Wettbewerbszentrale

Annual Report 2013

Developments in Competition Law

Framework conditions of Competition Law - in Europe

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During the year covered by the Report the European Commission continued its efforts to strengthen the internal market and economic consumer protection. Publication of the Consumer Agenda in 2012 ("A European Consumer Agenda - Boosting confidence and growth", COM (2012) 225 final) (see the Annual Report of the Centre for Protection against Unfair Competition 2012, p. 12) was followed on 31 January 2013 by the document "Setting up a European Retail Action Plan", (COM (2013) 36 final, available for download at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52013DC0036:DE:NOT*). The Commission states in the Communication that both wholesalers and retailers are among the most important sectors of the economy in the European Union and expects that they will provide a decisive contribution to boosting growth and employment as part of the Europe 2020 Strategy. However, as in the past there are considered to be obstacles, which hamper the smooth operation of cross-border purchasing, consumer access to cross-border services and retail services as well as market entry for retailers. The goal of the action plan is to minimise these barriers and to foster the attainment of a competitive Single Market. In the action plan the Commission envisages specific measures in the following five key areas:

- empowering consumers through improved information;
- improving access to retail services by promoting enhanced exchanges between the Member States concerning inter alia trade practices;
- fairer and more sustainable trade relations within the supply chain for food and non-food products;
- ensuring a better link between retail and innovation;
- creating a better working environment.

In order to monitor progress and to make concrete recommendations if required, the Commission wishes to establish a permanent Group on Retail Competitiveness. The European Parliament approved the Action Plan in December 2013.

The Europe 2020 Strategy also includes the Digital Agenda for Europe. Building on the Digital Agenda for Europe from 2010, new digital priorities were approved in December 2012 for 2013-2014. The goal is to increase investment in information and communications technologies and to achieve gross domestic product (GDP) growth.

Current trends

As in the past, the focus of the European Union is on whether and how the Member States implement the directives approved in the area of economic consumer protection. Guaranteeing efficient legal enforcement plays a particularly important role. Accordingly, the annual Consumer Summit held in March 2013 focused on this issue and discussed amongst other things questions concerning the misleading of consumers in connection

with guarantee statements, questions concerning product safety and cooperation between national enforcement authorities. For the Commission, it continues to be of crucial importance to ensure that the harmonisation of laws sought is not hampered by differing national interpretations. Accordingly, the Commission in part adopted guidelines as interpretative aids for the Member States. In relation to the Directive on Consumer Rights (Consumer Rights Directive/CRD), which has to be transposed by the Member States by June 2014, the Commission (Directorate-General for Justice) organised a workshop in Brussels in December 2013 in order to discuss the contents of such guidance with the Member States. In addition to the competent German federal authorities, this workshop was also attended on behalf of Germany by the Centre for Protection against Unfair Competition [Wettbewerbszentrale] and one further German trade association. Publication of the guidance on the Consumer Rights Directive is expected in spring or summer 2014. Moreover, it is important to point out the increasing tendency for the European Union to assess the effect of directives that have been enacted and to conduct consultation procedures in the Member States.

Ongoing legislative processes and discussion papers

Report on the application of the Unfair Commercial Practices Directive

On 14 March 2013, the Commission published its First Report on the Application of Directive 2005/29/EC (Unfair Commercial Practices Directive/UCP-D) (COM (2013) 139 final, *http://ec.europa.eu/justice/consumer-marketing/files/ucpd_report_de.pdf*). Questionnaires were sent to the Member States in 2011, which were also answered by the Wettbewerbszentrale. The Commission reports that the aspect of complete harmonisation has proved to be the largest problem in relation to the implementation of the Directive. It stated that many Member States had been required to review and amend their legislation comprehensively, as it had become clear that individual national rules were not compatible with those contained in the UCP-D. In the report the Commission specifically refers to the guidelines on the interpretation of the UCP-D. Whilst these are not legally binding, they are nonetheless frequently invoked in proceedings before the ECJ, such as e.g. in Advocate General opinions. The report provides an overview in this regard of the preliminary reference proceedings decided on by the ECJ along with those still pending that have examined the compatibility of national provisions with the Directive. The report also refers to the Commission's online database on legal matters, which now includes some 330 articles concerning legal issues, 400 individual decisions and 25 other documents such as studies and guidelines (see *https://webgate.ec.europa.eu/ucp/public/index.cfm?event=public.home.show*). Furthermore, the possible expansion of the scope of the Directive to B2C transactions is also mentioned. The Commission wishes to consider legal questions relating to sales promotion in greater depth, and announced that new legislative measures will be examined if necessary. In addition, the report deals with questions relating to the misleading of consumers, invitations to purchase, aggressive commercial practices, the so-called "blacklist" (Annex I to the UCP-D), environmental claims, customer reviews and price comparison websites, financial services and immovable property. It is concluded that the UCP-D has contributed to enhancing consumer protection in the Member States and that the "blacklist" has provided enforcement authorities with an effective tool for combating established unfair commercial practices. Even though, in conclusion, the Commission sees no need to amend the Directive at present, the Commission supports improved enforcement.

In a communication annexed to the Report to the European Parliament on the application of the Unfair Commercial Practices Directive of 14 March 2013 (COM (2013) 138 final, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0138:FIN:DE:PDF*), the Commission proposes specific measures to achieve the improved application and enforcement of existing rules. The following proposals are submitted:

- further development of the guidelines;
- updating of the UCP-D database;

- enhancing enforcement and administrative cooperation between the Member States (e.g. holding of thematic workshops for national enforcers, promotion of further sweeps, exchange of best practice in the Member States);
- monitoring market developments and raising awareness.

The following key sectors are the subject of particular scrutiny: travel and transport, digital and online markets, environmental claims, financial services and immovable property.

The European Parliament has also been involved in the assessment of the UCP-D. Accordingly, on 24 September 2013, taking account of the Commission documents referred to above, the responsible Committee on the Internal Market and Consumer Protection of the European Parliament published the draft of a report on the application of the Unfair Commercial Practices Directive (2013/2116(INI), available for download at *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-519.576+01+DOC+PDF+V0//DE&language=DE*). The Committee stresses the efficacy of the UCP-D and the enhancement of consumer confidence achieved within the internal market. At the same time, the Committee expressed its regret that misleading commercial practices in the B2B sector continued, in particular in the form of so-called misleading directory company. Therefore, the draft report recommends that further commercial practices be listed with a view to potential blacklisting. It is also suggested that a proposal be submitted on the introduction of collective forms of redress (group actions) in the area of consumer protection. In addition, the Committee recommends that the UCP-D database be gradually made available in more languages and that cooperation in the area of consumer protection be stepped up. Numerous amendments were proposed to the draft report, which were published by the responsible Committee on the Internal Market and Consumer Protection on 23 October 2013. The legal committee also submitted proposed amendments. The proposed amendments still have to be debated and approved before the final report can be submitted to the Parliament for approval.

Protection of enterprises against misleading and fraudulent marketing practices

Following a consultation exercise carried out in the Member States, the Commission concluded that enterprises should be provided with more enhanced protection against fraud such as so-called misleading directory company schemes. In November 2012 a Communication was released proposing specific protective measures (see Annual Report 2012, p. 13). Subsequently, questionnaires were sent to the Member States in January 2013 in order to identify the main problem areas and the extent of unprofessional conduct in the B2B sector. The Wettbewerbszentrale participated not only in this consultation, but also took part in a workshop held in Brussels in March 2013 and joined a further experts' discussion in Berlin. On 8 May 2013, the Committee on the Internal Market and Consumer Protection of the European Parliament published a draft report on protecting businesses against misleading marketing practices (2013/0000(INI), available for download at *http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/pr/935/935428/935428de.pdf*). The Committee welcomes the Commission Communication, although at the same time stresses that additional efforts are necessary, in particular in relation to enforcement. The European Parliament Committee proposes specific preventive measures such as the improved exchange of information between the Member States with the involvement of business associations, in relation to which databases should facilitate a smooth exchange of information. The Committee calls on Europol to take on a more active role and proposes closer cooperation between national enforcement authorities and banks, telecommunication companies, postal services and collection agencies in order to prevent rogue companies from operating. In relation to improved enforcement, it is proposed that guidelines be developed for the Member States. It is also recommended that the scope of the UCP-D including Annex I (the "blacklist") be expanded to B2B contracts. In addition, group actions by business associations from individual countries should be considered in order to ensure adequate compensation for the enterprises affected. The final report of the

European Parliament was published on 30 September 2013 (A7-0311/2013, available for download at *http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0311&language=DE*). In the report, the Commission is expressly called upon to establish a network for cooperation between national enforcement authorities in order to improve the enforcement of the Directive concerning misleading and comparative advertising in cross-border cases. The previous Position Paper of the legal committee of 19 September 2013 was taken into account in the report. It is expected that the Commission will submit a concrete proposal in 2014 on a possible review of the Directive concerning misleading and comparative advertising.

Green Paper on Unfair Trading Practices in the B2B Food and Non-Food Supply Chain in Europe

On 31 January 2013, the EU Commission published the Green Paper on Unfair Trading Practices in the B2B Food and Non-Food Supply Chain in Europe. It is one of the measures referred to in the "Retail Action Plan" (see p. 7). As is already suggested by the name, the Green Paper covers conduct within the vertical supply chain of enterprises. Through various studies, the Commission had concluded that unfair commercial practices occur within the supply chain, the cause of which lies in the considerable negotiating power of certain participant enterprises. The Commission clarified that an imbalance in negotiating strength can exist on both the supplier and the customer side. The Green Paper specifies seven types of commercial practices, which had emerged from the studies, specifically ambiguous contract terms, the lack of written contracts, retroactive contract changes, unfair transfer of commercial risk to the contracting partner, unfair use of information, unfair termination of a contractual relationship and territorial supply constraints. It envisages regulatory approaches in the area of antitrust law, fair trading law, and contract law including the law on general terms and conditions of business. Individual measures taken into consideration by the Commission are already established in German law. The Member States were able to state their positions on the Green Paper by 30 April 2013 as part of a consultation exercise. Further developments are still pending.

Collective Redress

The issue of collective redress was also relevant for politics and the economy in 2013. After many years of discussion, the Commission published a new package of measures on collective redress and damages claims in competition law on 11 June 2013. Compared to previous statements of its position, which still gave precedence to harmonised binding regulations, the concept now proposed does not involve binding and harmonised measures. The core of the package comprises a Commission Communication, in which the Member States are encouraged to facilitate collective redress for claims seeking injunctions and compensation for damage ("Towards a European Horizontal Framework for Collective Redress", COM (2013) 401, *http://ec.europa.eu/justice/civil/files/com_2013_401_de.pdf*). This is intended in particular as the bundling together and enforcement of individual claims by organisations or authorities. For reasons of procedural economy, a variety of similar legal claims should thus be enforced in one single action. Collective redress is conceivable not only for competition and consumer protection law, but also for financial services, environmental protection and data protection. In order to reduce the risk of abusive litigation, individual components are specified which should be taken into account when initiating such an action for redress. Reference is made inter alia to the guarantee of the opt-in principle and the principle that the unsuccessful party should bear the costs of the proceedings. The Member States should implement the measures proposed by the Commission within two years. The Commission announced that, after four years of publication of the recommendation, it will examine, on the basis of the practical experience gained from the recommendation, whether further legislative measures should be proposed in order to consolidate and enhance the horizontal approach chosen.

The packet of measures also contains a proposed Directive on damages claims under antitrust law ("Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for

damages under national law for infringements of the competition law provisions of the Member States and of the European Union", 2013/0185 (COD), available for download at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:DE:PDF*).

Proposal for a Regulation on a Common European Sale Law

In 2011 the Commission published a concrete proposal for a Regulation on a Common European Sales Law (COM/2011/635 final). The goal of the common European sales law is not to replace existing national legislation, but rather to enable parties involved in cross-border transactions to choose it voluntarily as an optional sales law. Alongside existing national sales laws, it should thus provide a further optional European sales law in order to facilitate the conclusion of cross-border contracts of sale and to increase the number of cross-border contracts concluded. The proposal has to date been the object of heated debate. On 20 February 2013, the responsible rapporteurs presented their draft report to the Legal Committee of the European Parliament and recommended that the scope be limited to distance selling contracts. However, they argued that it should be possible to choose the optional Common European Sales Law (CESL) not only in the B2C domain but also B2B, which is in part viewed with scepticism by the German economy. The draft report proposes significant changes in the area of warranty rights. On 17 September 2013, the Legal Committee of the European Parliament then approved its own report in order to enable the CESL to be chosen on a voluntary basis for distance selling contracts. The Internal Market Committee had previously rejected the Commission proposal on 9 July 2013. It is now necessary to wait and see which position the Council of the European Union and the European Parliament will adopt in relation to the proposal. In December, the German Bundestag raised a subsidiarity claim on the recommendation of its legal committee.

EU-Directive on alternative dispute resolution for consumer disputes

Directive 2013/11 on alternative dispute resolution for consumer disputes and Regulation (EU) no. 524/2013 on online dispute resolution entered into force on 8 July 2013. The European Parliament had previously approved the corresponding Commission proposals on 12 March 2013. The above mentioned framework directive lays down uniform rules and quality requirements for the out-of-court resolution of national and cross-border disputes. Consumers are to be provided with an EU-wide network of "ADR entities" with the goal of achieving the out-of-court settlement of disputes resulting from sales contracts or service contracts. A European online dispute resolution platform (ODR) is to be established for online disputes. The Member States must transpose the provisions of the Directive into national law before July 2015. The ODR platform is expected to be activated by the Commission at the end of 2015. Further information is available for download at *http://www.portal21.de/PORTAL21/Navigation/Service/meldungen,did=830326.html.*

Other measures and publications

Consultation on the review of consumer cooperation

In the area of cross-border consumer protection, the Regulation on Consumer Protection Cooperation (Regulation (EC) 2006/2004) was issued in October 2004. This accordingly acted as the foundation stone for the current cross-border network of authorities operating in the area of economic consumer protection. Five years after its entry into force, it is now necessary to examine whether the Regulation has achieved its target of improved enforcement of consumer protection rights in the event of cross-border breaches or whether such enforcement rather needs to be improved, or if necessary enhanced. A consultation process was launched within the Member States, which means that the Member States have the opportunity to answer the questionnaire

published by the Commission before 31 January 2014. An evaluation was first of all carried out in 2012, in which the Wettbewerbszentrale participated. Once the consultation has been completed, the Commission will inform the European Parliament and the Council of possible procedural steps.

Consumer Scoreboard

Since 2010, the European Union has been regularly publishing the "Consumer Scoreboard" - a paper which brings together data and facts relating to consumer satisfaction, including the number of complaints, pricing and consumer protection in general throughout all Member States. In this report, the intention of the Commission is to review whether the Single Market functions properly from a consumer protection perspective. After completion of the data collection process relating to the 2013 Consumer Scoreboard, the Commission has concluded that consumer rights are protected very differently in the individual Member States. Only 35% of EU citizens are confident about ordering an item from another Member State. It was also regarded as problematic that many citizens did not know how to react if they were sent unsolicited goods. The full text of the Consumer Scoreboard published on 23 July 2013 is available for download at *http://ec.europa.eu/consumers/consumer_research/editions/cms9_en.htm.*

EU Justice Scoreboard

On 27 March 2013, the Commission presented the first "EU Justice Scoreboard". This newly introduced paper is intended to contribute to the creation of effective systems of justice in the European Union and thus to strengthening economic growth. Further information concerning the Justice Scoreboard is available for consultation at *http://ec.europa.eu/commission_2010-2014/reding/multimedia/news/2013/03/20130327_de.htm.* The Report aims to provide objective, reliable and comparable figures on the functioning of the justice system in all Member States. The following results are presented in the first Justice Scoreboard:

- a great variation exists between EU countries in their length of judicial proceedings;
- monitoring and assessment of procedural activities helps shorten the duration of proceedings and improve quality of justice;
- alternative dispute resolution procedures such as mediation and conciliation relieve the burden on the courts and should be used more widely;
- the perceived independence of the judiciary in the different Member States varies significantly.

The Commission plans to analyse the issues with specific reference to each country, and to discuss them subsequently with the Member States.

Framework conditions of Competition Law - in Germany

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The Act transposing the Consumer Rights Directive

The Wettbewerbszentrale stated in its last annual report (page 16) that the European Directive on Consumer Rights 2011/83/EU (CRD) must be transposed into national law before 31 December 2013. In the meantime, the Act transposing the Consumer Rights Directive has been approved by the Bundesrat and will enter into force on 13 June 2014.

The most important changes include:

- The expansion of the concept of the consumer (see the § 13 of the German Civil Code [BGB], new version). In future, a person will be deemed to be a consumer under a mixed contract if the commercial purpose is not predominant.
- § 312a BGB, new version, sets out the general duties and principles applicable to consumer contracts (irrespective of the form of distribution). According to this provision, the identity of the business calling and the commercial purpose of the call must be stated in any telephone call (paragraph 1). Pursuant to paragraph 3, if ancillary services are automatically included in the order process these will not form part of the contract. Paragraph 4 provides that a surcharge for a particular form of payment is only possible in limited circumstances, and that the consumer must be offered at least one reasonable form of payment that is free of charge. Premium-rate numbers are not permitted under paragraph 5 if the consumer simply wishes to ask questions relating to a contract concluded.
- § 312b-h BGB, new version, set out regulations on off-premises or distance contracts. § 312d BGB, new version, in conjunction with Article 246a § 1 of the German Introductory Act to the Civil Code [EGBGB], new version, lists the pre-contractual duties to provide information.
- In future, in addition to the previously applicable duties to provide information, the trader must state the delivery deadline (no. 7) and refer to the availability of a statutory warranty right (no. 8). Moreover, the consumer must be informed of the existence and terms applicable to customer service, after-sales services and guarantees (no. 9) and of the term of the contract or the conditions governing the cancellation of contracts without a fixed term or contracts that renew automatically (no. 11). For distance contracts, the trader is obliged pursuant to § 312f(2) BGB, new version, to provide the consumer with confirmation of the contract and a copy of the contract on a durable data carrier at the latest upon delivery of the goods or before the provision of services commences.
- General duties governing electronic business transactions are regulated in the § 312i-j BGB, new version. The trader must also state clearly and distinctly on consumer websites at the latest at the start of the order process whether there are any delivery restrictions and which means of payment are accepted.
- The regulations on the right to withdraw from

consumer contracts have been redrafted (§ 355 et seq BGB, new version). In future, the withdrawal period will extend to a standard 14 days, whilst the previous right of return (§ 356 BGB) will no longer apply. Withdrawal requires an express declaration, and the return of the goods without comment will no longer be sufficient. There is a standard Europe-wide form for providing information concerning the right of withdrawal (Annex 1 to Article 246a, § 1(2), sentence 2 EGBGB, new version), which traders may use. The trader is obliged to provide the consumer with the standard withdrawal form (Annex 2 to Article 246a § 1(1), sentence 1, no. 1 EGBGB, new version).

- In future, the right of withdrawal will expire no later than 12 months and 14 days after the prerequisites are first met and the withdrawal period commences (§ 356(3) BGB, new version). This means that the "endless right of withdrawal" has been abolished.
- Pursuant to § 357(6) BGB, new version, consumers will be required to bear the costs of returning the goods, provided that the trader has previously informed them in the ordinary manner that he will be required to bear the costs. However, the trader is at liberty to cover these costs on a voluntary basis.
- The costs of return shipments will also be borne by the trader if consumers exercises their right of withdrawal (§ 357(2) BGB, new version). These exclude additional delivery costs, such as e.g. express surcharges.
- The trader may refuse to pay a refund until it has received the goods back from the consumer or the consumer has furnished proof of dispatch of the goods (§ 357(4) BGB, new version).
- The trader's claim to compensation for lost value is subject to new rules. Pursuant to § 357(7) BGB, new version, the consumer is only obliged to pay compensation for loss in value of the goods if the lost value is attributable to handling of the goods other than that necessary in order to examine the quality, characteristics and functioning of the goods. A distinction is no longer drawn between compensation for lost value through usage and compensation for lost value through wear and tear.
- The exceptions to the right of withdrawal have been broadened (§ 312g(2) BGB, new version). Thus in future there will no longer be any right of withdrawal for e.g. sealed goods that are unsuitable for return on the grounds of health protection or hygiene, if the seal has been broken after delivery.

Act against Improper Business Practises

The Act against Improper Business Practices entered into force on 9 October 2013. This Act is intended to enhance the rights of consumers. The most important provisions are the following:

In the area of copyright law (German Copyright Act - UrhG), consumers will be protected against exaggerated warning fees. If the warning is justified, the costs of the first warning by a lawyer are limited to EUR 155.30 (including VAT). In addition, the "itinerant jurisdiction" for claims against consumers has been abolished. As a result, claimants are no longer able to seek out the court with the most favourable case law, even in the event of copyright breaches over the internet.

There have even been several changes to the German Civil Code [BGB] and the Act against Unfair Competition [UWG]. Due to the requirement of written form for competitions, consumers are to be protected against the conclusion of long-term contracts over the telephone without their knowledge. In addition, the maximum fine for prohibited promotional calls has been raised to EUR 300,000. There is also a new obligation on those who issue warnings in a manner that constitutes the abuse of a right to compensate the costs necessary for the recipient to present a legal defence.

German Federal Lawyers‘ Act

The most important change to the German Federal Lawyers’ Act [BRAO] will be the requirement for enhanced duties to provide explanations and information to consumers, which collection agencies will be required to comply with from 1 November 2014. Specifically, demand letters will have to state clearly for whom the collection agency is working, why an amount is being demanded and how the collection costs are calculated.

The case law of the highest courts

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The case law of the European Court of Justice

"Must public law bodies be regarded as 'traders' within the meaning of the Directive concerning unfair commercial practices? Can compliance with the requirements of professional diligence preclude an allegation of an unfair commercial practice?" During the reporting year, the ECJ was called upon to address these questions, along with others relating to the interpretation of the Unfair Commercial Practices Directive (2005/29/EC) and the system created by it. The clarifications provided by the ECJ not only offer a better understanding of the Directive, but rather also have consequences for national trade practice laws, due to the harmonisation in that area sought by the Directive. The following paragraphs will present several proceedings in which the Wettbewerbszentrale was also in part involved, or is still involved.

During the year covered by the report the ECJ held for the first time that not only private enterprises but also public law bodies, such as a statutory health insurance fund, are to be regarded as traders within the meaning of Directive 2005/29/EC. It thus upheld the view of the Wettbewerbszentrale in BKK Mobil Oil v. Wettbewerbszentrale. According to the ECJ, only a broad interpretation of the concept of "trader" is capable of guaranteeing the high level of consumer protection sought by the Directive (ECJ, judgment of 3 October 2013, C -59/12; F 4 1059/08, see p. 47 for details).

In the "*Good News*" case the ECJ considered the concept of "commercial practice". A German publisher published two externally financed articles in its free advertising newspaper without designating them with the word "*Advert*", in breach of the national provision contained in § 10 of the Baden-Württemberg State Press Act. The ECJ held that the publications did not amount to commercial practices within the meaning of Directive 2005/29/EC. The concept of "commercial practice", which is broadly defined in the Directive and must in principle be construed broadly, was subject to a restriction in this judgment in that a commercial practice will only be deemed to exist if it is incorporated into the business strategy of an economic operator and is directly related to the promotion of its own goods/services. By contrast, the promotion of third party sales will only amount to a commercial practice if the agent is acting on behalf of or in the name of the company promoted. Starting from this interpretation, the ECJ held that there had been no commercial practice, since the publisher had not promoted sales of its own advertising newspaper - which was in any case free - with the sponsored articles, but rather those of the undertaking that placed the advertising. However, it also assumed that the publisher had not acted on behalf of or in the name of the undertaking. Pure editorial practice that is not also intended to promote sales of the newspaper, e.g. by offering competitions, puzzles or competitions, does not fall within the scope of the Directive. The ECJ also pointed out that the prohibition laid down in Directive 2005/29/EC on the provision of advertising masked as information (Annex I no. 11) is directed at the underta-

king placing the advertising and not in principle at the media provider, the duties of which are regulated in other directives. However, since there is no EU law applicable to the printed media, § 10 of the State Press Act cannot be measured against Union law. It is thus established that the duty of identification continues to apply (ECJ, judgment of 17 October 2013, C-391/12).

In a reference for a preliminary ruling relating to the structure of Directive 2005/29/EC submitted by the Austrian Supreme Court, the ECJ clarified that classification as a misleading commercial practice depends exclusively upon whether the criteria for misleading actions (Articles 6 to 9 of the Directive) have been fulfilled. If this is the case, it is not necessary to examine whether the commercial practice runs contrary to the requirements of professional diligence. Compliance with the requirements of professional diligence cannot therefore excuse misleading actions (ECJ, judgment of 19 September 2103, C-435/11).

A reference for a preliminary ruling still pending before the ECJ (Case C-609/12) from the German Federal Supreme Court concerns the advertising text objected to by the Wettbewerbszentrale "As important as a daily glass of milk" (German Federal Supreme Court, judgment of 5 December 2012, ref. I ZR 36/11; F 4 0806/09, see p. 56 for details).

The case law of the German Federal Supreme Court [BGH]

The case law of the BGH has registered movement in various directions. It has thus expanded for example the principles developed in its case law relating to sales promotional measures to further scenarios, whilst it has expressly departed from its previous case law in relation to individual advertising claims. However, in relation to cases involving nuisance advertising, the BGH has not only confirmed its previous strict line, but rather also expanded it to "*tell-a-friend advertising*". A somewhat strict tendency is also apparent in relation to compliance with the duties of information specified in § 5a(2) and (3) German Act against Unfair Competition [UWG]. The following paragraphs will consider several decisions.

As in previous years, the BGH was required to consider the lawfulness of a link between purchases and competitions in the year covered by the report. In a television advert by HARIBO it was stated under the slogan "GLÜCKS-WOCHEN" [i.e. lucky week] that anyone who purchased five packages and sent in the till receipts would have the chance to win 100 "gold-bear bars" in a prize draw. In the advert Thomas Gottschalk met a family with children. The BGH held that there had been no breach of § 4 no. 6 UWG. Contrary to the court of appeal, it held that it did not depend upon the perspective of the children and young persons, but rather the understanding of an average consumer, because the products are popular both with children and adults. Since the costs of participation in the competition were clear, no inaccurate chances of winning were suggested and no direct invitation to buy was made to children, the advert was found to be lawful (BGH, judgment of 12 December 2013, ref. I ZR 192/12).

The BGH held in 2011 in relation to temporary discount campaigns that a trader must in principle adhere to the period of time specified in their advert for a discount campaign and that a campaign may only be extended in the event that unforeseeable circumstances arise. It decided during the year covered by the report that this principle also applies in the "*opposite"* case: the defendant supermarket chain REWE had launched a temporary loyalty points campaign. Customers obtained one "loyalty point" for every EUR 5 spent. Any person who collected enough points could purchase certain knives at a discounted price. Since the demand for the knives promised could no longer be satisfied, the campaign was ended early. The BGH classified this early termination as misleading in two senses: first, due to its earlier actions, the defendant should have considered that their stock of goods might not be sufficient. Accordingly, they should have informed consumers, who had effectively rendered advance performance by acquiring loyalty points, of the

possibility of early termination in the announcement. Secondly, customers should have been offered an alternative, such as the purchase of other goods or a shopping voucher so that the points collected until that time did not simply expire (BGH, judgment of 16 May 2013, ref. I ZR 175/12).

