers to suffer damages from a similar commercial activity. There are many examples of misleading offers to consumers: prize winning notifications containing a request to call expensive premium phone numbers; advertisements for auxiliary income are only intended to sell meaningless brochures; promotional trips during which the promised present is not handed over.

In such cases the consumers affected are not entitled to make their own claim for damages. The advertising messages are not sufficiently individualised in order to derive claims under civil law. They are intentionally directed at an indefinite number of persons. However, the intention is to prevent companies from infringing competition law by threatening with the disgorgement of profits.



DISGORGEMENT OF PROFITS:
ASSESSMENT AND LIMITATIONS

The organisation being the plaintiff does not only have to establish causality, i.e. prove that the infringement of competition law led to the additional earnings. It also has to prove that the company was acting intentionally. Both requirements represent a considerable obstacle to making a claim.

This problem occurs, for instance, occurs when a consumer believes he became a victim of loss-leader pricing. In a newspaper supplement he discovers a high-performance computer for a very low price. The dealer in the shop explains that the computer unfortunately does not have the specifications stated in the advertisement and that the wrong data were used in the brochure by accident. The consumer decides to buy the computer nevertheless. In order to enforce a claim for disgorgement of profits, the organisation, being the plaintiff, firstly has to prove that a possible increase in sales during the campaign is due to the misleading information. Secondly, it has to establish that the dealer, in contrast to his assertions, condoned misleading consumers by issuing the brochure. Claims for disgorgement of profits only apply to infringements of competition law. It cannot simply be transferred to infringements of consumer law or rules on general terms and conditions.



IMPORTANT DECISIONS

1982

Advertisement using test results of Stiftung Warentest

A company must not advertise an SLR camera with a “good” test result label referring to a test by Stiftung Warentest if 11 of 22 cameras in the same test achieved better results. Omitting the number of products which performed better, could lead consumers to the erroneous assumption that the product did hold a top-ranking position in the test while in fact it was below the average.

This decision by the Federal Court of Justice (Bundesgerichtshof – BGH) was paramount for most companies nowadays referring to the comparative result of their product when referring to Stiftung Warentest’s test results for marketing purposes.

(BGH, judgment dated 11 March 1982 – I ZR 71/80)

1987

Advance payment clause in tourist travel contracts

If a travel organiser’s customer is not insured against the travel organiser’s risk of insolvency the latter may not request the full price of the trip to be paid at the moment of handing over ordinary travel documents to the customer, ahead of the start of the trip. This decision by the Federal Court of Justice was one of the ground-breaking rulings on travel law and it influenced German and European legislation. Today, the German Civil Code states that the

organiser is obliged to provide the customer with a risk coverage certificate before requesting full payment.

(BGH, judgment dated 12 March 1987 – VII ZR 37/86, NJW 1987, 1931)

1993

Cash payments at the bank counter

The Federal Court of Justice ruled on bank's pricing policies: banks are not allowed to charge an extra fee when customers pay cash into or withdraw cash from their own account at the counter. The court held that any claim for payment by the bank is satisfied by the cash-in and that, in such cases, the creditor cannot demand a separate fee for accepting cash. In cases of cash withdrawal, the bank is simply fulfilling its legal obligation to refund the money once paid into the account and must thus not charge an additional fee either.

(BGH, judgment dated 30 November 1993 – XI ZR 80/93, NJW 1984, 313 = VuR 1994, 7)

1994

Ten year contracts with insurance companies

In five decisions from 1994 and further judgments from 1995, the Federal Court of Justice ruled that general terms and conditions establishing a contract duration of ten years are to be considered void. It thereby ended discussions about whether or not long-term contract duration clauses in private liability insurances, insurances on contents and accident insurances were acceptable.

The court considered ten year duration clauses to represent a significant burden for policy holders as they limit consumers' possibilities to conclude new contracts. Policy holders are also not in a position to adapt the contract duration to circumstances already present or foreseeable at the time the contract is being concluded. Even more importantly, policy holders had no possibility applying normal market behaviour (shop for the best offer) after concluding such a contract. This in turns leads to a restriction of competition.

(BGH, judgment dated 13 July 1994 – IV ZR 107/93, NJW 1994, 2693; BGH, judgment dated 22 February 1995 – IV ZR 44/94, NJW 1995, 1289)

1999

Telemarketing

With this and other decisions on telemarketing, the Federal Court of Justice gave priority to the protection of privacy over the profit of market actors. When opening a bank account, customers gave their consent to be contacted by the bank and its partners for advertising purposes via the form's general terms and conditions. The court held the given consent to be legally void. Telephone advertising severely affects the called person's privacy, which is protected by the constitution. The court considered the company's interests to advertise their products to be legitimate but came to the conclusion that, in view of the large variety of advertising methods available, it is not necessary to use those that are particularly intrusive in terms of privacy. Explicit consent is hence required and

cannot be given through contract terms. Nowadays, the Unfair Competition Act stipulates that telephone advertising must only take place after prior explicit consent. To date, the act does not contain any prescription in terms of which form this consent ought to take.

