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Wettbewerbszentrale

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Annual Report  
2014

# Preface

Ladies and Gentlemen,

We are pleased to present you with the latest annual report of the German Centre for Protection against Unfair Competition. It vividly documents the variety of tasks and activities of our institution for fair competition.

The promotion of fair competition has formed the core competence of the Centre for Protection against Unfair Competition for over 100 years. Today, commitment to fair competition is more important than ever. It is not only required from our institution, but primarily from companies themselves. Corporate Social Responsibility (CSR) and compliance are the keywords compulsory for the transition of the old „model of an honest businessman“ into today’s business world in a modern and programmed way. The public, policy and, not least of all, customers now demand from companies not only good quality and a fair price — rather, they demand that companies also ensure sustainable business practices overall. They call for companies to be responsible for the environment, to respect social issues along the entire value chain, and to treat competitors and consumers fairly and lawfully. In this broad sense, CSR has already become a condition of entrepreneurial success.

In the strategy paper of the European Commission of 25 October 2011 (Com (2011) 681 final), companies that are striving to establish a formal CSR scheme are advised to orientate themselves on guidelines, such as the OECD Guidelines or the guidelines of the „Global Reporting Initiative“. These include, inter alia, the requirement for companies to observe competition legislation and provisions, and to train company management in competition issues. Responsibility for fair competition is thus an aspect of CSR and compliance.

The Centre for Protection against Unfair Competition achieves precisely this important aspect of the corporate social responsibility of companies: It ensures compliance with competition rules by advising its members on their own advertising campaigns and — where necessary — also prevents infringements of the law by taking legal action. In doing so, the Centre for Protection against Unfair Competition supports its members in the implementation of social responsibility for fair competition in the corporate structure. Through membership and support of our self-regulatory institution, companies visibly manifest their commitment to fair and open competition required by the OECD Guidelines. In this way, companies directly support fair competition and fulfil an important aspect of CSR vis-à-vis the public.

We invite all companies to join in these objectives and thus document a part of their CSR implementation.



Friedrich Neukirch  
President



Dr. Reiner Münker  
Managing Member of the Presidium

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# Developments in Competition Law

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# Framework conditions of Competition Law - in Europe

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Jennifer Beal, Lawyer, Berlin Office

The strengthening of the Single Market and an improvement of economic consumer protection remain fundamentally significant for the European Commission, which is also reflected in the sets of measures taken. After the document „A European Plan of Action for Retail“ (COM (2013) 36 final) was published in 2013 (see the Annual Report of the Centre for Protection against Unfair Competition from 2013, p. 8), the Council of Ministers approved in February 2014 the EU Consumer Programme for the period from 2014–2020 (Regulation (EU) No. 254/2014). In doing so, consumer protection is granted a budget of EUR 188.8 million; the previous consumer programme (2007–2013) had a budget of EUR 156.8 million. The new consumer programme focuses on these four key areas:

- Safety: in the interest of consumer welfare and a competitive economy, the Single Market is to ensure safe products and services;
- Consumer information and education: the consumer needs comparable, reliable and user-friendly information, as well as efficient consumer organisations;
- Consumer rights and effective legal protection: consumer rights must be strengthened, especially in the case of cross-border business transactions; this includes, inter alia, access to mechanisms for legal protection, without having to turn to the courts;
- Strengthening of cross-border enforcement of consumer rights: consumers should be made more familiar with the network of competent European Consumer Centres (ECCs); in parallel, the efficiency of the network of national enforcement bodies should be increased.

Questions and answers on the Consumer Programme 2014–2020 can be accessed here: [http://europa.eu/rapid/press-release\\_MEMO-14-250\\_de.htm](http://europa.eu/rapid/press-release_MEMO-14-250_de.htm)

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## Current trends

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At the heart of the European activities are both measures to improve consumer and corporate information, as well as steps to strengthen efficient legal protection.

With regard to existing consumer rights, in April 2014, shortly before the Consumer Rights Directive (CRD) entered in force, the European Commission launched a campaign to raise awareness among consumers and business owners with regard to their rights and obligations. Comprehensive information sorted according to consumers and business owners is listed under <http://europa.eu/youreurope/index.htm>. Also provided on the website of the European Commission is a list of nationally competent bodies that can be contacted in the event of an infringement. For Germany, the Centre for Protection against Unfair Competition is also listed as a contact point ([http://europa.eu/youreurope/promo-consumers/docs/flyers/national\\_enforcement\\_bodies.pdf](http://europa.eu/youreurope/promo-consumers/docs/flyers/national_enforcement_bodies.pdf)).

In order to achieve efficient law enforcement with interpretation that is as uniform as possible in the Member States, the European Commission increasingly publishes guidelines on the individual direc-

tives. Such guidelines have already existed for years on the Directive on Unfair Commercial Practices (UCP Directive). Guidelines, which can be accessed in German under [http://ec.europa.eu/justice/consumer-marketing/files/crd\\_guidance\\_de.pdf](http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_de.pdf), were also published for the CRD in June 2014. In December 2013 and April 2014, the Centre for Protection against Unfair Competition participated in the earlier workshops of the European Commission to discuss outstanding issues with the Member States and the Commission. The Centre for Protection against Unfair Competition submitted to the European Commission a Position Paper on the draft guidelines provided and requested the clarification of specific open questions in the interest of legal certainty for market participants.

The strengthened and improved cooperation between national enforcement bodies is also a key concern of the European Commission. The Regulation on Consumer Protection Cooperation (Regulation (EU) No. 2006/2004), which was adopted in October 2004, forms the foundation of the current cooperation between authorities in the case of cross-border disputes (so-called Consumer Protection Cooperation Network, i.e. the CPC). Numerous consultations and evaluations have already been carried out since the Regulation entered into force. During the reporting year, two additional questionnaires on the CPC Net have been sent to the Member States to determine the extent of cross-border infringements. In a previous consultation, which was completed in January 2014, it was put up for discussion to what extent the investigative powers of the competent authorities introduced with the Regulation should be expanded and strengthened. The questionnaire also discussed the possibility of simplifying compensation claims by consumers, a reporting requirement for Member States with regard to cases of particular relevance and mechanisms for improved cooperation. The Centre for Protection against Unfair Competition is of the opinion that an IT platform for exchanging experiences would be useful in improving the methods to determine infringements.

The evaluation report of the Commission published in July 2014 with regard to the application of the Regulation (EU) No. 2006/2004 (CPC Regulation)

is accessible under [http://ec.europa.eu/consumers/enforcement/cross-border\\_enforcement\\_cooperation/docs/140701\\_commission\\_report\\_cpc\\_reg\\_de.pdf](http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/docs/140701_commission_report_cpc_reg_de.pdf).

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## Ongoing legislative processes and discussion papers

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

Meanwhile, more actions have been taken after the European Commission published a Green Paper on 31 January 2013 with regard to unfair trade practices in the B2B food and non-food supply chain in Europe and carried out a consultation in the Member States (see Annual Report 2013, p. 11). Thus, the Commission published a Communication in July 2014 in which the Member States are encouraged to protect small food producers and retailers from unfair practices by stronger trading partners (COM (2014) 472 final). No statutory regulatory measures are proposed in the Communication; rather, the Member States are prompted to take reasonable precautions against unfair business practices, taking into account national circumstances. The support of the Supply Chain Initiative, which was founded in September 2013, is named thereby as a central instrument. The Commission regards such voluntary codes of conduct to be an important building block for fair and sustainable trade relationships. The Commission also calls for minimum standards applicable EU-wide to strengthen enforcement measures.

In particular, the following business practices are considered unfair in the Communication:

- avoiding or refusing to set contractual clauses in writing;
- subsequently unilaterally changing costs or prices for products and services;
- passing on unjustified or unreasonable risks to a contractual party;
- deliberate non-compliance with a delivery or

reception schedule in order to gain unlawful advantages;

- unilateral, unannounced or untimely announced termination of a commercial relationship without any objective reasons for justification.

In the Communication, the Commission announced that a report would be submitted to the Parliament at the end of 2015. The Commission is then to decide on the basis of this report whether further action is needed at EU-level. The Communication of the Commission of 15 July 2014 is accessible at: [http://ec.europa.eu/internal\\_market/retail/docs/140715-communication\\_de.pdf](http://ec.europa.eu/internal_market/retail/docs/140715-communication_de.pdf).

In connection with the so-called „Retail Action Plan“, which was published together with the Green Paper on 31 January 2013, an expert group was established in January 2014 to name unfair trade practices and to suggest possible remedies. The objective is to ensure greater efficiency in the retail supply chain and fair conditions for competition. Well-known German companies are also members of the expert group.

### Proposal for a Regulation on a Common European Sales 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. After the draft report was presented to the Committee on Legal Affairs of the European Parliament and amendment proposals were submitted, the Single Market Committee rejected the Commission's proposal. On 26 February 2014, the European Parliament then approved the Commission's proposal by a large majority in favour of a voluntary European Sales Law in

cross-border distance contracts. The Member States must now approve the draft. Germany is critical of the proposal: in December 2011 the German Bundestag already raised a subsidiarity claim on the recommendation of the Legal Affairs Committee.

### Draft Directive on the protection of undisclosed know-how and trade secrets

On 28 November 2013, the EU Commission submitted a proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets), i.e. (COM (2013) 813 final). Business and trade secrets are indisputably among the most important assets of many companies. So far, the jurisdictions provide different protection mechanisms and standards. There is agreement only in that trade secrets are not to be treated as conventional intellectual property rights and, in this respect, their protection is to be arranged differently. This is an area that has not yet been harmonized under European law, although global companies rely thereon to protect their trade secrets across national boundaries. The Commission aims to position Europe as a world leader in science and innovation. The draft Directive on the protection of trade secrets, inter alia, should contribute to this.

The Directive requires Member States to ensure adequate and effective instruments for the protection of trade secrets under civil law. The Directive assumes a broad definition of the term „trade secret“. In doing so, it does not differentiate between business and trade secrets {Geschäfts- und Betriebsgeheimnisse} as is done by the highest German court and, in contrast to the German courts, does not require a legitimate interest in confidentiality as a defining criterion. The Directive ultimately determines the scope of protection based on a differentiation between unlawful acts and those that are found to be lawful. Limits to the protection are laid down in Art. 4 of the Directive. Unlike the previous protective German laws, the Directive requires a different degree of culpability as subjective elements in the various constellations of actions. The problem is however that, neither in the recitals nor in the wording of the provisions themselves, does the Directive

indicate whether a minimum harmonization or full legal alignment is being pursued here. This issue should be clarified in further consultation processes and the response should then be anchored in the text of the Directive.

It remains to be seen whether the Directive proposal undergoes changes based on comments from stakeholders and the Member States this year. From a German perspective, it seems important that the expected final Directive should not fall short of the previous standard of protection established by German jurisprudence.

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## Other measures and publications

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### Resolution of the European Parliament on the implementation of the Directive on Unfair Commercial Practices

On 2 February 2014, the European Parliament adopted a resolution on the implementation of the Directive on Unfair Commercial Practices (UCP Directive) adopted (2013/2116 (INI)). In its report, the Parliament deplores deceptive business practices between companies, such as the so-called misleading directory company schemes; direct application of the UCP Directive to B2B practices is however not considered appropriate. Rather, the Parliament called on the Commission to clarify the interaction of the UCP Directive and the Directive concerning misleading and comparative advertising (2006/114/EC), which still applies in the B2B area. The Parliament rejects an extension of the „black list“ in Appendix I to the UCP Directive. The Parliament recommends to the Commission, however, that it create a list of practices that have been identified by the national authorities as being unfair, so as to consider a future possible extension of the „black list“. As far as the cooperation between the national authorities is concerned, the Parliament stressed the importance and strengthening of cross-border cooperation and calls on the Commission to develop more concerted investigations, such as the so-called „sweeps“ (*for this, also see p.90, Chapter individual cases with*

*international relevance*). Furthermore, the enforcement of the UCP Directive should also be improved in relation to vulnerable consumers, especially children. The database developed by the Commission on the national legislation and case law regarding unfair business practices is welcomed, as is the intention expressed by the Commission to revise the guidelines established for the application of the Directive. In particular, from the perspective of Parliament, the Commission should address in depth with the issue of false environmental claims and misleading practices in the air transport sector. The full text of the report is accessible under <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0063&language=DE&ring=A7-2013-0474>. The report of the Commission on the application of this directive was already submitted in March 2013 (see Annual Report 2013, p. 9).

### Commission Report on the Consumer Agenda

In April 2014, the European Commission submitted its second progress report on the so-called Consumer Agenda. The Consumer Agenda was submitted in 2012 with the aim of strengthening consumer confidence in the markets (see Annual Report 2012, p. 12). Four main objectives are outlined in the Consumer Agenda in order to meet the growth strategy: increase consumer safety, expand knowledge through consumer education, better law enforcement and adaptation of the consumer rights to social change. In its report, the Commission concludes that a majority of the measures proposed in the Consumer Agenda have been achieved; the other measures are to have already been started. The adoption of the statutory package on product safety and market surveillance, as well as measures on alternative dispute resolution (ADR) are mentioned, as are measures taken for consumer education. The report is accessible in English here: [http://ec.europa.eu/consumers/strategy-programme/policy-strategy/documents/consumer\\_policy\\_report\\_2014\\_en.pdf](http://ec.europa.eu/consumers/strategy-programme/policy-strategy/documents/consumer_policy_report_2014_en.pdf).

## Consumer Scoreboard

Since 2010, the European Union regularly publishes the so-called Consumer Scoreboard — a paper that compiles facts and figures on consumer satisfaction, including the number of complaints on pricing and consumer protection generally in 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. In doing so, the Consumer Scoreboard measures the performance of 52 consumer markets. The markets are classified thereby on the basis of these aspects: comparability of offers, confidence in the providers, problems and complaints, as well as satisfaction with the companies.

In the Consumer Scoreboard 2014, the Commission concludes that the market performance across all countries and markets has improved slightly in comparison to 2012 and 2013. Furthermore, it was determined that goods markets function better than service markets, even though the gap is slowly reducing. Banking services are identified as a problematic sector, whereby the markets for investment products and mortgages ranked the worst. In terms of the aspect trust, choice of provider and general consumer satisfaction, the telecommunication markets finished below average. Public utilities, in particular electricity and gas, were also rated below average by consumers. Finally, the used vehicle market and the fuel trade were also given bad marks. Based on these results, the Commission will commission a market study on end user prices for electricity and a behavioural study to promote the reading and understanding of contractual terms and conditions by the consumer.

The full text of the 10th edition of the Consumer Scoreboard from 30 June 2014 is accessible in English under [http://ec.europa.eu/consumers/consumer\\_evidence/consumer\\_scoreboards/10\\_edition/index\\_en.htm](http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/10_edition/index_en.htm).

## EU Justice Scoreboard

Since 2013, the Commission publishes the so-called EU Justice Scoreboard. This document should contribute to effective and independent judicial systems in the European Union and thereby to the strengthening of economic growth. The aim is to provide objective, reliable and comparable data on the functioning of the judicial system in all Member States. The 2nd edition of the Justice Scoreboard (*accessible under [http://ec.europa.eu/justice/effective-justice/files/justice\\_scoreboard\\_2014\\_de.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2014_de.pdf)*) was published on 17 March 2014 and arrives at the following conclusions:

- in some Member States, the first-instance proceedings are lengthy in part; in addition, the case clearance rates are low;
- even though the courts meanwhile have access to more information and communications systems (ICTs), there is still room for improvements;
- alternative dispute resolution (ADR) is now available in almost all Member States;
- many judges take part in training on EU law; the training of the judges and legal practitioners, as well as the ICT equipment are of fundamental importance for the legal area of Europe;
- the independence of the judiciary has improved in several Member States, but worsened in others.

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# Framework conditions of Competition Law – in Germany

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Susanne Jennewein, Lawyer, Stuttgart Office

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## The Act transposing the Consumer Rights Directive

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In last year's Annual Report, the Wettbewerbszentrale provided the information that the law implementing the Consumer Rights Directive entered into force on 13 June 2014. The most significant changes are found in Sections 312 et seqq. and Sections 355 et seqq. of the German Civil Code {Bürgerliches Gesetzbuch, BGB} and in Articles 246, 246 a, b and c of the Introductory Act to the German Civil Code {Einführungsgesetz zum Bürgerlichen Gesetzbuche, EGBGB}, as well as in the Appendices to Articles 246 et seqq. (see Annual Report 2013, pp. 14 and 15).

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## New information requirements for foodstuffs in online commerce

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As at 13 December 2014, online traders that offer pre-packaged foods must provide additional information for the consumer. The Food Labelling Regulation {Lebensmittelkennzeichnungsverordnung, LMKV} and the Nutritional Value Labelling Regulation {Nährwertkennzeichnungsverordnung, NKV}, which previously applied in Germany, are replaced by the Food Information Regulation (EU Regulation No. 1169/2011). This should update and unify the

labelling of foods and nutritional values across Europe. The most important information requirements are specified in Article 9 Subsection 1 of the Food Information Regulation (FIR). These include, in particular, the name of the food, the list of ingredients, the ingredients and processing aids pursuant to Appendix II that are proven to trigger allergies and intolerances, the amount of certain ingredients, the net quantity, the date of minimum durability or use-by date, special instructions for storage or use where appropriate, the name or business name and address of the food company, the country of origin or place of origin, instructions for use where appropriate, a specification of the alcohol content for beverages with more than 1.2% alcohol by volume and a nutrition declaration.

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## New information requirements for vacuum cleaners

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As is already the case for washing machines, dishwashers and televisions, there is also an energy labelling requirement for vacuum cleaners as at 1 September 2014 (Delegate Regulation (EU) No. 665/2013). Pursuant to Article 4a) of this Regulation, retailers must ensure that each model on display at a point of sale bears a label provided by the supplier. According to Article 4b) of this Regulation in conjunction with Annex V, the product description in online commerce must contain information on the energy efficiency class, the average annual energy

consumption, the carpet or hard floor cleaning class, the dust emission class and the sound power level. This information is to be provided in the order listed and must be clearly visible and legible with regard to the font type and font size. Pursuant to Article 4c), the energy efficiency class must also be provided in the advertising for a particular vacuum cleaner. Article 3 governs the obligations of the supplier. As at 1 September, these must ensure that every vacuum cleaner bears an energy label. In addition, a product data sheet must also be provided.