In a further case the BGH held that consumers will understand the terms "*Factory Outlet*" and "*Outlet*" as a factory sale, in particular if references to a factory sale are made through additional phrases such as "direct sale from the factory" or "from own production". The BGH now considers that advertising of unbranded goods under "brand quality" is permitted. In contrast with the assertion "branded goods", this assertion only states that the goods advertised are of similar quality to the goods of competitor branded producers. The BGH accordingly set aside its previous strict interpretation of this question and relaxed the requirements for advertising with "brand quality" (BGH, judgment of 24 September 2013, ref. I ZR 89/12).

In the "*brand new from the IFA*" case, the BGH considered multiple advertising by a sole proprietor who advertised goods extensively without providing the requisite details concerning legal status "e.K." pursuant to § 5a(3), no. 2 UWG. The BGH considered this to be misleading by omission and based its reasons inter alia on the wording of Article 7(4b) of Directive 2005/29/EC, which refers to the "trade name" in relation to the details concerning the identity of an enterprise. In addition, the identity of the contractual partner is an essential part of the consumer's commercial decision, because he or she is thereby enabled to assess the reputation of the undertaking with regard to quality and reliability, but also its economic power, creditworthiness and liability. Such circumstances may also be dependent upon the legal status of an undertaking (BGH, judgment of 18 April 2013, ref. I ZR 180/12).

The judgment of the BGH on the legality of the "*tell-a-friend advertising*" is of considerable practical importance. The defendant had set up a recommendation function on its website, which a third party used in order to send recommendation emails to the claimant. The claimant thereafter received various automatically generated emails which did not contain any further advertising content, but continued to refer to the web presence of the defendant. The BGH first clarified that even a recommendation email can constitute unlawful email advertising pursuant to § 7(2) no. 3 UWG. Secondly, the BGH regarded the defendant as *the responsible party*. It based its view on the fact that the dispatch of the email was attributable to the recommendation function set up by the defendant, the purpose of which was to make other people aware of its services, and that it appeared in the recommendation emails as the sender. It was immaterial that the email had been sent with the involvement of (unknown) third parties. In this judgment the BGH confirmed its strict line on unlawful email advertising (BGH, judgment of 12 September 2013, ref. I ZR 208/12).

A variety of decisions were adopted in the health sector relating to the breach of "market conduct rules", such as e.g. the "*prescription bonus*" and the "*prescription prize*" decisions, in which the Wettbewerbszentrale participated. See p. 46 for details.

General Terms and Conditions of Business

Elvira Schad, Lawyer, Dortmund Office

Efforts at reform

The 2012 Annual Report contained extensive information (page 31) relating to the controversial debate within the economy on a reform to the legal bases for general terms and conditions in contracts between traders. The supporters of reform are calling for greater scope for individual agreements on the limitation of liability in commercial transactions by relaxing the substantive controls on general terms and conditions of business. They consider that the freedom of action of businesses has been limited by the law on general terms and conditions of business in the German Civil Code as well as by the current case law of the Federal Court of Justice on the distinction between individually negotiated contracts and general terms and conditions of business. Opponents of these reform efforts consider the current law to be well balanced. It is argued that it protects small and medium-sized enterprises against unreasonable clauses and liability in contracts with economically stronger contractual parties. Following a consultation of associations by the Federal Ministry of Justice in 2012, in 2013 the Ministry commissioned a scientific study charged with establishing whether there was a need for reform (*http://www.uos.de/presse_oeffentlichkeit/presseportal/pressemeldung/artikel/in-der-kritik-agb-recht-fuer-vertraege-zwischen-unternehmen.html*).

Individual Cases

Complaints during the year covered by the report 2013 related to various sectors and clauses with differing substantive content. The following paragraphs will present, amongst others, a decision by the Thuringian Court of Appeal in Jena. In this case, the Wettbewerbszentrale was able to clarify two important issues for the economy: first, whether a business can specify in a clause that the customer must always accept two attempts at supplementary performance before he or she may withdraw from a contract or reduce the purchase price, and secondly the extent to which the five-year limitation period may be reduced by general terms and conditions of business.

Warranty - supplementary performance

The Thuringian Court of Appeal held in relation to a claim by the Wettbewerbszentrale by judgment of 19 September 2013, ref. 1 U 194/13, that a warranty clause will be invalid if a business reserves the absolute right to make two attempts at supplementary performance before the customer is able to reduce the purchase price due to defective performance or to withdraw from the contract. Such a clause was used by a dealer when concluding contracts with businesses and consumers on the sale and assembly of shop fittings, kitchen furnishings, stairs, railings and other equipment.

As a matter of principle, the law of sale establishes the fiction in § 440, sentence 2 BGB that any rectification of a deficiency will be deemed to have failed after the second attempt at rectification. Nevertheless, a different rule may result from the nature of the product or the deficiency. In cases involving a serious deficiency that may result in substantial economic harm to the buyer, further attempts at rectification may already become unreasonable after a first attempt to rectify a deficiency. This possibility is excluded by the clause, which is hence invalid in contracts of sale concluded during the course of business with a consumer or a business (§ 309 no. 8 a) BGB).

The buyer is also entitled to reduce the purchase price or to withdraw from the contract in the event of an unwarranted refusal by the business to effect supplementary performance or if it takes an unreasonably long amount of time to carry out the repair (§ 440, sentence 1 BGB). This right to is not affected by the clause. The Court of Appeal regarded this as a further reason for the invalidity of the clause (§ 309 no. 8 a) BGB). In these conceivable cases, customers were unable to invoke a right to reduce to price or withdraw from the contract (DO 1 0534/11; current on 19 November 2013).

Warranty exlusions

A complete exclusion of the warranty for deficient consumable parts in general terms and conditions applicable to businesses and consumers will not be valid. The seller must also provide a warranty for defective consumable parts. The Wettbewerbszentrale objected that a clause to that effect of an online dealer was invalid (§ 307 BGB). After a warning had been ignored, an action was brought before the Stendal Regional Court. The trader acknowledged the claim of forbearance after the action had been brought (D 1 0025/13).

Limitation period

Deficiencies in construction and materials for objects that are firmly anchored to a building often only become apparent after several years. § 634a(1), no. 2 BGB stipulates a limitation period of five years for such claims.

The Thuringian Court of Appeal ruled in the aforementioned case (judgment of 19 September 2013, ref. 1 U 194/13; DO 1 0534/11; current on 19 November 2013) that a clause reducing a five-year limitation period to twelve months was invalid. The trader stipulated a limitation period for claims for defects of twelve months in its contracts. The clause did not contain any exception in the event that the shop fittings delivered were firmly anchored to a building. If the shop fittings or stairs delivered are firmly anchored to a building, claims for defects under § 634a(1) no. 2 BGB are subject to a limitation period of five years. In the opinion of the court, a general reduction in the general terms and conditions of business of the limitation period for liability for defects from five years to twelve months in business transactions with consumers and with traders breaches the essential fundamental notion underlying § 634a(1) no. 2 BGB and such clauses will be invalid pursuant to § 307(2) no. 1 BGB.

The grant of this five-year limitation period is moreover not a discretionary matter for the seller. A supplier of flooring stipulated a limitation period of two years in its general terms and conditions of business for any claims for defects, unless the parties expressly agreed in writing that the materials would be used in construction work. The Wettbewerbszentrale challenged the clause as invalid. It was claimed to have limited the statutory limitation period in an inadmissible (§ 634a(1) no. 2 BGB) and surprising manner (§§ 305c, 307 BGB). Flooring is normally used in construction work or is related to construction work. Contracting partners should therefore not have to agree upon the standard manner of usage of a product in writing in order for the statutory limitation periods to have effect. Following a warning by the Wettbewerbszentrale, the trader amended its general terms and conditions and issued a cease and desist declaration (DO 1 0537/13).

Consumer contracts in online trading

There were no particular developments in online trading compared to the previous reporting year, 2012. 2013 saw in particular invalid clauses regulating the transfer of risk and the periods for reporting deficiencies in consumer contracts. In all cases in which

complaints were made, cease and desist declarations were signed and the clauses were amended (DO 1 0122/13, DO 1 0171/13, DO 1 0350/13, DO 1 0357/13, DO 1 0359/13, DO 1 0571/13).

Consumer contracts and online gambling

The Federal Office of Consumer Protection and Food Safety instructed the Wettbewerbszentrale pursuant to § 7(1) of the EC Consumer Protection Implementation Act to ensure the termination of an intra-Community breach (see also Chapter III. 2. b.). This mandate involved an examination of the general terms and conditions of business of a provider of online gaming services. Since the services offered were directed inter alia at Austrian consumers, the clause was also examined in accordance with Austrian law. The Wettbewerbszentrale objected to various clauses as invalid. One clause was invalid because it provided for a complete exclusion of liability on the part of the service provider in the event that the games were unavailable. Liability for wilful action and gross negligence cannot be excluded in general terms and conditions (§ 309 no. 7 b) BGB; § 6(1) no. 9 Austrian Consumer Protection Act [öKSchG] in conjunction with § 879 of the Austrian General Civil Code [ABGB]). In addition, agreement on exclusive jurisdiction in Germany for consumers who were ordinarily resident in another country was also disputed as invalid (§ 307 BGB; § 14(1), (3) öKSchG in conjunction with § 879 ABGB). Consumers were deprived of the statutory jurisdiction of their country of origin. Following a warning by the Wettbewerbszentrale, the trader issued a cease and desist declaration and amended the clauses (DO 1 0588/12).

Misleading practises

The Thuringian Court of Appeal also decided in the case cited above that it is misleading if a trader only uses general terms and conditions intended for contracts of sale when concluding contracts for work and service with consumers. These are different contractual types, to which different legal provisions apply. Such arrangements are liable to create misleading impressions for consumers as to their rights and the warranty rights (§ 5(1), sentence 2 no. 7 UWG).

Antitrust law

Dr. Wolfgang Nippe, Lawyer, Berlin Office

2013 was marked by legislative initiatives on national level. Agreement was reached before the end of the legislature in the Joint Committee of the Bundestag and the Bundesrat regarding amendments to the German Act against Restraints of Competition [GWB]. Thus, the 8th amendment to the GWB came into force before the Bundestag elections in the middle of the year.

8. GWB amendment

Parliament redrafted the rules on the supervision of abuse, which it structured much more clearly. The definitions of market dominance have been brought together into a self-standing provision (§ 18 GWB). These are followed by provisions on prohibited abuse by undertakings in a dominant position (§ 19 GWB) and by undertakings with relative or dominant market power (§ 20 GWB). The substantive content of the provisions reflects the previous legal position. The prohibition on tapping into competitors is expressly regulated under statute (§ 19(2) no. 5 and § 20(2) GWB). The prohibition on the sale of food below cost price has been reintroduced as an undue impairment of small and medium-sized competitors by undertakings with superior market power. This rule had expired at the end of 2012 (2012 Annual Report, p. 85), and has now been reintroduced until the end of 2017. Further amendments relate to the control of mergers and the area of water management and press wholesale business. Consumer protection organisations have been empowered to pursue breaches of antitrust law in the civil courts.

Sales over internet plattforms

The permissibility of restrictive agreements is determined with reference to the question as to whether and to what extent manufacturers, including in particular manufacturers of branded goods, are able to limit or exclude the sale of goods over internet platforms in supply contracts with traders. In 2013, the Wettbewerbszentrale successfully conducted proceedings on this basis before the Kiel Regional Court. A manufacturer of camera products had imposed an unconditional prohibition in its supply contracts on sales over internet platforms such as eBay or Amazon Marketplace. The Wettbewerbszentrale regarded the exclusion of internet platforms as a sales channel as a hardcore restriction of competition, which cannot be exempted from the ban on restrictive practices. The Kiel Regional Court accepted this view. It considered that dealers had been prevented from reaching customers which, for reasons of convenience, bought products on the internet over platforms and market places (Kiel Regional Court, judgment of 8 November 2013, ref. 14 O 44/13.Kart; D 1 0057/12). The defendant undertaking filed an appeal against the decision to the Court of Appeal in Schleswig (ref. 16 U (Kart) 154/13).

In the area of selective sales systems, the Berlin Court of Appeal considers that the inclusion of a prohibition in supply contracts on the sale of goods over internet platforms is in principle permissible. A manufacturer of school bags and rucksacks had established a selective sales system in order to market its goods, and prohibited traders from offering the goods for sale on internet platforms. Since this was done in order to maintain the brand image, the court did not object in principle to the contractual provision concerned. In the specific case, it nonetheless allowed the action for an injunction brought by a trader. The manufacturer had also sold its goods through discount food retailers, and hence had not applied the selective contractual system in a non-discriminatory manner (Berlin Court of Appeal, judgment of 19 September 2013, ref. 2 U 8/09 Kart; an appeal is pending before the Federal Court of Justice as case KZR 79/13). Ultimately, the European Court of Justice (ECJ) will have the final say.

Market Sector reports

Retail

Gabriele Bernhardt, Lawyer, Stuttgart Office
Peter Breun-Goerke, Lawyer, Bad Homburg Office,
Dr. Wolfgang Nippe, Lawyer, Berlin Office

Selected retail segments

The electronics sector

The electronics sector was once again marked by intensive advertising in 2013, which resulted in the submission of numerous complaints to the Wettbewerbszentrale. The vast majority of breaches of competition law involved instances of misleading practices, including the breach of obligations to provide information. In addition, in various cases action was taken against breaches of sales bans.

An electronics retail chain offered the "Easter present" with a "3 for 2 – buy 2 get one free!" promotion. Customers were supposed to receive the cheapest article from the product groups CDs, DVDs, blu-rays, PC/console games and software free of charge. However, a consumer who selected two CDs and one PC game was not allowed to receive the cheapest item free of charge. It was stated at the checkout that the offer only applied in the event that the three items belonged to the same class of goods, e.g. 3 CDs or 3 DVDs. The undertaking had however not referred to that fact in advertising. The Wettbewerbszentrale sought an injunction, with the aim of requiring that such restrictions on the offer be stated in the advert. The electronics retail chain accepted the claim brought by the Wettbewerbszentrale and an injunction was accordingly issued against it (Stuttgart Regional Court, recognition judgment of 29 July 2013, ref. 37 O 29/13 KfH; F 5 0204/13).

Numerous cases also concerned insufficiently clear references in advertising in which, contrary to assertions in the advertising, the sale of the products offered was limited in quantity. An electronics retailer advertised the sale of cut-price iTunes cards worth EUR 15 at a price of EUR 10 and cards worth EUR 25 at a price of EUR 15. A customer was not allowed to acquire three cards under the offer advertised on the grounds that the offer was limited to one card per customer. Since this was not stated in the advert, the Wettbewerbszentrale objected to this advert. After a warning had been ignored, the Stuttgart District Court allowed the claim. It accepted the view of the Wettbewerbszentrale that the advert should have referred to the limitation on the quantities that could be sold (Stuttgart Regional Court, judgment of 7 October 2013, ref. 37 O 40/12 KfH; F 5 0421/12). The Lübeck Regional Court also reached a similar decision in court proceedings conducted by the Wettbewerbszentrale. An electronics retail chain had failed to refer in the advert for the sale of cut-price external hard discs to a limitation on the quantities that could be sold (Lübeck Regional Court, order of 11 December 2012, ref. 11 O 65/12; F 5 0614/12). All of these cases share the common feature that the company had promised more in its adverts than it was actually willing to give. The courts regularly issue prohibitions if actual restrictions on offers are not stated in the advert.

In relation to electrical and electronic goods, the Wettbewerbszentrale has also dealt with cases in which the devices presented to customers in the shop do not display all of the technical features stated in the promotional description. The Wettbewerbszentrale objected to advertising for a flat-screen LED television which stated that it was equipped with a DVB-T-, -C and -S tuner. The television advertised was not in fact equipped with such a tuner. The Flensburg Regional Court regarded the advert as a significant breach of competition law and issued an injunction against the enterprise (Flensburg Regional Court, order of 3 January 2013, ref. 6 O 1/13; F 5 0664/13).

In various cases the Wettbewerbszentrale took action against traders that had not complied with product-related restrictions on sales. Various enterprises offered "Christmas crackers", which are especially popular and widely sold in the United Kingdom. These are crackers that contain an explosive/combustive mechanism. Pursuant to legal provisions applicable to explosives (§ 6(4) of the 1st German Ordinance on Explosives [SprengV]), such products must be examined or certified by the Federal Institute for Materials Research and Testing [Bundesanstalt für Materialforschung und -prüfung, BAM] prior to their first usage in Germany. Such certification, which is proof that the product is compliant with statutory provisions, was lacking in many cases for the "Christmas crackers" offered for sale. The enterprises were acting in an unfair manner by nonetheless offering the goods for sale. Most traders provided appropriate declaration of discontinuance under threat of contractual fines and undertook to refrain from placing such goods on the market in future without the requisite certification (F 5 0546/13).

Technical devices offered by traders must be registered with the public law foundation authorised by the Federal Environmental Agency, Elektro-Altgeräte Register (EAR), in accordance with the German Electrical and Electronic Equipment Act [ElektroG] either by the manufacturer or by the distributor. Traders that market such goods where neither the manufacturer nor the trader holds such registration not only breach the relevant provisions of the ElektroG, but also commit a further breach of competition law. The Wettbewerbszentrale had to make issue warning letters also in this area. The traders provided the declaration of discontinuance requested by the Wettbewerbszentrale (F 5 0514/13 and F 5 0465/13).

The sporting and outdoor sector

The failure to register with the Elektro-Altgeräte-Register (EAR) foundation was also at issue in a range of warning procedures launched against enterprises in the sporting and outdoor sector. Numerous online dealers offered dive computers for sale, which fell under the ElektroG. Producers based abroad had not registered with the EAR foundation as manufacturers. However, the law also provides that distributors which intentionally or negligently offer for sale new electrical and electronic devices of manufacturers that are not registered or not properly registered will be regarded as manufacturers (§ 3(12), sentence 2 ElektroG). The list of manufacturers registered with the EAR foundation is public and may be consulted by any dealer. If the trader does not check that a manufacturer is properly registered before offering the goods for sale to the public he will be acting negligently and in breach of the ElektroG. Since dealers are not permitted to sell products which the manufacturer has not properly registered, the dealer-specific prohibitions on sales constitute a misleading unfair practice. The warning procedures launched by the Wettbewerbszentrale were resolved amicably with the issue of declarations of discontinunance under threat of contractual fines (D 1 0415/13).

The issue of product-specific prohibitions on sales includes the offering of bicycle lights without marks of conformity. Owing to an amendment to the German Road Traffic Licensing Ordinance [StVZO] in 2013, bicycles may now also be equipped with battery-powered lights, provided that they comply with specific technical requirements. However, these lamps must also bear marks of conformity confirming that they were made in accordance with the officially approved design. However, the Wettbewerbszentrale received a variety of complaints objecting

that the lights offered for sale for use on bicycles did not display the mark of conformity. According to the provisions of the StVZO, products may not be offered for sale or sold by traders and may not be purchased or used by customers without the mark of conformity (§ 22a(2) StVZO). Accordingly, the lights are subject to a product-related prohibition on sales if they do not display the requisite mark of conformity. They are not fit for sale. If a dealer nonetheless offers such lights, this will amount to an absolute breach of competition law falling under the "blacklist" (no. 9, Annex to § 3(3) UWG). Moreover, such a breach of competition law cannot be remedied by the clarificatory reference that the relevant product is not licensed under the StVZO or should not be used in road traffic, since the goods are not fit for sale also in such cases. The numerous warning procedures regularly ended with the issue of a declaration of discontinuance under threat of contractual fines. In two cases the Wettbewerbszentrale turned to the Regional Courts in Freiburg and Berlin. Decisions are expected in 2014 (M 3 0305/13 and M 3 0324/13).

A striking allegation of "fictitious price advertising" was brought against a dealer who offered outboard engines for sale in his online shop. At the end of January he offered a specific model with the following price reference: "Our previous price: 179.90 EUR, now only EUR 154.00". In the middle of March the price reference stated "Our previous price: EUR 179.90, now only EUR 135.00" and five days later "Our previous price: EUR 179.90, now only EUR 129.00". The price references in March gave the misleading impression that the price had just been lowered and had been EUR 179.90 immediately before. Following a warning by the Wettbewerbszentrale due to misleading price advertising, the enterprise issued a declaration of discontinuance under threat of contractual fines (D 1 0045/13).

The furniture sector

With more than 150 queries and complaints, the furniture sector is one of the core areas in which the Wettbewerbszentrale works in the retail segment. A large number of complaints related to misleading price adverts. Another business practice which is encountered frequently in the furniture sector is eye-catching advertising offering customer benefits which are then limited at a later stage of the advert by riders provided in most cases in small type. This was the case in a furniture store brochure comprised of various pages which prominently advertised "35 % off all furniture! Including sale goods and cash and carry furniture!". A very small red asterisk referred to further explanation inside the brochure. This informed the customer that the promotion did not apply to half of the brands held by the furniture store, nor to any goods that were already available for sale at a reduced price. Since an out-of-court solution could not be reached, the Wettbewerbszentrale initiated legal action. The court will have to decide whether the small reference to extensive exceptions is sufficient, or whether the eye-catching prominent price reduction for the entire selection of goods is misleading (S 2 0714/13). The Wettbewerbszentrale also initiated legal proceedings in a further case involving misleading advertising. A furniture enterprise advertised a guarantee that its products would always be available for sale at the lowest price. If the customer was able to find any article cheaper at another seller, the enterprise promised a corresponding price reduction. The catch was that the customer was unable to make a genuine price comparison, since the defendant furniture dealer had branded his products with his own name. The announced low-price guarantee thus came to nothing, which the Wettbewerbszentrale objected to as misleading (S 2 0428/13). Decisions in the proceedings referred to above are expected in the summer of 2014.

Last year the Wettbewerbszentrale once again received a larger number of queries and complaints relating to the material composition of upholstered furniture. According to the provisions of the European Regulation on Textile Fibre Names, the requirement to state out of which fibres the substances have been made also applies to the textile upholstery of furniture (2012 Annual Report p. 25). An indication of the materials used constitutes significant information relating to the features of the goods and represents a significant factor in the consumer's decision to buy. The failure by the trader to provide this

information prior to purchase will not only constitute a breach of the provisions of the Regulation on Textile Fibre Names, but also a breach of competition law in the sense of a misleading practice consisting in the withholding of essential information (§ 5a UWG). The warning procedures were settled out of court (S 2 0263/13 and S 3 0101/13).

Internet law and e-commerce

Gabriele Bernhardt, Lawyer, Stuttgart Office

In 2013, more than 2,000 requests for advice and complaints relating to breaches of the law in the online and mail-order sectors and IT law were received by the Wettbewerbszentrale.

Breaches of duties to provide information in e-commerce

As before, the majority of cases relate to breaches of duties to provide information in relation to sales and auction platforms. Alongside the "classic" inadequacies in online legal notices and notices regarding cancellation rights, they related in particular to deficient price information and product descriptions. This is due in part to the additional information which, since the implementation of the Button solution (see Chapter I. 2.), must be provided by the seller prior to conclusion of the order process, and in part due to a lack of knowledge regarding special duties to provide descriptions such as basic price information for cosmetics, the composition of textiles or the fitness for sale of technical products. For example, complaints were submitted relating to breaches of the Biocidal Products Regulation (528/2012/EU). According to the Regulation, consumers must be clearly informed of the hazardous nature of biocidal products – such as disinfectants, moulds and pest controls – during the advertising stage. It was possible to settle all cases out of court (S 2 0628/13, S 3 0425/13, S 3 0997/13). A further increase in the demand for advice is expected in this area in 2014, since under the Consumer Rights Directive (abbreviated to CRD) newly amended information requirements will apply to the ordering process with online distributors from 14 June 2014 (see Chapter I. 2.). These will be covered by the information services and public relations work of the Wettbewerbszentrale in 2014 (for the focus in 2013, see Chapter VI.).

Control of general terms and conditions of business for online trading

Alongside the breaches of duties to provide information and breaches of description requirements referred to above, a large number of queries and complaints relating to online trading focused on the drafting of general terms and conditions of business. Since the review of the UWG in 2008, the legality of GTCs (known as "standard form review of clauses") may be assessed by associations or competitors also under the UWG, with the result that clauses are increasingly becoming subject to scrutiny from a competition law perspective (for breaches of GTCs, see also the Chapter 1.4). Accordingly, the Wettbewerbszentrale has received complaints relating inter alia to the restriction of the warranty for so-called "B goods" – such as ex-display goods or returned goods. However, the limitation of that warranty to one year is only permitted for second-hand articles (§ 475 BGB). In order to clarify whether B goods are to be regarded as "second-hand goods", the Wettbewerbszentrale brought a test case (see 2012 Annual Report, page 29). The court at first instance ruled that the warranty period for B goods may not be curtailed until the goods have been used by the final consumer, at least as a test (Essen Regional Court, judgment of 12 June 2013, ref. 42 O 88/12 – not yet final;

S 3 1109/12). The basis for the shortened limitation period is seen in the increased risk of quality defects owing to use. The mail-order enterprise has filed an appeal against this decision. It remains to be seen how the terms “B goods” and “second-hand goods” will be interpreted by the Hamm Court of Appeal.

Prohibition on misleading online offers

Complaints relating to online trading also focused on misleading product advertisements, such as deceptive information concerning a particular price benefit (§ 5(1), sentence 2 no. 2 UWG) or misleading information concerning product characteristics (§ 5(1), sentence 2 no. 1 UWG). More than 50 cases involved misleading price advertisements. In particular where crossed-out prices are provided, online dealers must ensure that consumers are not given an incorrect impression. The reference price must actually have been charged for a reasonable period of time. Accordingly, an online offer for e.g. neodymium magnets stating a higher reference price is unlawful if this has demonstrably been charged for the product for periods of only a few hours over the past six months. On the recommendation of the Karlsruhe District Court, the trader signed a declaration of discontinuance during the oral stage and undertook to refrain from advertising with higher reference prices unless these had been charged for a period of at least 14 days directly prior to the price reduction (S 3 0993/12). The offer of a Senseo stainless steel coffee machine for EUR 8.97 rather than EUR 40 as part of a special offer may be provided as a representative example of misleading product information in online trade. The machine was actually that of another manufacturer, into which Senseo brand coffee capsules could be inserted. The Bielefeld Regional Court accepted the position of the Wettbewerbszentrale and classified the advertising as misleading (Bielefeld Regional Court, judgment of 19 February 2013, ref. 12 O 172/12).

Websites that are equipped with a recognised seal generate greater sales owing to consumer trust. The Wettbewerbszentrale receives numerous complaints relating to the unauthorised use of these logos, which provide misleading information as regards the characteristics of the trader, as well as a breach of the blacklist (§§ no. 2 Annex to § 3(3), 5(1) sentence. 2 no. 3 UWG). However, there is also uncertainty regarding online traders in relation to advertising with actually awarded logos and consumer reviews. Thus, an online trader may not use the assertion “more than 100,000 satisfied customers” even if it has concluded more than 100,000 sales, if at the same time the buyers have not in fact reviewed the traders or the products. The advertisement of the “Shop Usability Award” distinction is unlawful if the criteria according to which it is awarded are secret (Berlin Regional Court, judgment of 29 October 2013, ref. 15 O 157/13).