(BGH, judgment dated 16 March 1999 – XI ZR 76/98)

2002

Account balance must be displayed correctly

Banks must not give incorrect information about an account's balance to their customers on an ATM. A pensioner had taken a sum of money from her account in accordance with the balance displayed on the screen. But since the sum had, in fact, not been transferred to her account yet, the pensioner unintentionally overdraw her account and hence used credit services of the bank she would not have used if the information had been clear. The Federal Court of Justice ruled in 2002 that such practices constitute unfair competition. In the same way, bank statements can also be misleading. The dates of booking and availability are individually displayed for all entries. However, the bank must clearly indicate that the account balance, highlighted at the end of the bank statement, may contain amounts that are not yet available. The consumer must be able to see that he may have sums already booked on his account that are not yet available without paying interest on a debit balance. (BGH, judgment dated 27 June 2002 – I ZR 86/00, GRUR 2002, 1093; BGH, judgment dated 11 January 2007 – I ZR 87/04)

20 | Important decisions

2007

Children and advertising

A manufacturer of cornflakes must not exploit the lack of commercial experience of children and young people in its advertising campaigns. In this specific case the company had, on packages and online, prompted schoolchildren to collect “Tony Taler” points by buying its products, which they could collect in a bonus booklet and exchange for sports equipment for their school. In order to acquire, for instance, a badminton set, around 50 packages of a specific product at 2.79 euros each were needed – that is a total of 139.50 euros. The Federal Court of Justice forbade the campaign, citing the triggering of peer pressure to collect the “Tony Taler” points as the main reason for doing so. In a similar decision, the Oberlandesgericht (Higher Regional Court) in Celle prohibited the advertising from a biscuit manufacturer by calling on parents and schoolchildren to collect points by buying biscuits in order to receive financial support for a school trip.

(BGH, judgment dated 12 July 2007 – I ZR 82/05, OLG Celle, judgment dated 21 July 2005 – 13 U 13/05)

2008

Exchange of defective equipment must be free of charge

Traders are not allowed to demand compensation for use when replacing faulty goods within the legal guarantee period. In this specific case the enamel coat flaked off a faulty oven 17 months after purchase. Since it was not possible to repair the oven, it had to be replaced by a

new one. The German Federal Court of Justice referred the case to the Court of Justice of the European Union (CJEU) which then decided that, in accordance with the EU Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees (1999/44/EC), the goods must be brought into conformity free of charge. Therefore, no compensation can be demanded for the use of a faulty product. The decision resulted in the amendment of the relevant legal provision in the German Civil Code.

(BGH, judgment dated 26 November 2008 – VIII ZR 200/05; CJEU, judgment dated 17 April 2008 – C-404/06)

2010

Free payment using standard credit card

An airline may only demand a fee for using a credit card for online reservations if it also offers a well-established method of payment free of charge. This meant that previous practices of the low-cost airline in question was not legal. The airline had charged its customers a fee of four euros per passenger one-way when tickets were purchased using a credit card. A fee of 1.50 euros was applied when using a debit card. Customers were given no opportunity to pay for their ticket without incurring additional costs. Payment “free of charge” was only possible with a little used Visa Electron card, only available for an annual fee of 40 to 100 euros. According to the Federal Court of Justice, this payment arrangement discriminated consumers in an unacceptable manner. They must be able to comply with their legal obligation

to pay without the opposite party demanding a separate charge for it. Furthermore, it must be possible to pay via a widely used method that does not put undue burden on the consumer.

(BGH, judgment dated 20 May 2010 – Xa ZR 68/09)

2012

Travel agencies must clearly identify air fares

If a travel agency offers additional services against payment while offering flights, it must comply with EU regulations when giving a quote air fares online. Costs for additional services must be stated right at the beginning of each reservation process. Travel cancellation insurance must not be preselected. In this specific case, a travel agency had preselected a travel cancellation insurance for 9.00 euros on its website under the heading “Your current travel costs”. Customers had to actively deselect this if they did not want the service. Such opt-out arrangements are no longer permitted according to EU Regulation on Common Rules for the Operation of Air Service in the Community (EC) No 1008/2008 which came into force in September 2008. In its decision, the Court of Justice of the European Union also pointed out that travel agencies must comply with these strict EU rules just as well as airlines when offering flights online. Until then, there was disagreement whether the regulation was binding on airlines only.

(CJEU, judgment dated 19 July 2012 – C-112/11)

2014**No direct solicitation of in-game purchases to children**

Embedding advertising into computer games with links pointing to ancillary pay-services (in-app purchases) directed at children is unlawful. “Grab this opportunity and give your armour and weapons that certain something.” This solicitation to purchase, directed at children, advertised accessories on the website of a computer role-playing game. Clicking the link opened a new website where various accessories were offered for sale. The Federal Court of Justice prohibited this.

vzbv had complained that directly soliciting children to purchasing is unlawful according to the appendix to the Unfair Competition Act. It made no difference that the offer was opened via a link. Furthermore, vzbv argued that offering upgraded armament objects, which make the participation in the game more attractive, is targeted at taking advantage of children’s lack of experience in commercial transactions. It was possible to download the game itself free of charge, but extensions were only available when purchasing virtual objects. The decision of the Federal Court of Justice overturned the judgments of the courts of lower instance.