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### New EU energy label and product data sheet in online commerce

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For products that are put on the market as at 1 January 2015 with a new model designation, the provisions of the Regulation No. 665/2013 are subject to a modification by Regulation No. 518/2014. This stipulates that, as at 1 January 2015, online traders and mail order retailers must provide the uniform EU energy label, including product data sheet, for each new energy-related product (e.g. dishwashers, televisions, washing machines, dryers, lamps and vacuum cleaners). These must be legibly displayed near the product price, whereby a clear link may be sufficient. In the past, the energy consumption data could be specified in writing; this is no longer sufficient. The design of the label is described exactly in the delegated regulation for each relevant product. These are the energy identification labels known from retail stores. Suppliers are also required to provide an electronic label and an electronic product data sheet for products with a new model identifier.

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### Draft bill of the German Federal Ministry of Justice amending the UWG

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Directive 2005/29/EC concerning unfair business-to-consumer commercial practices was implemented in 2008 with the Amendment to the Unfair Competition Act 2008 {*UWG-Novelle 2008*}. After the EU Commission informed the German legislature that, in its opinion, the German Unfair Competition Act {*Gesetz gegen den unlauteren Wettbewerb, UWG*} partially did not comply with the Directive, a draft bill has now been submitted by the German Federal Ministry of Justice. The relevant chambers and associations were given the opportunity to submit proposals or requests for changes. The Wettbewerbszentrale has also given a detailed opinion and made a proposal to restructure the UWG.

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# The case law of the highest courts

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Sennur Pekpak, Lawyer, Hamburg Office

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## The case law of the European Court of Justice

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In the reporting year, the European Court of Justice (ECJ) responded to several questions submitted by the national courts of the Member States concerning the interpretation of the Unfair Commercial Practices Directive 2005/29/EC (UCP Directive). With its rulings, the ECJ not only contributes to a better understanding of the directive, but in particular ensures the uniform interpretation of European Union law.

A preliminary ruling by the Supreme Administrative Court of Lithuania shows that the different language versions of the UCP Directive can lead to a divergent interpretation. The case concerned the interpretation of the prohibition of pyramid schemes laid down in Annex I Nr. 14 of the UCP Directive. A company had introduced an advertising system and offered LTL 20 to its customers for attracting new customers. New customers had to pay costs of LTL 0.01 when registering. Upon examining the Black List elements, the Court found that this is regulated differently in the language versions of the Member States. While the French, Spanish and Polish versions provide that the consumer itself must pay a fee in exchange for the opportunity to receive compensation, such a criterion for the payment of a fee is not provided for in the Lithuanian nor in the German version. With regard the question of the Supreme Administrative Court whether a payment of a fee is a

precondition for the assumption of a pyramid scheme, the ECJ clarified that such a system requires a financial contribution from the consumer, regardless of the amount. This is to result from the purpose of the UCP Directive, which directly protects the economic interests of the consumer from unfair business practices. The Court also pointed out that, in a forbidden pyramid scheme, a connection must exist between the fees paid by new participants and the premiums promised to existing customers. This could be missing if only a small portion of paid premiums are financed from the financial contributions required from the new participants. The national court must determine whether this is the case (ECJ, judgment of 3 April 2014, Case C-515/12).

After the ECJ dealt with the term „business practice“ last year in the case „Good News“, the highest judicial body in Hungary—the Kúria—posed the question to the ECJ whether an untrue statement to an individual consumer can be a business practice within the meaning of the UCP Directive. In this particular case, a false statement was made to a consumer in connection with the performance of the consumer’s contract, so that the consumer could not have terminated the contract in time, which led to economic disadvantages for the consumer. In spite of the remarkably broad definition of business practices in Article 2 lit. d) of the UCP Directive, the Advocate General is of the opinion that the question submitted is to be answered negatively. The terminology „practice“ presupposes that the conduct in question is either directed to an indeterminate group of addressees or the behaviour is repeated in relation

to more than one consumer, i.e. is recurring (ECJ, Case C-388/13).

Several judgments have been handed down in connection with the breach of notification and labelling requirements under EU law. For example, the Wettbewerbszentrale competition objected to the slogan used for fruit quark „As important as the daily glass of milk“ {„So wichtig wie das tägliche Glas Milch“} due in part to non-compliance with the notification requirements laid down in Article 10 Subsection 2 of the Health Claims Regulation No. 1924/2006. The question whether these notification requirements applied in 2010 was affirmed by the European Court of Justice (ECJ, judgment of 10 April 2014, Case C-609/12; F 4 0806/09). Details can be found on p. 57. Another case also concerned the temporal scope of application, this time with regard to the energy consumption labelling requirement for televisions. The ECJ ruled that, for retailers, the labelling requirement only applied to televisions that were brought to market after the date of application on 30 November 2011 for the delegated Regulation (EU) No. 1062/2010 from 28 September 2010 supplementing the Directive 2010/30/EU (ECJ, judgment of 3 April 2014, Case C-319/13). Also, in relation to the CE labelling, the controversial question in the electronics industry whether cases as components for multipole connectors for industrial applications are electrical equipment within the meaning of Directive 2006/95/EC was clarified. Even though the ECJ classified the case as equipment requiring labelling, it stated that a CE labelling of a case can also be misleading in certain circumstances (ECJ, judgment of 13 March 2014, Case C-132/13; F 5 0356/10).

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

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In the reporting year, the German Federal Supreme Court {*Bundesgerichtshof*, BGH} also had to deal with various cases concerning competition law.

One focal point thereby was promotional announcements, which were targeted specifically to children and young people.

The question of when advertisement specifically targets children was answered by the BGH in its decision „fantasy role-playing game“ {„*Fantasierollenspiel*“}. In the online role-playing game, „*Runes of Magic*“, children were prompted to equip the game characters by purchasing virtual items with the statements „Pimp your character - week [...] Don't miss the opportunity and give your armour and weapons that certain ,something'! [...]“ {„*Pimp deinen Charakter - Woche [...] Schnapp Dir die günstige Gelegenheit und verpasse Deiner Rüstung & Waffen das gewisse 'Etwas'! [...]*“}. The BGH decided that advertising was targeted specifically at children if the language in the advertising was in the form of „you“ and terms, including common anglicisms, are used that are predominantly typical of children. The statement „Don't miss [...]“ {„*Schnapp Dir [...]*“} is to be understood as „Purchase“ or „Grab“ and constitutes an inadmissible direct solicitation of purchase to children within the meaning of No. 28 of the Annex to Section 3 Subsection 3 UWG (BGH, judgment of 18 September 2014, ref. I ZR 34/12).

In the „marks action“ by Media Markt, a purchase price reduction of EUR 2.00 was announced to school students for each „A“ in their marks, whereby the discount was to apply to all ranges of products offered. Even though the BGH found that this was a purchase solicitation targeted at children, it determined with reference to the language of No. 28 of the Annex to Section 3 Subsection 3 UWG that a global solicitation to make a purchase for the entire range of products is not sufficient, but rather the purchase solicitation must be aimed at a specific product or several specific products. The Court rejected a violation of the statutory prohibition for lack of sufficient product reference. A violation of Section 4 Nos. 1 and 2 UWG was also rejected because the action neither completely overshadowed the rationality of the demand decision nor exploited the inexperience of children and young people in business (BGH, judgment of 3 April 2014, ref. I ZR 96/13).

However, the BGH affirmed an unfair exploitation of the business inexperience of young in the decision „North Job Fair“ {„Nordjob-Messe“}. In connection with holding a contest, a health insurance company intended to collect extensive personal information from young people in order to be able to use such data also for advertising purposes with a consent form. The BGH decided that the targeted young people between 15 and 17 years of age did not yet possess the necessary maturity to evaluate the scope of a consent to use the data for advertising purposes and the related disadvantages (BGH, judgment of 22 January 2014, Ref. I ZR 218/12). The ECJ already decided last year and, in a case of the Wettbewerbszentrale, the BGH decided in the reporting year that health insurance companies fall within the personal scope of the UCP Directive and the UWG (ECJ, judgment of 3 October 2013, Case C-59/12; BGH, judgment of 20 April 2014, Ref. I ZR 170/10; F 4 1059/08). Details can be found on p. 49.

In the wake of the decision „Brand new from the IFA“ {„Brandneu von der IFA“} (see Annual Report 2013, p. 18), the disclosure requirements laid down in Section 5a Subsection 3 UWG were developed further and substantiated. The BGH had to decide on a newspaper advertisement of an electronics retailer that had advertised for various electronic household devices, indicating prices, brand names and technical details, without mentioning type designations for the devices. In the decision „Type Designation“ {„Typenbezeichnung“}, the Court found that the advertisement constituted a solicitation to purchase within the meaning of Article 7 Subsection 4 of the UCP Directive and that the type designation in such an advertisement is an „essential characteristic of the goods“ within the meaning of Section 5a Subsection 3 No. 1 UWG, which is to be specified in the advertisement. The type designation is necessary to identify the devices in order to allow the consumer to make a price and product comparison (BGH, judgment of 19 February 2014, ref. I ZR 17/13; S 2 0794/11).

The subject of several judgments was the violation of so-called market conduct rules within the meaning of Section 4 No. 11 UWG. While the BGH affirmed a

violation of pharmacists against the German Medicines Act {*Arzneimittelgesetz*, AMG} in the decision „Holland Prices“ {„Holland-Preise“} (BGH, judgment of 26 February 2014, ref. I ZR 77/09; F 4 0346/08), the Court considered a free second pair of glasses presented as a gift by an optometrist to be a promotional gift prohibited pursuant to Section 7 Subsection 1 of the German Drug Advertisement Act {*Heilmittelwerbegesetz*, HWG} (BGH, judgment of 6 November 2014, ref. I ZR 26/13; HH 2 0535/10). Details can be found on pp. 47 and 54.

Finally, an important order for reference was issued by the BGH that concerned the practice-relevant violations against provisions of the German Price Indication Regulation {*Preisangabenverordnung*, PAngV}. In an advertisement, a new car was promoted stating the price amounting to EUR 21,800.00. Although the transfer costs were pointed out with the phrase „Price plus transfer fee of EUR 790.00...“ {„Preis zuzüglich Überführung in Höhe von 790,-€“}, the total final price of the car was not mentioned. Since, according to Section 1 Subsection 1 Sentence 1 of the PAngV, an indication of the final price is necessary, the question arose whether the law is compatible with EU law after the deadline specified in Article 3 Subsection 5 Sentence 1 of the UCP Directive expired on 12 June 2013. In its scope of application, the Unfair Commercial Practices Directive leads to a full harmonization of competition law. It is not possible for the Member States to adopt stricter rules in the scope of the Directive's application, unless exceptions are provided for. The decision of the ECJ on the applicability of the provisions of the PAngV will thus be decisive in evaluating the violation of the PAngV and its further application (BGH, judgment of 18 September 2014, ref. I ZR 201/12).

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# General Terms and Conditions of Business

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Elvira Schad, Lawyer, Dortmund Office

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## Reform efforts - legislation

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With the entry into force of the German Act Combating Late Payment in Commercial Transactions {*Gesetz zur Bekämpfung von Zahlungsverzug im Geschäftsverkehr*} on 29 July 2014, the legislature added amendments in the provisions of the German Civil Code {BGB} with regard to general terms and conditions and a new injunction for associations with Section 1a of the German Injunction Act {*Unterlassungsklagengesetz, UKlaG*}, in addition maximum deadlines for payment, inspection and acceptance procedures.

Section 308 Nos. 1a and 1b BGB now regulate bans on clauses in general terms and conditions that allow maximum deadlines to be exceeded for payment claims (30 days after receipt of counter-performance or invoice) and for inspection or acceptance procedures (15 days after receipt of counter-performance) in contracts with companies.

In the past, the Wettbewerbszentrale could file an injunction pursuant to Section 1 UKlaG against those who use invalid general terms and conditions. Individual agreements are not covered by this broad injunctive claim. With Section 1 UKlaG, the legislature has now created a new injunctive claim for associations in certain cases of grossly unfair or objectively unjustified individual agreements in connection with payment or acceptance deadlines.

## General terms and conditions in commercial transactions between companies

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Various clauses concerning claims for damages used by a textile manufacturer in the terms and conditions of sale were objected to. The company arranged with individual retailers that, in the event that the buyer was in arrears with payment, contractual penalty fines would be incurred in addition to the payment of default interest, and the company reserved the right to claim damages in the full amount. Since it is not permitted to demand contractual penalty fines in addition to interest and damages (Section 340 Subsection 2 and Section 341 Subsection 2 BGB), the Wettbewerbszentrale objected to the clause as being invalid pursuant to Section 307 Subsection 2 No. 1 and Section 307 Subsection 1 BGB. The company made a declaration of discontinuance.

Furthermore, it was to be objected that in two clauses the company reserved the right to claim lump sum damages in an unreasonable amount of 50%. It is generally permitted by law to claim lump sum damages. However, such a lump sum must remain within the limits of what can be expected as damages in the normal course of things (Section 309 No. 5a BGB). In the first clause, the user of the clause stipulated that, in the event of early termination of the contract due to the breach of contractual obligations by the buyer, the goods were to be returned and

lump sum damages amounting to 50% of the contract value were to be paid. In the second clause, the business operator gave the buyer the opportunity to amicably cancel a concluded contract and also reserved the right to claim lump sum damages amounting to 50% of the contract value. The Wettbewerbszentrale objected to the amount of the lump sum, as the expected damages could be considerably lower. For example, it cannot be excluded that delivered goods that have not yet been brought to market can be resold to other retailers with less damage or that a contract may not yet have been given to production by the manufacturer. The parties have not yet been able to reach an agreement with regard to these clauses. If the declaration of discontinuance is not made, the Wettbewerbszentrale will litigate the issue in court, since such clauses are submitted by individual textile retailers again and again for review with different lump sums (DO 1 0287/14).

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## General terms and conditions in consumer contracts nationally

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In several cases, the Wettbewerbszentrale had to review standard declarations of consent, the subject of which was the use of email addresses for advertising purposes. In its order form, company made provisions for new customers in relation to the use of the customer's email address for its own advertising purposes, namely for sending newsletters. According to the exception in Section 7 Subsection 3 No. 2 UWG, a business operator may only use the customer's electronic mail address, which the business operator receives within the scope of an order, for the purpose of direct advertising for „its own similar goods“; otherwise, the business operator requires the express consent of the customer. The agreement, however, did not contain a limitation of the contact to advertising for its own similar products. Thus, it was objected to as being invalid (Section 7 Subsection 3 No. 2 UWG, Section 307 Subsection 2 No. 1, Section 307 Subsection 1 BGB). The matter was settled amicably with the issue of a declaration

of discontinuance vis-à-vis the Wettbewerbszentrale (DO 1 0533/14).

According to the exception in Section 7 Subsection 3 No. 4 UWG, the business operator must, upon collecting the email address for advertising purposes, also notify the data owner of the right to object at any time with respect to the use of the collected email address. A well-known telecommunications company did not observe this when collecting the data for advertising purposes during an order. The Wettbewerbszentrale had to have the matter clarified in court. The Court of Appeal {Oberlandesgericht} in Coblenz, Germany, agreed with the legal opinion and upheld the action (Decision fro 26 March 2014, ref. 9 U 1116/13, updates from 22 April 2014; F 2 1197/12).

In another clause in this case, the company stipulated the use of the customer data also by „companies affiliated“ with it. The clause was not transparent and thus invalid because the consent was to apply for a number of unspecified companies (Section 307 Subsection 1 BGB). A declaration of consent must be so clearly formulated that the declarant can recognize from whom the declarant is consenting to advertising. With respect to this clause, the Court of Appeal in Coblenz also agreed with the legal opinion of the Wettbewerbszentrale.

The organizer of a rock-and-roll event with several bands offered the sale of tickets on the Internet. In the terms and conditions of sale, the organizer completely excluded the rescission of the contract in the event of changes to the line-up and programme. In the case of an event cancellation, tickets could only be returned up to two weeks after the event date for a refund of the purchase price. In the event of a cancellation of an ongoing event, regardless of the reason, any compensation was excluded. In doing so, the organizer curtailed the possibilities of its contractual partners to rescind the contract, to demand a reduction in price and to claim damages. The user of the clause, however, reserved the right not to render the performance due or not to do so in accordance with the contract. The clause was invalid because the contractual partners were denied

mandatory statutory rights (Section 307 Subsection 2 No. 1, Section 307 Subsection 1 BGB). The declaration of discontinuance was issued upon the warning of the Wettbewerbszentrale (DO 1 0046/14).

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## Misleading practices

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A business operator that lends Lego products on the Internet advertised on its website with the statement: „Borrow unlimited Legos and try before you buy. No additional costs for lost parts“. In addition, the business operator stated that the loss of Lego parts by a child would pose no problem. Lost parts were to have already been insured in the loan package. In the general terms and conditions, however, the business operator provided for an obligation to pay damages if more than 15 individual parts of the respective Lego set were lost. The loss of certain figures was, however, completely excluded from the loss insurance. The Wettbewerbszentrale objected to the advertising as being misleading (Section 5 UWG). The clause itself was surprising (Section 305c BGB). The declaration of discontinuance was issued (DO 1 0387/14).

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## General terms and conditions in consumer contracts internationally

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The Wettbewerbszentrale was repeatedly approached with the question whether, in cross-border transactions with consumers, so-called choice of law clauses, such as „These contractual provisions are subject to German law“ and „Place of performance: German law applies“, were admissible or valid in general terms and conditions of an online shop. A choice of law clause in consumer contracts may not cause the consumer to lose the legal protection that is afforded the consumer in accordance with mandatory provisions of the consumer's country of residence. In the opinion of the Wettbewerbszentrale, consumer may understand the clauses to mean that

only German law is applicable to their contracts with the online trader. To clarify the legal question in the interest of the entire economy, the Wettbewerbszentrale brought the problem to the courts. The Regional Court {Landgericht, LG} in Oldenburg, Germany, (judgment of 11 June 2014, ref. 5 O 908/14) and the Court of Appeal {Oberlandesgericht, OLG} in Oldenburg, Germany, (judgment of 23 September 2014, ref. 6 U 113/14) affirmed the legal opinion of the Wettbewerbszentrale and found the clauses to be invalid in accordance with Section 307 BGB (DO 1 0345/13, also see updates from 29 October 2014).