Covert advertising & social media marketing

The duties to provide a description and information applicable to online advertising must also be complied with in field of “innovative” advertising (§§ 5, 6 of the German Telemedia Act [TMG]; §§ 54 et seq of the German State Broadcasting Treaty [RStV]; §§ 312 et seq BGB in conjunction with Article 246 EGBGB), along with the rules on advertising under competition law. Accordingly, numerous complaints were received relating to the failure to describe advertising content, although corporate presences in social or professional networks must feature a recognisable statutory notice. If “content marketing” or “viral marketing” is used to advertise a product or undertaking it must be clear that it amounts to business activity. For example, it is unlawful to designate a website as “The magazine for...” if it is a front for an advertising campaign by a major car manufacturer. The Cologne Higher Regional Court accepted the position of the Wettbewerbszentrale that the website must be clearly designated, and that a rolling banner with the statement “advert” would be sufficient (Cologne Higher Regional Court, judgment of 9 August 2013, ref. 6 U 3/13). Attention must also be paid to ensuring that users will recognise the commercial nature of the information pages of enterprises.

Tourism / travel

Hans-Frieder Schönheit, Lawyer, Bad Homburg Office

The following paragraphs will deal with various cases under competition and standard form contract law which arise in the different areas of the tourist sector. In 2013, legal problems focused on the duties of travel agents to provide information, advertising by internet travel portals, advertising with hotel stars and price advertising for holiday properties.

Airlines

In 2013 the Wettbewerbszentrale only received a few complaints relating to advertising by airlines. However, there were several interesting cases.

The airliner “Singapore Airlines” offered a sales competition directed at travel agency staff. A prerequisite for participation was the sale of particular air tickets for Singapore Airlines within a promotional period. For every air ticket sold, a ticket was provided for a raffle in which flights to Australia were offered. However, according to case law, a direct approach of this nature to travel agency staff encouraging increased sales was anti-competitive (§§ 3(1), 4 no. 1 UWG). A customer who visits a travel agent expects to receive careful and accurate advice for selecting potential airliners. In this respect the customer trusts the information provided by the travel agency staff. However, such expectations are thwarted if the advice is influenced in the background by unilateral benefits in favour of the body arranging the sales competition (see also Frankfurt am Main Regional Court, WRP 2012, p. 1304). Given this clear legal situation, the enterprise signed the cease and desist declaration and ended the sales competition (F 2 1518/12).

Turkish Airlines used inter alia a “Skytrax seal” in its advertising, along with the assertion “Europe’s best airlines in 2012”. There was nothing in the seal or elsewhere within the advertising that could provide information relating to the award of the seal or the test result. Material information was thus withheld from the customer. The Wettbewerbszentrale objected to this as anti-competitive, as a result of which Turkish Airlines signed the requested declaration of discontinuance (F 7 0078/13).

The Wettbewerbszentrale was also forced to take action against German Lufthansa. The enterprise had presented the “Lufthansa Senator Credit card” in a sales letter, raising the prospect of a bonus of 10,000 miles as a prize in the event that this product was applied for. However, a customer who applied for the product in accordance with this advert was informed that only 5,000 bonus miles would be credited, rather than the 10,000 promised. The customer was thereafter informed in correspondence that the bonus of 10,000 price miles was only valid for the product “Senator Credit card World business”. However, this difference was not clear either in the text of the sales letter or in the accompanying explanation. The Wettbewerbszentrale objected to the advertisement for this reason. Also in this case, it was not necessary to involve the courts, as Deutsche Lufthansa AG undertook to desist from the activity (F 2 0600/13).

Tour operators

Misleading holiday descriptions

During the reporting period the Wettbewerbszentrale received complaints relating to the misleading representation of the titles of holidays. A magazine publisher from Franconia advertised a holiday for its readers under the title “Italy – Gulf of Sorrento”. Various holiday destinations were then referred to in the text of the advertisement, such as the islands Capri and Ischia. This created the impression that the holiday also included visits to these two islands at the price advertised. In actual fact however, the interested party could only reach these holiday destinations with an additional bookable excursion package, which involved a charge. The Wettbewerbszentrale thus objected to the holiday description in conjunction with the price specified as misleading for customers. The complaint was settled by the issue of a declaration of discontinuance (F 2 0306/13).

General terms and conditions of travel

Under the law on package holidays, travellers are entitled to withdraw from the travel contract at any time before the start of the journey (§ 651i(1) BGB). The tour operator then loses their claim to the agreed holiday price, although they may claim reasonable compensation (§ 651i(2) BGB). The level of this compensation is normally stated as a percentage amount in the terms and conditions of travel. However, this is subject to the rule that flat-rate cancellation fees must not be excessive. A tour operator had set flat-rate cancellation fees of 40% for the initial period in the event of a withdrawal by the consumer up to 30 days before the start of the holiday. In addition, a flat-rate fee of 100% of the holiday price was due in the event of withdrawal by the traveller later than 2 days before the start of the holiday. The Wettbewerbszentrale objected to both flat-rate fees as excessive. The Hamburg Regional Court accepted the position of the Wettbewerbszentrale and prohibited these flat-rate fees (Hamburg Regional Court, judgment of 23 April 2013, ref. 312 O 330/12; F 2 0530/12). This decision confirms the previous case law on similar flat-rate cancellation fees. Thus, flat-rate cancellation fees of 40% during the initial period have been classified by the courts as unlawful in the past according to the principle of “Dynamic Packaging” of package holidays (Cologne Regional Court, WRP 2011, 516; Dresden Court of Appeal, NJW-RR 2012, 1134).

Further proceedings conducted by the Wettbewerbszentrale under the law on standard form terms and conditions of travel concerned inter alia rights to amend prices and to alter services. In this case the tour operator had reserved the right inter alia to make a subsequent lump-sum price increase in the event of an increase in value added tax or the introduction of a city tax. However, reservations of the right to change the price are in the first instance generally excluded if the contract is concluded less than 4 months before the service is provided (§ 309 no. 1 BGB). In addition, the law on package holidays only regards an increase of the agreed price as lawful where strict requirements are complied with (§ 651a(4) BGB). None of this was complied with in this case, and hence the Dortmund District Court prohibited the clauses objected to (Dortmund Regional Court, default judgment of 30 July 2013, ref. 25 O 117/13; F 2 0358/13).

Duties to provide information under travel law

Parliament has laid down more detailed duties to provide information with the goal of ensuring that consumers receive comprehensive information regarding the individual arrangements applicable to holidays and holiday contracts (§ 4 of the German Civil Code Ordinance on Duties of Information [BGB-Info-VO]). These include inter alia information relating to payment arrangements, passport and visa requirements and the holiday price. In numerous cases the Wettbewerbszentrale has had to object to breaches of the law on this score. Various tour operators advertised in catalogues for young people, without at the same time providing information on the cost of the holidays. The catalogue therefore did not provide people interested in the holiday with a suitable basis for making a decision. Following a complaint to that effect from the Wettbewerbszentrale, the declarations of discontinuance requested were provided (F 2 1340/12, F 21342/12).

Charter price contingency insurance

Tour operators are obliged to insure all payments of the holiday price made by travellers before the start of the holiday and to provide a holiday price insurance certificate (§ 651k BGB). This duty to insure the holiday price also applies in the event that a tour operator combines entry tickets for rock concerts with transportation to and from the place of the performance. In this case too, several travel services are combined with each other, and hence amount to a package holiday in a legal sense. However, some organisers of such event holidays were unable to furnish proof of such travel insurance, even though payments of the holiday price were requested before the start of the holiday. The Wettbewerbszentrale has intervened here regularly and has been able to secure declarations of discontinuance (F 2 0 734/13; F 2 0735/13).

During the reporting period it was possible to clarify the question regarding the form in which the tour operator may refer to the existence of the holiday price insurance prescribed under statute. A simple reference without emphasis to the existence of holiday price insurance within the service description of a package holiday is acceptable under competition law (Cologne Court of Appeal, order of 1 February 2013, ref. 6 W 21/13; F 2 0794/12). On the other hand, an advert that suggests to the customer that the provision of such an insurance certificate is an advantage of a specific tour operator is not lawful. A tour operator had advertised on their website under the title “The trendtours advantages” with the assertion: “More security. Because you’ll get a travel price insurance certificate as soon as you confirm your holiday”. The enterprise subsequently advertised again under the title “The trendtours advantages” with the assertion “You’ll get a travel price insurance certificate as soon as you confirm your holiday”. The courts confirmed the position of the Wettbewerbszentrale that such a portrayal in advertising of holiday price insurance amounted to unlawful advertising of self-evident facts (Frankfurt am Main Regional Court, judgment of 15 May 2013, ref. 3-08 O 175/12 - not yet final; F 2 0600/12; Frankfurt am Main Court of Appeal, order of 25 November 2013, ref. 6 U 154/13; F 2 0600/12).

The hotel sector

The vast majority of complaints relating to the hotel sector during the reporting period concerned once again prohibited advertising containing references to a star classification. If a hotel advertises with stars - whether in situ or in other promotional material - the consumer regularly expects that the hotel will be certified according to the criteria applicable to German hotel classification and that this certification was valid at the time of the advertisement. If such a classification is lacking, the public is being misled. This was confirmed in further court rulings (e.g. Koblenz Regional Court, judgment of 9 July 2013, ref. 1 HK O 133/12; F 2 0997/12; Munich II Regional Court, order of 31 May 2013, ref. 1 HK O 24/13; F 2 0572/13). Several television programmes have also dealt with prohibited advertising with hotel stars. In the programme broadcast by Mitteldeutscher Rundfunk (MDR) on 20 August 2013 entitled “The star lie: how hotels adorn themselves with fake plumes”, the Wettbewerbszentrale had various opportunities to present the current legal position.

One procedure concerned the link on a hotel booking portal made by a search machine operator. Deutsche Telekom Medien GmbH had created a button on its own websites *www.dasoertliche.de* and *www.gelbeseiten.de* designated as “Book online” or “Hotel booking”, which linked to the booking machine of the hotel booking portal HRS. On the websites specified users were able to search for and display hotels using the input fields. The websites provide the names and addresses of hotels, along with telephone numbers and websites. In addition, they also contained a button designated as “Hotel booking” or “Book online”. If the user clicked on this button, he or she was directed to the hotel booking portal of the operator HRS. The Wettbewerbszentrale had objected to this presentation as misleading on the grounds that the customer would understand it to mean that he or she could contact the hotel direct online and reserve a room. This position has now been confirmed by the courts (Frankfurt am Main Regional Court, judgment of 20 February 2013, ref. 3-08 O 197/12; F 2 0318/12). According to the court,

a user who searches for hotels using the websites in question will expect that the contact details provided all lead direct to the hotel.

Holiday properties

During the reporting period, complaints relating to price advertisements by the providers of holiday properties did not abate. Once again, in numerous cases the costs of compulsory final cleaning were not included in the rental price displayed. However, it is compulsory also in relation to the rental and/or brokerage of holiday properties that all mandatory cost items be included in the final price. Any practice to the contrary not only breaches the terms of the German Price Indication Ordinance [Preisangabenverordnung], but is also at the same time misleading by omission (§§ 3(1) and (2), 5a(2) and (3) no. 3 UWG). The Wettbewerbszentrale has provided information relating to this legal position once again on its homepage at *www.wettbewerbszentrale.de*. The report was picked up on by professional associations, chambers of industry and commerce and in the press. The case law on this matter is unequivocal. Two higher regional courts have now confirmed the case law of the district courts and endorsed the legal position of the Wettbewerbszentrale (Schleswig Higher Regional Court, judgment of 22 March 2013, ref. 6 U 27/12; F 2 0215/12; Hamm Court of Appeal, judgment of 4 June 2013, ref. I-4 U 22/13; F 2 0755/12).

In further proceedings, one of the most important providers of holiday properties on the German market was prohibited from displaying prices within its web content that did not include a mandatory flat-rate fee for additional costs (Freiburg Regional Court, judgment of 11 November 2013, ref. 12 O 26/13 - not yet final; F 2 0053/13). The court justified the prohibition on the grounds that, in its opinion, the representation was misleading. The court stated that the target consumer will understand the rental prices offered per flat and per week during seasonal periods as final prices. The consumer does not expect that further additional mandatory costs of EUR 21.00 per person per stay will be payable in addition to this rent.

Other complaints relating to holiday properties concerned prohibited advertising with a star designation. There is also an official certification system in the area of holiday properties, which in this case is operated by the German Tourism Association (Deutschen Tourismusverband, DTV). Under this system, holiday properties may only be advertised with stars if there is a current valid quality assurance according to the requirements of the German Tourism Association. If this is lacking, the star advertising will be anti-competitive (Essen Regional Court, judgment of 18 September 2013, ref. 44 O 112/13, F 2 0783/13).

Bus tours

Complaints during the reporting year focused once again on prohibited advertising for holiday buses with star designations. According to settled case law, star designations for holiday buses are understood as a reference to a quality assured holiday bus. However, if the advert is not based on any current valid quality assurance issued by Gütegemeinschaft Buskomfort e.V., the advert will be prohibited as misleading for the consumer.

The terms and conditions of bus tour operators also provided grounds for objection during the reporting period. An enterprise operating a scheduled bus service applied prohibited flat-rate cancellation fees in its terms and conditions of carriage along with prohibited clauses on the exclusion of claims and schedule changes. Following an intervention by the Wettbewerbszentrale, these clauses were amended and the enterprise made a commitment to end these practices (F 2 1525/12).

Cruise sector

All mandatory price components must be incorporated into the price also for cruises. This rule was not respected by various providers of cruises, which showed a mandatory flat-rate service charge in addition to the holiday price, without including it in the overall price. The Wettbewerbszentrale has taken

action against this and has been able to secure declarations of discontinuance (F 2 0245/13, F 2 0244/13, F 2 0108/13).

During the reporting period, the Wettbewerbszentrale once again dealt with prohibited advertising with ship stars. Contrary to the position for hotels, holiday properties and bus tours, here there continues to be no independent quality assurance system for cruise ships. Classification with stars is regularly based on an industry publication, the Berlitz Cruise Guide, or even on the operator's own assessment. However, the advertisement of "5-star comfort" without any reference to this will be anti-competitive (Hamburg Regional Court, order of 21 January 2013, ref. 327 O 27/13 - not yet final; F 2 1595/12).

During the reporting period, it was possible to clarify the question of advertising with regard to the duration of the holiday for river cruises. At the end of 2012, the Wettbewerbszentrale received complaints relating to various river cruise operators. Each of the complaints related to the information regarding the duration of the holiday. One operator had e.g. given prominence to a Danube cruise with a duration of "7 days". Embarkation on the first day of the holiday occurred in the afternoon. On the 7th day of the holiday, disembarkation occurred in the morning after breakfast. Thus, the holiday occupied less than 2/3 of both the first day of the holiday and of the last day of the holiday. Referring to previous case law from the bus tour sector (Hamm Court of Appeal, NJW-RR 1987, p. 423), the Wettbewerbszentrale objected to this representation of the duration of the holiday and stated that the first and the last day should not be counted when specifying the duration of the holiday. One of the enterprises that received a warning had then referred to the fact that the decision issued by the Hamm Court of Appeal in relation to bus tours was not transferable to cruises. In order to achieve judicial clarification, the Wettbewerbszentrale applied for an interim injunction. In these proceedings, the Cologne Court of Appeal ruled that the advert objected to was not anti-competitive (Cologne Court of Appeal, order of 22 January 2013, ref. 6 W 17/13; F 2 1481/12). In its decision, the Cologne Court of Appeal distinguished between the river cruise sector and the bus tour sector and held that, for river cruises, the consumer does not expect that the days used for arrival and departure will be counted as significant parts of the holiday. The Wettbewerbszentrale informed specialist operators and will accept this decision of the Cologne Court of Appeal in future as a guideline for the advertising of holiday duration in the river cruise sector.

Telecommunications

Johanna Kilbinger, Lawyer, Bad Homburg Office

The trend away from land-line connection towards mobile connection also continued in 2013. At the start of the year for the first time German households had more mobile phones than land-lines. As reported by the Federal Statistical Office, 93 percent of the around 40 million private households had a mobile telephone, although only 90 percent had a land-line connection (source: Federal Statistics Office, press release of 12 November 2013). It will thus come as no surprise that sales in the land-line market are continuing to fall. However, providers were also confronted with stiff price competition in the mobile market. In view of the so-called "Allnet-Flat" (i.e. unlimited calls) plan, the price of which continues to fall and which can no longer be removed from the product range of mobile telephone providers, telephoning and texting as part of a fixed plan has now become a matter of course for consumers. Thus, in the mobile telephone sector mobile data traffic is becoming increasingly prominent; however, due to the planned speed reduction of the DSL flat rate by die Deutsche Telekom, the internet was also one of the major issues for the land-line sector.

Complaints received in the telecommunications sector focused once again on misleading advertising. The misleading practices related amongst other things to price adverts, many of which lacked transparency as regards the different elements of the price as well as extravagant advertising statements by telecommunications providers.

Misleading advertising

The term "flat rate" has been recently in vogue since at least since at least the "Drosselkom" case. However, The term "flat rate" has been recently in vogue telecommunications providers are keen to make frequent use of this term not only in relation to the internet, but also when marketing SMS options. As in the previous year, the Wettbewerbszentrale also received various complaints relating to the prominent advertising claim "SMS flat rate" in 2013. In the cases objected to, the all-inclusive service was limited to a certain number of text messages. After using up the SMS allowance, additional costs were incurred for each additional SMS. However, since the average consumer will expect the claim "SMS flat rate" to refer to a comprehensive and unlimited ability to send text messages at a specified lump-sum price, the Wettbewerbszentrale objected to the advertising as a misleading anti-competitive practice (§ 5 UWG). The enterprises warned thereupon either issued declarations of discontinuance (e.g. F 7 0031/13; F 7 0179/13; F 7 0222/13) or were ordered to do so by the courts (Frankfurt Regional Court, order of 5 August 2013, ref. 3-10 O 97/13 – not yet final; F 7 0190/13).

Advertising of a unique selling point is a preferred advertising tool in the German mobile phone market in order to draw attention to the individual provider, despite the large number of products and the strong price competition. During the reporting period, two telecommunications providers drew attention to themselves by advertising an allnet flat rate plan

at the lowest price throughout Germany. In actual fact, at the time when the enterprises published their adverts, various products were on offer from competing companies which charged a significantly lower price for the same or even better services. The Wettbewerbszentrale issued warnings to the enterprises on the grounds that consumers would be misled regarding the special price advantage. A declaration of discontinuance was issued in one case (F 7 0135/13). In the other case, the Kiel Regional Court ordered the telecommunications company to end the incorrect advertising claim on the grounds that it breached § 5(1), sentence 2 no. 2 UWG (Kiel Regional Court, judgment of 22 November 2013, ref. 14 O 70/13 – not yet final; F 7 0110/13).

In a further case involving a misleading practice, a mobile telephone discount seller advertised a combined offer including a smart phone and a mobile phone plan, providing the costs of each product component separately. This enterprise gave prominence to the claim that, if a contract was concluded before a specific date, the customer would have "nothing to pay for 2 months". However, the saving advertised related solely to the costs of the tariff. The customer was obliged to pay monthly instalments for the smart phone over the full term of the contract. After a warning had been ignored, the Wettbewerbszentrale applied for an interim injunction, which was duly issued (Hamburg Regional Court, order of 28 February 2013, ref. 315 O 48/13; F 7 0049/13). At a later date, the Wettbewerbszentrale dealt with the same advertisement once again. The limited period discount campaign "nothing to pay for 2 months" was repeatedly extended over a period of several months. According to the case law of the Federal Court of Justice, any party that stipulates a fixed period of time for a discount campaign must in principle adhere to it (Federal Court of Justice, judgment of 7 July 2011, ref. I ZR 173/09). Since it was not clear from the advert that the enterprise company already intended to extend the campaign at the time the advert appeared, it misled consumers as to the end date of the campaign (§ 5(1), sentence 2, no. 2 UWG). After a claim was filed, the telecommunications provider issued a declaration of discontinuance(F 7 0103/13).

Price advertising

The 2012 annual report referred to two proceedings initiated by the Wettbewerbszentrale against major telecommunications providers. Both cases have now been successfully concluded by decisions of the courts of appeal:

The Düsseldorf Court of Appeal decided that an advert for a games console stating its price must also mention the price of the additional mandatory mobile phone contract along with its costs (Düsseldorf Court of Appeal, judgment of 5 November 2013, ref. I-20 U 92/13; F 2 0227/12). Vodafone GmbH had advertised the "PlayStationVita 3G/Wi-Fi" on its website with a prominent reference to the price of EUR 49.90. However, the rider "with MobileInternetStarter" was written underneath the price. It was only stated on a sub-page that the device could only be purchased in conjunction with a mobile phone contract, which was associated with additional monthly costs of EUR 19.99 over a term of 24 months plus an up-front payment of EUR 29.99. The Düsseldorf Court of Appeal held that the advert was misleading (§ 5(1), sentence 2, no. 2 UWG). When offering a games console, which could in principle be operated also without mobile phone access, the consumer does not expect that, in addition to buying the console, he or she will also have to conclude a mobile phone contract.

In another case the Koblenz Court of Appeal upheld the order against 1&1 Internet AG by the Koblenz Regional Court on the grounds of misleading price advertising in a television advert and on the internet (Koblenz Court of Appeal, judgment of 8 May 2013, ref. 9 U 1415/12; DO 1 0586/13). The enterprise had advertised an all-net flat package on television and the internet for EUR 29.99 per month, next to a crossed-out price of EUR 39.99. At the same time the advert also featured a Samsung mobile phone for EUR 0.00. However, any person who wished to acquire the tariff with a smart phone for EUR 0.00 discovered that EUR 39.99 per month and not EUR 29.99 were payable for the combination offer over 24 months.

Anti-competitive price advertising during the reporting period focused on cases involving final price information according to §1 of the German Price Indication Ordinance [Preisangabenverordnung, 1 PAngV]. Since an all-inclusive final price can often not be established in the telecommunications sector as individual price components depend on time and usage, there is by contrast an obligation to arrange the individual price components under the price given prominence in such a manner as to be easily recognisable and legible for the consumer. The adverts objected to did not comply with this requirement. The complaints were mostly settled with the issue of cease and desist declarations (e.g. F 7 0027/13; F 7 0166/13; F 7 208/13). In one case, the Wettbewerbszentrale obtained a recognition judgment from the Kiel Regional Court (Kiel Regional Court, judgment of 15 October 2013, ref. 16 O 43/13; F 7 0104/13).

Further complaints in the area of price advertising concerned the prices displayed in electronic shopping baskets. If a consumer decides to order a combination offer comprised of a mobile phone and a mobile phone tariff in one of the numerous online shops of telecommunications providers, products are often subject both to up-front and monthly costs (up-front/monthly costs of the mobile phone, connection price, monthly costs of the mobile phone tariff). However, in the cases objected to by the Wettbewerbszentrale, when the product selected was placed in the electronic shopping basket, only the up-front costs of the mobile phone were displayed as the “total amount”. This incomplete price information amounts to a breach of the German Price Indication Ordinance. In addition, the term “total amount” conveys the impression to the average consumer that the price referred to contains all costs due for the product selected. The additional costs actually charged could not be inferred from the price displayed, which was hence misleading. Following a warning by the Wettbewerbszentrale, the enterprise undertook to desist from this practice and changed the way their prices were displayed (e.g. F 7 0179/13; F 7 0210/13; F 7 0223/13).

Advertising of mobile internet

Numerous complaints were received during the previous year relating to the advertising of mobile flat rate data plans under the claim “unlimited surfing”. Such advertising is misleading if the data transfer speed is limited from the outset in the event that a particular volume of data is used up. Due to existing case law and the resulting enforcement of rights, hardly any such advertising claims were made during the reporting period. The Koblenz Court of Appeal upheld a district court decision from the previous year which had held that advertising with the claim “unlimited surfing on the internet” was misleading (Koblenz Court of Appeal, judgment of 8 May 2013, ref. 9 U 1415/12; DO 1 0586/11). A complaint relating to the claim “unlimited mobile surfing on the internet” was resolved with the issue of declaration of discontinuance (F 7 0116/13). The Cologne Court of Appeal was called upon to decide on the advertising claim “endless surfing” which had been objected to as misleading (judgment of 8 November 2013, ref. 6 U 53/13; F 2 0874/12). However, the court held that this advertising claim was not objectionable under competition law. Although the unclear and extravagant claim “endless surfing” could lead to an incorrect impression on the part of the consumer regarding the limits of internet usage and therefore required clarification, a footnote reference to the price claim was however seen to be sufficient as clarification, since it did not amount to misleading information concerning surfing speed with or without a restriction that was so specific that the necessary rectification could only be provided by a footnote located directly under the claim. However, the court prohibited advertising under the claim “data flat with up to 7.2 Mbit/s”, which had also been objected to by the Wettbewerbszentale. The offer of “data flat with up to 7.2 Mbit/s” was liable to be misunderstood. Although the addressee of the advert will be aware that the achievement of the speed advertised is dependent upon external factors such as regional network expansion or the capability of the end device, the relativisation of “up to” does not however make it sufficiently clear that the data transfer rate may be drastically limited by the telecommunications com-

pany after a particular monthly data allowance has been reached. Once again, not even experienced smart phone users would expect a reduction to 64 Kbit/s for downloads and 16 Kbit/s for uploads from such an advertising claim. Such a claim, which is liable to be misunderstood, requires rectification, and hence consumers were being misled. Any such clarificatory and explanatory reference available through a footnote must be directly linked to the misleading claim.

Mobile data usage is being given ever increasing prominence in advertising. Since increasing numbers of people possess smart phones that can access the internet, demand for mobile internet is rising. Consumers no longer decide in favour of a mobile phone tariff with reference to the costs of telephone calls and text messages, but rather increasingly with reference to the data volume included and transfer speed. During the reporting period, the Wettbewerbszentrale received complaints relating to the failure to provide information regarding data transfer speed and the time when transfer speed is restricted. Telecommunications companies did not mention such information with a clarificatory reference within advertising under the prominent claim “internet flat-rate”. Due to the role in the decision to buy of data transfer speeds and the included data volume before the speed is limited, the Wettbewerbszentrale regarded this as the anti-competitive failure to provide essential information (§ 5a(3) no. 1 UWG). The cases objected to were mostly settled with the issue of declarations of discontinuance (e.g. F 7 0001/13; F 7 0029/13; F 7 0031/13).

Duties to provide information in online trading

During the reporting period the Wettbewerbszentrale received several complaints concerning the failure to provide consumer information pursuant to § 312g(2) BGB. A renowned provider of telecommunications products failed to provide summary information concerning the essential product features and price components on the order confirmation page as part of its internet ordering procedure. The Wettbewerbszentrale considered this to breach the duties to provide information pursuant to § 312g(2) BGB in conjunction with Article 246 § 1 no. 4, first half sentence, 5, 7 and 8 EGBGB. The Koblenz Regional Court accepted this view and prohibited the enterprises form offering or representing goods over the internet without providing the consumer with the essential features of the service, including in particular tariff information, minimum contract terms, connection charges, basic monthly charges and/or the final price including all fixed price components in a clear, understandable and prominent manner directly before the order is placed. § 312g(2) BGB was to be interpreted to the effect that the consumer information specified must be summarised immediately before the binding order is placed and on the last page prior to order confirmation. This interpretation is consistent with the meaning and purpose of the consumer protection provision and the intention of the legislature when introducing the so-called “button solution” transparency rule. The additional proceedings were settled with the issue of declarations of discontinuance under threat of contractual fines (F 7 0169/13; F 7 0227/13; F 7 0257/13).