(BGH, judgment dated 19 September 2014 – I ZR 34/12)

2015**Details on foodstuffs must be transparent and comprehensible**

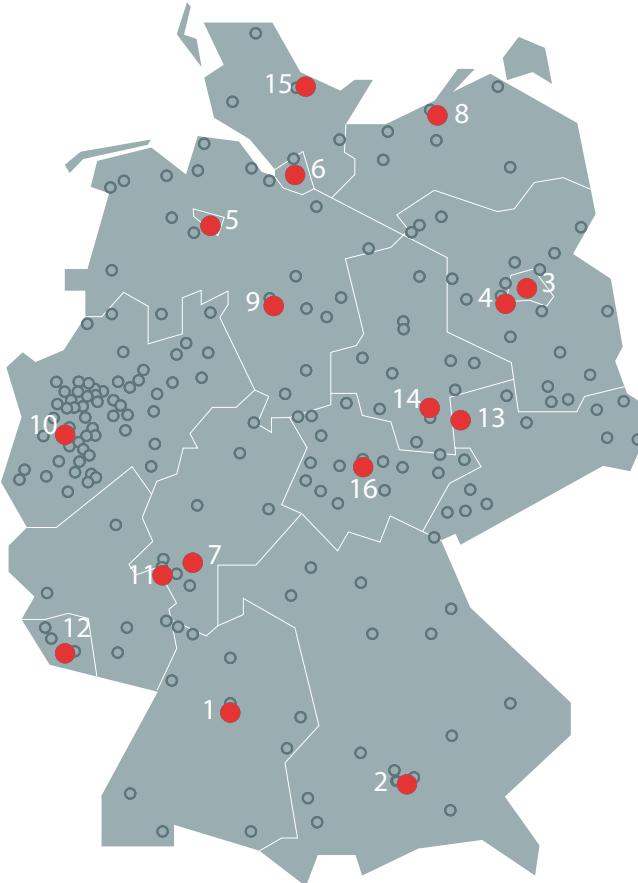
Food labels, design and advertising must not create the illusion that they contain a certain ingredient when the ingredient is not present and when that fact can only be found out by looking at the list of ingredients. A tea producer advertised a children’s fruit tea by placing raspberries and vanilla on the front of the packaging. Furthermore, the labels “fruit tea with natural aroma” and “only natural ingredients” were placed in a prominent position on the front of the package. However, the tea contained neither raspberry nor vanilla. In fact, the tea contained no natural parts or aromas of these plants. This was stated in the small print containing the list of ingredients on the rear of the package. The tea was composed mainly of hibiscus, apples, blackberry leaves, orange peel, rose hips and natural aroma with vanilla and raspberry flavour.

In vzbv’s opinion, the messages on the package gave consumers the impression that the tea contained natural ingredients of raspberries and vanilla.

After the Federal Court of Justice submitted the case to the Court of Justice of the European Union, the latter ruled that even a correct and complete list of ingredients cannot sufficiently rebalance an incorrect or misleading impression created by the rest of the packaging.

(CJEU, judgment dated 4 July 2015 – C-195/14)

22 | Important players



- regional consumer association
- consumer advice center

Consumer associations of the Federal Länder

- 1 Verbraucherzentrale Baden-Württemberg e.V.
- 2 Verbraucherzentrale Bayern e.V.
- 3 Verbraucherzentrale Berlin e.V.
- 4 Verbraucherzentrale Brandenburg e.V.
- 5 Verbraucherzentrale Bremen e.V.
- 6 Verbraucherzentrale Hamburg e.V.
- 7 Verbraucherzentrale Hessen e.V.
- 8 Verbraucherzentrale Mecklenburg-Vorpommern e.V.
- 9 Verbraucherzentrale Niedersachsen e.V.
- 10 Verbraucherzentrale Nordrhein-Westfalen e.V.
- 11 Verbraucherzentrale Rheinland-Pfalz e.V.
- 12 Verbraucherzentrale Saarland e.V.
- 13 Verbraucherzentrale Sachsen e.V.
- 14 Verbraucherzentrale Sachsen-Anhalt e.V.
- 15 Verbraucherzentrale Schleswig-Holstein e.V.
- 16 Verbraucherzentrale Thüringen e.V.

www.verbraucherzentrale.de

Stiftung Warentest

www.test.de

Bundesamt für Justiz (Federal Office of Justice)

www.bundesjustizamt.de

Bundesministerium der Justiz und für Verbraucherschutz

(Federal Ministry of Justice and Consumer Protection)

www.bmjjv.de

Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railways)

www.bundesnetzagentur.de

Luftfahrt-Bundesamt (Federal Aviation Office)

www.lba.de

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www.wettbewerbszentrale.de

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