As part of a so-called „sweep“ (cross-border investigation of Internet websites) on behalf of the EU Commission, which was participated in by the Wettbewerbszentrale, online shops of electronics retailers were reviewed. It was found, inter alia, that a supplier made provisions within the scope of a warranty clause with domestic and international consumers for the complete exemption from the obligation to provide the warranty if the consumer did not provide the goods objected to due to a defect so that they could be inspected for defects. The buyer must, within the framework of the buyer's obligations, give the seller the opportunity to inspect the goods. The buyer can not enforce their rights as long as this obligation is not fulfilled. The clause was invalid because it could give the wrong impression to consumers that they would completely lose their warranty claims, if they do not provide the goods to the party using the clause for inspection. A declaration of discontinuance was issued because of the warning for being misleading from the Wettbewerbszentrale (F 5 0543/14).

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# Antitrust law

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Dr. Wolfgang Nippe, Lawyer, Berlin Office

While the year 2013 was marked by the 8th Amendment of the German Act Against Restraints of Competition {Gesetz gegen Wettbewerbsbeschränkungen, GWB} in the legislative area, the ball was back in the court of the European Union during the reporting year. In December 2014, the Directive on actions for damages under national law for infringements of the competition law (Directive 2014/104/EU) was published in the Official Journal of the European Union. It aims to harmonize the national procedures for obtaining damages under antitrust law. The Member States have two years to incorporate the EU directives into national law.

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## EU Directive on actions for damages

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The reason for the EU Directive on actions for damages was the finding of the EU Commission that claims for damages were rarely following violations of competition rules. The Commission found that the cause was that the immediate customers who acquire the goods from members of a price-fixing cartel would compensate their damage with price increases. Other market participants in the supply chain, especially consumers, are hardly able to quantify their damage they have suffered due to prices that are excessive because of cartels. Therefore, they would be deterred from enforcing their legitimate interests. The Directive seeks to address this.

The Directive makes it clear that any individual or legal entity may demand and obtain full compensati-

on for the damage suffered by an antitrust violation. Indirect customers should also be eligible for damages. These are market participants who themselves do not enter into any contractual relationships with the members of the cartel, but who suffer damage due to price increases on intermediate economic levels. Thus, such consumers are also entitled to claim damages under antitrust law. The Directive contains provisions governing the disclosure of evidence that will enable the injured party to calculate its damage. In this connection, the opportunities are also governed for access to the record from competition authorities.

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## Sales via internet platforms

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In the Annual Reports 2012 (p. 84) and 2013 (p. 22), the Wettbewerbszentrale already reported a case before the Regional Court in Kiel, and the Court of Appeal in Schleswig, Germany, that concerned the admissibility of the exclusion in dealer agreements of sales via Internet platforms, such as eBay or Amazon Marketplace. This case was successfully completed in 2014.

In its supply contracts with dealers, a manufacturer of camera products prohibited sales via „Internet platforms“, such as eBay or Amazon Marketplace, without exception. The Wettbewerbszentrale considered the capping of the Internet platform sales channel to be a core restriction of competition that

could not be exempted from the ban on cartels. After the Regional Court in Kiel allowed the lawsuit in the first instance, the Court of Appeal of Schleswig dismissed the appeal of the camera manufacturer, thus agreeing with the views of the Wettbewerbszentrale (OLG Schleswig, judgment of 5 June 2014, Ref 16 U Kart 154/13; D 1 0057/12). The decision has become final. In a comprehensive consideration of the interests of the manufacturer, the consumers and the dealer, the appellate court came to the conclusion that the exclusion of the sales via platform had the purpose and effect of restricting competition, which is contrary to antitrust law. For consumers, the exclusion of sales via the platform would bring about a restriction of the access to e-commerce because the availability of the dealer would be limited. For the dealers concerned, this means a restriction of access to market, because they cannot compete with other companies that offer similar goods via Internet platforms.

Such restrictions of sales via the Internet platforms also fall within this range of issues according to which the goods acquired from the manufacturer can then not be offered via an Internet platform if the online shop of the dealer on the platform shows the name, logo or mark of the platform operator. For the Wettbewerbszentrale, this restriction of sales via the platform under the heading „logo clause“ was the reason to issue a warning against a manufacturer. In addition, such contractual provisions would factually mean the exclusion of sales via Internet platforms. The case was not completed by the end of 2014 (D 1 0270/14).

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## Vertical price maintenance

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In cases that concern vertical price maintenance, the Wettbewerbszentrale often had difficulties with proof. In light of the ban on cartels, the adherence to such price specifications is not regularly demanded in letters or emails. The Wettbewerbszentrale was able to act against a manufacturer of diet foodstuffs which markets its products through pharmacies. The manufacturer announced rebates to pharmacy owners for the purchase of a certain product. The prerequisite for doing so was, inter alia, that the pharmacy not sell the product concerned below a price specified by the manufacturer. The Wettbewerbszentrale considers this to be inadmissible resale price maintenance, which cannot be exempt from the ban on cartels. Due to the fact that the discontinuance case was unsuccessful, the Wettbewerbszentrale intends to file a lawsuit to the Regional Court in Hannover, Germany, at the beginning of 2015 (D 1 0080/14).

# Market Sector reports

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# Retail

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Gabriele Bernhardt, Lawyer, Stuttgart Office  
Dr. Wolfgang Nippe, Lawyer, Berlin Office

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## Selected retail segments

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### The electronics sector

As in the previous year, the electronics industry was heavily represented among the incoming inquiries and complaints in 2014. The complaints were related, in particular, to being misled with regard to product characteristics, on one hand, and prices and price advantages on the other hand. Moreover, it turned out that dealers had circumvented company-related sales bans due to lacking registration in the German National Register for Waste Electric Equipment {*Elektro-Altgeräte Register, EAR*}.

During Christmas season 2013, an electronics retail chain, which markets its products over the counter and via an online shop, announced a technology bonus. The customers were to receive a shopping voucher of EUR 50.00 for purchases over EUR 499.00 and a shopping voucher of EUR 150.00 for purchases over EUR 999.00. The redemption of the vouchers was subject to certain restrictions. The vouchers could not be combined with other promotions and also could not be credited to the purchase of iTunes cards. It was objected that the electronics retail chain had neither pointed out these restrictions in the print advertisement nor in its Internet presentation. In the announcement of sales promo-

ting measures, companies are however obligated clearly and unambiguously point out all conditions for taking advantage of the promotion. After an unsuccessful warning, the Wettbewerbszentrale file an injunction against the electronics retail chain, which did not defend itself. Thus, the court issued a default judgment as sought (Regional Court in Ingolstadt, Germany, default judgment of 11 February 2014, ref. 1 HK O 1671/13; F 5 0432/13).

The advertisement “Everything is dramatically reduced—you save up to 30%!” {*„Alles radikal reduziert. Sie sparen bis zu 30 %!“*} of an electronics retail chain also had to be objected to by the Wettbewerbszentrale. Upon asking, in-store customers were informed that, in fact, only exhibition items were offered at a reduced price. The company announced that other products, such as toner cartridges or software, were only available at regular prices. Due to the fact that the warning for the reception was unsuccessful, the Wettbewerbszentrale filed suit. The company did not defend itself, so that the court issued a default judgment as sought (Regional Court in Frankfurt am Main, Germany, default judgment of 16 April 2014, ref. 3 – 08 O 167/13; F 5 0525/13).

Under the heading „Lowest Price Guarantee“ {*„Tiefpreisgarantie“*}, an electronics retail chain advertised with the statement: “If you find a product purchased from us—with the same power and in our region—elsewhere for cheaper within 14 days, we will refund to you the difference or take back the product.”

{*“Sollten Sie innerhalb von 14 Tagen ein bei uns gekauftes Produkt – bei gleicher Leistung und in unserer Region – günstiger sehen, erstatten wir Ihnen den Differenzbetrag oder nehmen das Gerät zurück.”*}. The customer went to the electronics store to purchase a specific coffee machine that was priced at EUR 749.00. The customer presented that prospectus of a competitor in which the coffee machine in question was priced at EUR 499.00. That’s, the customer demanded that the electronics store also sell the coffee machine at a price of EUR 499.00 on the basis of the lowest price guarantee. The company refused to do so. After an unsuccessful warning, the Court of Appeal in Hamburg, Germany, ordered the electronics company to cease and desist. It considered the promotional announcement to already be misleading with regard to the rights of the consumer. In the promotional statement mentioned, the company linked to different guarantee promises, namely a lowest price guarantee (“...we will refund you the difference...”) and a money back guarantee (“... take back of product”). The second variant, i.e. the money back guarantee, however, does not correspond to a lowest price guarantee because, in the case of a return, the consumer cannot have purchased product at a lower price from a competitor. The company also does not offer a double guarantee for the customers, as the lowest price guarantee and the money back guarantee were only available alternatively. The customer is not unequivocally granted the right to decide for themselves which alternative the customer would like to make use of (Court of Appeal in Hamburg, Germany, judgment of 13 February 2014, ref. 5 U 160/11; F 5 0118/11).

The number of complaints concerned about misleading advertisement for lithium-ion batteries with regard to their capacities. For example, in the advertisement for such products, a dealer stated a capacity of 3,500 m/Ah, even though the actual capacity barely reached even half of the announced amount. This was not only a violation of the relevant DIN-EN Regulation, but also misleading asked as to essential characteristics of the product. The consumer is deceived with a capacity that the product does not actually possess. This case could also be settled out of court with the issue of corresponding declara-

tions of discontinuance (F 5 0383/14; F 5 0409/14).

The German Federal Supreme Court {Bundesgerichtshof, BGH} dealt with a case of the Wettbewerbszentrale that concerned the indication of the type designation for household electrical appliances. An electronics retailer advertised in print media for refrigerators and washing machines. In doing so, the retailer indicated the respective brand-name, the price and various technical details of the individual products. The typed designation of the respective device was lacking. The consumer could thus not identify the devices with certainty, so that a product comparison or consultation with the test results was not possible. The Wettbewerbszentrale thus considered the lacking indication of the type designation to be misleading by omission in breach of competition law. The BGH affirmed the assessment of the Wettbewerbszentrale. It makes it clear that, when purchasing household electrical appliances, consumers would orient themselves to the type designation of the devices (BGH, judgment of 19 February 2014, Ref. I ZR 17/13; S 2 0794/11).

In one matter that concerned casings of multi-pin connectors for industrial applications, the proceedings led to the European Court of Justice (ECJ). The providers of these connectors attached the CE mark to the casings. By attaching this label, the manufacturer assumes the responsibility for the conformity of the product with the legal requirements. According to the EU Directive 2006/95/EC, electrical equipment may only be brought to market within certain voltage limits if they possess a CE mark. Conversely, products that wrongly bear a CE mark may not be sold. The peculiarity of the case lies in the fact that the related EC declaration of conformity applies only to the casing, but not on the connectors contained therein. The ECJ found that the casing was component of the multi-pin connector, the main function of which is to physically and electrically isolate the various cables from each other and from the environment by grounding. Thus, they could be labelled with the CE mark. The Regional Court in Cologne, Germany, which referred the case to the ECJ, must now determine whether, in light of its function of isolating the various cables from each

other and the connectors from the environment by a grounding device, the casing itself can be tested in relation to the safety requirements. The case is therefore not yet finished (ECJ, judgment of 13 March 2014, ref. C - 132/14; LG Cologne, ref. 84 U 23/11; F 5 0356/10).

Companies that offer technical equipment on the market without being registered with the German National Register for Waste Electric Equipment {Stiftung Elektro-Altgeräte Register; hereinafter: EAR Foundation} are circumventing the requirement to cooperate in taking back and disposing of electrical equipment and to bear the costs incurred thereby. The costs of taking back and disposing of waste electrical equipment account for up to 80% of the costs. Companies that circumvent the registration thus obtain a significant competitive advantage. In accordance with the provisions of the German Electrical and Electronic Equipment Act {Elektrogesetz, ElektroG}, both manufacturers and distributors of new electrical and electronic equipment are bound by the rules of the Electrical and Electronic Equipment Act. The Wettbewerbszentrale had to issue multiple objections, whereupon the warned companies each issued dispute settling declarations of discontinuance (F 5 0002/14; F 5 0356/14; F 5 0558/14).

### The sporting and outdoor sector

The lacking registration with the National Register for Waste Electric Equipment was also the subject of a series of discontinuance proceedings against companies in the sporting and outdoor industry. Numerous online traders offered lamps and breathing apparatus for divers to which the Electrical and Electronic Equipment Act applies. 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 (Section 3 Subsection 12 Sentence 2 ElektroG). The list of manufacturers registered with the EAR Foundation is public and may be consulted by any

dealer. If the dealer does not check whether the manufacturer is properly registered before the dealer offers the manufacturer's goods for sale to the public, the dealer is acting negligently and in violation of the Electrical and Electronic Equipment Act. Since dealers are not permitted to sell products for which the manufacturer is not properly registered, owing to the dealer-specific prohibitions on sales there will be a misleading anti-competitive practice. The discontinuance proceedings initiated by the Wettbewerbszentrale could be amicably settled by declarations of discontinuance (D 1 0094/14; D 1 0266/14; D 1 0267/14; D 1 0288/14; D 1 0424/14; D 1 0507/14).

A product-related marketing ban becomes an issue if lamps for bicycles are offered without an inspection mark. The inspection mark confirms the engineering of the product in the approved construction type. According to the provisions of the German Road Traffic Licensing Regulations {*Strassenverkehrs-Zulassungs-Ordnung*, StVZO}, such products without an inspection mark may neither be offered for sale nor sold by retailers and may neither be purchased nor used by customers (Section 22a Subsection 2 StVZO). The lamps are subject to product-specific sales ban if they do not possess the required certification. They are not fit for sale. A dealer is acting in breach of competition law if it offers bicycle lamps with the required inspection mark. Moreover, such a breach of competition law cannot be remedied by the clarifying 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 Wettbewerbszentrale was able to successfully complete a lawsuit with this result. Even though the Regional Court in Freiburg, Germany, dismissed the lawsuit, the Court of Appeal in Karlsruhe confirmed the opinion of the Wettbewerbszentrale in a final decision (OLG Karlsruhe, judgment of 12 December 2014, ref. 4 U 45/14; M 3 0305/13). The court also did not follow the objection that the lamps could also be used for other activities in the areas of „leisure, outdoor and camping“. This would not eliminate the risk that the lamps would also be used on the road as bicycle lighting.

E-bikes are becoming increasingly widespread on public roads. They were also the subject of a test by Stiftung Warentest (i.e. foundation for testing consumer products) in 2014. The individual areas tested are of particular significance, as e-bikes are relatively complex products. Thus, a manufacturer of e-bikes advertised with the statement that its product was „rated by the testers with a ‚good‘ or ‚very good‘ in all individual disciplines.“ This statement did not quite match the facts, because in the category „driving“, which made up 40 percent of the overall evaluation, the e-bike reached a „satisfactory“. A legal dispute was not necessary in this case, as the company issued a declaration of discontinuance after the Wettbewerbszentrale warned it due to making misleading statements about test results. However, the company failed to change the offending advertising statement on its Internet presence. The Wettbewerbszentrale thus had to demand the contractual penalty fines, which were paid without court proceedings (D 1 0330/14).

A company offered for sale „piston testing needles and piston cleaning needles“ that are used for cleaning weapons. In the headline of the offer, it advertised for a set of 13 needles and a file for a price of EUR 4.90. A sale price of EUR 3.90 was then mentioned in the article description, which was compared to the old purchase price of EUR 4.90. At the end of the product description, the purchase price then read EUR 4.90 again. Thus, it was unclear to prospective buyers what the actual purchase price was. Due to this ambiguous price indication, the Wettbewerbszentrale issued a warning due to it being misleading price advertising. The company recognized the anticompetitive violation and issued a declaration of discontinuance (D 1 0293/14).

## Drugstores

In the reporting year, the Wettbewerbszentrale pursued two lawsuits against various drugstore chains. The one chain announced in brochures that rebate coupons of the direct competitor would be redeemed for the entire range of its own company's articles. The Wettbewerbszentrale considers this to be a targeted impediment of those drugstore chains that had

issued the rebate coupons. On the one hand, these measures entice the customers of competitors in an unfair manner and, on the other hand, the expenses incurred by the competitor for the advertising coupons would be nullified. The Wettbewerbszentrale filed a discontinuation action, but was unsuccessful with it before the Regional Court in Ulm. The court states that the enticement of customers did not yet exceed the threshold of a target impediment, as the holders of the coupons could still decide themselves at which business they redeem their coupons. The Wettbewerbszentrale was not convinced by the arguments. Thus, it has appealed to clarify this issue further (LG Ulm, decision of 20 November 2014, Ref. 11 O 36/14; F 5 0298/14).

Another drugstore chain advertised discounted dishwasher tabs. The presentation in the advertising brochure gave the impression that the dishwasher tabs could be purchased in packs of 38, 44, 52 or 72 tabs, whereby 10 percent would be added free in each pack size. In fact, only the pack size containing 44 pieces was available for this promotion. The other pack sizes were not even available. The Wettbewerbszentrale filed a lawsuit because a settlement could not be reached out of court. The drugstore chain argued that every housewife knows what pack sizes these dishwasher tabs would be offered. In a court order, the court let on that — after asking the wives of the chamber members — it could not agree with this assessment. A decision will not be made until 2015 (F 5 0350/14).

## The furniture sector

With over 180 inquiries and complaints, the furniture sector formed a focus of activity in the area of retail, as it did in the previous year. It often concerned misleading advertising for upholstery fabrics on furniture. An online trader advertised upholstered furniture stating that upholstery was leather. In fact, it was not upholstery made from the grown skin of animals. Another supplier offered dining chairs with the statement „leather chair“ and placed a slightly altered leather symbol in the product description. In an inconspicuous place in the product description, there was then the note that it was artificially bonded

leather. Artificially bonded leather is made from leather fibres that are glued together. Since it is not a naturally grown animal skin, the term „leather chair“ was misleading and anti-competitive. Both cases were settled out of court with the issue of declarations of discontinuance (S 3 0179/14; S 3 0174/14).