Financial services

Peter Breun-Goerke, Lawyer, Bad Homburg Office

With around 150 complaints and requests for advice in 2013 in relation to the financial market, activity remained high at practically the same level as the previous year. Work to secure trust in the financial market in the resolutely implemented transfer to the SEPA direct debit scheme on the creation of a single European payments area, which required considerable efforts for banks and undertakings alike, was most conspicuous from an external perspective. Comprehensive legislation should re-establish lost trust through provision for controls and transparency. EU lawmakers are still working on a revised version of the Markets in Financial Instruments Directive along with new rules for credit intermediaries. European banking supervision has already been decided upon and the establishment of related institutions is being pursued by politicians. The Directive on Credit Agreements relating to Residential Property was approved at the end of the year and will continue to throw up new questions in practice, in a similar manner to the Consumer Credit Directive. Regarding efforts to create greater trust, it is even more astonishing that this year too, the Wettbewerbszentrale was forced to object to missing and incorrect information in all areas of the financial market, albeit in isolated cases. Some of the focuses of the activities of the Wettbewerbszentrale in the area of banks, insurance and financial service providers are presented in the following overview:

Banks

The banking sector continues to be dominated by discussions regarding more stringent oversight. Also in 2013, banks are attempting to secure consumer trust through advertising, which nonetheless in individual cases provided grounds for complaint.

Free VISA cards

The Itzehoe Regional Court had issued a legally binding judgment against comdirect bank Aktiengesellschaft on 20 March 2012 preventing it from advertising a so-called “free current account” “without minimum deposits” in connection with the opening of an account, making reference to the possibility of the free issue of a VISA card for as long as the bank made the issue of the VISA card conditional upon the amount of monthly deposits. The Wettbewerbszentrale subsequently received complaints that, despite this legally binding prohibition, the bank was still advertising on the internet unchanged the opening of a current account without minimum monthly deposits including the reference to the issue of the free VISA card. The bank defended itself within the penalty proceedings commenced thereafter inter alia by arguing that, in the event of a low credit score, it would offer the customer a prepaid VISA card, which has to be topped up in advance. By a legally binding order of 22 May 2013 (Itzehoe District Court, ref. 5 O 80/11; F 5 0416/11), the Itze-

hoe Regional Court then ordered comdirect bank to pay an administrative fine of EUR 7,500 and stated in its order that the impartial consumer, who was the addressee of comdirect bank, expected a VISA card to be issued without minimum deposits and not simply a credit card that had to be topped up in advance. There had thus been a breach of the prohibition on advertising previously issued.

Credit advertising

As stated on page 44 et seq of the 2012 annual report, in 2011 the Wettbewerbszentrale participated in the "Internet Sweep 2011 on consumer credit" coordinated by the German Federal Financial Supervisory Authority (BaFin) under the auspices of the European Commission. This involved the scrutiny of the internet portals of banks and credit intermediaries for compliance in particular with rules on the provision of information. All proceedings initiated in 2013 in this respect have been concluded.

The Potsdam Regional Court (Potsdam Regional Court, judgment of 24 July 2013, ref. 52 O 134/11) prohibited a savings bank in Brandenburg from advertising private loans without stating the debit interest rate and without a recognisable representation of a ⅔ example. The savings bank advertised consumer credit over the internet providing only the annual percentage rate. According to the relevant Price Indication Ordinance, the debit interest rate must however also be specified in consumer credit advertising. In addition, the advert must include an example, from which the advertiser should expect that at least ⅔ of contracts concluded on the basis of the advert were agreed upon at the interest rate stated. The Wettbewerbszentrale objected to the credit advertising due to the lack of the debit interest rate, but also on the grounds that the ⅔ example was not included in the advert.

The Potsdam Regional Court accepted the view of the Wettbewerbszentrale and held that the bank was obliged to present a summary overview of the essential information required by law. It was not sufficient that the average consumer could look for the essential information, which is regarded by law as necessary in order to compare loans, on different pages of the lender's website. The bank had argued that further information was available under an extra menu item entitled "loan details", which had to be called up additionally. In the opinion of the court, it is not sufficient that the information required by law is located on sub-pages, which the consumer will not necessarily visit but may rather arrive at by chance.

The court also held that the savings bank was obliged to provide the representative example required by law even if, as argued, it offered loans at a fixed rate of interest. Specifically, it must also be clear for the consumer that the information amounts to a representative example. It is not sufficient to provide details without designating them as a ⅔ example. The court held in its decision that two items of information required by law in loan advertisements were not visible for the consumer, or not visible at first sight, and hence a tangible impairment of the interests of competitors and consumers may be presumed (F 5 0857/11).

In another case, the Wettbewerbszentrale objected to a bank's advertising for consumer credit which did not provide the ⅔ example. The bank advertised consumer credit over the internet. The advert did not feature the "representative example" required under the German Price Indication Ordinance either in the terms of credit advertised or in the notice of charges available for download. The Hamburg Regional Court (Hamburg Regional Court, judgment of 28 June 2013, ref. 327 O 653/11; F 5 0854/11) accepted the defendant bank's argument that the provision of a "representative example" in the specific case was unnecessary because the interest rates charged by the bank for loans were set in advance depending upon the term and were disclosed in the advert. The Regional Court adopted the view that, if a loan granted at interest rates determined in advance with identical amounts for all customers is advertised, it is not necessary to provide a representative example. In the appeal proceedings conducted before the Hamburg Court of Appeal (ref. 3 U 120/12) the Court of Appeal pointed out to the defendant bank in the oral discussion on 5 September 2013 that, according to the relevant statutory provisions, a representative example must be provided even in cases in which interest rates are set in ad-

vance (as previously held by the Potsdam Regional Court in the case described above). This is required both under the Price Indication Ordinance as well as the Consumer Credit Directive 2008/48/EC. On the advice of the court, the bank subsequently issued a cease and desist declaration under threat of damages in the appeal proceedings and undertook to cover the costs of the legal dispute.

Term deposits and instant access deposits

In 2 cases the Wettbewerbszentrale objected to advertising for financial investments. In one case, a car finance bank advertised a term deposit at an interest rate of up to 1.6% and stated that any amount of between EUR 5,000.00 and EUR 250,000 could be invested. In actual fact, an interest rate of 1.6% was advertised for fixed terms, but only for deposits above EUR 25,000. The Wettbewerbszentrale objected to this practice as misleading because the impression was created, in particular through the reference to a minimum investment, that the interest rate advertised was already available from these minimum deposits. The bank subsequently issued a cease and desist declaration (F 5 0262/13). In another case, a car finance bank likewise advertised instant access deposits at an interest rate of 1.5% with the reference: “More right from the first day – that’s a promise! We don’t have any minimum deposit and no interest rate limit. At X-Bank you’ll get 1.5% per year from the first to the last cent”. It was only on the bank’s FAQ page that it was stated that the interest rate advertised was variable and could be altered at any time by an online notice. The Wettbewerbszentrale objected to this practice as misleading, because a sole reference on the FAQ page to this information, which was essential for the customer, is not sufficient. The bank refused to issue a declaration of discontinuance, and hence the Wettbewerbszentrale brought a claim before the Düsseldorf Regional Court (F 5 0545/13).

Insurance brokers

As before, the Wettbewerbszentrale has dealt with cases involving breaches of the duties to register and to provide information and the disclosure requirements for insurance brokers.

Registration of financial investment brokers

Professional financial investment brokers have been subject to new rules governing access to the profession since 1 January 2013. As before, they require accreditation, which is issued – depending upon the federal state – either by the chambers of industry and commerce or by the governmental authorities. Alongside the requirements of personal reliability and ordered financial circumstances, proof must be provided of expertise and professional liability insurance. In addition, financial investment brokers must be included in a federal register held by the German Chamber of Industry and Commerce.

Here too the failure to register amounts to a breach of competition law so that, as for insurance brokers, in the first cases warnings had to be issued to financial investment brokers. The enterprises issued a declaration of discontinuance under threat of damages and secured registration (F 5 0341/13).

Misleading practices

By judgment of 23 October 2013 (ref. 1 U 225/12–68-; F 5 0405/11) the Saarland Court of Appeal prohibited an insurance broker from asserting to potential customers that he had been instructed by the chamber of industry and commerce.

The insurance broker had stated over the telephone to people setting up a new business that he had been instructed by the chamber of industry and commerce to carry out an insurance review with the entrepreneurs in order to ensure they were appropriately insured. The telephone call was made even though the recipients had not requested such advice or such a call, and no instruction had been given by

the chamber of industry and commerce. Within the proceedings, the insurance broker denied having asserted to the entrepreneurs telephoned that he had been instructed by the chamber of industry and commerce. In addition, he attempted to avoid the claim for injunctive relief due to misleading practices and prohibited nuisance telephone advertising by invoking the time barring of the claim for injunctive relief, as such time barring allegedly depended not on the knowledge of the Wettbewerbszentrale but rather on the knowledge of the chamber of industry and commerce of the disputed processes.

The Court of Appeal concluded that, on the basis of the witness statement from the entrepreneur taken at first instance, the Regional Court had correctly reached the conclusion that the insurance broker had alleged over the telephone that he was acting on the instructions of the chamber of industry and commerce. Even the fact that the witness remembered an incorrect date did not impair his credibility. The telephone guidelines relating to tele-marketing presented by the insurance broker in which reference was made at least to the address of the chamber of industry and commerce were irrelevant in this regard. No reason could be established as to why the entrepreneur should have informed the chamber of industry and commerce of this occurrence if no corresponding reference had been made to the chamber of industry and commerce, as stated by him.

Telephone advertising

Two cases came before the courts involving the acquisition of clients over the phone by insurance brokers without proof of prior express consent. In the case described involving misleading advertising with a reference to appointment by the chamber of industry and commerce, the Saarland Court of Appeal also issued an injunction against the insurance broker relating to the lack of consent in the advertising call. In a further case, an insurance broker advertised the brokerage of health insurance with a businessman specialising in interior construction. No consent had been provided for the advertising call. Following a warning by the Wettbewerbszentrale, the insurance broker issued a cease and desist declaration relating only to the businessman called. The Heilbronn Regional Court upheld the view of the Wettbewerbszentrale (Heilbronn Regional Court, judgment of 21 June 2013, ref. 8 O 112/13; F 5 0160/13), according to which a businessman cannot be assumed to have an interest in receiving information concerning health insurance as a matter of course. Likewise, consent cannot be assumed as a matter of course owing to the fact that a telephone call is used as a means of communication. The position of the Wettbewerbszentrale that a cease and desist declaration relating only to calls to a certain businessman cannot exclude the risk of repetition in other future telephone calls was also confirmed.

Other financial service providers

Advertising with BaFin

The Wettbewerbszentrale was once again required to deal with attempts by financial service providers to secure customer confidence through advertising by referring to BaFin oversight. An enterprise used such a reference to advertise the brokerage of construction finance. The advert was misleading because, contrary to the claims made in the advert, the enterprise was not supervised by the German Federal Financial Supervisory Authority. Following a warning, the enterprise issued a declaration of discontinuance stating that it would refrain from referring to BaFin supervision in future (F 5 0483/13).

Misleading practices

Also in the area of financial service providers, advertising does not always fulfil what is promised to the customer. A cooperative representing the interests of persons working in the medical and care sector advertised membership of this association by stating that it was a “federal pension institution” or a federal cooperative”. The Wettbewerbszentrale regarded this designation as misleading because it created the impression that the organisation was a public law body such as for instance the German Federal Financial Supervisory Authority or a simi-

lar institution. Following a warning, the cooperative issued a declaration of discontinuance under threat of contractual fines and undertook to refrain from using this designation in future (F 5 0347/13).

A financial services provider offering to provide rent guarantees throughout the country used the advertisement “Money within 14 days” to lessors to show that the “non-cash deposits” offered by it were accepted and used. Due to these references, lessors were induced to accept such rent guarantees rather than payment of a deposit in cash. However, the application form for payment of the surety, which was provided by the financial services to the lessor, stated that payment of the guaranteed amount may be delayed by the lessee’s opposition to payment, such that payment of the deposit to the lessor would not occur within 14 days. The Wettbewerbszentrale thus objected to the reference to payment of the rent guarantee within 14 days to the lessor as misleading, as it was clear from the terms and conditions of payment that the provider could not comply with this limit. The enterprise thereupon issued the cease and desist declaration under threat of damages requested by the Wettbewerbszentrale and undertook to refrain from referring to payment within 14 days in future (F 5 0002/13).

Healthcare

Christiane Köber, Lawyer, Bad Homburg Office

Pharmacists

A key issue regarding pharmacists continues to be price advertising. Pharmacists are not free to set prices for prescription drugs, since the prices of such articles are set at mandatory levels under the German Pharmaceuticals Act and the German Pharmaceutical Price Ordinance. Two actions initiated by the Wettbewerbszentrale were still pending before the Federal Court of Justice (Bundesgerichtshof, BGH) during the reporting year: a pharmacist from Thuringia advertised that any customer who redeemed a prescription for prescribed drugs would receive as a free gift a voucher for EUR 1, up to a maximum of EUR 3.00. The second proceeding involved a pharmacist who had announced a bonus of EUR 1.50 for each prescription drug. The BGH clarified that the question as to whether a bonus is negligible in value is to be determined with reference to the pharmaceutical prescribed, and not the prescription (BGH, judgment of 8 May 2013, ref. I ZR 90/12; F 4 0875/10). The threshold of relevance is exceeded at EUR 1.50 for each prescription drug, and such a bonus thus breaches the prohibition on bonuses under § 7 of the German Drug Advertisement Act [HWG] (BGH, judgment of 8 May 2013, ref. I ZR 98/12; F 4 0854/10). However, neither BGH decision is relevant in practice any longer since legislation has subsequently clarified that vouchers or bonuses are not permitted, irrespective of their value. By the 3rd German Act on the Amendment of Pharmaceutical Legislation and other Provisions of 7 August 2013, the legislature introduced a second half-sentence into § 7(1), sentence 1, no. 1 HWG in which it now states that bonuses or free gifts are not permitted for pharmaceuticals where they are awarded in breach of the price requirements applicable under the German Pharmaceuticals Act. However, it is expected that the Wettbewerbszentrale will deal with this issue again in future: as soon as the new legislation entered into force, new practices appeared on the market which attempted to circumvent the German Pharmaceutical Price Ordinance, such as a travel expense reimbursement for the consumer's journey to the letterbox or compensation for any consumer who fills out a questionnaire. The courts will have to clarify the question as to whether the compensation is actually paid for a service by the customer, or simply amounts to a new ruse to circumvent price controls.

It was already foreseeable over the past years that, alongside the classic stationary pharmacy, which may or may not hold a mail-order licence, concepts would appear on the market that would need to be examined for compliance with the law applicable to pharmacies. Accordingly, the Düsseldorf Court of appeal prohibited a pharmacist from allowing trainees to issue prescription drugs to customers, unless personal advice had been previously provided by an appropriately qualified pharmacist within the pharmacy (Düsseldorf Court of appeal, judgment of 23 July 2013, ref. I 20 U 116/12; F 4 0741/11). The object of the legal dispute was delivery by a so-called "pill taxi", whereby pharmaceuticals ordered from the pharmacy over the phone were deliver-

ed to customers by courier. In the specific case, the pharmaceutical was delivered by a trainee who was unable to answer one of the patient's questions. The Higher Regional Court regarded such delivery by a trainee as a breach of § 20 of the German Ordinance on the Operation of Pharmacies. Under that provision, the pharmacist or an appropriately qualified staff member is subject to a duty to ascertain the information required by the patient on their own initiative through targeted questioning. In the opinion of the court, a customer who approaches the local pharmacist does not waive his or her right to advice in the same manner as when buying from a mail-order pharmacist. According to the court, the advice must either be provided at the time the order is placed in the pharmacy or the courier must not only deliver the product but must also be able to provide advice and information to the customer.

According to a representative Reader's Digest survey, 87% of Germans have a lot of confidence in pharmacists. 93% of Germans consider local pharmacists to be indispensable in urgent cases, according to a representative survey by the Institute for Trade Research [Institut für Handelsforschung], Cologne 2012 (Source: *www.abda.de/zdf.html*). Consumers thus have a very positive view of pharmacists. In this respect, it will come as no surprise that the designation "pharmacy" is also used by enterprises that do not in fact hold a licence to run a pharmacy. Thus, the Wettbewerbszentrale brought a claim against the operator of a retail outlet for gemstones and minerals, who traded under the name "Edelstein-Apotheke", i.e. "Gemstone Pharmacy". The Wettbewerbszentrale based its claim principally on the prohibition of misleading practices under § 5(1) no. 1 and 3 UWG. However, the opposing party issued a cease and desist declaration during the course of the trial (F 4 0792/12).

An enterprise which sells classic, environmentally friendly products made from recycled materials online and in eight warehouses located throughout Germany advertised under the name "M.-Apotheke" (i.e."M.-Pharmacy") personal care products, which were in actual fact manufactured by a pharmacist. However, the Wettbewerbszentrale objected to the designation as misleading because it created the impression that the enterprise had its own pharmacy. It was possible to settle the matter out of court (F 4 0354/13). On the other hand, a claim was brought against an enterprise selling mainly nutritional supplements under the name "Urwald-Apotheke" (i.e. "Virgin Forest Pharmacy"), which was not however a pharmacy. The impression that customers were buying from a pharmacy was strengthened by the heading "Pharmaceuticals" (which however referred only to nutritional supplements) (Konstanz Regional Court, ref. 8 O 47/13 KfH; F 4 0735/13).

Health insurance industry

In its judgment of 3 October 2013, the European Court of Justice (ECJ) ruled that advertising for members of a health insurance fund is subject to competition law (Case C-59/12; F 4 1059/08). The Wettbewerbszentrale objected to the advert for the health insurance fund as misleading and eventually brought a claim. The fund had asserted to its own members that any person who left the fund would be tied in to the new health insurance fund for 18 months, and hence the members would miss out on attractive premiums and eventually lose out were the new fund to charge an additional levy. It failed to mention that the consumer has a special right of termination if an additional levy is charged. Whilst the BGH was minded to accept that the practice was misleading, it was nonetheless uncertain whether the health insurance fund was acting as a trader and was subject to the provisions of the UWG. It thus made a reference for a preliminary ruling to the ECJ concerning the interpretation of the term "trader" within the meaning of the Unfair Commercial Practices Directive. In its decision, the ECJ noted that EU law conceptualised the term "trader" in very broad terms and neither institutions pursuing a task in the general interest nor public law institutions are exempt. In addition, the ECJ pointed to the preamble to the Directive, which indicated that it should provide a high common level of consumer protection. The ECJ's decision is of major importance for the Wettbewerbszentrale, because it has now been established that advertising by health insurance funds must also comply with the provisions of the UWG.

As in the previous year, queries and complaints focused on advertising with reference to tests, hallmarks, survey results and the like. Tests that present the result of a comparison must state a source. This requirement is provided for under § 6(2) no. 2 UWG (verifiability) and § 5a(2) UWG, since consumers must be provided with basic information, which enables them to understand a test result. According to the judgment of the Dresden District Court issued during the reporting year, this applies not only to classic product tests, such as those provided by Stiftung Warentest (i.e. foundation for testing consumer products), but rather also to adverts with TÜV seal (Dresden District Court, judgment of 22 August 2013, ref. 44 HK O 76/13; F 4 0081/13). The health insurance fund advertised a TÜV seal bearing the inscription “very good”. The second seal referred to the fact that the health insurance fund had achieved a customer assessment of “good”. No further information was provided either by the health insurance fund advertising itself in this manner or by either of the technical control associations. The District Court pointed out that any body that advertises using test results must ensure that specific details, such as the requirements and the testing method, are easily accessible for consumers.

In another case, a company health insurance fund advertised using the seal “top health insurance fund”, stating an issue of Focus Money as the source. In this issue, Focus Money had indeed examined and graded numerous health insurance funds. However, the advertising health insurance fund was not mentioned. During the pre-trial correspondence, the defendant stated that the Focus Money article had noted that further information relating to the assessment was available on a website. After considerable research, it was discovered that this website contains a table under the heading “The top 15 regional [funds]”. The defendant health insurance fund could be found there ranked 15th, having achieved 18 points in the ranking. The best health insurance fund, a general health insurance scheme (AOK), had achieved 86 points. The Wettbewerbszentrale considers first that the source cannot be easily found and secondly that, given the significant gap between 15th place and the leading positions, the designation as a “top health insurance fund” is inaccurate and hence misleading. Since the health insurance funds did not issue any cease and desist declarations, the Wettbewerbszentrale brought a claim before the Darmstadt Regional Court in December of the reporting year (F 4 0666/13).

Doctors

There have been fewer procedures relating to price advertising by physicians compared to the previous year. It was possible to conclude the vast majority of cases in which physicians, dentists and also veterinarians advertise fixed prices or discounts with cease and desist declarations. In one case the Düsseldorf District Court issued an injunction against a doctor who advertised anti-ageing treatments with Botox at lump-sum prices. The Wettbewerbszentrale objected to this with reference to the Fee Scale for German Physicians [Gebührenordnung, GOÄ]. The GOÄ stipulates that the physician must charge according to treatment and according to factual and medical criteria within a fee scheme. The GOÄ does not provide for lump-sum prices or discounts (Düsseldorf Regional Court, judgment of 30 June 2013, ref. 38 O 6/13; F 4 0813/12).

In October 2012, the German Drug Advertisement Act [Heilmittelwerbegesetz, HWG] was amended. The general prohibition on “before-after images” was removed. Pictorial representations are now only prohibited if they depict changes to the body in an “improper, repugnant or misleading manner”, § 11(1), sentence 1, no. 5 HWG. Pursuant to § 11(1), sentence 3 HWG, comparative representations are only now generally prohibited for plastic surgery, i.e. aesthetic operations. In a case involving advertising by a dentist, the Celle Higher Regional Court did not find any breach of these regulations on medication. In a magazine for dental patients it had described in detail the medical history of a patient who had neglected to visit the dentist for a number of years due to panic attacks. After meeting a new life partner, the patient “gained renewed courage to tackle her problem. The qualified retail saleswomen from Lower Saxony wanted to be pretty for him once again.” The articles shows the open mouth of the

patient with the sub-heading “Years of neglect destroy teeth and gums.” A further picture showed a cutting of the smiling patient, showing healthy teeth following the treatment. The Celle Court of Appeal held that there had not been a purely aesthetic operation because according to the advert there was also a medical recommendation for the comprehensive dental work. The court also held that there had not been a repugnant visual representation in either of the images. The picture of the open mouth still remained “within the domain of the bearable”. With reference to the goal under the law on the advertising of medication of protecting the consumer against improper influence, in this case a stricter approach would by all means have been justified, above all as the treatment advertised was also provided for aesthetic purposes (Celle Court of Appeal, judgment of 30 May 2013, ref. 13 U 160/12; F 4 0974/09).

In numerous cases the Wettbewerbszentrale has become involved because advertisers created the inaccurate impression that they are doctors. The Wettbewerbszentrale has accordingly successfully issued warnings to animal psychologists, alternative animal practitioners, animal behavioural therapists etc., who improperly spruced up their professional title with a “diploma”, thus creating the impression that they had received academic training. An alternative practitioner referred to herself as an “Ayurveda Doctor” (F 4 0696/13). After making a commitment to cease and desist, she amended her website, although stating that she was an alternative practitioner with an academic qualification. However, she had not completed her studies at a recognised university. In this case the alternative practitioner also issued a declaration of discontinuance (F 4 0818/13). The Wettbewerbszentrale is currently pursuing litigation against a beautician who presents herself as an “oncology beautician”. Under the German Act on Alternative Practitioners, alternative medicine may only be practised by physicians and alternative practitioners. Beauticians are at most allowed to offer skin care, but are not permitted to provide diagnoses or to cure the skin of cancer patients. In the view of the Wettbewerbszentrale the term “oncology beautician” creates the impression of special competence and training. At the time this Report was closed for publication, no judgment has yet been issued in this case, which is pending before the Braunschweig Regional Court (Braunschweig Regional Court, ref. 21 O 860/13; F 4 0784/12). A person who runs a school for alternative practitioners under the name “Alternative Practitioner School Dr. XY” without referring to the fact that the title of Doctor was obtained in the field of Chemistry is acting in a misleading manner (Frankfurt Court of Appeal, judgment of 19 February 2013, ref. 6 U 28/12; F 4 0264/10). The Frankfurt Court of Appeal refused leave to appeal, following which the opposing party filed an appeal against that order, which had not been decided on at the time this Report was closed for publication.

Pharmaceutical industry

Impressive brand and market success may be achieved relatively quickly with suitable brand advocates (Kilian, markenlexikon.com, celebrity advertising, special 75-year edition brand article). According to a study by Imas International conducted in 2013, at present just under 15% of all adverts in Germany feature celebrities. This is only possible in the pharmaceutical sector subject to limitations. This is because, following the amendment of the German Drug Advertisement Act [Heilmittelwerbegesetz, HWG], pharmaceuticals, procedures, treatment, articles or other objects may not be advertised outside specialist circles with information or images which indicate a recommendation by persons who, due to their reputation, may encourage the use of pharmaceuticals (§ 11(1), sentence 1, no. 2 HWG). The proceedings pursued by the Wettbewerbszentrale against a pharmaceutical company should thus be of interest for the sector because they are testing the limits of celebrity advertising for the first time since the amendment of the HWG. The case was based on the following facts: the actress Ursula Karven appeared in adverts for homoeopathic products. Her picture was accompanied by the text “I’m responsible for striking a balance between work and family - just like my health”. The back-lit signature of Mrs Karven appeared under this statement, beneath which the text “Ursula Karven, mother, actress and entrepreneur” appeared. The dispute essentially concerned the question as to whether there

had been a “recommendation”. In its decision the Karlsruhe Regional Court stressed that § 11(1), sentence 1, no. 2 HWG does not require any specific recommendation of action relating to particular clinical symptoms. A “latent” recommendation is also sufficient. The District Court was also left in no doubt as to the fact that the advert sought to encourage the use of pharmaceuticals and that this was a consequence of the celebrity status of the actress Ursula Karven and of the particular confidence placed in her (Karlsruhe Regional Court, judgment of 26 April 2013, ref. 13 O 104/12 KfH I; F 4 0266/12). The opposing party filed an appeal. At the time this Report was closed for publication, the Karlsruhe Court of Appeal had not yet scheduled an oral discussion.

Price controls for pharmaceuticals or the circumvention of such controls is not only an issue for pharmacies, but also for pharmaceutical companies. The Wettbewerbszentrale was able to clarify during the reporting year that price controls also apply to pharmaceuticals which may be used for blister packaging in pharmacies (Stuttgart Court of Appeal, judgment of 5 September 2013, ref. 2 U 155/12 – not legally binding; F 4 0466/11). The creation of patient-specific pharmaceutical blister packs is mostly a service provided by pharmacies for old-age and care homes. The pharmaceuticals prescribed for patients were provided in individual ready-to-use rations pre-packaged in blister packs. When providing such ready-to-use pharmaceuticals, the producers are also required to abide by their own sale price (§ 78(3) AMG). However, in the disputed case, the enterprise invoked an exceptional provision in the German Pharmaceutical Price Ordinance which exempts partial quantities taken from finished pharmaceuticals from price controls. The Stuttgart Court of Appeal argued that it did not amount to a partial quantity within the meaning of this provision, since the final effect was that the entire quantity of the pharmaceutical prescribed was sold. The argument presented by the opposing party that the cheaper price amounted to compensation for the costs incurred by the pharmacist in preparing the blister packs was also not regarded as convincing. According to the court it fell to the health insurance funds to bear these costs. Due to its fundamental significance the Stuttgart Court of Appeal has granted leave to appeal.

Healthcare sector mechanical work/ medicinal products

Peter Brammen, Lawyer, Hamburg Office

Marketing of medicinal products

As before, enterprises engaged in the distribution of medicinal products do not appear to have become aware of the fact that special rules and restrictions apply to the sale of these special products. These are contained in the German Medicinal Devices Act [Medizinproduktegesetz, MPG] and in particular in the German Drug Advertisement Act [Heilmittelwerbegesetz, HWG], and nothing has changed with the entry into force on 26 October 2012 of the 16th amendment to the AMG. All the same, as a consequence of the "Gintec" decision of the European Court of Justice of 8 November 2007, this legislation resulted in a comprehensive review of the German Drug Advertisement Act, ultimately in order to ensure compliance with Directive 2001/83/EC. It could thus be presumed for the year 2013 as regards the application of the German Drug Advertisement Act, including in particular the prohibition on bonuses under § 7 HWG, that the provisions of competition law comply with Directive 2001/83/EC and, as a whole, also reflect the current intention of Parliament.

§ 7 HWG, referred to above, was thus not a forgotten relic from the 2004 German Ordinance on Additional Benefits [Zugabeverordnung], but rather a rule on market conduct which reflects the current intention of Parliament.

Whilst in 2013 alone the Wettbewerbszentrale received 151 queries and complaints relating to this specific issue, this reveals first a simple unwillingness to engage with these special marketing rules, and secondly the significant lack of information, in particular for smaller competitors. The latter issue is being addressed by the Wettbewerbszentrale through a constant presence in industry information services such as DOZ, Optikernetz, BIHA-Info and comprehensive presentations at expert symposia, such as the internally organised health law symposia in 2012 and 2013.

Against this backdrop it almost goes without saying that the assistance of the courts had to be sought in a range of cases in order to clarify open questions relating to the application of the marketing rules laid down by the HWG. Proceedings before the Lüneburg Regional Court (judgment of 16 May 2013, ref. 7 O 18/13 - not yet final -; HH 1 0511/12) and the Nuremberg-Fürth Regional Court (order of 14 November 2013, ref. 4 HK O 7950/13; HH 1 0436/13) led to the prohibition of free "Armani" reading, spare or sunglasses. The prohibition imposed by the Stuttgart Court of Appeal on the issue free of charge to regular customers of a bonus card for valuable additional services which were normally subject to a charge of EUR 5.00, has in the meantime become legally binding following the refusal by the Federal Court of Justice to grant certiorari of 12 December 2013, ref. I ZR 26/13 (HH 2 0522/11). Finally, the attempt by a chain of opticians to offer buyers of a visual aid a pair of sunglasses as an additional benefit for a fictitious charge of EUR 1, which were ultimately no longer available, was unacceptable on the grounds that it was misleading (Bielefeld Regio-

nal Court, order of 21 August 2013, ref. 16 O 57/13; HH 1 0378/13). This makes clear the tendency within the case law on the prohibition of bonuses to set clear boundaries for loopholes and attempts at circumvention.

That this also applies for B2B relations was moreover clarified by the Karlsruhe Court of Appeal in its judgment of 2 October 2013, ref. 4 U 95/13 (HH 1 0401/11) in which, following a claim by the Wettbewerbszentrale, it prohibited outright a world famous producer of optical class from pursuing a sales-related bonus programme for opticians, i.e. its customers.

Avoidance of the risk of corruption

Since the order by the Joint Senate of the Federal Court of Justice of 29 March 2012 in case GSSt 2/11 in a decision of principle established that statutory health insurance fund doctors are not to be regarded either as officeholders pursuant to § 11(1) no. 2 c) of the German Criminal Code [StGB] or as appointees of statutory health insurance funds, the possibilities for prosecution under criminal law of instances of bribery within the healthcare industry have been significantly reduced. Moreover, activities in this area did not bear fruit before the end of the legislature, following the ultimate failure in the Bundesrat of a Federal Government initiative on the establishment of grounds for intervention under criminal law, with debates relating more to the stringency of the regulations rather than the question as to "whether" a new corruption offence should be created for the health industry. The Coalition Agreement for the new Federal Government has taken up the issue once again (Coalition Agreement, p. 77, paragraph 2.4).

Combating the risks of corruption with professional and competitive law, as pursued by the Wettbewerbszentrale, therefore continues to be a matter of great significance.

In this context the Wettbewerbszentrale was able to achieve far-reaching clarification of vague legal concepts in 2013 concerning the offence of the unprofessional referral of patients to providers of healthcare services under § 31(2) of the Draft Professional Rules of Conduct for Physicians active in Germany [Musterberufsordnung für die in Deutschland tätigen Ärztinnen und Ärzte, MBO]. If conduct occurs for which it "makes financial sense" in any way to pay or receive bribes, then it is simply necessary to prove the referral of patients without an objectively sufficient reason, irrespective of whether any corresponding payments were made between the physician and the service provider.

The following rules apply to such matters: the Wettbewerbszentrale is particularly effective at combating the risks of corruption where it is able to end the referral of patients as a decisive link in a supposed chain of corruption through declarations of discontinuance secured by a contractual commitment or the threat of an administrative fine.

In 23 cases, most of which also required legal proceedings, the Wettbewerbszentrale considered that it was necessary to take action against physicians due to unprofessional referral practices. It was thus possible to clarify important detailed aspects of the referral offence with practical relevance.

These disputes focused mostly on striking a fair balance between the freedom of choice of patients concerning the healthcare service provider to be commissioned with adjusting a visual aid, hearing aid, etc. and an interest in information stated under certain circumstances in discussions with the physician. This interest in information may in no way be piloted by the physician, as held by the Dortmund Regional Court in its legally binding judgment of 21 November 2012, ref. 25 O 209/12; HH 1 0234/12. In addition, the physician may not provide information to the patient consisting of a limited regional recommendation that is not focused on the personal needs of the patient, which constitutes a breach of duty (Schleswig Court of Appeal, judgment of 14 January 2013, ref.
6 U 16/11 see B I 2 c, legally binding; HH 1 0026/10).

The "abbreviated care route" practised by certain physicians, i.e. where the physician participates in the patient care by taking on essentially mechanical

parts of the service, whilst the major part of the care is nonetheless provided by third parties, e.g. hearing aid specialists, ophthalmic opticians etc., has time and again been a cause for disputes. Whether the physician may persuade patients to participate under these terms in this arrangement for supplying a hearing aid, with the subsequent necessary involvement of the cooperation partner in the sales transaction, is currently being clarified with reference to a specific case in proceedings initiated by the Wettbewerbszentrale before the Federal Court of Justice.

It is necessary to wait and see whether this will be the last case in a series of four (!) decisions by the highest courts since 2009 concerning the offence of unprofessional references. The imagination of the protagonists in exploiting further “earnings potential” within the healthcare industry does not appear to know any bounds.

Cosmetics

Christiane Köber, Lawyer, Bad Homburg Office

On 11 July 2013, Regulation (EC) no. 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products (EU Cosmetics Reg.) entered into force. The goal of the Regulation is to harmonise the law on cosmetic products in the EU while ensuring a high level of protection of human health (recital 4). The Regulation is directly applicable without any requirement for transposition in the various Member States.

Despite the new Regulation, many of the previous competition law rules have been retained: as previously, numerous labelling requirements apply to cosmetic products, which are now laid down in Article 19 of the EU Cosmetics Regulation. The labelling requirements amount to market conduct rules, with the result that missing or insufficient information may be prohibited under competition law.

Misleading advertising continues to be prohibited. Pursuant to Article 20 of the Regulation, using texts, names, trade marks, pictures and figures or other signs in the labelling, making available on the market and advertising of cosmetic products,is not permissible in order to imply that these products have characteristics or functions which they do not have. On the other hand, there is a new list "establishing common criteria for claims which may be used in respect of cosmetic products". The Commission has thus complied with its task specified in Article 20(2) of the EU Cosmetics Regulation of laying down common criteria for the justification of claims used in relation to cosmetic products. The list was issued with the status of a regulation alongside the EU Cosmetics Regulation, and came into force on 11 July 2013. In part the criteria have not changed compared to the existing legal position. Thus, for example the following criterion appears under the heading "truthfulness": "If it is claimed on the product that it contains a specific ingredient, the ingredient shall be deliberately present." According to competition law standards, this is a matter of course. On the other hand, the scope of other criteria cannot be immediately ascertained. Thus, the Regulation states under the heading "Informed decision-making" that: "Claims are an integral part of products and shall contain information allowing the average end user to make an informed choice." Since the producer must already comply with a duty to provide information and a prohibition on misleading practices, it will probably fall to the courts to concretise this criterion.

During the reporting year the Wettbewerbszentrale received 51 queries and complaints from the cosmetics sector. Many of these concerned prohibited claims relating to effects. Thus, the impression was created for laser treatments offered in a cosmetics institute that they also had therapeutic effects, such as resolving skin problems involving acne (F 4 0397/13). Leaving aside the fact that the beauticians were not authorised to carry out skin treatments under the German Act on Alternative Practitioners [Heilpraktikergesetz], but must rather limit their work to skincare, the claims are largely inaccurate as to their content. The misleading effect is clear if it is suggested to consumers that they will become "immediately wrinkle-free within 7 minutes" (F 4 0820/13) or will look ten years younger within 72 hours (F 4 0336/13). However, precisely during the second half of the reporting year, complaints

increased relating to advertising with test results, customer surveys, etc. The following cases are provided by way of example: a large enterprise with global operations based in New York gave away samples of its face cream in its perfume shops with the reference “after only 4 weeks, the skin of 92% of women appeared visibly tauter as if it had been lifted.” The asterisk behind “women” is explained as “clinical test”. The Wettbewerbszentrale objected that consumers had not been provided the full information which would enable them to understand the claim (§ 5a(2) UWG). The enterprise issued a declaration of discontinuance under threat of a contractual penalty fines (F 4 0517/13). It is misleading to refer to a “confirmed efficacy” or a “proven effect” if this is based on the subjective assessments of several women, and not on the results of an objective test carried out by a third party (F 4 0815/13). The licensee of a group offering fragrances alongside international fashion brands advertised in a magazine with the claim “95% of testers would recommend Fragrance E to their friends”. The case concerned volume 07/13 of the magazine Glamour. Leaving aside the fact that the source was hardly legible, it was not possible to understand the test result even with this information – the magazine only contained an invitation to women to apply for the product test. However, the issue did not contain any information relating to the test result (F 4 0847/13).

Foodstuffs

Antje Dau, Lawyer, Bad Homburg Office

Health Claims Regulation

The Advocate General of the European Court of Justice (ECJ) stated in his opinion that the advertising claim objected to by the Wettbewerbszentrale "As important as a daily glass of milk" amounted to a health-related claim for a fruit quark. The claim was thus capable of creating the impression for the average consumer that consumption of the quark had a positive effect on health because it was just as important as the daily glass of milk. The Advocate General answered in the affirmative the question submitted by the Federal Court of Justice (BGH, order of 5 December 2012, ref. I ZR 36/11) as to "whether the duties to provide information under Article 10(2) of the Health Claims Regulation (Reg. (EC) 1924/2006) were already applicable in 2010". The duties to provide information contained in the provision required compliance since the Health Claims Regulation came into force on 1 July 2007 (opinion of the Advocate General of 14 November 2013, Case C-609/12; F 4 0806/09; see also 2012 Activity Report, p. 56). The judgment of the ECJ is expected in 2014. The ECJ is not bound by the opinion of the Advocate General, although generally follows it.

Three complaints concerned the use of the term "diabetic wine". Pursuant to Article 4(3) of the Health Claims Regulation, beverages containing more than 1.2 % by volume of alcohol shall not bear health claims. The term "diabetic wine" constituted such a claim, since the claim relating to dietary suitability is associated with a claim targeted at the health concerns of persons with diabetes. With the assistance of this health-related reference, such products will be differentiated from products that do not bear this claim. All three wine traders have issued declarations of discontinuance (F 4 0528/13; F 4 0549/13; F 4 0550/13).

In two further cases, prohibited health-related claims used for cranberry capsules were objected to. The capsules were each advertised with claims relating to the maintenance of bladder health. Regulation (EU) no. 432/2012, which contains health-related claims in its Annex, does not stipulate any such claim for cranberries. In both cases the undertakings issued declarations of discontinuance (F 4 0018/13; F 4 0529/13).

A complaint was directed against the advertising of "white tea power drops", which were advertised with the claim "I lost 22 kilos in 3 months". The advertising of white tea powder drops was objected to on the grounds that it breached Article 12(b) of the Health Claims Regulation, since according to this provision no health related claims such as claims which make reference to the rate or amount of weight loss may be made. The provision amounts to a per se prohibition, which cannot moreover be subject to any exceptions. However, this does not have the result that slimming advertising is prohibited in general, as it concerns rather claims relating to the rate or amount of weight loss. Declarations of discontinuance were issued (F 4 0363/13).

Misleading food labelling

Out of the just under 200 complaints received in the reporting year, around one third related to the area of misleading food labelling.

These focused on cases involving deception as to geographical origin. For example, the egg pack of a farm shop branded with the umbrella brand “Spreewald”, even though the eggs actually originated from different federal states and not from the Spreewald, was objected to as misleading. The proprietor of the farm shop issued a declaration of discontinuance (F 4 0385/13).

In one further case, the Karlsruhe Court of Appeal prohibited a food company from designating cheese manufactured in Germany and in the Netherlands from cow’s milk as “Erzincan Peyniri” or “Erzincan Kaşari”, since the designation created the impression for a non-negligible part of the target public that the cheese, or at least part of the ingredients, originated from Erzincan, a city in Turkey. The court stated that even the reference “according to the Turkish style” was not sufficient in order to make it clear to the buyer that the product was not manufactured in Turkey (Karlsruhe Court of Appeal, judgment of 23 January 2013, ref. 6 U 38/12; F 4 0133/08).

Another case concerned a Sacher Torte advertised under the brand “St. Alpine” with the additional claims “The best from the Alps” and “according to the Austrian style” along with an Austrian flag, even though the product was manufactured in North-Rhine Westphalia. The food discounter concerned issued a declaration of discontinuance (F 4 0091/13).

In 2012, the Karlsruhe Court of Appeal was required to decide whether a packaging for fresh cheese amounted to deceptive packaging. The fresh cheese was marketed in plastic packaging which was rounded towards the bottom and which had a large indent on one of the sides. This plastic packaging was surrounded by a sheath so that this indent was not visible. The court prohibited the manufacturer of the fresh cheese from offering its products for sale in packaging that simulated a larger capacity than it actually had (Karlsruhe Court of Appeal, judgment of 22 November 2012, ref. 4 U 156/12; F 4 0613/11). The fresh cheese producer filed an appeal against that order to the BGH, which was finally rejected in the reporting year (BGH, order of 15 August 2013, ref. I ZR 234/12). The judgment of the Karlsruhe Court of Appeal is thus legally binding.

Online trade

As stated in the previous year’s annual report, during the reporting year there were once again numerous complaints against online traders selling organic food without holding organic certification (e.g. F 4 0564/13; F 4 0580/13; F 4 0801/13; see also 2012 Activity Report, page 57). Pursuant to Article 28(1) of the EC Organic Products Regulation (Reg. (EC) no. 834/2007), any operator who places organic products on the market shall notify his activity to the competent authorities of the Member State and submit his undertaking to the control system. No exception from this obligation is provided for online traders, since the products are not delivered direct to the final consumers. Most online traders obtained certification from an eco-inspection body and issued declarations of discontinuance.

A further focus within online trade concerned the insufficient food labelling of foreign products. As the magazine “Lebensmittelzeitung” stated in its issue of 30 August 2013 under the headline “We speak German”, producers and importers of international delicacies must also comply with German labelling rules. Thus, pursuant to § 3(3) of the German Ordinance on Food Labelling [Lebensmittelkennzeichnungsverordnung], the list of ingredients and the best-before dates must be provided in German. Pursuant to § 5(7) of the German Ordinance on Food Labelling, the duty to label in German also applies to nutritional value labelling. The use of other languages is only permitted if they are easily understandable and this does not impair the provision of information to consumers. This is often not guaranteed where ingredients or nutritional value details are provided in English or French (e.g.

F 4 0671/13; F 4 0720/13; F 4 0842/13). In one case the Wettbewerbszentrale obtained a recognition judgment from the Cologne Regional Court (judgement of 20 July 2013, ref. 33 O 5/13; F 4 0645/12). In another case an action was brought before the Berlin Regional Court against a Berlin department store, which offered French food in purely French-language packaging (Berlin Regional Court, ref. 52 O 286/13; F 4 0486/13). At the time this Report was closed for publication, oral proceedings had not yet been scheduled. The Federal Court of Justice held in a case relating to pasta packaging that labelling in Italian amounted to a breach of competition law (BGH, judgment of 22 November 2012, ref. I ZR 72/11). According to the information available to the Wettbewerbszentrale, veterinary and food monitoring authorities are also pursuing breaches against food labelling requirements and are issuing fines.

The beverage industry

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In 2013 more than 250 cases relating to the beverage industry were dealt with by the Wettbewerbszentrale. The issues ranged from simple breaches of statutory notice requirements through to product-specific questions concerning the composition of labels and presentation.

Water

According to the German Association of Mineral Water Producers [Verband der Mineralbrunnen], with pro capita consumption of 137 litres (2012), mineral water is the Germans' favourite drink (source: http://www.vdm-bonn.de/). Such a product was advertised by one mineral water producer with the claim that its contents did not feature "any change to natural elements" (M 2 0209/13). Pursuant to § 6 of the German Ordinance on Mineral and Table Water [Mineral- und Tafelwasserverordnung] however, substances may not in principle either be added to or removed from mineral water. The Wettbewerbszentrale issued a warning due to the misleading advertising of self-evident facts. In a further case, a publisher published a book which extolled solely the water of a particular producer as having healthy effects (M 2 0315/12). The company accepted that this constituted a prohibited health-related claim and covert advertising.

Juices and soft drinks

Amongst other issues in this sector the Wettbewerbszentrale engaged in the frequently discussed topic as to when fruits may be featured on drinks packaging and whether the overall picture along with the product names may be misleading. For instance, a fruit juice producer called a fruit nectar "Himbeer-Maracuja", i.e. raspberry-passion fruit (M 2 0282/13). The image on the front side portrayed a flood of raspberries and passion fruits, whilst a green apple on green ground lay discretely in the background. With a fruit content of 44%, the fruits named only made up 6%. The drink comprised 35% apple juice from concentrate. The Wettbewerbszentrale objected to this product presentation as misleading, since the consumer would expect a significantly higher proportion of raspberries and passion fruit.

In three further proceedings (M 2 0280/13, M 2 0281/13, M 2 0501/13), the Wettbewerbszentrale objected as misleading to coloured and non-transparent lemonades which portrayed fruits true to life, even though they were actually only contained as aromas. The Nuremberg Regional Court (ref. 4 HK O 7402/13) will have to decide in one of the cases (M 2 0281/13) whether a producer may use a label with the picture of a red orange, dragon fruit and the lettering "Blutorange" (i.e. blood orange) for an orange-red coloured lemonade along with the reference "refined with dragon fruit", if the drink amongst other things only contains blood orange and dragon fruit aromas and 3% orange juice from concentrate.

Another complaint related to a derogatory text on the website of a smoothie producer under the title “The concentrated evil”. This described the manufacture of fruit juice concentrates in a denigrating manner (M 2 0247/13). The manufacturer acted in a reasonable manner and issued a declaration of discontinuance.

Wine

The Commission’s implementing Regulation (EU) no. 203/2012 of 8 March 2012 as regards organic wine has stipulated with binding effect since 1 August 2012 the oenological procedures according to which biological wine must be produced. Thus the continuing organic trend has also reached the wine industry. Numerous cases subsequently arrived at the Wettbewerbszentrale in which online traders sold organic wines without subjecting themselves to the control system prescribed under European legislation (see for greater detail the report on the food sector).

Beer

The brewery industry has reported a further fall in beer consumption. This is due on the one hand to the general trend towards healthy living and on the other hand to the fact that consumption of alcohol-free beer as a fashionable sports drink has increased, alongside a stabler market for beer mixer drinks with a broad consumer range.

Alcohol-free beer was the issue in a request for advice regarding the problem as to whether an “alcohol-free” beer must actually have an alcohol content of 0.0‰. According to an agreement by the Federal State Working Group on Food Chemistry [Länderarbeitskreises Lebensmittelchemie], alcohol-free beer may have a content of up to 0.5 ‰. The uncertainty arose following an evaluation of consumer perception by the Consumer Protection Ministry. In the absence of any new regulations, the limit of 0.5 ‰ will continue to apply. In one case the Wettbewerbszentrale considered the noticeability of the prescribed manufacturer information on beer sold by a food discounter (M 2 0331/13). Pursuant to § 3(3) of the German Ordinance on Food Labelling [LMKV], these must be provided in German and must be easily understandable, clearly legible and indelible. The information was arranged in a horseshoe pattern on the body label in typeface which was too small, located on the edge of an oval window in which the castle of the eponymous prince was visible. A similar complaint related to the excessively small and inconspicuous information of a de-localised ingredient for a beer which advertised itself on the body label as originating from Mecklenburg, but was actually bottled in Hamburg (M 2 0399/13). Declarations of discontinuance were issued in both cases following complaints by the Wettbewerbszentrale.

In the case concerning a discount brand beer (M 2 0215/13), which was reported last year in this section and which suggested the location of a brewery and bottling through the misleading inclusion of a location in a brand name, the discount company issued a declaration of discontinuance in the oral discussion, after the Munich Regional Court had stated its view.

Trade in beverages

In a further case a warning was issued to a beverage delivery service which, amongst other breaches, had also “fiddled” its pricing (M 2 0116/13). In order to appear cheaper than competitors, it had advertised its delivery services at net prices also for private households even though, according to the law on pricing information, it was required to state the final price.

Overview

In 2014, the drinks industry will also be faced with a major task under Regulation (EU) no. 1169/2011 on the Provision of Food Information to Consumers of 25 October 2011 (abbreviated to the Food Information Regulation [Lebensmittelinfoverordnung, LMIV]). This will become binding on 13 December 2014 and lays down new and amended duties to provide information for traders and manufacturers.

Energy and utilities industry

Peter Brammen, Lawyer, Hamburg Office

The tendency towards the re-municipalisation of energy supply was a driving force behind various sales efforts and resulting cases which also came before the Wettbewerbszentrale during the reporting year, 2013. The trend is set to continue as most energy and gas network concession contracts will expire before 2015/2016, which may result in a further engagement by municipal undertakings in energy supply. To date the more than 80 energy supply enterprises under municipal control that have been newly founded since 2007 and the takeover of more than 200 concessions by municipal enterprises already represents a factor for energy competitors, which is leaving traces in sales practices.

Growing energy costs and the promotion of energy efficiency were once again important sales-related issues for energy supply competition.

The market conduct of significant professional groups in the energy sector (e.g. chimney sweeps) also resulted in a not insignificant increase in new cases for the Wettbewerbszentrale in the energy sector in 2013 and, according to year-end figures, the Wettbewerbszentrale responded to a total of 148 enquiries and complaints from this important economic sector.

Sales practices

An evidently latent tendency to break a long-standing or newly established link with municipal suppliers has increasingly led to complaints relating to the unfair, misleading and thus improper use of direct marketing methods. However, ensuring that staff who work directly with potential energy consumers adhere to standards of fair conduct appears to be a problem for networked sales operators. This ranges from nuisance and unsolicited cold calls through to deception as to the identity of the company that is actually presenting itself as the energy supplier. Reference is made here merely by way of example to an order of the Frankfurt am Main Regional Court of 30 October 2013 (ref. 3-08 O 50/11; HH 2 0188/11) by which a particularly persistent sales company received an administrative fine of EUR 6,000.00 due to repeated unsolicited telephone advertising after the enterprise had already been ordered to desist from such practices in 2011.

In another case, a legal dispute with an energy supplier, which had been ongoing for several years, was concluded with a commitment by the enterprise as part of a settlement with the Wettbewerbszentrale, on pain of an administrative fine of up to EUR 25,000.00, to refrain in future from presenting itself or allowing itself to be presented to potential contract partners for the supply of electricity whilst claiming to be employers of the municipal utility company (Hamburg Hanseatic Court of Appeal, order of

7 March 2013, ref. 5 U 118/10; HH 1 0606/08). Repeated attempts using this so-called "municipal utility company trick" are made during direct contact with customers ("door-to-door" strategy) to induce unsuspecting persons to believe that, whilst the customer is agreeing to a contractual amendment, he or she will continue to be a customer of the local "municipal utility company".

It was also necessary to issue warnings in various cases regarding comparative price advertising for electricity contracts. These cases were characterised by the fact that special rates of the advertising energy supplier were compared with the basic supply rates of local competitors in order to emphasise significant savings. According to case law, this is at the very least misleading and unfair if, having regard to the consumption quantities advertised (as a rule 3,000 – 5,000 kWh), only a negligible portion of the electricity customers of the comparator company are supplied at the basic supply rate (Frankfurt Court of Appeal, judgment of 13 August 2009, ref. 6 U 80/09; HH 1 0566/13 and Frankfurt Court of Appeal, judgment of 10 December 2009, ref. 6 U 110/09; HH 1 0657/13). However, these proceedings initiated by the Wettbewerbszentrale have not yet been concluded.

Energy supplier competition / consumption and cost savings on the heating market

Since CO2 emissions have been branded as one of the causes of global warming within debates on climate policy, there have been various attempts, which may be assessed positively, to deal with atmospheric CO2 through measures to reduce consumption. These not infrequently involve the use of fuel additives for mixing with fuel, generally heating oil, in order to achieve the desired saving. For example, the Wettbewerbszentrale will regularly regard a claim such as "7 to 10% heating cost savings with additive" as grounds for presenting a warning demanding that entitlement to make such a claim be established, if the explanations provided for such additives in the advert in no manner indicate how such a heating cost saving may be achieved. In such disputes it is significant that the advertising enterprise described here are evidently unable to prove their bold advertising claims, but rather regularly issue declarations of discontinuance without further discussion (HH 1 0034/13; HH 1 0242/13; HH 1 0180/13). For the time being, more precise examination by consumers is appropriate if significant consumer price savings or cost reductions are advertised.