Another case concerned misleading statements about the upholstery material: the brochure of one furniture retailer advertised a sofa stating that it was produced from unique buffalo leather. The decoration appearing above the sofa depicted was of a wild buffalo and the consumers were prompted to bring the wilderness home. The crux of the matter was that the upholstery material consisted of easy-care microfibers, which the retailer certainly had not mentioned. The company issued a declaration of discontinuance upon a warning by the Wettbewerbszentrale due to misleading claims about the product characteristics (S 3 0870/14).

A number of complaints in the furniture sector concerned the price advertising of the companies. For example, in the exhibition of one furniture retailer there was a chair with a price of EUR 1,091.00 placed in an eye-catching manner on the tag. The seller let the customer who wanted to buy this piece of furniture at that price know that this was not possible. Namely, the chair had been equipped with two motors with which it could be adjusted. As could be seen on the back side of the tag, an extra charge of EUR 729.00 was to be paid for this, so that the chair cost a total of EUR 1,820.00. The Regional Court in Würzburg agreed with the Wettbewerbszentrale and found the price presentation to violate the requirement of transparency in the Price Indication Ordinance {Preisangabenverordnung} and to be misleading with regard to the price. The customer to be able to purchase the product exhibited for the price that is placed in an eye-catching manner. The decision is not yet final because the defendant furniture store has appealed (LG Würzburg, decision of 26 June 2014, Ref. 1 HK O 866/14; F 5 0040/14).

The advertising appearance of another furniture company gave cause for complaint in multiple respects. In a radio spot, it announced price reductions

of 35 percent on furniture and emphasized that this reduction would also apply to advertising goods and customer-assembly furniture. Actually, however, not the entire furniture range was reduced in price. It was objected that this circumstance was not mentioned in the advertising. The company also announced that customers could finance the purchase price of the products over a period of three years with „0% mega-financing“. No mention was made that this financing offered was only to apply for purchase over EUR 500.00. The lack of information about this constituted an infringement of competition law. At the same time, in a promotional letter, the furniture store announced percentage price reductions that were emphasized in an eye-catching manner. This advertising statement was marked with an asterisk, but the information for the customer was nowhere to be found in the promotional letter. It could only be worked out from the advertising brochure that accompanied the promotional letter. The Wettbewerbszentrale not only objected to the misleading statement with regard to the extent that the price reduction applied to the range of goods and the financing advertisement from the radio spot, but also objected to the dissemination of the information relevant to the price reduction in the promotional letter on the one hand and the advertising brochure on the other. Explanatory notes on an advertising statement should be carried out in such a way that the consumer can also perceive them. In this point, the company acknowledged the claim of the Wettbewerbszentrale to discontinuation, so that the Regional Court in Leipzig issued a corresponding judgment based on acknowledgement. In the findings with regard to the radio advertising, the court followed the view of the Wettbewerbszentrale and ordered the company to discontinue doing so (LG Leipzig, decision of 10 July 2014, Ref. 05 O 89/14; S 2 0714/13).

Another case, which was still pending before the Regional Court in Freiburg at the end of 2014, also concerns the presentation of informative notifications in advertising. In a brochure, a furniture store pointed out special offers, whereby it wanted to make the terms and conditions of the special offers later on its website. The company did not, however, announce these discounts in its online shop. The Wettbewerbs-

szentrale considers it misleading that, on the one hand, the terms and conditions of the special offers were not listed in the advertising brochure itself. Also, the Wettbewerbszentrale also objects that the terms and conditions of the special offers were not clearly displayed on the Internet presentation. Thus, it was not apparent to the consumer, to what conditions the consumer could take advantage of the price savings. We will to continue to report on this case in the Annual Report 2015 (S 3 0473/14).

Furniture retailers often advertise with statements that it is the largest or most important company or simply the best in the region. Advertising uniqueness in this way gives the impression that the company has a significant and lasting advantage over their competitors in terms of sales, product range, assortment depth, turnover, etc. One dealer referred to itself as the „Largest furniture store the region,“ which however did not match the facts. Thus, the advertisement was anti-competitive because it was misleading with regard to the company. An advertising brochure of the same company had to be objected to, in which the company announced a „factory sale“. Contrary to this advertising statement, the company did not actually manufacture the advertised furniture. It acted exclusively as a dealer. This promotional statement was thus anti-competitive because it was misleading. In both cases, the company issued the demanded declarations of discontinuance (HH 1 0036/14; HH 1 0163/14).

## Hardware stores

Like almost every year, the complaints received in the reported year were also related to the promotional activities of hardware stores. From the large number of cases, two situations are singled out here that are not untypical for this industry.

In a brochure, a hardware chain advertised for floor coverings and offered, among other things, „click-vinyl design floor advertised a home improvement retailer for flooring, including offers of a „click-vinyl floor covering“ and added the statement „Class 31“.

This figure is a classification according to EN ISO 10582 in relation to the areas of usage and application for the product. The use class 31 indicates a particularly high usage standard. Floor coverings of this usage class are already suitable for use in a commercial environment and promise even more exceptional durability when used in the private sector. However, the covering merely had a wear layer of 0.15 mm, which corresponded only to usage class 21. Thus, the incorrect statement on the usage class was a significantly misleading with regard to the characteristics and hence the possibilities of using the product. Upon the warning of Wettbewerbszentrale, the company in question issued a declaration of discontinuance subject to contractual penalty fines (HH 1 0333/14).

The competition in the hardware store sector is extremely competitive, so providers often try to substantiate an outstanding market position with so-called uniqueness advertising. For example, one newspaper advertisement from a hardware store chain contained the advertising statement „#1 for projects. #1 in prices and products.“ as well as other substantiations „Also #1 in the categories: overall satisfaction, value for money, product line compared to the competition, prices compared to the competitions, choice and variety, and quality of goods and products, as well as in 14 others.“ Such advertising messages cannot be objected to under competition law, if the market leadership in the advertised parameters actually exists. This is measured according to objective criteria. The advertising hardware store chains could, however, only rely on a test by the Customer Monitor of Germany {*Kundenmonitor Deutschland*}, which had polled the consumers about the purely subjective evaluation of the hardware stores. However, a subjective consumer evaluation cannot justify uniqueness advertising with respect to the individual competitive parameters. Thus, the Wettbewerbszentrale filed a discontinuance action, which had not yet ended at the end of 2014 (HH 1 0367/14).

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# Internet law and e-commerce

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Gabriele Bernhardt, Lawyer, Stuttgart Office  
Johanna Kilbinger, Lawyer, Bad Homburg Office

In the reporting year, the Wettbewerbszentrale again received more than 2,000 inquiries and complaints concerning violations of law in the areas of Internet law as well as online retail and mail-order. The consistently high number of cases in these areas is not surprising, since online and mail-order business is still growing. Even though, according to the growth forecast of the German E-Commerce and Distance Selling Trade Association {Bundesverband E-Commerce und Versandhandel Deutschland e.V., bevh}, e-commerce will only experience single-digit growth due to subdued consumer confidence, the growth will exceed that of retail trade as a whole (see Press Statement from 30 October 2014, [www.bevh.org](http://www.bevh.org)).

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## Price Advertising

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Many of the complaints concerned misleading price advertising online. In distance selling, for example, goods were advertised by specifying a current price that is compared to a significantly higher non-binding price recommendation and/or a crossed-out subscription price, which is touted as the former retail price for the product. Such advertising is misleading pursuant to Section 3 and Section 5 Subsection 1 Sentence 2 Number 2 UWG, if the non-binding price recommendation specified does not exist or the specified former sales price was not actually charged.

For more than a year, one online furniture retailer

advertised for nearly its full range of products with price comparisons. The price comparisons for five products were documented for the period mentioned in two-week intervals, respectively. In doing so, it was found that the crossed-out subscription prices for the advertised products that were, in part, significantly higher were not actually charged at any point in time. This advertisement was objected to by the Wettbewerbszentrale as being misleading. In court proceedings, the company did not appear and was therefore ordered as sought to refrain from advertising with a price reduction, inasmuch as the advertisement with such price reduction is used for more than 13 weeks (LG Berlin, default judgment of 4 September 2014, Ref. 52 O 92/14; S 3 1112/13).

The advertisement with a „Best Price Guarantee“ for the products of one online store was also objected to by the Wettbewerbszentrale as misleading. This guarantee was provided with the statements that customers could return the products and would receive back the difference in price, if they saw the advertised product somewhere else online for cheaper than from the advertising retailer. However, this price comparison was problematic because the product was „renamed“ by the advertising retailer, i.e. it was marked with a different product name. Thus, a comparison was no longer possible. The Regional Court in Cobourg agreed with the opinion of the Wettbewerbszentrale and ordered the condemned the company for misleading the consumers concerned (LG Cobourg, judgment of 13 March 2014, Ref. 1 HK O 53/13; S 2 0428/13).

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## Misleading advertising claims

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Caution is also merited with the use of product or company related advertising claims. The advertiser is bound to such claims. The Wettbewerbszentrale took action against one online store for software and hardware products that advertised on its website with the statements: „Around 30,000 products with a price advantage of up to 80%. Your reliable partner for your IT needs for around 10 years. More than 200,000 customers prove us right“. However, the company actually offered less than 500 products; it had only existed for about six months and did not have more than 200,000 customers. After unsuccessful warning for being misleading (Section 5 Subsection 1 Sentence 2 Nos. 1, 2 and 3 UWG), the company was ordered by way of default judgment to refrain from making such advertising statements (LG Lüneburg, default judgment of 6 November 2014, Ref. 7 O 103/14; F 7 0209/14).

It is also misleading and anti-competitive, if an online trader advertises its products with a reference to a particular availability of products, such as by pointing out shipping availability within 1–2 business days, if the advertised products are not actually available for shipping within the advertised delivery period (Section 5 Subsection 1 Sentence 2 Number 1 UWG). It was not possible to reach a settlement out of court, the Wettbewerbszentrale called on the Regional Court in Aschaffenburg. In court, the provider acknowledged—on the advice of the Court—the injunctive claim (LG Aschaffenburg, judgment based on acknowledgement of 19 August 2014, Ref. 2 HK O 14/14; F 5 0619/13).

In the reporting period, the advertisement of a large Internet shipping retailer was also objected to that advertised for a synthetic leather product marked the indication „leather jacket“. Only the additional product description showed that it was not a real leather jacket. The court had to be called on in this case as well. The Regional Court in Berlin issued a preliminary injunction as sought. The retailer sued then issued the closure declaration (LG Berlin,

decision of 20 December 2013, Ref. 15 O 590/13; B 1 0439/13).

In the previous year, we already reported on the advertising of an online retailer that limited the warranty rights of the consumer for demonstration products and returned products to one year; these were so-called B-goods (see Annual Report 2013, p. 29). The Court of Appeal in Hamm has now confirmed the first instance judgment and prohibited a major electronics online retailer from limiting the warranty period of B-goods to one year (OLG Hamm, judgment of 16 January 2014, Ref. I – 4 U 102/13; S 3 1109/12).

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## Lacking marketability

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Time and time again, the Wettbewerbszentrale deals with cases in which products are brought to market, although they lack marketability. A retailer from Spain advertised on the video portal YouTube for a high-pressure cleaner „Water Zoom“. As part of the promotional video, it was advertised that the cleaner removes hornets' nests fast and worry-free. Hornets are protected under the Federal Act for the Protection of Nature {Bundesnaturschutzgesetz, BNatSchG} (Section 1 Subsection 1 BNatSchG). Protected species may neither be caught nor killed (Section 44 Subsection 1 Number 1 BNatSchG). A device that is advertised with the statement that it is designed for killing protected species is not marketable. A retailer that advertises in this way for its product also violates its obligation to professional diligence. The demanded declaration of discontinuance was issued (B 1 0330/14).

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## Information requirements in e-commerce

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On 13 June 2014, important changes came into force for distance selling retailers (also see Annual Report 2013, pp. 14 et seq.). For example, companies may not charge consumers telephone costs beyond the base rate for the clarification of question related to the contract. Pre-set ancillary services, such as previously marked check boxes, are not permitted. Online retailers must fulfil further pre-contractual information requirements. For example, the total price is to be indicated in permanent contracts and/or subscription contracts. The consumer is also to be informed about guarantees and the contents of guarantees before making the contractual declaration, inasmuch as these guarantees are advertised. In addition, the right of withdrawal was also changed substantially. The withdrawal period is 14 days EU-wide. If the contractor does not properly inform the consumer about the right of withdrawal, the withdrawal period is extended from 14 days to 12 months. Consumers can now withdraw from their contract by phone. In case of withdrawal, the consumer is to bear the direct costs of returning the product, inasmuch as the retailer informs the consumer of this before the contractual declaration is made. Furthermore, the business operator is obligated to not only inform the consumer of the right of rescission before the contractual declaration is made, but also provide the consumer with the standard withdrawal from.

In autumn of the reporting year, the Wettbewerbszentrale received the first complaints about inadequate implementation of the new information requirements by online retailers. For example, it is complained of time and time again that the consumer was not provided with a withdrawal form before the consumer makes contractual declarations. This is a violation of the provisions of the Civil Code (Section 312g Subsection 1, Section 355 Subsection 1 BGB) and of the Introductory Act to the German Civil Code (Article 246a Section 1 Subsection

2 Number 1 EGBGB). As these rules are intended to regulate market conduct in the interests of market participants, this is also a violation of Section 4 Number 11 UWG. Upon a warning by the Wettbewerbszentrale, the retailers agreed to refrain, so that the cases could be settled out of court (S 3 1080/14; S 3 0930/14; S 3 0963/14; S 2 0737/14; F 7 0183/14; F 7 0184/14; F 7 0205/14).

The Wettbewerbszentrale has also already received complaints with regard to the pre-contractual information requirements on guarantees (Article 246a Section 1 Subsection 1 Sentence 1 Number 9 EGBGB). For example, before the consumer makes the contractual declaration, the retailer is to name the name and address of the guarantor and the term and/or geographic scope of the guarantee. Moreover, this obligation applies not only to retailers that deal with products in distance selling, but also in retail stores. The infringements of competition law complained of could be settled out of court with the issue of a declaration of discontinuance (S 3 0912/14; S 2 0851/14).

The so-called „button solution“ was already introduced by the German legislature in 2012 (see Annual Report 2012, p. 28). According to that, in e-commerce contracts between consumers and businesses, the business operator is obligated to provide consumers with certain information essential to the consumer directly both in time and space before the confirmation of the order function (Section 312j Subsection 2 BGB in conjunction with Article 246a Section 1 Subsection 1 Sentence 1 Number 1 EGBGB). In its judgment of 26 March 2014, Ref. 9 U 1116/1, the Court of Appeal in Koblenz dealt with questions of what characteristics are so essential in the sale of mobile products that they need to be mentioned on the order completion page and in what way and manner the information must be provided (F 2 1197/12; see Annual Report 2014, industry report on telecommunications p. 41).

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# Tourism / travel

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Hans-Frieder Schönheit, Lawyer, Bad Homburg Office

Various cases under competition and standard form contract law arise in the different segments of the tourism sector, which will be considered in the following paragraphs. The legal problems in 2014 focused on information requirements of tour operators, promotional activities of Internet travel portals, advertising in the hospitality industry, as well as in the price advertising for holiday properties.

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## Airlines

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In 2014, the Wettbewerbszentrale only received a few complaints about advertising by airlines. There were, however, some very interesting cases.

This concerns first of all the internet booking system from the airline Ryanair. Here, the customer could only continue the booking process initiated for a ticket if the customer had decided for or against the conclusion of additional travel insurance. In the contested design of the web site, the user had to make the decision in such a way that a drop-down box opened with the heading „Select a country of residence“ where the customer had to either click on one of the countries listed there in alphabetical order or the box „not insured“—arranged between „Latvia“ and „Lithuania“. The Court of Appeal in Frankfurt am Main prohibited this design (OLG Frankfurt am Main, judgment of 9 October 2014, Ref. 6 U 148/13; F 2 0768/12). The court found a violation of the provisions of European law on airfare advertising (Ar-

ticle 23 of Regulation (EC) 1008/2008). The opt-in for optional additional services, such as travel insurance, must observe the principle of clarity, transparency and unambiguousness. This is not the case if the way to deselect the optional additional service is harder to locate than the way of booking the additional service.

In another case, the Wettbewerbszentrale objected to the online booking system of the airline Germanwings. When booking flights online that started in non-European countries and flew to Germany, the customer (with residence, invoice address and bank account in Germany) were only offered payment variations that cost money. At least one common and reasonable payment possibility that does not cost money must however be provided for consumers (Section 312a Subsection 4 Number 1 BGB). The airline then changed the booking system and agreed to discontinuance (F 2 0848/14).

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## Travel agents

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### Misleading hotel stars

During the reporting period, the Wettbewerbszentrale received several complaints about misleading advertising with hotel stars in travel offers from tour operators. Different tour operators advertised hotel stays using star icons and statements about stars, even though the enterprises advertised were ac-

tually classified. Actually, the advertised hotels did not even possess currently valid classifications according to the German hotel classification. The tour operators, which mainly came from the segment of the so-called X-operators (dynamic package organizers), regularly issued declarations of discontinuance (F 2 0159/14; F 2 0218/14; F 2 0590/14, among others).

### General terms and conditions of business

In the law on package tours, mandatory requirements apply for the possibility of a tour operator to limit or exclude its liability from the travel agreement vis-à-vis the travel customers (Section 651h BGB). This provision apply to package tours of all kinds and thus also for trips with special risks, such as expeditions. This was not observed by one tour operator that provided for an exclusion of liability in its general terms and conditions for trips with special risks. This exclusion of liability was prohibited within the scope of a clause action (LG Potsdam, judgment based on acknowledgement of 12 February 2014, Ref. 2 O 524/13; F 2 1064/13).

In its general terms and conditions, one travel company that acted as a travel agency provided for compensation pursuant to Section 651i BGB for its own benefit in the case of a withdrawal declared by the customer. Such a compensation claim is, however, only due the tour operator, but not the travel agent. Consequently, this provision was prohibited as invalid (LG Köln, judgment of 2 July 2014, Ref. 26 O 8/14; F 2 1289/13).