Significant professional groups in the energy sector

Chimney sweeps above all others should be mentioned in this regard for the reporting year, since legal framework terms have changed significantly for them through various deregulatory steps, including most recently the German Chimney Sweep Act [Schornsteinfegerhandwerksgesetz, SchfHwG] of 1 January 2013. Even though the remaining area of official activity of the so-called "accredited district master chimney sweep" has become significantly smaller, in principle the rule of separation remains for the parallel operation of private and official activities. This is manifested for example in § 19(5), sentence 1 SchfHwG, according to which district chimney sweeps and masters may only use sweep register data if this is necessary in order to perform official tasks.

If purely private regular sweeping work is advertised with reference to officially issued heating appliance notices, this will constitute an abuse of authority in the form of the "abuse of sweep register data". Warnings were successfully issued by the Wettbewerbszentrale in such cases (HH 2 0182/13; HH 2 0351/13).

The automotive industry

Silke Pape, Lawyer, Munich Office

As in the previous years, advertising for new and used vehicles in 2013 was characterised by the price war continuing on the automotive market. These include not only discounts and favourable financing terms, with which car dealers attract customers, but also advertising campaigns by car manufacturers in the form of for example special models or bonuses for particular consumer groups ("young drivers", "exchange bonus").

Counting 837 complaints and 132 requests for advice, around 120 additional cases were dealt with in relation to the automotive industry compared to 2012. This represents an increase of more than 13.5%. Around one half of complaints came from members of the Wettbewerbszentrale. Consumer complaints made up one quarter of complaints. Just under three quarters of the 498 warnings issued were concluded quickly with the issue by the recipient of the warning of a cease and desist declaration under threat of a contractual penalty fine. In more than one half of the remaining cases, the cease and desist declaration under threat a contractual penalty fine was given in resulting proceedings before the arbitration body on the settlement of competition law disputes at the relevant chamber of industry and commerce. For around 75 adverts the Wettbewerbszentrale provided advertisers with information regarding the unfair aspect of the advertising. Upon further examination, in just under one quarter of cases the advertising objected to was not altered, with the result that a subsequent warning was necessary. Recipients of warnings who refused to issue a cease and desist declaration under threat of a contractual penalty fine were subject to one interim proceedings and a total of 28 main proceedings before the courts. In addition, 25 main proceedings were successfully resolved at first or second instance, along with one case which reached the BGH. In three cases the courts rejected the claims brought by the Wettbewerbszentrale.

Requests for customer satisfaction surveys by telephone

Who has not received a call from the garage following the inspection or repair of a vehicle after an accident asking how satisfied the customer was with the service? The decision awaited from the BGH on whether such calls seeking to ascertain customer satisfaction following completion of a contract are to be seen as advertising was not issued in 2013.

In one case pursued by the Wettbewerbszentrale, a lawyer arranged for a windscreen crack to be repaired in a branch of a car glass group. Shortly afterwards he was phoned by a market research institute instructed by the car glass group in order to "research" the customer's satisfaction with the processing of the order in the group branches. The call was sent to the mobile phone number which the lawyer had left with the repair team "in case of emergency". The warning was countered by the car glass group with the argument that calls were intended for research purposes. They could thus not be classified as advertising. Questioning was conduc-

ted anonymously according to the rules of neutral market research. Answers could not be attributed to individual customers.

The Cologne Regional Court ordered the car glass group to desist from such practice, since the provision of a mobile phone number "in case of emergency" was not itself sufficient to presume consent to customer satisfaction calls (Cologne Regional Court, judgment of 24 August 2011, ref. 84 O 52/11). The Cologne Court of Appeal dismissed the appeal brought by the car glass group and confirmed the status of the call as advertising. It held that it did not amount to neutral market research, since the data obtained was assessed by the car glass group. It contained information which would enable it to remove any weaknesses and to optimise order processing within group branches. The call gave the customer the impression that the car glass group was continuing to take care of him. The call was also likely to encourage the customer to recommend the car glass group to a third party: "I have been treated well and have even been asked whether I was satisfied." A call from a market research institute on behalf of a car glass company with the aim of establishing customer satisfaction constitutes prohibited telephone advertising pursuant to § 7(2), no. 2 UWG if the customer has not given his or her consent to be contacted for advertising purposes. This applies not only for business customers but also for consumers (Cologne Court of Appeal, judgment of 30 March 2012, ref. 6 U 191/11). The appeal filed was withdrawn by the car glass group only a few days before the date arranged by the BGH for oral proceedings and the appeal was ruled forfeit (BGH, order of 20 June 2013, ref. I ZR 69/12). The case was thus resolved by a legally binding decision of the Cologne Higher Regional Court. At any rate, in the case of the automotive sector, it remains that calls seeking to establish customer satisfaction with the processing of an order are prohibited unless the customer has consented to advertising (M 3 0515/09).

Withholding of essential information

As before, the plethora of binding formal provisions on the provision of consumer information represents a major challenge above all for small and medium-sized car dealers. The information requirements are generally based on the implementation of European directives. Since the amendment of the UWG on 30 December 2008, such information is deemed to be essential information, which may not be withheld from consumers (§ 5a(4) and (2) UWG). If essential information is withheld from the consumer, the automotive dealer will be acting unfairly pursuant to § 3(2), sentence 1 UWG and will run the risk of receiving a warning.

Name of the automotive dealer

The essential information which the automotive dealer may not withhold is not limited to the statutory notice on its homepage or its web presence on an online vehicle exchange. Newspaper adverts must also contain the company name and address and cars advertised must be offered in such a manner that the average consumer could conclude the transaction (§ 5a(3), no. 2 UWG). An invitation to purchase as a rule already exists if the characteristics of the standard or special features of the vehicle advertised are specified and the vehicle price is stated. This is because, according to the relevant findings of the ECJ, "it [is not] necessary that the commercial communication also offer an actual opportunity to purchase the product" (ECJ, judgment of 12 May 2011 in ref. C-122/10 – Ving Sverige).

Renault Retail Group Deutschland GmbH had advertised in a daily newspaper in two adverts (4.5 cm x 4.5 cm) for a used Dacia vehicle and a used Opel vehicle. Each vehicle was pictured. Information relating to the model and type, approval, mileage, colour and special equipment features of the vehicle appeared under the picture. The price was also stated. The logo of the Renault brand (Renault diamond and the term "RENAULT"), a website address ("www.gebrauchtwagenpool.de") and

a telephone number were printed under the logo, which in the opinion of the Wettbewerbszentrale is not sufficient in order to inform the consumer of the identity of the advertising car dealer. The company name and address should have been provided. The Hamburg Regional Court, which dealt with the case, confirmed the view of the Wettbewerbszentrale. Since the advert concerned contained the core information which the consumer would have to know in order to buy a used vehicle, it amounted to an invitation to purchase. At best the logo of the Renault brand indicated a branch or contractual dealership of the car maker. However, it did not say anything regarding the identity of the advertising automotive dealer. The reference to a website containing further information did not reveal the identity of the advertising automotive dealer. In addition, the website address used was "purely descriptive" and hence not suited for identifying the dealer. Finally, the advert concerned was not affected by space constraints (Hamburg Court of Appeal, judgment of 1 August 2013, ref. 327 O 116/13; M 3 0359/12).

In 2013 it was noted that most automotive dealers now provide a company name in their newspaper adverts. However, the suffix indicating their legal status (GmbH, oHG, UG (haftungsbeschränkt), e. K.) is often left out. This question has been disputed until now. It has now been answered by the BGH in proceedings which were not initiated by the Wettbewerbszentrale, to the effect that the suffix indicating legal status is part of the business name and must be provided (BGH, judgment of 18 April 2013, ref. I ZR 180/12 – Brandneu von der IFA [Brand new from IFA]).

Delivery costs alongside the vehicle price

The so-called final price is now part of the essential information which the automotive dealer may not withhold from a consumer. The final price is the price which the consumer must ultimately pay. It includes the costs which the automotive dealer incorporates into the calculation of his price for a particular vehicle. For a new vehicle the costs incurred for transporting the vehicle from the factory to the automotive dealer form part of the end price (see previously BGH, judgment of 16 December 1982, ref. I ZR 155/80 – Kfz-Endpreis [vehicle end price]).

Also in 2013 the Wettbewerbszentrale was often forced to object to the failure to provide end prices. Time and again, car dealers advertise new cars with prices which only contained the vehicle price. It is pointed out solely incidentally that delivery costs will be charged on an additional basis. Whilst the amount is generally given, so that the consumer could calculate the end price, since it amounts to essential information, this is no longer sufficient. Delivery costs must be incorporated into the price advertised. The end price can only be provided if this is done. It was possible to settle most warnings out of court. Only claims against a few car dealers needed to be enforced through court action (Augsburg Regional Court, judgment of 6 June 2013, ref. 1 HK O 4283/12; M 1 0310/12: "zzgl. Frachtkosten" ["plus freight costs"]; Munich Regional Court, judgment of 12 June 2013, ref. 37 O 1471/13; M 3 0383/12: "zzgl. Überführungskosten (einmalig): 680,00 €" ["plus delivery costs (one-off) EUR 680.00"]; Trier Regional Court, judgment of 25 July 2013, ref. 7 HK O 41/13; M 1 0031/13, M 1 0032/13, M 1 0033/13: " … zzgl. Überführungskosten" ["...plus delivery costs"]; Bochum Regional Court, judgment of 9 September 2013, ref. I-15 O 82/13; M 1 0139/13: "zzgl. € 750,- Überführungskosten" ["plus EUR 750 delivery costs"]; Essen Regional Court, judgment of 4 September 2013, ref. 41 O 45/13; M 3 0227/13: "*… . Zzgl. 750,-€ Überführung/Zulassung" ["… . plus EUR 750.00 delivery/licensing"]).

Complete accident management

Vehicle garages are fond of advertising that they will support customers in the dealing with the other party's insurer, or if appropriate with the driver's own insurer. This amounts to an additional service which has become possible under the German Legal Services Act [Rechtsdienstleistungsgesetz, RDG], in force since 1 July 2008. In principle, the provision of legal services is reserved to the legal professions. However, an exception is permitted under § 5 RDG, which permits non-lawyers to provide legal services as an ancillary service to their professional or job profile. The boundary is difficult to determine. At any rate, the car garage cannot arrange comprehensi-

ve settlement of the damage. It is stated on pages 95/96 of Bundesrat publication 623/06 (Draft Act on the re-arrangement of the Legal Services Act) that the basic settlement of disputed situations can never be an ancillary service to a car repair. In previous years the courts had thus prohibited the operators of automotive garages from advertising with statements such as. “complete accident damage management”, “complete accident service”, “complete accident management” or even “accidents - complete service”. In 2013, the Wettbewerbszentrale objected to advertising by an automotive garage on the removal of hail damage: “We deal with the full insurance management process for you!” The claim was rejected by the Augsburg Regional Court. Since the car garage concerned dealt exclusively with fully comprehensive damage, it was not examined whether the claim was valid or not. For third party liability the position was different (Augsburg Regional Court, judgment of 11 April 2013, ref. 1 HK O 3861/12; M 3 0391/11). Whether this is also the case for car glass repairers is an open question.

Charity donation as liquidated damages

Liquidated contractual penalty fines under competition law are a cash amount which the party obliged to desist from particular action is required to pay to the claimant in the event of the failure to abide by the declaration of discontinuance. This should prevent the party obliged to desist from particular action from repeating its prohibited conduct. At the same time, the party to which the commitment to desist from particular action has been made has an incentive to monitor it. Two of the car companies warned by the Wettbewerbszentrale attempted to structure liquidated contractual penalty fines as a donation to a charitable organisation. Mazda Motors (Deutschland) GmbH had advertised a discount for the models Mazda 2, Mazda 3, Mazda 5 and Mazda 6 with the reference “we pay the VAT”, which was dependent upon particular conditions. However, the conditions were not stated in the advert objected to. This amounted to a breach of § 4 no. 4 UWG. Ford-Werke GmbH had advertised the models Ford Ranger and Ford Transit Nugget with consumers each at a price of “from EUR ….00 net”, which thus breached the German Price Indication Ordinance. The prices stated should already have contained statutory value added tax. Both groups provided a cease and desist declaration “under threat of a contractual penalty fine” that was not acceptable. The liquidated penalty fines agreed upon in the event of a breach were to have been paid subject to the condition that the Wettbewerbszentrale passed on the money as a donation to SOS Kinderdorf e.V. Munich (Mazda Motors) or the Stiftung Deutsche Kinderkrebshilfe [German Child Cancer Assistance Foundation] (Ford Werke). The Cologne Regional Court, which had jurisdiction, confirmed the view of the Wettbewerbszentrale. Mazda Motors (Deutschland) GmbH would be able to reduce the amount of donations which would in any case have been made by the liquidated penalty fines which were paid and passed on. The impact of the modified liquidated penalty fines was thus lower than the impact had payment been made to the Wettbewerbszentrale. In addition, the liquidated penalty fines would lose their effect if the Wettbewerbszentrale were burdened with the entire cost risk associated with enforcement of liquidated penalty fines, whilst the success benefited a third party (Cologne Regional Court, judgment of 22 August 2012, ref. 84 O 104/12; M 3 0032/12). Contrary to Mazda Motors (Deutschland) GmbH, which regularly sponsors SOS Kinderdörfer, there is no special connection between Ford-Werke GmbH and the Stiftung Deutsche Kinderkrebshilfe. Nevertheless, the court repeated the position stated in the previous case in the proceedings against Ford-Werke GmbH. In addition, the court referred to the “almost absurd consequence” of a “model of liquidated penalty fines”, under which the Wettbewerbszentrale undertakes to pass the liquidated damages on to a charitable association. This is because the money could also be passed on to another charitable association pursuant to § 8(3) no. 2 UWG, which could finance the same tasks and work as the Wettbewerbszentrale with the money (Cologne Regional Court, judgment of 20 August 2013, ref. 33 O 292/12; M 3 0146/12).

Driving schools

Peter Breun-Goerke, Lawyer, Bad Homburg Office

The reporting year 2013 also presented new challenges for driving schools from both economic and legal perspectives. The number of driving school pupils continued to decrease. According to current statistics of the German Federal Office for Motor Traffic, the number of driving tests, which represents the result of driving school activity, also fell. The legal framework for the professional activities of driving schools is constantly changing. The long-awaited new German Road Traffic Code [Straßenverkehrsordnung], which provides the basis for the work of driving schools, finally came into force on 1 April 2013. A similarly decisive impact for driving instructors resulted from the promulgation in the German Federal Law Gazette on 30 August 2013 of the 5th Act amending the Road Traffic Act [Straßenverkehrsgesetz] and other laws, under which the new rules on the points system and the introduction of driver fitness seminars took definitive effect on 1 April 2014. As if that were not enough, there was a further change to the German Driving Licence Ordinance on 5 November 2013.

In addition, driving schools continued to be subject to stiff competition during the reporting year. The number of procedures dealt with in the driving school sector – more that 370 – has remained practically the same. The slight fall in complaints is the result of years of the clarificatory work which the Wettbewerbszentrale has carried out in conjunction with driving instructors. Presentations on driving instructor training and contributions to professional journals have helped participants and readers to avoid mistakes in advertising. 50 procedures related to requests for advice concerning planned adverts by driving schools. This successful consultancy activity shows that good cooperation between the Wettbewerbszentrale and associations and enterprises in the driving school sector could also be continued in 2013.

In the 320 cases in which complaints were submitted, 96 warnings were issued, of which more than 90 percent could be resolved through the issue of a cease and desist declaration or another form of amicable settlement. In 5 cases it was necessary to initiate actions for an injunction. The number of arbitral proceedings initiated before the arbitration body on the settlement of competition law disputes at the relevant chamber of industry and commerce remained constant. These all concluded with a positive result. In 15 cases, having regard to the minor significance of the breach of the law, a written notice was given enabling driving schools to correct their advertising accordingly which was then checked in an inspection.

Price advertising

Also during the reporting year 2013 most cases dealt with by the Wettbewerbszentrale concerned issues of price advertising, which is regulated by the special provision laid down in § 19 of the German Driving Instructor Act [Fahrlehrergesetz].

Whilst promotional advertising with special offers is permitted, it is all too often forgotten that the further information required by law alongside the reduced price for the basic fee or additional hours should be provided. This failure to include the full price not

only breaches § 19 of the German Driving Instructor Act, but also competition law. In some cases, driving schools had already signed a similar cease and desist declaration in relation to an earlier advert, and thus the liquidated contractual penalty fines due were claimed.

Alongside the general issue of promotional advertising in which the price information provided for under § 19 of the German Driving Instructor Act was simply left out, the main issues relating to price advertising during the reporting year were legal issues concerning voucher and review platforms and the issue of overall prices.

Advertising on voucher platforms

Driving schools continued to use the coupon market unchanged in 2013 and advertised full or partial driver training packages with coupons to cover particular driving school services. However, it was overlooked that § 19 of the German Driving Instructor Act also applies to the advertising of offers, which means that all prices must be specified in full, which often did not occur in the voucher advertising objected to. As a rule, it often remains an open question as to which costs are charged to learner drivers once the advance payment confirmed in the voucher is used up. Moreover, advertising including the acquisition of a driving licence, which cannot be secured at the voucher price, is unfair. In the vast majority of cases it was possible to resolve the disputes out of court.

In one recent judgment (judgment of 11 June 2013, ref. 6 U 98/12; F 5 0780/11) the Brandenburg Court of Appeal stated its position in relation to various issues regarding advertising on voucher platforms. The Wettbewerbszentrale had objected to an offer by a driving school on a voucher platform according to which any customer who acquired the voucher would receive 2 hours of driving lessons at the heavily discounted price of EUR 9.00. It considered that, in this form, the advert for driving school services including a price breached § 19 of the German Driving Instructor Act, according to which specific mandatory information must be provided in driving school adverts including prices. The Wettbewerbszentrale also objected to the deadline of one year set in the terms and conditions of the platform operator for redeeming the voucher as unreasonable pursuant to § 307 BGB. After the driving school issued a cease and desist declaration under threat of a contractual penalty fine during the oral proceedings before the Brandenburg Court of Appeal relating to the breach of the mandatory price information under the German Driving Instructor Act, the court only needed to rule on the question of the admissibility of the time limit for the vouchers. In its judgment, the court clarified that the driving school which allowed the vouchers in question to be sold over the platform, is also in principle responsible as a matter of competition law for the terms and conditions governing the redemption of the voucher stated on the platform. It did not accept the driving school's argument that it was not responsible for the terms and conditions of business on the platform. By contrast, it had to bear responsibility for the terms and conditions published on the platform with regard to the offer of a voucher, which it ultimately also undertook to honour. Nevertheless, the court did not regard the one-year time limit for presentation to the driving school of the voucher purchased for EUR 9.00 as constituting an unreasonable disadvantage for the consumer. Given that the voucher was associated with a price discount of 80 percent, the company had an interest in working through such particularly beneficial offers as quickly as possible. The voucher buyer will have already decided to take driving lessons in this driving school before buying the voucher and also receives a commitment by the platform operator to bear liability as an additional security for his or her claims. This is because it guarantees reimbursement of the voucher in the event that it is not honoured by the driving school. Having regard to all specific circumstances of the individual case, the court held that there was an objective justification for the time limit on redemption of the voucher of one year and considered that there had been no unreasonable disadvantage or infringement of the so-called "equivalence principle" in this respect. Both the Braunschweig District Court (Braunschweig Regional Court, judgment of 8 November 2013, ref. 22 O 211/12) and the Munich Court of Appeal (judgment of 14 April 2011, ref.

29 U 4761/10) held, on the basis of the case law of the Federal Court of Justice on the unlawful limitation of the validity of telephone cards (BGH, judgment of 12 June 2001, ref. XI ZR 174/00), that the significant curtailment of guarantee periods amounted to an unreasonable disadvantage for the customer. It remains to be said that in practice a time limitation of such vouchers, where offered for payment, is only permitted in exceptional circumstances.

In a further case, the Wettbewerbszentrale took direct action against the operator of a voucher platform which had advertised the sale of vouchers in a newsletter under the title “Mobile: car driving licence including the basic charge” (F 5 0225/13). The voucher cost EUR 199 and, alongside the basic charge and the presentation fee for tests, contained only 2 driving lessons providing practical instruction. Special driving lessons were not even included in the voucher. The Berlin Regional Court (judgment of 7 November 2013, ref. 52 O 144/13 – not legally binding) accepted the position of the Wettbewerbszentrale that this eye-catching title of the newsletter was misleading because, contrary to the advert for the voucher, significant parts of training for a driving licence are not covered.

Total prices

Total prices and adverts which create the impression that the costs of training for a driving licence can be reliably predicted in advance also continue to be a persistent issue.

A driving school had hung up a poster in its display window in which it advertised a time-limited offer for class B training with a price of “from EUR 1,450.00”. In addition to the basic charge, the poster featured the cost of a 45 minute driving lesson, the cost for special driving lessons and the cost for taking part in tests. The Celle Higher Regional Court (Celle Court of Appeal, judgment of 21 March 2013, ref. 13 U 134/12 – not yet final; F 5 0670/11) considers that the establishment of this lump-sum price of EUR 1,450.00 and its advertisement constituted a multiple breach of § 19 of the German Driving Instructor Act, with the consequence that an unfair anti-competitive act had been committed pursuant to § 4 no. 11 UWG. An overall calculation or representation of a total price does not comply with the law applicable to driving instructors on price advertisements, even if the total price is accompanied by a “from” element. In addition, the court based its position on the fact that it is ultimately not foreseeable what costs the training envisaged for driving licence class B will actually generate. This amounted to a breach of the principles relating to clear and accurate prices laid down in the pricing rules under the German Driving Instructor Act. The court did not grant leave to appeal, although the decision is not yet final as the driving school appealed to the Federal Court of Justice against the refusal of leave to appeal (BGH, ref. I ZR 71/13).

Comparative sites / intermediary platforms

The requirement for information relating to the offer of goods and services is continuing to rise. Many customers look for answers to these questions on the internet, and to do so they use comparison sites. Their principal use is the ability to compare prices for goods and services at a relatively low cost and to obtain information about the experiences of customers who have already used the company’s services.

Driving schools must also subject to such comparisons, including in particular online price comparisons. Enterprises cannot avoid the comparison and the summary of information that is generally accessible and obtained through research. Such comparison, which is based on generally accessible information, cannot be objected to under competition law or on any other grounds. Thus, it is not in principle possible to prevent the inclusion of one’s own enterprise on such platforms, provided that the information relating to prices is accurate.

However, driving schools are not required to tolerate allegations by platform operators within the information provided that the fact that a driving school is not

mentioned on the platform is due to the fact that the driving school does not want its prices to be compared and that this “is a sign that the driving school has inflated prices”. Likewise, the driving school need not tolerate the creation by the platform of the impression of actual cooperation, which in reality does not exist. Enterprises may naturally defend themselves against such misleading representations. Moreover, a button entitled “Register now online, get a driving lesson agreement ready to sign” can only be used if the platform operator has concluded an agency agreement with the platform operator. In such cases the Wettbewerbszentrale was able to secure an alteration of the presentation after giving advice to the platform operators.

Misleading advertising

Once again it was also necessary to object to misleading advertising during the reporting year. For instance, a Bavarian driving school advertised with that it offered a “money-back guarantee”. Although it was not stated in the advert, this amounted to the offer that, provided that specific learning software was used by test candidates, if they failed to pass the driving theory test, they would be refunded the test fee charged by the examining body. The driving school subsequently issued a declaration of discontinuance under threat of a contractual penalty fine (F 5 0334/13). The provision of a guarantee that a driving licence would be issued, which no driving school can really give, was likewise misleading. Here too, a cease and desist declaration under threat of a contractual penalty fine was issued by the driving school (F 5 0364/13).

Professional experts

Dr. Andreas Ottofülling, Lawyer, Munich Office

The professional expert sector includes issues relating to the appointment and certification, testing and recognition procedures of professional experts along with the test engineer sector and various activities carried out on behalf of the state, including, above all, official tests. The caseload increased compared to the previous year by around 8% to 345 procedures. The Wettbewerbszentrale was involved in order to prevent unfair advertising measures and to advise public bodies, associations, enterprises and studios of professional experts concerning special issues relating to professional experts under competition law. Nearly 300 cases involved breaches of competition law which arose largely in relation to litigation. From this number, around 190 warnings were issued and information letters issued. In 24 cases the arbitration body on the settlement of competition law disputes was involved in order to provide the unlawful advertiser with the opportunity to resolve the dispute amicably. It was only necessary to involve the courts in order to enforce the claims in 8 cases.

Public appointment and sworn professional experts

In the Federal Republic of Germany there are around 16,000 publicly appointed and sworn professional experts in more than 400 fields, operating in almost all sectors of the economy and manufacturing. As before, appointment is a quality indicator of extensive expertise in a specifically defined area. For this reason, as well as statutory regulation, the courts continue to instruct predominantly publicly appointed professional experts and not for instance certified professionals, those recognised by associations or even self-appointed professionals. Alongside public appointment, which within Europe is operated above all in Austria in addition to Germany, in recent years certification, which is widespread especially in the other EU Member States, has become more significant also in Germany.

At the time they swear an oath, professional experts receive a round stamp from the appointing bodies which must be used during their appointment in relation to their activities (issue of expert reports, consultancy, monitoring, testing, issue of certification, etc.). However, the round stamp may not be used outside the area of appointment. In spite of this restriction a professional expert had used the round stamp outside his professional field, stamping both the photographs incorporated into the report on the lower right side and also stamping each side of text in the report on the lower right side, in addition to a stamp alongside his signature. The court prohibited him from such “enthusiastic stamping“ (Rostock Regional Court, default judgment of 7 October 2013, ref. 6 HK O 151/13; M 1 0347/13). This is because, pursuant to no. 2 of the Annex to § 3(3) UWG, the use of quality marks without the requisite approval amounts to an unfair practice. In addition, the prohibition of misleading practices under § 5(1), sentence 2 no. 3 UWG had been breached, since the target public will assume that the professional expert was also appointed for the field in which he prepared the report. Finally, the corresponding provision

in the rules for professional experts of the appointment body had also been breached, thus entailing also a breach of a market conduct rule under § 4 no. 11 UWG. Such conduct may also be relevant under criminal law, as § 132a(1) no. 3 of the German Criminal Code [Strafgesetzbuch, StGB] provides that any person who uses the designation "publicly appointed professional expert" without authorisation is liable to punishment.

Once again, attempts were also made by persons who were not publicly appointed and sworn professional experts to create the impression through their advertising claims, letterheads or visiting cards, telephone or business directory entries and websites that they were publicly appointed and sworn, or were similarly qualified. For example, a professional expert had stated on his letterheads and in relation to the issue of a report "Occasionally appointed by: Düss Local Court 1999- …, Cologne Regional Court 2008- …, Essen Regional Court 2010- …, Düss Regional Court 2010- …". He was prohibited from doing so by the courts (Düsseldorf Regional Court, judgment of 25 September 2013, ref. 12 O 161/12; M 1 0073/12). As reasons, the court stated amongst other things that the reference to an occasional public appointment provides the misleading impression of appointment by an appointing body. The sole fact that there was no reference to sworn status did not prevent it from being misleading. Similarly, the additional element that public appointment was only "occasional" – naming also a court – could also not offset the false impression. In using the words "publicly appointed", the formulation chosen by the professional expert was "too close" to the terms featuring in and protected by the professional expert sector and § 36 of the German Trade and Industry Code [Gewerbeordnung, GewO]. An impartial consumer would associate it with appointment by a chamber of industry and commerce. This professional expert had already been prohibited from advertising with the following claims: "professional expert sworn and appointed by the courts in individual cases for …", "professional expert firm for … - sworn and appointed by the courts in individual cases …-professional expert" and "professional expert sworn and appointed by the courts in individual cases for …" (Hagen Regional Court, recognition judgment of 2 February 2010, ref. 21 O 2/10; M 1 0461/08).

The Federal Administrative Court ruled the general maximum age limit of 68 years, subject to the possibility of one extension of three years for publicly appointed and sworn professional experts, in the rules for professional experts of the chambers of industry and commerce and age discrimination prohibited under the German General Equal Treatment Act [Allgemeines Gleichbehandlungsgesetz, AGG] (BVerwG, judgment of 1 February 2012, ref. 8 C 24/11). By contrast, the age limit of 70 years for authorised inspectors and expert inspectors under the Hessen Construction Code was deemed to constitute age discrimination compatible with superior law because in setting this age limit in order to guarantee construction safety at a federal level, Germany made valid use of the security derogation under a European Directive (Dir. 2000/78/EC) (Hessen Higher Administrative Court, order of 26 February 2013, ref. 7 K 574/11.WI).

Qualification as a professional expert

The view is commonly stated that the term professional expert is not protected. This is only conditionally correct, provided that there are no special legislative regulations regarding designation as a professional expert. The Federal Court of Justice ruled (BGH, judgment of 6 February 1997, ref. I ZR 234/94, published in WRP 1997, 947 – Selbsternannter Sachverständiger [Self-appointed professional expert]) in proceedings initiated by the Wettbewerbszentrale that, alongside a master, technician or engineer, a person may also use the designation professional expert in exceptional cases in a particular area, provided that he or she has acquired the requisite unlimited expertise and experience, which may also occur through long-standing cooperation and orderly work as an expert under a recognised professional expert (self-taught). In addition, a professional expert must be objective, impartial, independent and demonstrate personal integrity.

A qualified engineer referred to himself as an architect and a free and independent professional expert, stating as the technical area mould damage and humidity damage, even though he had been subject

to an enforceable court order to pay damages of around EUR 1 million due to false surveying and had been struck off the register of architects and consumer insolvency proceedings had been initiated in relation to his assets. In court proceedings (Hanover Regional Court, ref. 24 O 50/13; M 1 0227/13), the self-appointed professional expert issued a cease and desist declaration in relation to the misleading advertising and due to the insolvency procedure and undertook to cover all costs, following which the claim was withdrawn.

Advertising with certificates, auditing, recognitions or memberships or professional associations also does not always occur in accordance with the requirements of competition law. All of the cases described below were settled out of court. Various professional experts were issued with warnings because they advertised using the logo and/or under the acronym of professional associations or auditing bodies, even though they were not (or no longer) members (M 1 0349/13, M 1 0524/13). Other professional experts referred in their adverts to certifications, recognitions and/or audits by associations without having completed the corresponding procedures or stating by whom they had been certified, recognised or audited and for which field (M 1 0186/13, M 1 0244/13, M 1 0458/13, M 1 0500/13, M 1 0503/13, M 1 0527/13). Where a state escutcheon is depicted in relation to an advert, this breaches the German Ordinance on the Portrayal of State Escutcheons, because usage thereof is restricted to the state authorities and institutions (M 1 0525/13). Such advertising also breaches § 145(1) no. 1 of the German Trade Mark Act [MarkenG]. The corresponding federal state ordinances regularly contain so-called escutcheon signs which may be used in the form specified by citizens, associations and organisations.

"TÜV advertising"

In recent years reports have regularly discussed various forms of "TÜV advertising", whether in conjunction with activities on behalf of the state such as roadworthiness tests for motor vehicles, or the inspection of elevators, pressure vessels, etc. However, the use of "TÜV test marks" or "GS marks" in the free market also contains potential for unfair advertising. During the reporting period, one defendant was prohibited by the court from using the seal "TÜV – audited transaction security", because it had not been authorised to use the seal by the competent TÜV organisation (Nuremberg-Fürth Regional Court, default judgment of 28 March 2013, ref. 3 O 9069/12; M 1 0432/12).

Architects and engineers

Susanne Jennewein, Lawyer, Stuttgart Office

In 2013 the Wettbewerbszentrale worked on 125 queries and complaints relating to the "architects and engineers" sector. The caseload was thus similar to the previous year.

As for last year (see 2012 Annual Report, page 71), the focus lay on the unlawful use of the professional designations protected under statute of "architect", "interior designer", "landscape architect" or "city planner" and the unlawful use of compound words containing these professional designations. These included e.g. the designation "furniture architecture" (S 2 0063/13), "interior design architecture" (S 2 0095/13), "landscape architecture" (S 2 0116/13) and "architect studio" (S 2 0049/13). In addition, during the reporting year the Wettbewerbszentrale received an increased number of complaints relating to entries by construction planners in industry directories under the entry "architecture". These entries were objected to as misleading where the persons reported were not "architects" under the German Architects Act [Architektengesetz] (e.g. S 2 0049/13). Most of these cases were settled out of court with a warning.

Other cases also involved the use of designations by planning or engineering studios for which they did not fulfil the prerequisites: For example, a planner who was not included in the register of architects signed a building application not only with the professional designation "Dipl.-Ing. (FH) Architekt/ Innenarchitekt" [i.e. "certified engineer (university of applied sciences) architect/ interior designer"], but also with a non-existent number from the register of architects and crossed the box "authorised to submit building applications". This created the impression that a corresponding entry had been made in the register of architects and that the person signing was fully entitled to submit building applications under the State Construction Code [Landesbauordnung]. Since this was not the case, the information contained in the building application was misleading. A cease and desist declaration was issued after the Board of Conciliation was involved (S 2 0161/13).

The Wettbewerbszentrale also objected to the use of the designation "training as a recognised energy consultant at the Düsseldorf Chamber of Architects". No such training exists or has ever existed at the Chamber of Architects for North-Rhine Westphalia, and hence this designation was misleading. A corresponding declaration of discontinuance was issued (S 2 0812/13).

In a further case the Wettbewerbszentrale warned an engineering company which had advertised on its homepage with the reference "Measurements pursuant to § 26 of the German Federal Emission Control Act… and the Technical Instructions on Atmospheric Emissions Measurement" and "Testing laboratory and QM system according to DIN EN ISO/EC 17025:2005", depicted the emblem of the German Accreditation Council [Deutscher Akkreditierungsrat, DAR] and cited the number "DAP-PL-3807.00". This website created the impression that, at the time of the advert, the enterprise was a recognised measurement body and held current accreditation. In actual fact, this had no longer been the case since 2010, and the website was thus misleading. After the Wettbewerbszentrale brought an action for an injunction, a declaration of discontinuance was issued (S 2 0179/12).

The real estate sector

Jennifer Beal, Lawyer, Berlin Office

During the reporting year the Wettbewerbszentrale dealt with around 260 cases involving the examination of advertising in the real estate sector. Queries and complaints related not only to questions of general competition law such as aspects of misleading and nuisance advertising, but also to issues specific to the real estate sector, such as for example the calculation of agency fees and the German Estate Agent Act. An overview of the most frequent issues arising is provided below:

German Estate Agent Act

The German Estate Agent Act [Wohnungsvermittlungsgesetz, WoVermG] applies to the conclusion of tenancy contracts, amongst other things, it regulates that estate agents may not charge a commission to prospective tenants that exceeds two monthly rental payments ("cold rent") plus statutory value added tax (§ 3(2) WoVermG). The commission charged is thus usually referred to as "2.38 months' cold rent payments including VAT". However, this upper limit is not always respected by individual estate agents. For example, an estate agent who, due to the small business regulations in § 19 UStG [Value Added Tax Law; Umsatzsteurergesetz], does not charge VAT, nonetheless charged 2.38 months' cold rental payments as a commission. However, he should only have charged 2 months' cold rental payments, without adding the tax (B 1 0070/13). Other agents charged commissions of 2.5 months' rental payments (B 1 0426/13) or twice the rate for warm rental, rather than cold rental (B 1 0290/13). Cease and desist declarations were signed by the advertisers in all cases. For the sake of completeness, reference should also be made at this point to § 6(2) WoVermG. According to this provision, the estate agent must state the rent for the flat and must at the same time indicate whether additional costs are to be charged separately. In addition, the advert must make clear that the offer originates from a residential estate agent.

Bonus payments for tips

Due to the tight residential market in the metropolitan areas, the announcement of so-called "tip payments" for designating potentially leasable properties remains particularly widespread throughout the real estate sector. The estate agent promises to pay a bonus to the consumer in the event that the latter establishes contact between the estate agent and a property owner who is willing to sell, e.g. through a recommendation. Such cases involve what is known as "lay advertising", since a consumer is integrated into the trader's sales channel as a "layman". Lay advertising is not in principle prohibited. In fact, the assessment as to whether it is permissible under competition law depends amongst other things on whether it is clear for the person offering the property for sale that the private "broker" receives a bonus for his or her recommendation and that the recommendation therefore may not necessarily be genuine, but may in fact be guided by economic

interests. Any case in which this is not recognisable will constitute so-called hidden lay advertising, which is problematic under competition law. If the advert for example states “Your recommendation is worth EUR 1,000 to us…. Your recommendation will naturally be treated with discretion and in confidence.”, the situation will be assumed to involve hidden lay advertising, which will be objected to by the Wettbewerbszentrale (B 1 0494/13). Further complaints regarding this issue were settled out-of-court through the issue of declarations of discontinuance (B 1 0132/13, B 1 0162/13, B 1 0191/13).

Price advertising

The Wettbewerbszentrale also regularly receives complaints in relation to the real estate sector concerning breaches of the German Price Indication Ordinance [Preisangabenverordnung, PAngV]. Estate agents must - as must other entrepreneurs - state final prices in negotiations with the end consumer (§ 1 Abs. 1 PAngV). However, agents’ commissions are often stated along with the additional remark “plus VAT”, with the result that the final price is not communicated. Corresponding warning letters were issued. In most cases, the entrepreneurs concerned signed the cease and desist declaration requested (e.g. B 1 0106/13, B 1 0135/13, B 1 0328/13, B 1 0445/13, D 1 0061/13); in two cases, a claim for injunctive relief on the grounds of insufficient price information was enforced through the courts (Osnabrück Regional Court, judgment of 17 May 2013, ref. 13 O 7/13; DO 1 0026/12 and Bielefeld Regional Court, judgment of 15 October 2013, ref. 17 O 122/13 – not yet final; B 1 0093/13).

Misleading advertising

Cases involving misleading advertising in the real estate sector are varied. For instance, misleading conduct relates in part to the advertised properties in themselves, and in part also the estate agent as the offeror. Concerning the property itself, it may occur that incorrect information is provided regarding the property’s location. In one case, a property located in the federal state of Brandenburg was advertised on an internet portal for immovable property with a Berlin post code in order to increase the number of interested buyers (B 1 0351/13). A declaration of discontinuance was issued. A similar case was reported concerning a property in the Tübingen area, which was also advertised with incorrect location details (D 1 0523/13).

Special requirements to provide price information in advertising arise where a house or flat is sold separately from ownership of the land, but rather with a hereditary building lease. A hereditary building lease is a right to use land, limited in time, for which the holder of the hereditary building lease is required to pay ground rent to the land owner. The remaining period of time of the hereditary building lease and the amount of ground rent are factors of decisive importance in the decision by a prospective buyer. Therefore, in order to ensure compliance with competition law, an advert for real estate must provide this information to the public. However, this has not always happened, which has resulted in the submission of several complaints to the Wettbewerbszentrale. For example, a real estate enterprise advertised a flat on an internet platform at a purchase price of EUR 195,000.00. The property description stated that the building comprising of 5 flats was built on a leasehold property. However, no information was provided regarding the remaining period of time of the hereditary building lease and the amount of ground rent. The Wettbewerbszentrale objected to this as a misleading unfair practice through omission (§ 5a(2) UWG), since information essential for their decision was withheld from prospective buyers. The failure to state the ground rent constitutes a breach of the obligation to state final prices (§ 1(1), sentence 1 PAngV). The fact that ground rent is not payable to the seller of the flat, but rather to the land owner, is immaterial. The price elements of which the final price is comprised also include the fee for third party services incurred on a mandatory basis. Following unsuccessful attempts to resolve the dispute through a warning letter and before the Board of Conciliation, the Wettbewerbszentrale brought a claim before the Karlsruhe Regional Court, which

will be ruled on during the first quarter of 2014 (Karlsruhe Regional Court, ref. 14 O 77/13 KfH III; D 1 0490/12). Another case was settled out of court before the Board of Conciliation (D 1 0196/13).

As regards misleading statements concerning the advertiser himself, it was necessary to object to the misleading designation "Dipl. Immobilienmakler" [graduate estate agent]. This is because the abbreviation "Dipl." stands for the award of a degree and the existence of an academic qualification. However, the advertiser was unable to present such a qualification (B 1 0206/13). The claim "Awarded several times the title of Best Estate Agent in Munich" was also objected to since the advert did not contain any information as to who had issued this award (D 1 0325/13). Other cases involved complaints against estate agents who had published adverts for properties as a private sale, misleading the public as to the commercial nature of the adverts, which is not permitted (B 1 0289/13, B 1 0316/13). The Wettbewerbszentrale also queried adverts in which individual estate agents advertised real estate brokerage services, without indicating that it was a commission-based service of the estate agent. The fact that the customer has to pay a commission for the service is regarded by the Wettbewerbszentrale as essential information pursuant to § 5a(1) and (2) UWG. In some cases cease and desist declarations were issued (B 1 0321/13, B 1 0323/13), whilst in one case an interim injunction was obtained (Berlin Regional Court, order of 10 October 2013, ref. 16 O 512/13 – not legally final; B 1 0322/13). In a further case, the advertising claim "With more than ten years' experience as an estate agent in…" was objected to as a breach of § 5a(2) UWG because, contrary to the assertion, the business had not been present on the market for more than ten years. By contrast, the period specified had been obtained simply by adding together the periods of time for which both business partners had been commercially registered as estate agents (D 1 0078/13).

Breaches of market conduct rules

Businesses still have problems fulfilling the duty to provide the compulsory imprint on websites regulated under § 5 of the German Telemedia Act [Telemediengesetz, TMG]. There are thus repeated cases in which the operator's details are incomplete, references to legal status are lacking, or the representatives or even postal address are not provided or are incorrect. Required contact data such as email addresses are sometimes missing. Such cases were usually settled efficiently out of court through the issue of a declaration of discontinuance under threat of contractual penalty fines (B 1 0182/13, B 1 0244/13, B 1 0312/13, B 10319/13, B 1 0334/13, B 1 0386/13). In one case the agreed penalty fine was imposed: the advertising enterprise had only provided a PO box instead of a postal address, which is not sufficient for the purposes of § 5(1) no. 1 TMG. The Munich I Regional Court allowed the claim (judgment of 19 November 2013, ref. 33 O 9802/13 – not yet final, M 3 0288/12 and M 2 0269/07).

Estate agents sometimes also offer services relating to the preparation and conclusion of tenancy contracts or contracts of sale. They thus frequently operate within the scope of the German Legal Services Act [Rechtsdienstleistungsgesetz, RDG]. Estate agents are permitted to provide legal services if these constitute an ancillary service to their professional or job profile within their sector (§ 5(1), sentence 1 RDG). The filling out of pre-printed standard-form contracts available in shops is unobjectionable. However, any additional contract drafting is not permitted under statute. The Wettbewerbszentrale thus objected to an advert by an estate agent including the claim "Preparation and conclusion of the tenancy contract or notarial agreement" and "Arrangement of contract drafting". The claims suggested individual contract drafting according to the wishes of the contract parties, which exceeds the bounds of the German Legal Services Act. The enterprise issued a declaration of discontinuance under threat of a contractual penalty fine (D 1 0364/13). The unlimited advertising of an estate agent with "legal consultancy" was also successfully objected to for the above reasons (B 1 0231/13).

Customer acquisition

Finally, it happens that estate agents send advertising by email even though they do not hold express prior consent, which is necessary under § 7(2) no. 3 UWG. In these cases, the Wettbewerbszentrale demands a statement under oath by the complainant warranting that no such express consent was given to the sender of advertising (B 1 0045/13, B 1 0267/13, D 1 0147/13). As soon as a declaration to that effect is obtained from the complainant, a formal warning letter can be issued. In addition, some estate agents overlook the fact that, in relation to customer acquisition activity, the depositing of advertising material in letterboxes is not allowed if a notice has been affixed to the letterbox which prohibits the depositing of advertising. If advertising material is nevertheless deposited in such a letterbox, this will constitute nuisance advertising pursuant to § 7(1) UWG, establishing grounds for a complaint (B 1 0347/13, B 1 0399/13, D 1 0217/13).

Alongside enforcement and consultancy activities, the Wettbewerbszentrale also offers its members presentations and talks in the real estate sector for training purposes. This is of interest in particular for associations of estate agents that wish to keep their own members up to date regarding legal issues. The presentations may focus both on questions specific to estate agents as well as general competition law issues.

The security industry

Dr. Friedrich Pfeffer, Lawyer, Berlin Office

During the reporting year the Wettbewerbszentrale received around 400 complaints and requests for advice in this area. These focused on misleading advertising by locksmiths and by safety technology dealers. The following paragraphs present in greater detail first of all the cases arising most frequently in relation to the commercial activity of locksmiths.

For example, a customer who had been locked out of her flat requested the telephone number of a local locksmith through directory enquiries. The lady from directory enquiries informed the customer that there was an emergency locksmith with a free phone 0800 number. The customer contacted the locksmith directly through the number. After around 30 minutes a technician arrived. He provided neither his name or that of his employer or its address, and stated that it was a security door and that there was no alternative other than to bore through and replace the lock. He provided no information as to the estimated costs. After the door was opened in this manner and the key was changed, the technician wrote out an invoice for EUR 534.07 and demanded immediate payment. This conduct was anti-competitive since in presenting the invoice, a payment demand for the invoice amount, which was unusually high for the area, was suggested to exist in a misleading manner (§§ 3 and 5 UWG). In the proceedings pursued before the Cologne District Court, the defendant recognised the claim of the Wettbewerbszentrale for injunctive relief (Cologne Regional Court, recognition judgment of 16 May 2013, ref. 31 O 13/13; S 3 0790/12).

A further case involved a locksmith enterprise active throughout the country, which advertised on a full page in the Stuttgart local telephone directory with a variety of locksmiths, providing information relating to Stuttgart streets and districts. It also stated “Einbruchschutz.de [i.e. break-in protection] recommended by the police” and “Kripoberatungsstelle.de [i.e. CID information centre] free call”. No locksmiths actually existed at the addresses specified. There was also no cooperation with the CID or any recommendation by the CID. Court proceedings seeking an injunction are currently pending before the Düsseldorf Regional Court (ref. 38 O 122/13; S 3 0532/13).

Further litigation involved price advertising by a locksmith. He had placed an eye-catching advert online for door opening with the reference “only EUR 19.00”. In a concealed footnote, it was stated that the price specified applied for each 15 minute period worked, or part thereof, in addition to a call-out fee of EUR 189.21. The Wettbewerbszentrale regarded this as misleading advertising. Court proceedings are currently pending before the Essen Regional Court (ref. 44 O 130/13; S 1 0317/13).

The Wettbewerbszentrale has already reported on one case involving misleading advertising in the “trade in safety technology” sector concerning lashing straps for securing cargo. It objected to the false information concerning the standard tension force of the lashing straps. Following an inspection by the Material Testing Office for

North-Rhine Westphalia [Materialprüfungsamt Nordrhein-Westfalen, MPA], it was established that the values achieved for standard tension force were lower than those stated (see 2012 Annual Report, page 78). A further procedure was concluded during the reporting year. The case was characterised by the fact that the defendant had invoked the fact that the lashing straps were constantly examined by a testing organisation and had also been awarded a GS mark. However, the Nuremberg District Court proceeded on the assumption that both the manufacturer and the party marketing the lashing straps were responsible for any incorrect information, and that it was not necessary to establish fault for the misleading advertising claim. The proceedings were concluded by a settlement in which the defendant undertook to desist from the practice (Nuremberg Regional Court, ref. 3 HK O 2214/12; S 3 0901/11).

International activities of the Wettbewerbszentrale

Foreign relations of the Wettbewerbszentrale

Jennifer Beal, Lawyer, Berlin Office

The Wettbewerbszentrale is well connected within the European Union in matters of competition law. For instance, through its Society for International Competition Law [Förderkreis für Internationales Wettbewerbsrecht], it is a member of the International League of Competition Law [Ligue Internationale du Droit de la Concurrence, LIDC] based in Geneva. Secondly, the Wettbewerbszentrale is a direct member of the EASA (European Advertising Standards Alliance), the umbrella association of national self-regulatory organisations based in Brussels. These networks not only enable the exchange of developments relating to political developments, legislation and case law, but also provide assistance for cross-border complaints.

International League of Competition Law (LIDC/League)

The LIDC (League) is an international association which deals with all questions relating to competition law and its interface with intellectual property. It is represented in all the main industrialised countries by national associations and enables views to be exchanged once each year at a congress focusing on two selected issues. The League's national group in Germany is represented by the Wettbewerbszentrale through the Society for International Competition Law, which has its own members.

The essential goals and tasks of the International League of Competition Law are:

- to promote the principles of fair competition and the related legal principles along with their application in case law;
- to collect and assess all information and documentation dealing with anti-trust and competition law as well as intellectual property law in the various countries in which the League is represented by national associations;
- to collate, assess and publish information relating to anti-trust and competition law as well as intellectual property law;
- to carry out international comparative law studies in the area of anti-trust and competition law and on current developments in competition law, associated with the drafting of proposals on the further development of competition law and intellectual property law
- to publish the results of the work of the International League of Competition Law in the area of anti-trust and competition law and intellectual property law
- to promote research and legal defence in the area of anti-trust and competition law and intellectual property law with the goal of protecting free trade and commerce.

2013 League Congress

The League organises a congress each year which discusses central issues from a comparative law

perspective. The programme is enhanced by further presentations and panel discussions concerning interesting issues. The 2013 League Congress, which was held between 19 and 22 September 2013 in Kiev (Ukraine), was attended by around 110 participants from 23 countries.

Following the welcome speech by Mr Vasiliy Tsushko, the Head of the Anti-Monopoly Committee of Ukraine (AMCU), the first panel discussion was conducted, entitled "FRAND determination and anti-trust: what is a fair FRAND?" The discussion was chaired by Prof. Anselm Kampermann Sanders (University of Maastricht) and involved Dr Claudia Tapia (Director of IP Policy Patent and Standards Strategy, Blackberry Germany), Dr Szilvia Szekely (GD Competition, European Commission), Richard Wolfram (Attorney-at-law, USA) and Christian Loyau (Head of the Legal Division at ETSI, France).

Thereafter, the two working issues for the Congress were presented by the International Rapporteurs:

Question A:
The grocery retail market: is anti-trust efficiently handling the market? (mergers, restrictive practices, abuse of dominant position). International Rapporteur: Prof. Frédéric Jenny, France

Question B:
Does non-compliance with CSR (corporate social responsibility) commitments constitute unfair commercial practice? International Rapporteur: Guy Tritton, Attorney-at-law, United Kingdom

Resolutions were adopted on each of these conference questions. The national reports for Germany were prepared by Dr Marco Hartmann-Rüppel, Attorney-at-law (question A) and Prof. Susanne Augenhofer (question B).

The Congress also included a keynote speech by Dr Torsten Bettinger (Germany) on the issue of "Trademark and market issues in relation to the new generic Top-Level Domains (gTDLs)" along with two further panel discussions.

One panel discussion entitled "Enforcement of antitrust law: international experience and post-transition economies" was moderated by Aleksandr Voznyuk (Ukraine) and involved Nikolay Barash (Authorised governmental official, Antimonopoly Committee of Ukraine), Andrey Tsyganov (Deputy Head of the Russian Federal Anti-Monopoly Service), German Zakharov (member of the Advisory Board at the law firm ALRUD) and Dr Sergey Shkylar (President of the Association for Resistance to Unfair Competition, Ukraine).

The last panel discussion on the issue of "Anti-trust damages claim - after the EU Commission's proposal for a directive (opening the private enforcement mechanism for anti-trust lawyers)?" involved a discussion by the moderator Prof. Muriel Chagny (University of Versailles) with Bruce Kilpatrick (from the law firm Addlehaw Goddard, UK) and Dr. Marco Hartmann-Rüppel (from the law firm Taylor Wessing, Germany).

2014 League Congress

The next League Congress will be held in Turin (Italy) from 18 to 21 September 2014. Further information concerning the next Congress is available at *http://www.ligue.org/congres.php?lg=en&txtt=16*. Alongside anti-trust law, the question of the exhaustion of IP rights in the on-line industry will be discussed.

European Advertising Standards Alliance (EASA)

The Wettbewerbszentrale is also a member of the European Advertising Standards Alliance (EASA) based in Brussels. The EASA, which is an umbrella association for the advertising industry, includes not only national advertising self-regulatory bodies, but also other associations and organisations from the advertising industry. One of the essential tasks of the EASA is to coordinate cross-border complaints in the area of fair trading law, which are then processed by the member organisations of EASA. Further information concerning the tasks and membership structure of the EASA is available at *www.easa-alliance.org*.

Further cooperation

Alongside regular cooperation within the networks referred to above, the Wettbewerbszentrale receives queries relating to German competition law from foreign ministries, authorities, embassies and university professors. The Wettbewerbszentrale also receives foreign delegations with an interest in particular in the German system of the private enforcement of rights. For example, in July 2013 the Wettbewerbszentrale welcomed a Chinese delegation, whose members wanted to learn more about the structure, tasks and responsibility of institutions pursuing competition law goals. The 25 participants included high-ranking senior executives from various regulatory and anti-trust authorities in the provincial regions of China.

Individual cases with an international aspect

Jennifer Beal, Lawyer, Berlin Office

Complaints submitted by economic actors

In 2013, the Wettbewerbszentrale processed more than 400 cases in which the advertising enterprise was based abroad. The complaints received concerned enterprises from 46 countries. Despite being based abroad, these advertisers must as a rule comply with German competition law, if the advert is directed at customers in Germany. This results from the so-called “market location principle”. By contrast, enterprises based in the European Union may be subject to the so-called “country of origin principle” in relation to cross-border advertising on television, on the radio or on the internet. In these cases the trader need only comply with the law of its country of origin.

Around one half of complaints involving a foreign connection concern - as was the case law year - conduct by undertakings based in the United Kingdom, Switzerland, the Netherlands and Austria. Complaints were also received in relation to advertising by enterprises based in Luxembourg, Spain and France.

Around 25% of complaints regarding enterprises based abroad related to misleading conduct concerning for example the price, essential features of the goods or business relations. Breaches of the German Price Indication Ordinance [Preisangabenverordnung, PAngV] occurred in particular in the tourism sector (e.g. absent or incorrect information concerning final cleaning costs). In addition, unsolicited and hence nuisance advertising received by email and fax was objected to. Breaches of the law on distance selling and the absence of or provision of incorrect information concerning the right of cancellation or return were also reported. The statutory imprint of some foreign providers of auctioning platforms and online shops also gave grounds for complaint.