### Duties of information under travel law

During the reporting period, the court's reasoning was now available from the case of the Wettbewerbszentrale against Jochen Schweizer GmbH for failure to name the company carrying out hot air balloon trips (BGH, judgment of 9 October 2013, Ref. I ZR 24/12 - Alps Panorama in a Hot Air Balloon {Alpenpanorama im Heißluftballon}; F 2 1049/09). Reversing the decisions of the lower instances that had decided against the company, the Federal Supreme Court denied a legally protected interest of consumers to be informed of the company that is

carrying out the hot air balloon ride. It is sufficient for the consumer to be informed about the provider of these rides. There was no obligation pursuant to Section 5 a Subsection 3 Number 2 UWG to provide the identity and address of the company actually carrying out the hot air balloon ride. The identity of the contractual partner was sufficient. In addition, the disclosure of the company carrying out the event would lead to a complete ban on the business model of Jochen Schweizer GmbH. The Federal Supreme Court apparently did not want to go that far.

Among other things, tour operators must provide information in their brochures with regard to passport and visa requirements in the country of destination (Section 4 Subsection 1 Number 6 of the Ordinance on Information and Proof Requirements under Civil Law {Verordnung über Informations- und Nachweispflichten nach bürgerlichem Recht, BGB-Info-VO}). The violation of these information requirements under travel law is anti-competitive (LG Bückeburg, judgment of 12 November 2013, Ref. 1 O 99/13; F 2 0216/13).

In its prospectus, another tour operator indicated that he general terms and conditions used could be read in the office, could be requested or could be found online. According to the relevant provisions (Section 6 Subsection 3 BGB-Info-VO), however, the tour operator has to voluntarily inform the traveller in full about the general terms and conditions used before the contract is concluded. The Wettbewerbszentrale objected to the infringing practice, whereupon a declaration of discontinuance was issued (F 2 0095/14).

### Charter price contingency insurance

Tour operators are obligated to secure all payments made by the traveller on the travel price before the end of the trip by previously handing over a travel cost insurance certificate (Section 651 k BGB). This was not observed by one tour operator, which did not transmit the insurance certificate together with the deposit invoice, but first with the final invoice. In this way, the payment of the traveller was not insured by an insurance certificate as is required by law. The court prohibited this (LG Wiesbaden, decision

of 7 March 2014, Ref. 12 O 14/14; F 2 0111/14). In addition, the Wettbewerbszentrale had to take action against various providers of sailing trips that also offered such trips without travel price insurance certificates. Declarations of discontinuance were regularly issued in these cases (F 2 0103/14; F 2 0105/14).

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## Holiday bureaus / holiday brokers

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During the reporting period, the Wettbewerbszentrale again had to object to the design of an online booking portal for air travel. Here, the portal operator did not give the final price, including all fees and VAT, at the beginning of actual booking step. Rather, a mandatory fee for the payment method and a so-called „service fee“ was presented only at the end of the booking process. This violates the obligation to indicate the final price in the price advertising for air travel (Article 23 of Regulation (EC) 1008/2008). Accordingly, the Regional Court in Hamburg allowed the action filed by the Wettbewerbszentrale (LG Hamburg, judgment of 13 January 2014, Ref. 408 HKO 102/13; not yet final; F 2 0427/13).

In an online booking site for car hire, the portal operator had additional insurance benefits in the form of deductible protection shown by default, so that the customer had to click away this service if the customer did not want to have it at a charge. According to the applicable consumer protection rules that are based on the European Consumer Rights Directive, the default setting of such additional ancillary services is however not permitted (Section 312a Subsection 3 Sentence 2 BGB). The UK-based portal operator agreed to discontinuance as demanded by the Wettbewerbszentrale (F 2 0954/14).

Another portal operator, Check 24 Vergleichsportal GmbH, advertised its own offers with the statement „Germany’s best travel portal“. In doing so, the company justified the advertising claim on a study by the University of Rosenheim. This study, however, only showed a minimal margin of two percentage points over the runner-up. Other tests on travel portals showed significantly better results for the competi-

tors and showed other test winners. In the opinion of the Wettbewerbszentrale, there was thus no clear advantage over competing providers. As a settlement out of court could not be reached, the Regional Court I in Munich prohibited the advertising by way of a preliminary injunction (LG Munich I, decision of 14 July 2014, Ref. 33 O 12924/14; F 2 0537/14).

A regional travel agency chain used numerous Internet domains that contained place names. However, the company had no establishments locally in some of these places. The Wettbewerbszentrale considered this to be misleading to the public, whereupon the travel agency agreed to discontinuance (F 2 1377/13).

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## The hotel sector

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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 on the building itself or in other promotional materials, the consumer regularly expects that the hotel operations were certified according to the criteria of the German hotel classification and that this certification is also valid at the time of the advertising. It is misleading to customers, if such a classification is lacking. Most of the complaint cases were settled by way of declaration of discontinuance. In the other cases, the courts regularly affirmed the legal opinion of the Wettbewerbszentrale (so, e.g., LG Dresden, default judgment of 27 June 2014, Ref. 44 HKO 107/14; F 2 0333/14; LG Hannover, judgment of 9 April 2014, Ref. 23 O 83/13; WRP 2014, p. 1496; F 2 0456/13). In the price advertising in the hospitality industry it is also the case that the advertised prices must contain all mandatory price components. This also applies to the „city tax“ assessed in numerous cities which is to be included in the quoted price according to the requirements laid down in the court decisions (OLG Köln, judgment of 14 March 2014, Ref. 6 U 172/13). A hotel chain that operated nation-wide in the budget sector did not observe this in the price representation. Upon the

objection of the Wettbewerbszentrale, the company agreed to discontinuance (F 2 0165/14).

During the reporting period, the Wettbewerbszentrale had to object to the terms and conditions of booking of hotel chains with regard to terms of cancellation. Many hotel chains, including such well-known suppliers such as CCOR, Starwood, etc., had provided in the terms and conditions of booking for some of the rates offered that, in the case of a cancellation of a hotel room, a cancellation fee amounting to the full accommodation rates would be charged. Such conditions, however, do not take into account the expenses saved by the hotel operator. Even though the customer has no free right of withdrawal when booking hotel rooms (unlike when a travel contract is concluded), the hotel also retains its claim for remuneration if the guest is prevented from using the accommodations. According to the applicable provisions under tenancy law, the hotel must however credit the expenses it saves (Section 537 Subsection 1 Sentence 2 BGB). The hotel operator should have no advantage if the customer is prevented from using the accommodations. According to the recommendations of the German Hotel and Restaurant Association {*Deutscher Hotel- und Gaststättenverband*, DEHOGA}, the expenses saved in the case of an overnight stay with and without breakfast amount to 10% of the stipulated price of accommodation. These expenses saved must, in any case, be credited to the customer who cancels a hotel room. The objections could all be settled out of court. In the meanwhile, the hotel chains have changed their cancellation policy and adapted it to the legal situation in Germany (F 2 0207/10, among others).

Other complaints were lodged against the Netherlands-based operator of the hotel booking portal [www.booking.com](http://www.booking.com). In its German-language booking portal, the company advertised accommodation offers with the claims of limited availability of hotel rooms, inter alia, with the statement „Last chance! We still have one room!“. As a result, a certain amount of pressure was purposely made to book. In fact, however, other equivalent hotel rooms for the guests could still be booked through other booking channels. Comparable advertising claims were

already prohibited by the Reclame Code Commissie (RCC) in the Netherlands (Ref. Dossier 2014 00190). Upon the objection of the Wettbewerbszentrale, the company agreed to discontinuance (F 2 0722/14).

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## Holiday properties

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During the reporting period, the complaints about price advertising from providers of holiday properties were undiminished. Once again, in numerous cases the costs of compulsory final cleaning were not included in the rental price displayed. It is also necessary in the rental and/or arrangement of holiday properties that all mandatory cost items are included in the final price. The Wettbewerbszentrale has again provided information about this legal situation on its website [www.wettbewerbszentrale.de](http://www.wettbewerbszentrale.de) and pointed out the clear case law (most recently, for example, OLG Rostock, decision of 24 March 2014, Ref. 2 U 20/13; F 2 0250/13).

The provider also cannot circumvent the obligation to indicate the final price by replacing the originally separately shown amount for the final cleaning with a service fee that is likewise shown separately. Within the scope of a contractual penalty action, the Regional Court in Aurich found that this violated a previously issued declaration of discontinuance (LG Aurich, judgment of 27 August 2014, Ref. 6 O 186/14; F 2 1157/13).

Other complaints in the area of holiday properties once again concerned impermissible advertising with a star marking. There is an official certification system also in the area of holiday properties, which in this case is operated by the German Tourism Association {*Deutscher 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, advertising with stars is not permitted. The cases could regularly be settled by the issue of declarations of discontinuance (F 2 1049/13).

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## Bus tours

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Once again, the focus in the reporting period was on complaints about impermissible advertising with star markings for travel coaches. According to settled case-law, such a star marking is seen as an indication of a quality-assured travel coach. However, if the advertising is not based on a currently valid quality assurance by the Gütegemeinschaft Buskomfort e.V., this results in an impermissible misleading of the consumer. The cases could regularly be settled by the issue of declarations of discontinuance (F 2 0329/14, among others).

Other complaints concerned the advertising for offers of bus tour operators. These had advertised in newspaper advertisements with the prices quoted for the tours they operated, however without providing information on their business name and address. The Wettbewerbszentrale regularly objected to this as a violation of the information requirements under competition law (Section 5a Subsection 3 Number 2 UWG). In these cases, the objections could regularly be settled by the issue of declarations of discontinuance (F 2 0453/14, among others).

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## Cruise sector

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During the reporting period, the Wettbewerbszentrale was occupied once again with prohibited advertising with ship stars. In this segment, there is — unlike in the areas of hospitality, holiday properties and bus tours — still no independent quality assurance system for cruise ships. The categorization with stars is regularly based on a trade publication, i.e. the so-called Berlitz-Cruise-Guide, or on a self-evaluation by the providers themselves. If, however, a ship touts a certain number of stars without pointing this out, this is misleading to the public. The reference to a self-assessment must be made in a clear and unambiguous way (LG Hanau, judgment of 1 September 2014, Ref. 7 O 397/14;

F 2 1314/13).

The sales of cruises are increasingly taking place via online booking portals. The operator of one such booking portal wanted to draw attention to the special range of offers and advertised with the statement „over 23,400 cruises on more than 400 ships“. This statement was based on the booking availability on a „quick search“ provided simultaneously. Using this „quick search“, however, cruises could actually only be booked on 386 ships. The Wettbewerbszentrale considered this deviation from the actual circumstances to be relevantly misleading to the consumer. A high number of ships that can be booked using the „quick search“ can influence the business decision of the consumer. This legal opinion has meanwhile been affirmed and the advertisement in question of the online booking portal was prohibited with final effect by way of a preliminary injunction (OLG Frankfurt am Main, decision of 16 October 2014, Ref. 6 U 92/14; WRP 2014, p. 1482; F 2 0002/14). The company has since acknowledged the decision made in the procedure of provisional injunction as the final say.

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# Telecommunications

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Johanna Kilbinger, Lawyer, Bad Homburg Office

One of the big issues in the telecommunications sector in 2014 was the merger of the companies, Telefónica Deutschland and E-Plus, which led to a reduction in the number of German mobile network providers from four to three. It remains interesting to see what consequences this change will have and whether a new player will enter the mobile market in the near futures.

The broadband expansion in Germany is progressing with good results (see the press release from BITKOM on 21 January 2014). As the Internet becomes increasingly important for people, nation-wide coverage of households with fast Internet access is of the highest priority for policy and citizens. The ongoing digitization of the everyday life of consumers and businesses leads to increasingly high data traffic that puts large demands on the performance of the networks in both the fixed network and mobile communications. The different interests of Internet users and providers are reflected in the discussion around the so-called net neutrality. The question of whether certain Internet services can be given preferential treatment for remuneration will also preoccupy the telecommunications market in the future, because statutory rules are planned on both a European and a national level.

The focus of the complaints and requests filed with the Wettbewerbszentrale is again misleading advertising. Among others, price advertising and eye-catching advertising with product- and company-related statements were misleading.

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## Price advertising

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In the highly competitive telecommunications market, the price is a determining criterion for the consumer when choosing a telecommunications product. Thus, to gain a competitive advantage to competitors, telecommunications companies grant consumers numerous price advantages upon conclusion of the contract. During the reporting period, several providers of telecommunications and Internet rates advertised with temporary campaigns with discounts on the monthly payable base rate and connection costs. The advertising made statements, such as „2 months free only until ...“, „save almost EUR 60 only until ...“ and „instead of EUR 19.95, only EUR 14.95/month until ...“. A particular characteristic of these cases was that the campaigns were extended again and again after the date stated in the advertisement passed. According to the case law of the Federal Supreme Court, those who state fixed time limits for a discount campaign are generally held thereto. Due to the specification of the time limit, consumers would assume that the company actually intends to adhere to the end date specified (BGH, decision of 7 July 2011, Ref. I ZR 173/09 and Ref. I ZR 181/10). Since, based on the disputed advertisement, it did not seem like the company already intended to extend the campaign continuously at the time the advertisement appeared, the company would mislead with regard to the end date of the campaign (Section 5 Subsection 1 Sentence 2 Number 2 UWG). The complaints were regularly settled with the issue of a declaration of discontinuance subject

(F70051/14; F70087/14; F70312/14, among others).

In two cases, the Wettbewerbszentrale objected to the price advertising in television commercials. In one case, a well-known telecommunications company advertised an „Allnet flat“ rate with the statement: „Allnet flat now starting at EUR 19.99 a month for all X customers, ...“. This offer was not available for new customers. Only existing customers could purchase an Allnet flat rate for EUR 19.99—however, only by adding it to their existing contract. After the warning of the Wettbewerbszentrale was unsuccessful, the Regional Court in Dusseldorf prohibited the advertising (LG Dusseldorf, judgment of 29 August 2014, Ref. 38 O 78/14; F 7 0088/14). The commercial violated Section 5 Subsection 1 Number 2 UWG because it contained statement with regard to the price that could mislead. It is uncontested that only certain customers could add the performance at the advertised price. This was, however, not apparent from the advertisement. The court also criticized that it was not even clear that existing customers were unable to receive the product at the advertised price, as it is merely an additional rate. The public is not informed about this.

In another case, a mobile phone company advertised a smartphone at a price of EUR 29.99 to be paid monthly. The price information was marked with an asterisk that referred to an illegible note. No where in the commercial was information provided with regard to the circumstance that the smartphone could only be purchased at the eye-catching price if a mobile phone contract was concluded with a minimum term of 24 months and that other one-time costs would be charged for the conclusion of the contract and the smartphone. The Wettbewerbszentrale objected to the advertising as being misleading, because the consumer is misled about the real costs and the company advertising obtains a competitive advantage over its competitors due to the impression of particular affordability. Since a settlement out of court could not be reached, the Regional Court in Kiel prohibited the advertising (LG Kiel, default judgment of 28 August 2014, Ref. 14 O 72/14; F 7 0040/14). The decisions make it clear that, also in the context of television commercials for telecommunications offers, the costs must be made known

with transparency to avoid misleading consumers.

During the reporting period, the Wettbewerbszentrale took action against companies in the four major network providers because they had misleadingly advertised with very attractive prices for mobile phones on the price comparison portal of Google. The price listed in the Google-heading „Shopping“ was not the total purchase price, but rather only a part of the total price composed of a single payment and an instalment payment. The products could not be had at the advertised price. Because only one component of the price was stated, the offers in question were each much higher in the Google shopping hits sorted according to price than the ads of competitors acting in accordance with competition law. Not only were consumers, who could not purchase the product at the advertised price, affected by this violation of competition law, but also but also competitors, the potential customers of which were enticed away. After the Wettbewerbszentrale objected to this, all but one of the companies issued a declaration of discontinuance (F7 0103/14; F 7 0106/14; F 7 0107/14; F 7 0123/14). The case that could not be settled out of court is currently pending at the Regional Court in Dusseldorf (LG Dusseldorf, Ref. 38 O 74/14; F 7 0104/14).

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## Misleading advertising

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As in previous years, there was no shortage of complaints about misleading advertising of telecommunications companies. The Wettbewerbszentrale again received numerous complaints that gave rise to objections. However, the problem of when advertising is misleading and when it delivers on its promise also forms a focal point in the consultation of member companies.

In the telecommunications industry, advertising with test and quality labels is also a gateway for misleading statements. The Wettbewerbszentrale receives complaints time and time again with regard to the misleading use of labels, but also with regard to the lack of a citation in connection with advertising

with labels. The Regional Court in Fulda forbade a mobile phone provider from advertising with three different labels. The online retailer had advertised on its website with several test and quality labels, including a label from Yatego GmbH. The label bore the words „Yatego approved provider 2010“. The criterion for awarding the label was the presentation of a business registration or an excerpt from the company register {Handelsregister}. Furthermore, it also advertised with „2010 Winner Deloitte Technology Fast 50“ and „2010 Winner Deloitte Technology Fast 500 Emea“. In the competition, „Deloitte Fast 50“, the company was ranked 12th; in the overall ranking of the competition „Deloitte Technology Fast 500 Emea“, it was not even among the top 100 ranked companies. The Regional Court in Fulda found that the advertising violated Section 5 UWG and Section 5a UWG, and thus agreed with the opinion of the Wettbewerbszentrale. The advertising with the Yatego label would give consumers the impression that the award would be based on a review of objective criteria with regard to the person and quality of the performance offered. Consumers would assume that, with the award, criteria would be reviewed that consumers were unable to assess themselves. Such objective, pertinent review and award criteria are lacking, however, if merely a business registration of the provider was reviewed. The advertising with the Deloitte labels was also misleading. Although it cannot be excluded that consumers understand the „winner“ to not only be the winner in first place, but also the winners in second and third place, the general public would not however understand „winner“ to include competitors in 12th place or lower. Here, this was merely a „participant“ (LG Fulda, judgment of 17 January 2014, Ref. 7 O 48/13; F 7 0098/13). In another case, an online shop for mobile phone products advertised with the award „Shop Usability Award 2013“ without specifying a citation. In accordance with Section 5a Subsection 2 UWG, however, a citation must be provided that is clear and easily found by consumers. Only then is it possible for consumers to inform themselves about the criteria that led to the awarding of the prize. Since the lack of the citation made a review impossible, the Wettbewerbszentrale objected to the advertising with labels, as a result of which the company issued a declaration of discontinuance (F 7 0304/14).