Complaints submitted by the European network of authorities

The Wettbewerbszentrale is not only active in relation to complaints submitted by economic actors. In fact, additional complaints originating from abroad, which were directed against enterprises based in Germany, were forwarded to the Wettbewerbszentrale in connection with a European network of authorities. This occurs on the basis of the Regulation on cooperation for the enforcement of consumer protection laws (Reg. no. 2006/2004 (EC)), which established the Consumer Protection Corporation Network, abbreviated to CPC Net. If a cross-border breach originating from Germany has been committed, the foreign authorities will in the first instance contact the Federal Office of Consumer Protection and Food Safety [Bundesamt für Verbraucherschutz und Lebensmittelsicherheit, BVL], which is the competent authority in Germany. The BVL then commissions inter alia the Wettbewerbszentrale pursuant to § 7 of the German Consumer Protection Implemen-

tation Act [Verbraucherschutzdurchsetzungsgesetz, VSchDG] to end the intra-Community breach of competition law with the assistance of a claim for forbearance under private law. Thus, the network of authorities makes use of the tried-and-tested private law enforcement system in Germany. Details regarding the appointment are laid down in a framework agreement (German Federal Gazette, issue no. 90 of 19 June 2008, p. 2145).

In 2013, the BVL commissioned the Wettbewerbszentrale to end cross-border breaches in five cases. Complaints were received from the authorities in the Czech Republic, Spain, Sweden and Malta. In 3 cases cease and desist agreements under threat of penalty fines were signed, whilst in one case the Wettbewerbszentrale initiated court action. A further case is still being processed.

Alongside the requests for enforcement measures, requests for information may also be made within the network of authorities. These requests often serve as a precursor to requests for enforcement, in order to obtain the necessary information relating to the enterprises. Conversely, the Wettbewerbszentrale may also submit requests for information and enforcement to the BVL, to then be forwarded to the foreign authorities, if enterprises from abroad breach national law to the detriment of fellow competitors or consumers based in Germany. However, this may only occur if harmonised European law has been breached.

Reports and consultations

The BVL presents an annual report on requests received and forwarded in Germany (requests for enforcement and information). The report covering the years 2011 and 2012 was published in 2013 and is available for download at *http://www.bvl.bund.de/SharedDocs/Downloads/091_WVS/WVS_Bericht_2011_2012.html*. By contrast, the Commission prepares its own report on the application of the Regulation on cooperation for the enforcement of consumer protection laws (Reg. no. 2006/2004 (EC)) every 2 years. To date, the Commission has presented reports for the European Parliament and the Council in 2009 and 2012.

On 11 October 2013, the Commission launched a consultation on a review of the Regulation. All interested parties from the Member States may state their position on it before 31 January 2014. The goal of the consultation is to assess whether, five years after its entry into force, the Regulation has fulfilled the planned targets or whether it needs to be enhanced or improved. The results are due to be presented to the European Parliament and the Council in 2014.

European Commission sweeps

Since 2007, the European Commission has initiated and coordinated sweeps, in which investiagtions are carried out in the Member States on a pan-EU scale within a specific time window as to whether enterprises from a particular sector are complying with rules harmonised on EU level. The sweeps are carried out by the competent national authorities, which is the BVL in Germany. Taking into account that the Wettbewerbszentrale is involved in the enforcement of cross-border cases, it is also invited by the BVL to participate in the national sweep. In other Member States, these tasks are performed almost exclusively by the authorities.

Sweeps have been carried out in the past in relation to airlines, telecommunications providers (in particular regarding ringtones), electronic goods, ticket providers for sporting and cultural events, consumer credit and digital products such as online games and music downloads. In 2013, the sweep related to services in the travel industry. In Germany, 30 websites were examined for potential breaches by the BVL, the vzbv and the Wettbewerbszentrale. Further information regarding the sweeps is available at *http://ec.europa.eu/consumers/enforcement/sweeps_en.htm*.

Summary of activities in 2013

Overview of the range of work

Ulrike Gillner, Lawyer, Bad Homburg Office

As in previous years, the work of the Wettbewerbszentrale in the area of competition and anti-trust law was extremely varied also in 2013: queries and complaints related to various sectors, such as for example health and food, energy, banks and insurers, the automotive sector, security or telecommunications, to name but a few. Alongside taking action against breaches of competition law, advice was provided to member enterprises, chambers and associations in relation to specific adverts. These involved various different rules of competition law. In a large number of queries resulting from national and European politics, the Wettbewerbszentrale provided its services as an expert institution on the enforcement of competition law. It also published numerous publications and organised numerous seminars during the reporting year as a provider of specialized information services in the area of competition law.

Member advice

Competition law questions are arising time and again in new forms: first, actual opportunities for advertising are developing, and secondly competition law continues to develop. This means that companies have a greater need for information and advice in order to avoid a breach of applicable competition law. For this reason, the provision of advice to members represents an important element of the everyday work of the Wettbewerbszentrale. Also in 2013, the Wettbewerbszentrale received numerous written and telephone queries from members relating to individual questions of law and issues of legal policy, in response to which information was provided and reports and opinions were prepared.

Information services of the Wettbewerbszentrale

Nicole Tews,LL.M., Lawyer, Bad Homburg Office

Public seminars / in-house events

In 2013 the information services of the Wettbewerbszentrale once again arranged four public seminars with around 500 participants.

- Spring seminar: Open legal questions under the UWG – theoretical & practical perspectives;
- Summer academy: Internet law & online marketing – including the “Button Solution”;
- Autumn seminar: Current developments in competition law 2013;
- Specialist conference: 4th Bad Homburg Health Law Symposium 2013.

In addition, numerous in-house seminars and presentations were held by heads of department from the Wettbewerbszentrale. Adopting a practice-based approach, these presentations took account of the multifaceted interests and areas of operation of members, enterprises and professional associations. Features specific to individual sectors were focused on and explained with reference to corresponding case material. In-house seminars and presentations were held inter alia in relation to the following issues:

- The Cookie Directive & marketing in the pharmaceuticals sector
- Sports marketing – introduction to competition law
- Competition law for insurers
- Opportunities and risks associated with professional expert advertising

Print and online publications / online database

The Wettbewerbszentrale provides regular information to more than 1,000 businesses, associations and lawyers regarding current case law and publishes papers on issues relating to competition law, internet law and intellectual property law in online reviews

- Competition update – newsletter;
- Competition law update;
- Intellectual property law update.

Members of the Wettbewerbszentrale receive the newsletter, which contains information regarding current developments in competition law and internet law, free of charge. Subscribers receive access to the online database of the Wettbewerbszentrale and are able to carry out searches using a simple search function. The online database now includes more than 30,000 contributions relating to competition law, internet law and intellectual property law. These feature editorial comments with practical relevance on the classification of the relevance of judgments, parallel proceedings and the law enforcement practice of the Wettbewerbszentrale.

The print publications include books, manuscripts and information brochures on current issues within competition and internet law as well as industry-specific issues – such as adverts for driving schools and pharmacies – and can be obtained direct via the Wettbewerbszentrale homepage: *http://www.wettbewerbszentrale.de/de/publikationen/print/*.

Provision of information to the public

The Wettbewerbszentrale provides information to the public in various ways: the seminars referred to above were accessible to the wider public, i.e. including non-members, although they were mainly attended by the specialist public.

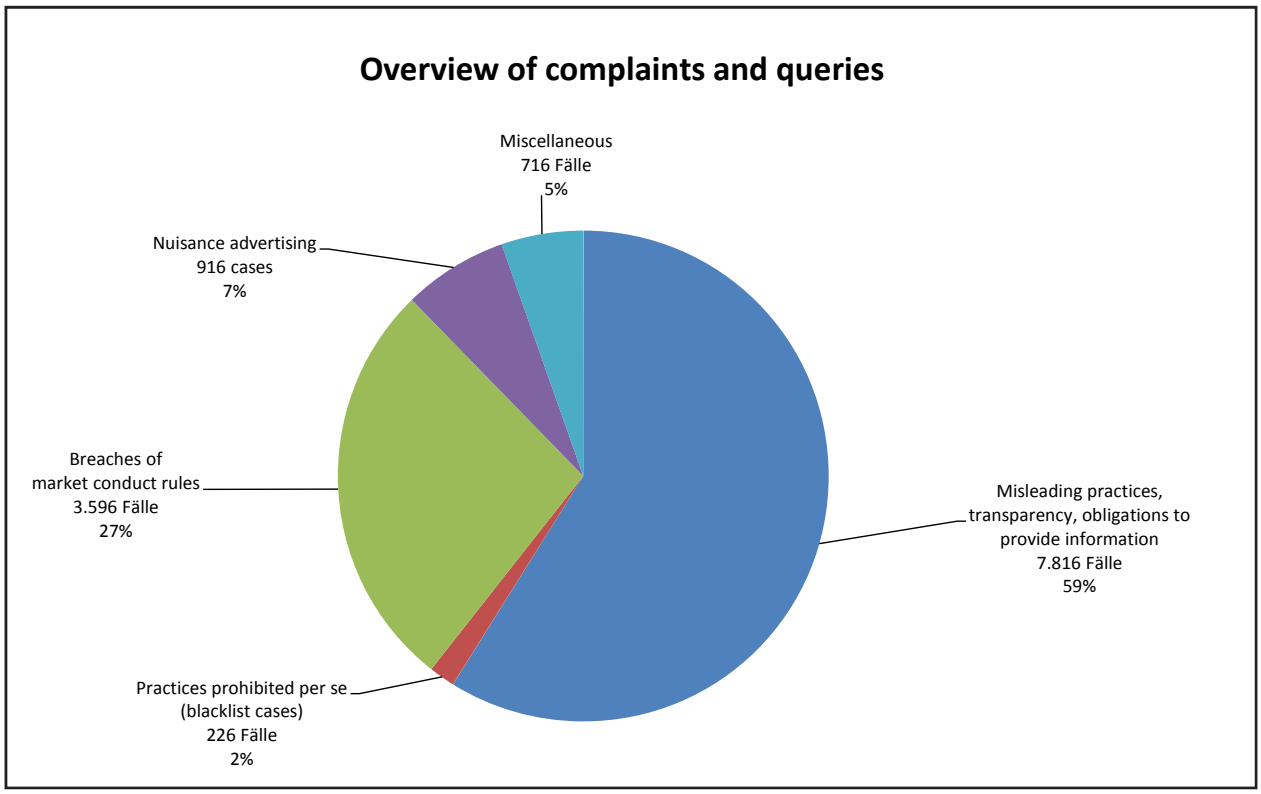
Any person may obtain information concerning the activities of the Wettbewerbszentrale through the website www.wettbewerbszentrale.de. The site contains reports on current court decisions, new legal provisions and developments within individual sectors. The start page contains various up-to-date reports on important novelties from competition law under the heading “current”. Specific market sector pages have been created on the homepage for individual sectors. These contain an overview of all information relating to competition law within a particular sector.

In addition, lawyers from the Wettbewerbszentrale have given numerous presentations and written articles on various competition law issues, which have been published in specialist and industry journals and in the magazines of the chambers of industry and commerce.

The Wettbewerbszentrale has become an important partner for the press. For example, it provides information to editors through press releases or in telephone discussions regarding important proceedings or court rulings. In addition, in 2013 it was also willing to grant interviews to journalists in response to numerous requests from the press.

Law enforcement

In 2013, the Wettbewerbszentrale handled around 13,000 cases, i.e. enquiries and complaints. The following diagram provides an overview of the cases managed:



Just under 59% of all cases dealt with by the Wettbewerbszentrale in 2013 related to misleading and non-transparent advertising and the non-compliance or inadequate compliance with duties to provide descriptions and information. Overall, case numbers in this area amounted to 7,816 (previous year: 7,473). Thus, compared to the previous year, their proportion out of all cases managed increased by 2.5 percent. In the two-year period since 2011, this figure has increased by 7.9 percent: in 2011, 51% of all cases dealt with fell under the category of misleading practices / transparency / description and labelling duties.

The increase is due amongst other things to higher case numbers relating to transparency § 4 nos. 3-5 UWG (+ almost 10%). Within this group, the number of cases relating to disguised advertising (§ 4 no. 3 UWG), such as for example editorial advertising, almost doubled. In addition, there was an increase in cases involving the inadequate provider identification.

The Wettbewerbszentrale also worked on 226 cases involving misleading and aggressive business practices that are prohibited per se (known as “blacklist cases”, see Annex to § 3(3) UWG). This group of cases has been reported separately for the first time. In particular, cases involving tempting offers, which made up more than 50% of blacklist cases, were particularly prevalent in practice. Furthermore, this category of cases also included those involving the concealment of the status of the business, the unauthorised use of quality marks and misleading the public as to the fitness for sale of goods.

There were also increases during the reporting year for breaches of market conduct rules, which have already been at a high level for a number of years: with 3,596 cases, 27.1 % of all cases processed by the Wettbewerbszentrale in 2013 involved breaches of market conduct rules. These involved professional regulations such as e.g. craft or trade regulations as well as business-related or product-related regulations, e.g. the Packaging Regulation [Verpackungsverordnung], the German Drug Advertisement Act [Heilmittelwerbegesetz, HWG] and so on. These regulations,

which are laid down in special legislation, in most cases also serve the purpose of consumer protection. For example, the purpose of the HWG is both to protect the general public and also to protect the health of individuals. Individual consumers should thus be protected against particular advertising practices within the drug advertising sector.

Last year, in 2012, this class only accounted for 3,233 cases, representing a proportion of 24.4% of all cases processed. For the reporting year this means 363 additional cases in this area, representing a rise of 2.7 percent.

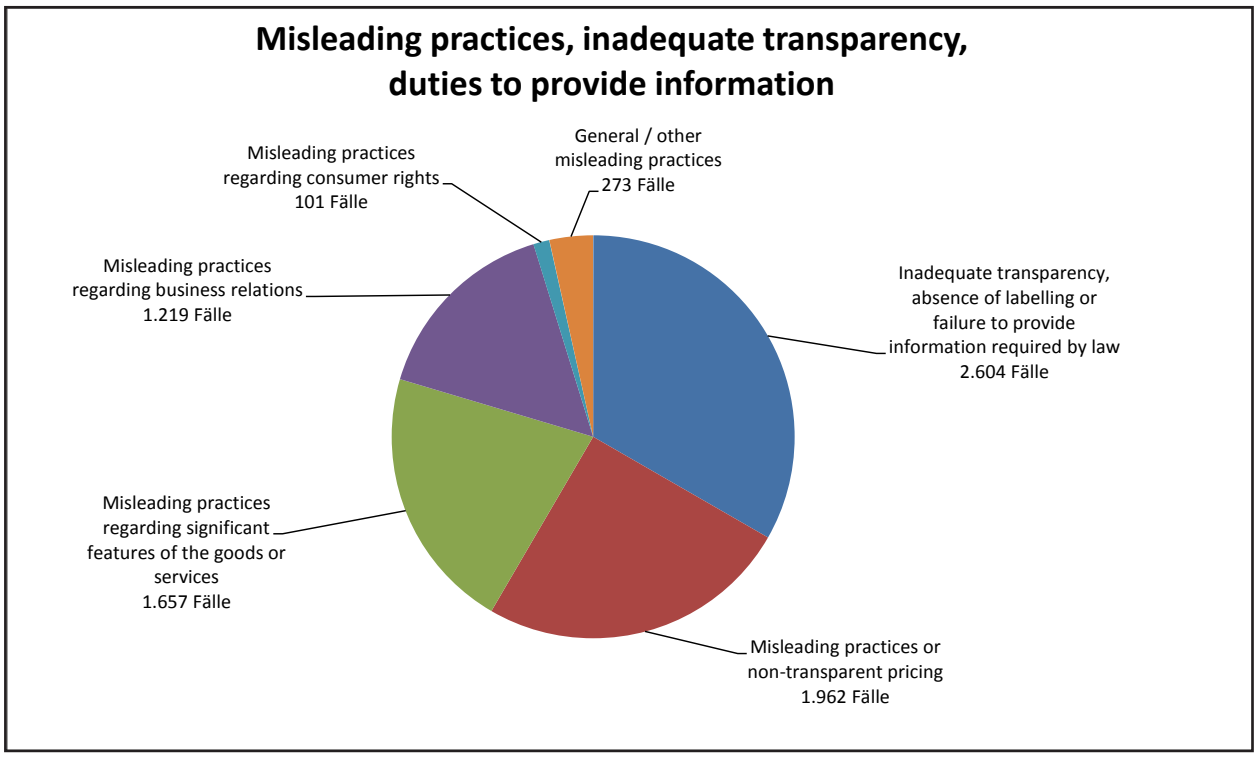
916 cases involved nuisance advertising, i.e. prohibited telephone, fax or email advertising. This was practically unchanged compared to the previous year (919 cases in 2012).

Finally, more than 700 cases related to comparative advertising, imitation, obstructing competition, undue influence, anti-trust issues, cases involving general terms and conditions etc.

Misleading practices, lack of transparency, information duties

Out of the 7,816 cases in this area, 2,604 related to situations involving a lack of transparency, the failure to provide descriptions or the withholding of information required by law. In 2012, 2,525 cases were counted, which means that the increase this year amounted to 3.1%.

Cases involving misleading and non-transparent pricing have also increased. 1,962 cases were dealt with. Compared to the previous year (1,928 cases) this meant an increase of 1.8%. 1,219 cases concerned misleading information as to business relations (e.g. unwarranted unique selling point, information regarding the size, significance and age of the undertaking, etc.). In 2012 there were 1,150 cases, or a 6% increase.

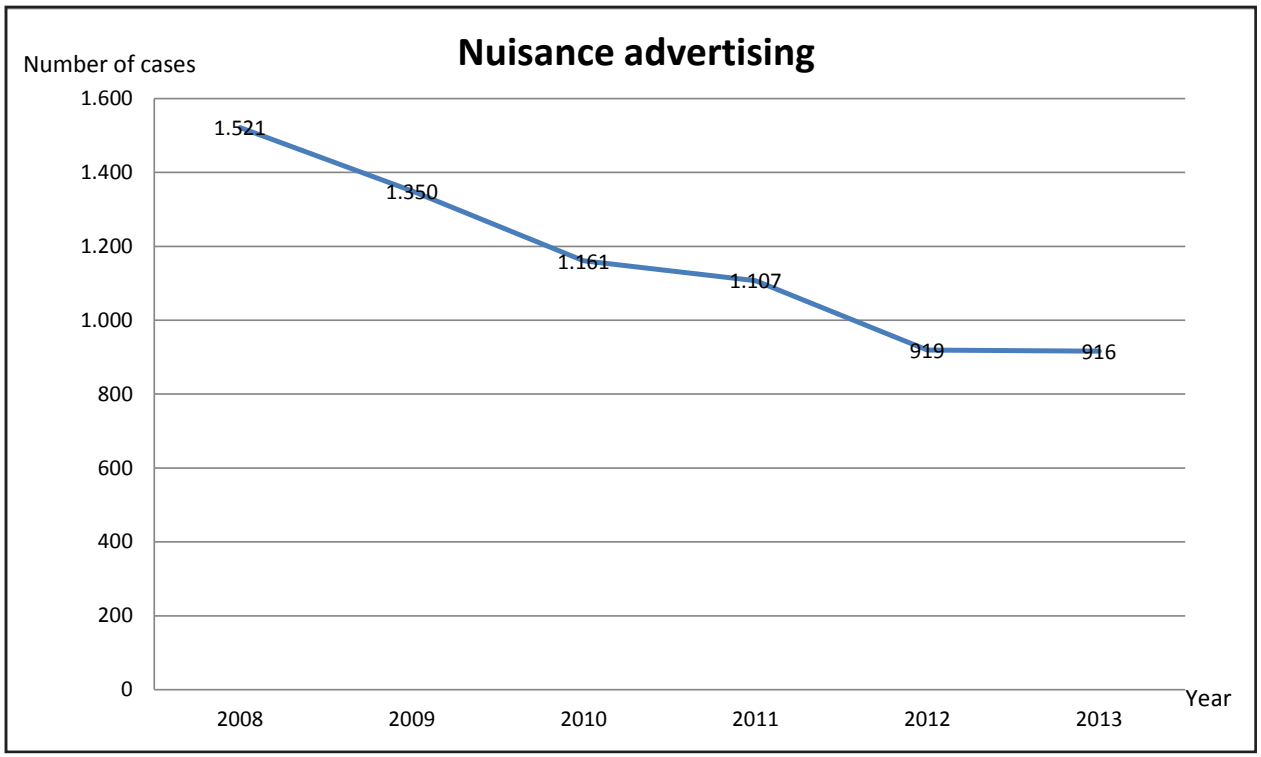


Following a fall of 2.7% in 2012, case numbers for the group “misleading regarding essential features of goods and services” once again saw a rise: case numbers here in the reporting year were 1,657. This means a rise of a full 4.6% compared to the previous year, whereby the 2011 level (1,628 cases) was not only achieved but was even exceeded.

Nuisance advertising

The numbers of cases involving nuisance advertising (e.g. unsolicited telephone, fax or email advertising) were practically constant in 2013 compared to the previous year: overall, 916 cases were dealt with in this area (919 in 2012), whilst 1,107 cases were dealt with in 2011.

The overall downward trend in case numbers for nuisance advertising has operated as follows over recent years:



Overview broken down according to sectors

In certain sectors, market control by competitors and associations is particularly high, whilst in other sectors the number of queries and complaints received by the Wettbewerbszentrale is low. This is clear from the following overview of queries and complaints, in relation to sectors chosen by way of example for the reporting year:

Sector Number of cases	**2013**	**2012**
Healthcare sector (doctors, pharmacists, health insurance funds, pharmaceutical industry, healthcare sector mechanical work such as opticians, etc.)	1,099	1.219
Auction platforms (e.g. eBay, my-hammer, etc.)	1,034	1,025
Craft trades	824	763
(stationary) trade	1,104	1,180
Food and drink	473	n.a.
Tourism/travel	955	904
Automotive industry	971	853
Online trading (without auction platforms)	531	578
Driving schools	368	390
Security industry	378	562
Professional experts	345	316
Media/publishing	248	180
Finance (banks, insurance, insurance brokers, financial service providers)	151	196
Telecommunications	317	227
Vending machine industry/amusement arcades	338	184
Architects / engineers	125	135
Energy/utilities industry	143	147
Real estate	258	275
Mail-order selling (offline)	342	288

Overview of procedures

Also in 2013, the primary goal pursued by the Wettbewerbszentrale was the out-of-court settlement of competition law breaches and amicable dispute resolution. The arbitral proceedings conducted in 2013, which numbered just under 600, once again reported a very high settlement rate. The advantage offered by these arbitral proceedings is that competition law disputes can be discussed with the expertise of businessmen and -women, who are appointed as arbitrators, and amicable solutions may be achieved without involving the courts (including the related costs). Alongside the legal expertise, these proceedings always incorporate practical experience from the economy directly into the arbitral proceedings.

Nonetheless, the Wettbewerbszentrale had to pursue a total of more than 700 court proceedings in 2013. Almost 350 cases were resolved during the reporting period. In more than 90% of cases, the Wettbewerbszentrale won the legal dispute either outright or in part and the conduct objected to was ended.

Governing bodies and management of the Wettbewerbszentrale

Governing bodies and management

The Wettbewerbszentrale was founded in 1912 as a registered association. After the Second World War, it was re-founded on 17 July 1949 in Frankfurt am Main, where the Wettbewerbszentrale continues to be registered (registration court: Frankfurt am Main Local Court 73 VR 6482). The Wettbewerbszentrale has been recognised as a non-profit entity since it was founded.

The governing bodies of the Wettbewerbszentrale are:

- The Board of Governors
- The Management Board
- The Advisory Board
- The General Assembly

The Board of Governors

Prof. Dr. Dr. h.c. mult Erich Greipl
(Chairman, deceased)
Otto-Beisheim-Group GmbH & Co. KG
Düsseldorf

Friedrich Neukirch
(Vice-Chairman, Treasurer)
MCM Klosterfrau Vertriebsgesellschaft mbH
Cologne

Uwe Bergheim
Falke KGaA
Schmallenberg

Wilfried Mocken
Underberg AG
Rheinberg

Stephan Nießner
Ferrero Middle and Eastern Europe GmbH
Frankfurt am Main

Josef Sanktjohanser
PETZ REWE GmbH
Cologne

Gerhard R. Schöps
FR.O.G. Consulting
Meerbusch

Dr. Daniel Terberger
KATAG AG
Bielefeld

Martin Tschopp
eBay GmbH
Europarc-Dreilinden

Michael Wiedmann
Metro AG
Düsseldorf

Dr. Reiner Münker
(Exec. Member of the Board of Governors)
Wettbewerbszentrale
Bad Homburg v.d.H.

The Management Board

Dr. Reiner Münker
(Executive Member of the Board of Governors)
Wettbewerbszentrale
Bad Homburg v.d.H.

The Advisory Board

Michael Adel
Dortmund Chamber of Industry and Commerce

Jakob Stephan Baschab
Bundesinnung der Hörgeräteakustiker KdöR

Ass. Jürgen Dax
BTE / BTL Vertriebs- und Verwaltungs GmbH

Jens Dohmgoergen
Canon Deutschland GmbH

RA Dr. Alexander Dröge
Markenverband e.V.

RA Peter Feller
Bundesvereinigung der Deutschen Ernährungsindustrie e.V.

Dr. Thomas Gerhardus
Karstadt Warenhaus GmbH

RAin Cornelie von Gierke
Counsel with a right of audience before the Federal Court of Justice

Christian Graf
Hamburg Chamber of Commerce

Dr. Roswitha Grießmann
Saxony State Association of Pharmacists

Dr. Jürgen Hoffart
State Association of Physicians Rhineland-Palatinate

RA Thorsten Höche
Bundesverband deutscher Banken e.V.

Dr. Kathrin Janke
Association of Dentists North-Rhine

Dr. Ute Jähner
Chamber of Industry and Commerce Halle-Dessau

Peter Kalb
Bavarian State Association of Physicians

RAin Corinna Kleinert
Deutscher ReiseVerband e.V.

Dr. Axel Koblitz
Zentralverband Deutsches Kraftfahrzeuggewerbe e.V.

RA Dr. Ludwig Linder LL.M.
CMS Hasche Sigle

Martin Mildner
Otto (GmbH & Co KG)

Prof. Dr. Martin Müller
Attorney at law

Dr. Beate C. Ortlepp
Chamber of Industry and Commerce for Munich and Upper Bavaria

Manfred Parteina
Zentralverband der deutschen Werbewirtschaft e.V. (ZAW)

Iris Plöger
BDI Bundesverband der Deutschen Industrie e.V.

RAin Hildegard Reppelmund
DIHK Association of German Chambers of Industry and Commerce

Dr. Christof Riess
Chamber of Craft Trades Rhine-Main

RAin Kerstin Schmidt
GALERIA Kaufhof GmbH

Dr. Peter J. Schröder
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RAin Dr. Ine-Marie Schulte-Franzheim
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Dr. Marc Zgaga
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