According to a ruling by the Federal Supreme Court in March 2014, companies may not present consumer rights in such a way that gives consumers the false impression that they are voluntary performances of the company. Such advertising also violates Number 10 of the Annex to Section 3 Subsection 3 UWG if the alleged characteristic is lacking in a highlighted presentation (BGH, judgment of 19 March 2014, Ref. I ZR 185/12). During the reporting period, the Wettbewerbszentrale received complaints about the advertising of the 14-day right of withdrawal due consumers by law in distance selling contracts. This right was claimed to be an „advantage“ of the concrete rate offered and/or of the online shop. In doing so, it was suggested to the customer that the granting of a 14-day possibility of withdrawal was an advantage of the specific provider's offer. Upon warning by the Wettbewerbszentrale due to impermissible advertising with matters of fact, the companies agreed to discontinuance (F 7 0139/14; F 7 0201/14).

During the reporting period, a large mobile phone company introduced new rate terms and conditions for its mobile Internet. Based on the so-called „data automatic“, the customer automatically receives additional data volume at a cost up to three times after the included monthly „high-speed“ data volume is used up, before the browsing speed is throttled. If the maximum „speed“ volume is used up completely in three consecutive months, an automatic upgrade is made to the next higher data option involving additional monthly costs. In the case objected to by the Wettbewerbszentrale, the consumer was not made aware of the obligatory „data automatic“ within the scope of the advertising, so that it was impossible to make a conscious, informed purchase decision. However, the omission of essential information violates competition law (Section 5a Subsections 2 and 3 UWG). The company has issued a declaration of discontinuance (F 7 0144/14). The case makes it clear that the business operator must provide consumers with essential information on the offer in an unambiguous and clear manner.

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## Information requirements in online commerce

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In the Annual Report 2013, a case was reported in which the Wettbewerbszentrale went against a well-known provider of telecommunications products that had provided no information about the main product characteristics and price components on the order conclusion page within the scope of its ordering process (see Annual Report 2013, p. 40). The decision of the Court of Appeal in this case became available during the reporting period (OLG Coblenz, judgment of 26 March 2014, Ref. 9 U 1116/13; F 2 1197/12). The Court of Appeal found that the order conclusion page violated the former version of Section 312g Subsection 2 BGB (new: Section 312j Subsection 2 BGB), as did the lower court. The necessary consumer information must be provided directly in time and space before the binding offer is made, for example before clicking the „buy“ button. With regard to the temporal connection, it is not sufficient if the information were to already be provided at the beginning or during the ordering process, as consumers should have the opportunity to take notice of the relevant information directly before time of their order. In order to guarantee the spatial-functional connection, the information must be displayed in close proximity to the order button. Two other cases based on violations against Section 312j Subsection 2 BGB are currently pending in court (LG Cologne, Ref. 31 O 417/14; F 7 0232/14 and LG Dusseldorf, Ref. 37 O 78/14; F 7 0101/14). It remains to be seen what requirements are demanded by these courts with regard to the content and the time when the required information is provided.

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# Financial services

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Peter Breun-Goerke, Lawyer, Bad Homburg Office

With 160 complaints and consultation cases in 2014, the financial market sector remained at nearly the same level. The financial market was badly affected by the insolvency petition of the wind energy provider Prokon. The bad news rekindled the discussion of further rules on the supervision of financial markets. The EU legislature is planning a revision of the Markets in Financial Instruments Directive and new rules for credit intermediaries. The uniform European supervisory mechanism (Single Supervisory Mechanism, i.e. SSM), was launched on 4 November 2014 and is intended, in particular, to ensure the security and soundness of the European banking system and to improve financial integration and stability in Europe. The national legislature has presented a draft for a retail investor protection law that provides for risk information for capital investments as well as a restriction of public advertising. In October, it was begun with the provision of the first funds of the financial market watchdogs that are to detect problems and legal infringements in the area of financial markets. These new rules, but also compliance with the rules that already apply, will be enforced in the interest of a fair and equitable competition with the means of competition law. 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:

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## Banks

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The banking sector is also still dominated by negative headlines. The value and informative content of consultation protocols and leading decisions of the Federal Supreme Court with regard to disputes, such as the costs of consumer credit, provide for volatility. In this period, the banks attempted to win the trust of customers with advertising measures that also gave rise to objections in individual cases.

### Interest rate advertising for call money

In a judgment that is now final, the Court of Appeal in Dusseldorf (judgment of 29 August 2014, Ref. I 20 U 175/13; F 5 0040/13) confirmed the prohibition of the advertising of a consumer bank with a promotional offer for so-called „top call money“. On its homepage, the bank had advertised the promotional offer with the statement „Now 2.25% interest per annum — coolly calculated, well profited“. At the bottom was a button that read „Secure returns now“. In fact, however, the eye-catchingly advertised interest rate of 2.25%, which exceeded the prevailing interest rate on the market, only applied to an investment amount up to EUR 5,000.00. For amount exceeding this, the bank only intended on giving interest rates of between 1% and 0.25% per annum. Potential customers only first received this information, however, on the third subpage of the website when opening the account.

The Regional Court in Mönchengladbach had prohibited this by judgment of 15 July 2013, Ref. 8 O 18/13. The Court of Appeal in Düsseldorf now agreed with this opinion and confirmed that the restriction of the advertised interest rate to a particular investment amount was essential information, the omission of which on the homepage was suited to influence the decision of the consumer. The information on the restriction of the offer must be provided on the homepage and, indeed, before the button „Secure returns now“. By clicking the button, the customer enters — as in retail stores — the virtual business locale of the defendant, whereby the former is denied essential information, namely the restriction of the investment amount with the interest rate displayed in an eye-catching manner.

### Interest rate advertising with current account interest

With the statement „Discounted current account interest inclusive of 2% points“, a savings bank advertised to new customers the opening of a current account model „My top-class current account“. In fact, the interest rate for overdrafts of the current account in this account model was not the 2% that was stated in the advertising. The current account interest was charged for merely 2% lower than the current account interest rates charged for other current account of this financial institution—in this particular case, 9.38% instead of the usual 11.38%. The Wettbewerbszentrale objected to the advertisement for the current account interest of 2% as being misleading because the specific wording gave customers the impression that only 2% current account interest would actually be charged for this account in the event of an overdraft. The savings bank issued a declaration of discontinuance with the content that it would omit this statement in the future if the underlying offer only mentioned that the usual current account interest charged by the savings bank is only reduced by 2% (F 5 0513/14).

### Misleading advertising for a credit card

One bank offered its customers a so-called Visa Platinum Card in addition to the current account. The listed advantages of this platinum credit card in-

cluded a higher credit limit of up to EUR 10,000.00, a comprehensive insurance package as well as access to over 600 VIP airport lounges around the world with the so-called „Priority Pass“. The Wettbewerbszentrale objected to this advertising as being misleading because it was not mentioned anywhere that additional costs would be incurred if one of these lounges was visited with the Priority Pass. For example, the customer would have to pay a respective entrance fee of EUR 24.00 when visiting a lounge. An additional EUR 24.00 would be charged for each guest's entry into the lounge. These additional costs were not pointed out anywhere in the advertising for the conclusion of the credit card agreement, although it was an essential circumstance for the offer. Upon the warning by the Wettbewerbszentrale, the bank issued a declaration of discontinuance, in which it agreed to no longer advertise in the future that over 600 airport lounges could be accessed without pointing out that additional costs would be incurred for the visit to these airport lounges (F 5 0225/14).

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## Insurance / insurance brokers

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In the area of insurances and insurance brokers, the main focus in the reporting year 2014 was also in the activities of insurance brokers without the necessary registration with the Chamber of Commerce *{Industrie- und Handelskammer}*.

### Insurance brokering without registration

In a case of the Wettbewerbszentrale in 2009, the Regional Court in Leipzig (LG Leipzig, judgment of 29 September 2009, Ref. 5 O 2480/09; F 5 0178/09) already decided that brokering without registration constitutes a violation of competition law. The Regional Court in Wiesbaden (LG Wiesbaden, judgment of 14 May 2008, Gewerearchiv 2008, p. 306) had also previously ordered a commercial enterprise to discontinue brokering insurances with the same reasoning.

However, individual insurance brokers online still ad-

vertise the brokering of insurance contracts without being registered in the register of intermediaries. For example, a bound insurance agent {*gebundene Versicherungsvertreter*} advertised for contracts under the name of an establishment and referred herself as „insurance broker“ in the correspondence and in the advertisement. She was, however, not registered with this activity in the insurance intermediary register. Upon warning by the Wettbewerbszentrale, she issued a (F 5 0251/14). Another broker not entered in the register of intermediaries advertised for his services online and, after the warning, claimed that he had only put the website online for a few hours as a trial, which could however be refuted by corresponding documentation. The broker also issued a declaration of discontinuance (F 5 0271/14).

### Misleading advertising with the designation „insurance“

One insurance broker operated his company with the term „insurance“, but was not an insurance company itself. According to the Insurance Supervision Act {*Versicherungsaufsichtsgesetz*}, this term may also be used by insurance companies. The Wettbewerbszentrale objected to the use of the designation as a violation of the market conduct rules and as being misleading, as a result of which the insurance broker issued a declaration of discontinuance (F 5 0510/14). In another case, an insurance broker referred to himself on Facebook as an „insurance company“, also without fulfilling the corresponding prerequisites. Upon the warning by the Wettbewerbszentrale, this company also issued a declaration of discontinuance and declared that it wanted to stop using the term „insurance company“ (F 5 0583/14).

### Misleading advertising for a training event

A brokerage pool advertised that a convention would be held with the name „Pools & Finance“, inter alia, with the statement that, by taking part in the convention, further education credit points could be earned that were to be prerequisite for continuing to act as an insurance broker.

The Wettbewerbszentrale objected to this adverti-

sing as being misleading because, in the area of insurance brokers, there is currently no statutory obligation for further education or for acquiring such credit points. The company defended its behaviour by arguing that it was an internal promotional document for members of the brokerage pool and thus merely an internal self-commitment was to be implemented. All of this was, however, not apparent from the letter; it gave the recipients the misleading impression that there was a statutory requirement of further education. Upon being told so, the brokerage pool issued a declaration of discontinuance, but did not pay the reimbursement of expenses. The Wettbewerbszentrale then filed an action for payment and declared that the dispute was settled in the main proceedings after receipt of reimbursement of expenses. The Regional Court in Lübeck (LG Lübeck, decision of 22 July 2014, Ref. 8 O 44/14; F 5 0135/14) ordered the brokerage pool to bear the costs of the proceedings because the warning that it was misleading was justified.

### Lacking information on registration in the imprint

A commercial law firm in the legal form of a German limited liability company {GmbH}, which advertised for the conclusion of insurance contracts as insurance broker within the scope of regularly held information evenings, did not list the registration information of the commercial register nor the registration number in the imprint of its website, nor did the imprint contain the necessary information on the registration of the GmbH in the insurance intermediary register. After an unsuccessful warning, the Wettbewerbszentrale filed an action. The Regional Court in Frankfurt (LG Frankfurt am Main, default judgment of 21 October 2014, Ref. 3-06 O 55714; F 5 0296/14) ordered the insurance broker to offer her services online in the future only in such a way that the corresponding register data are mentioned in the imprint.

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## Other financial service providers

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### Advertising with supervision

The Wettbewerbszentrale had to repeatedly deal with the attempt of financial service providers to gain customer confidence by claiming to be supervised by the Federal Financial Supervisory Authority {*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*}.

For example, an insurance broker and an insurance intermediary each advertised in the imprint of their websites that they were supervised by the BaFin, which was however not actually the case. Upon the warning by the Wettbewerbszentrale, the companies issued a declaration of discontinuance and removed the statements from their imprints (F 5 0101/14 and F 5 0491/14).

### Fee-based consultation without permission

For the first time in 2014, the Wettbewerbszentrale had to deal with a case in which a fee-based consultant offered its services without being registered in the list kept by the BaFin. Since 1 August 2014, companies that wish to provide investment advice must be entered in the register kept by the BaFin. The company offered such fee-based consultation on its website without being entered in this register. The Wettbewerbszentrale objected to this conduct as a violation of market conduct rules, as a result of which the company issued a declaration of discontinuance (F 5 0449/14).

### Misleading advertising for participation rights

After the warnings against a wind energy provider in the years 2009 and 2010, the Wettbewerbszentrale again had to object to the advertising for the purchase of participation rights that were offered by a company the core business of which, according to its own statements, was real estate and project development. In promotional flyers, the compa-

ny advertised the subscription of these participation rights with interest of 8% and statements such as „Fixed high interest rates compared to savings accounts and time deposit“. The Wettbewerbszentrale objected to these and other statements in the flyer as being misleading because the subscription of participation rights poses a risk of loss that is not comparable to the risk of an investment in a savings account or time deposit. The company thereupon issued a declaration of discontinuance and stopped the advertisement (F 5 0001/14).

### Advertising with awards

A company for the management of capital assets and fund management advertised for its services with claims to various awards, including those from Börse Online and Euro am Sonntag. The illustration of the label of the awards lacked any indication of where consumers could inform themselves about the awards and the terms of their being awarded. The Wettbewerbszentrale objected to the lack of the citation as a lack of essential information that is important to consumers. With regard to the lacking citation, the company issued a declaration of discontinuance and changed the advertising (F 5 0248/14).

### E-payment system only with general terms and conditions in a foreign language

An e-payment system based in London offered to German consumers an app for download that was intended to allow customers to carry out social and financial transactions with friends. In addition to sending messages and pictures, the app also allowed money to be sent and received. The corresponding app was available for download online for Android and iOS-based phones, whereby the general terms and conditions only for the payment services offered were only available in the English language.

The Wettbewerbszentrale objected to this practice as impermissible because the use of general terms and conditions only available in a foreign language targeted at German customers is not compatible with the requirement of transparency and comprehensibility under the law concerning general terms and conditions. The e-payment service

provider agreed vis-à-vis the Wettbewerbszentrale within the scope of a declaration of discontinuance to offer such services in the future only in German, if the general terms and conditions in the same context are also available in German. The payment service was discontinued and/or the on-line offer targeted at German customers was taken offline until the corresponding translation was available (F 5 0426/14). In another case, the provider of an e-payment system issued a declaration of discontinuance with regard to the use of general terms and conditions in English only (F 5 0498/14).

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# Healthcare

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Christiane Köber, Lawyer, Bad Homburg Office

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## Pharmacists

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The judgment was not a big surprise: In February 2014, the Federal Supreme Court ordered several pharmacists to discontinuance that had advertised under the slogan „Cheap Dutch Prices“ for a specific shopping service (BGH, judgment of 26 February 2014, Ref. I ZR 77/09; F 4 0346/08). Customers could place their orders in the German pharmacy; the medicines (including those only available on prescription) were delivered to the German pharmacies by a pharmacy based in the Netherlands. The advantage for the customer was in significant price advantages. Since the Joint Senate of the Highest Courts of Justice of the Federal Government had, in the past, affirmed the question (decision of 22 August 2012, GmS-06B 1/10), whether the German provisions for the pharmacy selling price also apply to Dutch pharmacies that deliver to German customers, the Federal Supreme Court joined in this jurisprudence. The special feature of the case was, however, that the place of performance was moved to the Netherlands as per contractual obligation between the customer and the mail order pharmacy. The opposing side argued that the medicines were supplied in the Netherlands. The Federal Supreme Court, however, made it very clear that the stipulated provision with respect to the place of performance only served to circumvent the German pharmaceutical pricing law. In doing so, the Federal Supreme Court once again showed that it intends on applying German pharmaceutical pricing law not

only to foreign providers, but also that it does not tolerate circumventions.

The Court of Appeal in Munich also prohibited a pharmacy pick-up model (OLG Munich, judgment of 26 June 2014, Ref. 29 U 800/13; F 4 0044/11). In this case, the drug was also not to be dispensed from the product range of the German pharmacy, but rather ordered via a Dutch pharmacy. For doing so, the customer received discounts on the co-payment or a product voucher. The advantage for the participating pharmacies was a revenue-based commission for the placement of orders from the Dutch pharmacy. The Court of Appeal affirmed the applicability of the price maintenance provisions. The remarkable thing about the decision, however, is that the Court of Appeal also took the view that the contractual construct violated Section 4 Number 1 UWG, because it unreasonably and unduly influenced the participating pharmacies' freedom of decision. The court substantiated this with the special duty of pharmacies to safeguard the interests of their customers. Financial incentives, such as commissions, were suited to violate this duty to safeguard interests. For the German pharmacy, it is more economical to refer the customers to the Dutch pharmacy than it is to dispense the necessary drug from its own product range. In the opinion of the court, this establishes the risk that, in individual cases, the pharmacy neglects the health interests of its customers and, with regard to the financial advantage, refers to the pick-up model. The principles developed by the Court of Appeal in Munich should be of interest for similar existing or planned

cooperation models. The decision makes it clear that, especially in the health industry, restrictions are placed on the influence of third parties on the independence of pharmacies.

Another main issue is the price advertising in pharmacies with the so-called Lauer-Taxe price. This is the price that the pharmaceutical manufacturer is required to deposit in accordance with Section 78 Subsection 3 of the German Medicines Act {*Arzneimittelgesetz*, AMG} for the case that the health insurance reimburses a non-prescription drug as an exception. This price is used in advertising by pharmacists as a supply price, which is compared with their own lower price, which suggests a significant price savings to consumers. It is often called „AVP“ (= *Apothekenverkaufspreis* {pharmacies selling price}) or similar. The Court of Appeal has prohibited advertising with „AVP“ as impermissible and misleading (KG, judgment of 17 January 2014, Ref. 5 U 89/13; F 4 0556/12). It substantiated this with the incorrect expectation of the customer who assumes that an „AVP“ is a non-binding price suggested by pharmaceutical manufacturers for sales to consumers. Even detailed explanations of „AVP“ did not help the pharmacy. The court held that the consumer has no reason to read through such explanations. And even if the consumer made the effort, the explanation would more likely reinforce the belief that it is a non-binding retail price suggested by the manufacturer. The Court of Appeal in Frankfurt (judgment of 20 March 2014, 6 U 237/12; F 4 0866/11), the Regional Court in Hamburg (judgment of 14 January 2014, Ref. 312 O 139/13; F 4 0713/12, not yet final) and the Regional Court in Heilbronn (judgment of 18 September 2014, Ref. 21 O 65/14; F 4 0120/14, not yet final) have decided in a similar way. Only the Regional Court in Braunschweig came to the conclusion that the price pursuant to Section 78 Subsection 3 AMG is to be considered „some sort of a non-binding retail price suggested by the manufacturer“ (LG Braunschweig, judgment of 7 November 2013, Ref. 22 O 1125/13; F 4 0155/13, not yet final). In summary, it can be said that the vast majority of the courts found the reference to „AVP“ misleading in each specific case. Thus, it is already questionable whether, regardless of the concrete arrangement, the Lauer-Taxe price is a relevant supply price

because it is a settlement price between the health insurance company and the pharmacy, but not a relevant price for consumers. Ultimately, this will have to be decided by the courts.

The Wettbewerbszentrale was also occupied with vouchers for the supply of prescription drugs: One pharmacy gave out tickets to customers when redeeming public health insurance prescriptions. The prizes received by scratching off the tickets also included a voucher for EUR 1.00. The Court of Appeal in Frankfurt found that to be a violation of the price maintenance pursuant to Section 78 AMG, which is also the case according to the case law of the Federal Supreme Court if the medicine is dispensed at the fixed price, but the customer receives other benefits that make the purchase of the medicine seem more favourable to the customer. The court found the scratch ticket to be such an economic advantage, regardless of the odds of winning. The court also found that the behaviour was „appreciable“. In doing so, the court referred to the version of Section 7 Subsection 1 Sentence 1 Number 1 of the German Drug Advertisement Act {*Gesetz über die Werbung auf dem Gebiete des Heilwesens*, HWG} in force since 13 August 2013, according to which the admissibility under that law of gifts was tightened and in the last half-sentence of which it is explicitly regulated that gifts are always inadmissible, inasmuch as they are granted contrary to the price provisions that apply on the basis of the AMG (OLG Frankfurt, judgment of 10 July 2014, Ref. 6 U 32/14; F 4 0827/13). The vouchers for two bread rolls that were given out by a pharmacy with the purchase of medicine also violates the Drug Price Ordinance {*Arzneimittelpreisverordnung*} and thus also Section 3 and Section 4 Number 11 UWG (LG Darmstadt, judgment of 4 December 2014, Ref. 19 U 327/14; F 4 09523/14, not yet final).

A case before the Court of Appeal in Dusseldorf dealt with the expansion of a pharmacy's product range (judgment of 28 October 2014, Ref. I 20 U 159/13; F 4 0171/11). The Court of Appeal in Dusseldorf was of the opinion that neither a travel sewing kit nor a carrying cooler bag or aluminium lighter are among the products that may be sold in pharmacies. To do so, the German Pharmacy Practice Order {*Apothe-*

*kenbetriebsordnung*} calls for a tangible relationship of the objects to healthcare; the Court of Appeal denied that this was so. The Wettbewerbszentrale is currently clarifying whether the piercing of ears and the sale of earrings belong to the usual services and/or products of pharmacies within the meaning of the Pharmacy Practice Order (LG Wuppertal, Ref. 15 O 19/14; F 4 0627/14). No decision had yet been made at the copy deadline.

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## Health insurance industry

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The Federal Supreme Court has ruled that a health insurance company is acting in a misleading way if it creates the wrong impression with consumers that by switching to another health insurance company they would lose the extraordinary right of termination in the event that an additional contribution is charged (BGH, judgment of 30 April 2014, I ZR 170/10; F 4 1059/08). As „business operator“ {*Unternehmer*} within the meaning of UWG, health insurance companies are subject to the ban on misleading statements pursuant to Section 5 Subsection 1 Sentence 2 Number 7 UWG. Previously, on the basis of the order for reference of the Senate from 18 January 2012, the ECJ had decided that a corporation under public law, which is entrusted with a task in the interest of the public such as the administration of a public health insurance system, is also subject to the personal scope of the Directive on Unfair Commercial Practices (ECJ, judgment of 3 October 2013, Rs C-59/12; see in more detail in the Annual Report 2013, p. 27). The decision does not significantly alter the legal enforcement practice of the Wettbewerbszentrale, as the health insurance companies and their associations have in the past already used the instruments under civil law to stop violations of competition law quickly and effectively through the Wettbewerbszentrale or to clarify open questions of law.

Violations of competition law continue to play a role in the area of test advertising, advertising with customer surveys, etc. The decision of the Court of Appeal in Dresden is also of importance because it confirms that the general criteria for text advertising also apply

to the advertising with TÜV seals {German technical inspection association} (OLG Dresden, judgment of 11 February 2014, Ref. 14 U 1561/13; F 4 0081/13). The health insurance company had advertised with a seal of TÜV in Thuringian, which read „certified service quality — very good“. The inscription on a seal of TÜV in Saarland read „Service tested with customer rating of good (1.8 points)“. The health insurance company neither provided more information on both seals nor was it apparent from the websites of both TÜVs how these assessments were made. The Court of Appeal in Dresden noted that no other standards could apply for the advertising with such TÜV seals, in any case if these reflect the result of a test, than usually apply for goods and services. In its reasoning, the court objected that it was not apparent from the advertising what standards were used in the test and what requirements would apply for an application with „very good“. Even in the case of TÜV seals, the court considers the advertiser to be obligated to clearly indicate the citation for consumers in way that is easy to find. According to the court, such an obligation is based on Section 5 Subsection 2 in conjunction with Section 3 Subsection 2 UWG. The Wettbewerbszentrale correspondingly informed the health insurance associations so that it could, with respect to the criteria specified by the Court of Appeal in Dresden, offer their customers the opportunity to design TÜV seal advertising in a manner consistent with competition law.

Similarly, advertising with the designation „Top Health Insurance“ referring to a magazine „Focus Money“ is misleading and therefore impermissible, if that issue contains no indication at all of the health insurance company (LG Darmstadt, judgment of 25 November 2014, Ref. 16 O 238/13; F 4 0666/13). It does not meet the requirements for a citation with which consumers can understand the test results, if reference is made at the end of the Focus Money article to a website and multiple steps are necessary on the website to arrive at the test results. In addition, the court is of the opinion that placement of the health insurance company at number 18 with a total of 105 points does not justify the designation „Top Health Insurance“.

Towards the end of the year, the Amendment on

1 January 2015 foreshadowed what is to come. The Act for the Further Development of the Financial Structure and the Quality of Public Health Insurance {*Gesetz zur Weiterentwicklung der Finanzstruktur und der Qualität in der gesetzlichen Krankenversicherung*, GKV-FQWG} reduced the general contribution rates to public health insurance from 15.5% to 14.6%. Of the 14.6%, employees and employers each bear half. The previous special contribution of 0.9% that employees had to pay themselves was done away with. In the future, each health insurance company can charge an income-related additional contribution specific to the health insurance company. Against this background, it is misleading if a health insurance company advertises with the statement „We are reducing contributions“, as it is not the health insurance company that is reducing contribution rates (and that then confers such benefits on consumers), but rather the reduction of the contribution rate was set by the legislature. It remains to be seen what kind of effects GKV-FQWG will have with regard to competition law.

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## Physicians

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Although the price issue has been the subject of publications and of healthcare law conventions of the Wettbewerbszentrale for years, there are repeatedly competition complaints against physicians. Physicians are not free in pricing arrangements, but rather are subject to the provisions of the respective fee schedules (GOÄ for physicians, GOZ for dentists, GOT for veterinarians). The fee schedules provide a fee framework within which the physician, dentist or veterinary charges according to objective medical criteria. Advertising with fixed prices or even discounts is not provided for in the fee schedules. The focus of the cases is often the question of whether the fee schedules apply if the performances are charged by a GmbH {German LLC}, since the GOÄ, for example, only addresses physicians. According to the current conservative estimate, the courts are more inclined to affirm the applicability of the fee schedules and to consider the construction via a GmbH as a circumvention of the legal requi-

rements in the fee schedules. In once case of the Wettbewerbszentrale, for example, after the Regional Court in Frankfurt very clearly stated this opinion in the hearing, the opposite side acknowledged the violation of competition law. The company in the form of a GmbH had advertised for laser eye surgery with the announcement of price reductions and also announced in radio commercials that one would receive laser eye surgery „for only EUR 995.00 per eye“ for a limited period of time. The Wettbewerbszentrale had alleged violations of Section 3 and Section 4 Number 11 UWG in connection with the fee schedule. At the copy deadline, the judgment based on acknowledgement was not yet available (LG Frankfurt 3-08 O 106/14; F 4 0252/14). At the end of 2014, four cases were still pending that deal with the permissibility of price advertising by physicians, so that in 2015 at least further 1st instance decisions can be expected (F 4 0006/14, F 4 0096/14, F 4 0252/14 and F 4 0471/14).

Another issue in medical area are free medical services that are illegal not only in accordance with the codes of conduct for physicians, but are also impermissible in accordance with Section 7 HWG. According to Section 7 Subsection 1 HWG, gratuities and gifts generally violate competition law. Thus, the Regional Court in Hamburg consequentially prohibited a clinic from advertising for a free second opinion for all diseases of the thyroid gland or to carry out the check-up free of charge (LG Hamburg, judgment of 14 October 2014, Ref. 312 O 19/14; F 4 0851/13).

As is the case in all sectors, misleading advertising in the medical sector also makes up a large portion. One aspect of misleading statements concerns the incorrect representation of a general hospital as a „clinic“. In the opinion of the Regional Court in Bochum, it is important to note in the advertising that it is „just“ a general hospital. In addition, the Regional Court found that the advertisement „There are no hopeless cases“ is misleading with respect to the prohibition of misleading statements pursuant to Section 3 HWG (LG Bochum, judgment of 21 August 2014, Ref. I-14 O 117/14; F 4 0118/14).

The decision of the Federal Supreme Court with regard to Section 18 Subsection 1 Sentence 1 Case 1

of the Code of Conduct for Physicians of the Medical Association of the Federal State Baden-Württemberg {*Berufsordnung für Ärzte der Landesärztekammer Baden-Württemberg*, BO} is an isolated case that is however important for the question of how partial professional practice communities {*Teil-Berufsausübungsgemeinschaften*} can be arranged. The regulation prohibits the establishment of partial professional practice communities involving medical-technical subjects because this is considered to be a circumvention of the prohibition of assignment pursuant to Section 31 BO. The Federal Supreme Court found that the regulation is not consistent with the noted that the provision is incompatible with the freedom to pursue an occupation pursuant to Article 12 Subsection 1 of the German Basic Law {*Grundgesetz*, GG}. The Federal Supreme Court remanded the case back to the Court of Appeal (BGH, judgment of 15 May 2014, I ZR 137/12; F 4 1076/08).

In the reporting year, the trend continued that non-physicians approached the area of physicians, at least in advertising, or disguised their own non-physician activities. In the Annual Report 2013 on page 49, the Wettbewerbszentrale reported about a case in which the operator of a non-medical practitioner school was prohibited from advertising with the designation „Non-medical Practitioner School of Dr. XY“ without an indication that the doctorate was acquired in the field of chemistry. The Federal Supreme Court dismissed the appeal against refusal of leave to appeal (BGH, judgment of 6 February 14, Ref. I ZR 54/13; F 4 0264/10). The case concerning the „oncological beautician“ could also be ended with a judgment based on acknowledgement (LG Braunschweig, judgment of 29 April 2014, Ref. 21 O 860/13; F 4 0784/12). The Regional Court in Wiesbaden prohibited a non-medical practitioner, who had acquired a doctorate in the field of technical microbiology, to advertise smoking cessation or the like with the designation „Private Practice of Dr. B“ (LG Wiesbaden, judgment of 31 October 2014, Ref. 13 O 15/14; F 4 0011/14). A non-medical practitioner may also not use a stamp that is marked with „Drs.“, „Master of Medicine“ or the like, and where the abbreviation „*Heilprakt.*“ {non-medical practitioner} first appears in the fourth line. Reference to a „private practice for naturopathic general practice“

without clear reference at the same time to the work as a non-medical practitioner is also misleading (LG Leipzig, judgment of 4 December 2014, Ref. 05 O 454/14; F 4 0548/13, not yet final).

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## Pharmaceutical industry

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In the Annual Report 2013 on page 49, the Wettbewerbszentrale reported on a case that dealt with the limits of celebrity advertising in the pharmaceutical industry. In the dispute, it must be clarified whether there is a „recommendation“ within the meaning of Section 11 Subsection 1 Sentence 1 number 2 HWG. Unfortunately, at the copy deadline, the Court of Appeal in Karlsruhe has still not scheduled date for a hearing.

The question of whether the price maintenance also applies to medicines that are used by pharmacies for blistering will, however, be clarified by the Federal Supreme Court in 2015 (see Annual Report 2013, p. 50, on the judgment of the Court of Appeal in Stuttgart of 5 September 2013).

Another case could, however, be completed: According to Section 5 HWG, advertising for homeopathic medicinal products, which are registered under the German Medicines Act or exempt from registration, may not indicate areas of application. The provision is a result of the advantage that, with the registration, the manufacturer of homeopathic medicinal products can choose a simplified procedure without proving effectiveness — as is necessary for approval — to achieve marketability of its products. However, in this case, the manufacturer must accept the disadvantage of not being able to advertise for areas of application. The company sued by the Wettbewerbszentrale based its claims on a so-called „drug history“ and mentioned indications for which the medicinal product had been sold up to February 2005. Furthermore, it stated „Now a registered homeopathic medicinal product without indicating areas of application“. The Court of Appeal in Stuttgart already pointed out that, in spite of designating the areas of application as „history“, the reader concludes

from the advertising that the product could still be used in these areas of application today. In the opinion of the court, the „formulaic“ statement that it is a registered homeopathic medicinal product without indicating areas of application does not change that (OLG Stuttgart, judgment of 30 October 2014, Ref. 2 U 32/13). The Federal Supreme Court dismissed the appeal pharmaceutical company against refusal of leave to appeal against the judgment of the Court of Appeal in Stuttgart on the grounds that the case had neither fundamental importance nor does the development of the law or the ensuring of uniform case law require a decision of the Federal Supreme Court (BGH, decision of 23 October 2014, Ref. I ZR 52/14; F 4 0475/12). In doing so, the Federal Supreme Court again limited attempts to expand the strict regulation in Section 5 UWG. In 2012, it had already decided that the advertising prohibition for homeopathic medicinal products also applied to advertising aimed at professionals (BGH, judgment of 28 September 2011, I ZR 96/10; F 4 0315/09).

The Regional Court in Cologne had to deal with the question whether the so-called viewable selection {*Sichtwahl*} can be moved to the over-the-counter selection {*Freiwahl*}. Products that are prescription-only belong to the viewable selection. This means that they may be „seen“ by consumers, but must be dispensed by the pharmacist or pharmacy staff by way of servicing. The case concerned the following sales model: Pharmacies were offered a so-called indication table for the retail space on which empty packages of prescription-only medicines were to be placed. The pharmacy customer would have the empty packages exchanged at the counter for a corresponding original package. The case was intended to gauge the reach of the self-service prohibition pursuant to Section 17 Subsection 3 of the Pharmacy Practice Order. In the opinion of the Regional Court in Cologne, the sales model of the defendant constituted self-service, even if only OTC dummies were presented at the counter. The court reasoned that the customer already picked a medicine on the indication table, i.e. had already made a purchase decision, even if the medicine chosen was merely an empty package. Thus, the customer encouraged to make a purchase decision with regard to prescription-only products without previous

consultation (LG Cologne, judgment of 6 November 2014, 31 O 135/14; F 4 0867/13).

The central theme in drug advertising is — as in other sectors — misleading statements. For the area of pharmaceuticals, misleading statements are governed by Section 3 HWG. According to this provision, exaggerated statements about effectiveness, inter alia, are impermissible in the event that they give the wrong impression that success can be expected with certainty (Section 3 Number 2a HWG). The line between permissible indication of the product's effectiveness and impermissible advertising due to its exaggeration is a narrow one. In the opinion of the Regional Court in Berlin, the limits of permissible advertising were exceeded by one pharmaceutical company that advertised for its cold medication in a television commercial with the statement „Turn off the cold. Fast.“ (LG Berlin, decision of 28 November 2014, Ref. 15 O 526/14, not yet final; F 4 0609/14).

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# Healthcare sector mechanical work/ medicinal products

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Peter Brammen, Lawyer, Hamburg Office

Two changes for the sale of medical products ensured a number of disputes under competition law in the reporting year, especially with regard to hearing aid companies. One of these events was the revision (that entered into force on 1 November 2013) of the reference price group system {Festbetragsgruppen-system} and the reference prices for hearing aids on the basis of Section 36 Subsection 1 SGB V. The second event giving rise to disputes was the termination of existing supply contracts on 31 December 2014 by the AOK Bundesverband, also for the area of hearing aids. Both events triggered specific promotional activities that did not always stand up to review with regard to competition law. In particular, it concerned the following:

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## New reference prices and a new scope of performance for hearing aids

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After the Federal Social Court {*Bundessozialgericht*} ruled in a decision on 17 December 2009 that a public health insurance company had to reimburse insured persons in full for the cost of a hearing aid, inasmuch as the reference price for disability compensation is objectively insufficient (Bundessozialgericht, decision of 17 December 2009, Ref. B 3 KR 20/08 R), the reference prices for all insured persons was increased significantly, at the end of 2013 from EUR 421.28 to EUR 784.94 per hearing aid. In exchange for this, however, hearing impaired insured persons are to be provided with technically significantly improved hearing aid systems.

Due to this situation, some companies conducted product advertising with the special prominence of additional features that was to generate additional co-payments. This is what happened in two very similar cases that the Regional Courts in Cologne and in Dortmund had to deal with.

In these cases, the hearing aid companies compared four different hearing aids with the corresponding highlighted co-payment levels, whereby the base hearing aid without co-payment was technically equipped as fully digital and, with respect to the application, was certified for trouble-free conversation with another person. Even just conversing with multiple persons was to necessitate a co-payment of EUR 199.00 per hearing aid. The same principle was employed in the second case, except that in this case merely conversing with multiple persons was to necessitate a co-payment of EUR 999.00, and that even though the upscale standard also covered this without an additional co-payment just a few weeks before the new price references entered into force. Both courts found such advertising to be misleading within the meaning of Section 5 Subsection 1 Sentence 2 Number 1 UWG, as it gave the wrong impression to the public being advertised to that the hearing aids in the basic category would enable conversations between two persons, but would fail to do so in conversations with multiple persons and in large groups, and that an expensive hearing aid was necessary (LG Cologne, judgment of 13 November 2014, Ref. 31 O 265/14; HH 1 0087/14, LG Dortmund, judgment of 25 November 2014, Ref. 25 O 171/14; HH 1 0137/14).

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## Termination of the AOK contracts

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The circumstance that changes in benefit law often lead to complaints under competition law can be seen very clearly in the consequences of the termination by the AOK Bundesverband {health insurance association} of supply contracts for hearing aids. For example, a hearing aid company advertised with the reference to this termination and the announcement that the AOK intended on „reducing the reference prices in the coming year“. In doing so, the company wanted to exert time pressure at least on those potential customers who could have a claim to a new supply after the 6-year period expired. The advertising worked specifically with the fear of even being able to fall into an uninsured situation after 31 December 2014. Actually, however, even without a subsequent contract, those insured with public health insurance from AOK would have the claim after the end of the year to a co-payment-free supply of hearing aid systems with the significantly improved features introduced after 1 November 2013. The hearing aid company was warned and subsequently issued a declaration of discontinuance (HH 3 0225/14).

The consequences of termination were described to potential customers even more drastically by another hearing aid company by stating together with a clear exhortation to make a purchase that, without a new contract, the insured persons would have to negotiate the co-payment themselves as at January and that the higher reference prices that applied since 1 November 2013 were only contractually guaranteed up to 31 December 2014. This was also misleading because of the persons insured by AOK in no way have to negotiate the co-payment in an uninsured situation. Rather, the cost estimate principle would then apply and the insured person would have to be supplied without co-payment within the framework of the reference price provisions. The warning of the Wettbewerbszentrale led to the issue of a declaration of discontinuance here as well (HH 3 0208/14).

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## Limits under medicines law on the marketing of medicinal products

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In contrast, the generally applicable gift prohibition in Section 7 Subsection 1 HWG, with which the use of value advertising in the health sector is to be stopped as much as possible. However, it is noted that especially ophthalmic enterprises fail time and time again in the attempt to promote their sales efforts with free gifts. The Wettbewerbszentrale strives to provide for legal certainty and clarity here in the border areas. For example, in its decision on 6 November 2014, Ref. I ZR 26/13, the Federal Supreme Court upheld the prohibition already pronounced in the lower instances on a large ophthalmic company from using the promotional announcement of a „free second pair of glasses“. With this clear decision, it was found a second time that the courts do not accept promotional activities that are intended to induce consumers to purchase a medicinal product with the promise of valuable gifts (HH 2 0535/10).

In another judgment on 28 August 2014 (Ref. 25 O 104/14) dealing with this topic, the Regional Court in Dortmund made it clear that the companies are in a legally risky zone between the prohibition of gifts on the one hand and the prohibition elements in Number 21 of the Annex to Section 3 Subsection 3 UWG (so-called blacklist). This case concerned the promise of a „free glasses lens“ for any pair of glasses. Subsequent to being sued by the Wettbewerbszentrale, the company was ordered to discontinuance because the above mentioned blacklist provision Number 21 considers it impermissible if goods or services are offered as „free“, „no charge“, „no cost“, or similarly, although costs are nevertheless to be borne. The court availed itself of this provision for the prohibition ordered because the defendant had plead that the advertising was nothing other than a 50% discount on the price of the glasses. With this, the defendant probably thought that it could effectively counter the allegation of an impermissible gift pursuant to Section 7 Subsection 1 HWG. The court, however, understood it to mean that the consumer also had to pay for the allegedly

free lens, albeit at a favourable discount, and that this is precisely what is impermissible according to the blacklist provision Number 21 (HH 3 0003/14).

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## Major consulting efforts for the Wettbewerbszentrale

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From all of this, it is clear that the sometimes highly specific provisions of the HWG, the MPG, the rules on the profession of physicians, the rules on craft trades and the benefit performance rules in SGB V for the marketing of medical products can often not be properly implemented by companies without legal advice. After all, of the approximately 520 entries that the Wettbewerbszentrale received in 2014 in the area of medical products, advising member accounted for a substantial amount of 40%, whereas the remaining 60% of the cases were matters of legal enforcement.

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# Cosmetics

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Christiane Köber, Lawyer, Bad Homburg Office

In July 2013, the Regulation (EC) No. 1223/2009 (EU Cosmetics Regulation) entered into force. It is flanked by Commission Regulation (EU) No. 655/2013 laying down common criteria for the justification of claims used in relation to cosmetic products (for details, see the Annual Report 2013, p. 54). The new „cosmetic claims regulation“ codifies general principles of competition. For example, it states under the key word „demonstrability“ that advertising claims with respect to cosmetic products must be demonstrated by sufficient and verifiable evidence. The conclusiveness of the evidence and/or proof must be consistent with the type of the advertising claim being made.

And exactly that is the main topic in the area of cosmetics: opinion polls are used as evidence for the effectiveness of products, results of opinion polls are represented inaccurately or the citation required pursuant to Section 5a Subsection 2 UWG is lacking. In the last annual report, the Wettbewerbszentrale reported on a company that advertised in a magazine with the statement that „95% of testers would recommend the perfume E. to their girlfriends“. The case concerned volume 07/13 of the magazine Glamour. Apart from the fact that the test results were not shared, it turned out in the course of proceedings that the content of the statement was inaccurate. This is because the question „Would you recommend E. to a girlfriend?“ was answered by 66% with „Yes, definitely“, whereas 29% answered with „Yes, probably“. The advertising claim did not reflect this result. Even before a hearing, the other party acknowledged the claim of the Wettbewerbszentrale, so that it ended with a judgment based on

acknowledgement (LG Mainz, judgment of 25 April 2014, 10 HK O 1/14; F 4 0847/13).

However, most cases were ended with declaration of discontinuance. For example, a company agreed to no longer advertise with the statement that after just four weeks the skin of 92% of women looked visibly firmer and appeared to have been lifted. Except for the reference to a „clinical trial“, it lacked any further information (F 4 0066/14). Another company agreed to no longer advertise an anti-aging creme with the statement „The effect is scientifically proven“, if a citation for the study is not provided at the same time (F 4 0531/14). The simple statement „95%“ of testers would recommend the new Lash Princess volume mascara to their girlfriends“ is also impermissible without the reference to a citation with which those interested can look up the questions, criteria, weighting, etc. (F 4 0530/14). And a creme advertised in newspapers as „Red Wonder“ will no longer be able to be advertised without specifying a corresponding citation (F 4 0585/14).

Except in the cases of the test or survey advertising, the main focus of the complaints were in the area of misleading statements. A typical example is the advertising of a company that promoted its shampoo in a two-page advertisement with the statement „Moisture & up to 95% more volume“. The „asterisk“ after the word „volume“ was explained on the second page, opposite to the reading direction and barely perceptible, as „vs. unwashed hair“. It is clear that such a comparison is „misleading“ because the consumer does not expect a comparison between washed and unwashed hair (F 4 0490/14). So-called

„green washing“ is also the subject of complaints. A line of cosmetics, which also contains chemical ingredients, cannot be advertised with statements like „Pure from the beginning, purer than ever,“ or „Skin care in harmony with nature“ because the consumer is given the wrong impression of natural cosmetics (F 4 0004/14).

It is striking that most cases did not concern promotional activities of small or medium-sized enterprises, but rather large companies that predominately issue declarations of discontinuance upon the warning of the Wettbewerbszentrale. As a result, towards the end of 2014, there only two court cases still pending. The „threat“ contained in Article 20 Subsection 2 Paragraph 3 of the Cosmetics Regulation should be reason enough for the cosmetics industry to adjust their advertising to the common criteria. This is because if a report to be submitted to the Commission by July 2016 concludes that the promotional statements contradict the common criteria, the Commission will take „appropriate measures to ensure that these criteria are fulfilled“ in cooperation with the Member States. This could lead to a type of „Health Claims Regulation“ in the cosmetics industry as well. Incidentally, this was also the purport of a presentation on this topic held at the 5th Health Convention of the Wettbewerbszentrale.

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# Foodstuffs

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Antje Dau, Lawyer, Bad Homburg Office

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## Health Claims Regulation

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The European Court of Justice ruled on the question submitted by the Federal Supreme Court that the notification requirements of Article 10 Subsection 2 of the Health Claims Regulation are already to be observed since the regulation entered into force. The subject matter of the proceedings was the slogan „As important as a daily glass of milk“ on fruit curd. The Wettbewerbszentrale had objected to the slogan as being misleading because the product contains much more sugar than milk. In addition, the statement is a nutrition and health claim, which must satisfy the requirements of the Health Claims Regulation. The ECJ had held that a business operator that has decided to use a health-related claim is responsible itself for knowing the effects of the foodstuff in question on health and thus already possess the information required by Article 10 Subsection 2 of the Health Claims Regulation (ECJ, judgment of 10 April 2014, Rs. C-609/12; F 4 0806/09; also see the Activity Report 2013, p. 56). A hearing took place on 17 November 2014 before the Federal Supreme Court. A judgment is expected in the first half of 2015 (BGH, Ref. I ZR 36/11).

Numerous complaints concerned advertisements for foodstuffs (especially medicinal mushrooms, coffee, tea, beverages and dietary supplements) with impermissible health-related claims, such as „reduced stress“ or „anti-inflammatory effect“. According to Article 10 Subsection 1 of the Health Claims Regu-

lation (Regulation (EC) No. 1924/2006), health-related claims may only be used if they are approved. This was not the case in the circumstances objected to here. In the majority of cases, the cases could be settled out of court with the issue of a declaration of discontinuance (e.g. F 8 0039/14; F 8 0153/14; F 8 0198/14; F 8 0208/14).

However, nutrition claims were also the subject of complaints. For example, a frozen yoghurt was advertised with the statement „low calorie“, even though it had an energy value of 140 kcal per 100 g. The Annex to the Health Claims Regulation provides that such a claim may only be used in solid foods if they contain no more than 40 kcal per 100 g. The company issued a declaration of discontinuance (F 8 0029/14).

In another case, an action was filed with the Regional Court in Trier to clarify the fundamental issue of whether mineral water may be advertised with health-related claims, although it did not contain the minimum amount of minerals required by the Health Claims Regulation. The Mineral and Table Water Regulation governs minimum values only for nutrition claims such as „contains calcium“. This specific case concerned the advertisement for mineral water with the statements „Whether for health bones, teeth or muscles—calcium is a true all-rounder in the body“ and „Magnesium also supports metabolism and muscle function—valuable, above all, for people active in sports“. In a judgment is expected in the first half of 2015 (LG Trier, Ref. 4 O 273/14; F 4 0025/14).

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## Food Information Regulation

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In the reporting year, the Food Information Regulation has (Regulation (EU) No. 1169/2011, abbreviated FIR) entered into force. Since 13 December 2014, FIR is binding for all Member States of the European Union. An exception is the nutrition declaration that must be provided starting on 13 December 2016. FIR generally governs the way that information is provided for foodstuffs. In particular, a number of additional information requirements enter into force for sales of foodstuffs online but also in retail stores the online trade but also in retail stores (for this, see the articles under News {Aktuelles} on 22 July 2014, 14 November 2014 and 13 December 2014 at [www.wettbewerbszentrale.de](http://www.wettbewerbszentrale.de)). Article 54 FIR provides for a period of sale for products that were brought to market or labelled before 13 December 2014.

Before the provisions of FIR applied, there was an increasing need to advise the members of the Wettbewerbszentrale. In addition, the first complaints were received about the lack of labelling of foodstuffs online. In the coming years, the courts will have to provide legal clarity in many points because the FIR raises many unresolved legal issues.

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### Misleading food labelling

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Two cases dealt with deception of geographic origin. In one case, a herb quark from Brandenburg was advertised with the logo „MV cuisine does you good“. However, since the quark was not from Mecklenburg-Vorpommern, this was a deception of origin (F 8 0077/14). In another case, a durable whole milk was advertised in a prospectus of a food retailer under the heading „Naturally from Hessen“, even though the milk was actually produced in Rhineland-Palatinate (F 8 0183/14). In both cases, a declaration of discontinuance was issued.

Other cases concerned the area of sausage and meat products. In one case, the meat was adverti-

sed as „T-bone steak“, even though it contained no fillet. According to the Guidelines for Meat and Meat Products, a T-bone steak is a bone-in slice of a large loin (always including fillet). The lack of the fillet is a limitation on the quality of the product, so that the use of the name „T-bone steak“ was misleading (F 8 0169/14). In another case, sausages were advertised with the statement that they consisted exclusively of pork, even though they also contained veal according to the packaging (F 8 0190/14). Again in these cases, both companies issued declarations of discontinuance.

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### Sales promoting activities

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In the reporting year, complaints have increased about non-transparent sales promoting activities in food industry. In one case, advertising offered „FREE breakfast cutting board made of high quality glass in Knäcke look!“ and only in a hidden spot stated that shipping would be charged at EUR 4.99 (F 8 0017/14). In another case, stickers were attached to 1 kg packs of chocolate balls with the following label: „Exclusive glass dish for you as an action bonus if you buy 2 x 1 kg bags“. The illustration of a high quality glass dish was located next to the text. The action was to go until 31 March 2014. The other terms and conditions of participation were on the back of the sticker. By the end of 2013, no more glass dishes were available. Due to the circumstance that, for the relevant public, it was not apparent that there were lower numbers of the high quality addition than there were of the main product, the conditions of participation were not clear and explicit (F 4 0049/14). Another case involved a sales promoting action of a delicatessen specialist in which it was not apparent to the participants that the announced action „Great free bonuses for as low as 4 points“ could already be completed before the end of the specified promotion period. The promotion period was from 1 April to 15 July 2014. Before the end of the period, the website stated „Thank you for your great interest in our customer loyalty action. Due to large demand, the action is already finished“ (F 8 0139/14). In another case, a foodstuff was advertised with a money-back guarantee. The packa-

ges were still available commercially, even though the submission deadline indicated on the package had already expired. For the participants, it was not sufficiently apparent that a declared sale promoting action for a product could no longer be claimed at the time of purchase (F 8 0166/14). In all four cases, the companies issued declarations of discontinuance.

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## Sales online and in retail stores

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In the reporting year, the Court of Appeal in Frankfurt am Main decided that online commerce with organic foodstuffs requires certification by an organic inspection authority. In the annual reports of the two previous years, it was stated that numerous complaints had been received against online retailers that had sold organic foodstuffs without themselves having an organic certification (see Activity Report 2012, p. 57, Activity Report 2013, p. 57). The Court of Appeal in Frankfurt am Main has now stated that online retailers that offer organic foodstuffs are subject to the inspection system pursuant to Article 27 of the EC Eco-Regulation (Regulation (EC) No. 834/2007). Every business operator is generally obligated pursuant to Article 28 Subsection 1 of the EC Eco-Regulation to register its activity with the competent authorities of the Member State in which the operator carries out such activities and to subject its company to the inspection system when selling organic products. According to the provision, the entire retail business is obligated to be certified. Germany has exercised the possibility provided in Article 28 Subsection 2 of the EC Eco-Regulation to create an exception rule for retailers. This exception is implemented in Section 3 Subsection 2 of the German Organic Farming Act {*Öko-Landbaugesetz*, ÖLG}. According to that provision, retailers are released from the inspection obligation if the products are sold directly to the final consumer or user. In the opinion of the Court of Appeal in Frankfurt am Main, this exception rule does not apply to online business because the term „directly“ can only be understood in terms of the meaning and purpose of the provision to mean a seller at the site of storage with the simultaneous presence of both the business operator and

the consumer. This is not the case in online business (OLG Frankfurt am Main, judgment of 30 September 2014, Ref. 14 U 201/13; F 4 0844/12). The other side has appealed the judgment (BGH, Ref. I ZR 243/14). The Court of Appeal in Frankfurt am Main has allowed the appeal to be filed due to the fundamental importance of the matter.

In last year's Annual Report, it was stated that numerous complaints were received regarding the insufficient labelling of foreign foods (see Area of Activities 2013, pp. 57–58). The Regional Court in Berlin has ruled that French or English food offered for sale in the gourmet section of a branch of a French department store in Germany must have a German label. In Section 3 Subsection 3 Sentence 1, the Food Labelling Regulation (FLR) provides that the label (such as, inter alia, the sales name, the list of ingredients and the best-before date) must be in German. An exception is only provided if the information is given in another language easily understood, and doing so does not compromise the information for the consumer. The Regional Court in Berlin stated that the designations „Galette au Beurre frais“, „Terrine du Chef au Foie Gras de Canard“, „Viandox - un gout inimitable“ and „Marmite – yeast extract“ were not product sales names comprehensible for Germans (LG Berlin, decision of 22 May 2014, Ref. 52 O 286/14; F 4 0486/13).

The labelling foreign foodstuffs will no longer be an issue when the Implementing Regulation for the EU Food Information Regulation enters into force. The Regulation to Adapt National Legislation was not passed in time for 13 December 2014 adapting national legislation has not been passed in time to 12.13.2014. In Section 2, the Draft of 8 July 2014 provides that the required information on foodstuffs and the labels required by it are to be in German. There is no longer an exception, as was provided for by the FLR.

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# The beverage industry

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Sabine Bendias, Lawyer, Munich Office  
Torsten Hülksen, Lawyer Munich Office  
Michael Kendler, Lawyer, Munich Office

In 2014, there were more than 400 cases in the beverage industry—from simple base price violations up to special foodstuffs issues—were processed. Towards the end of the year, the advice dealt primarily with the Food Information Regulation (Regulation (EU) No. 1169/2011, abbreviated FIR), which has been binding in the European Union since 13 December 2014 and which presents a large challenge to manufacturers and retailers (for FIR, also see the Report of the Food Industry, p. 57, and of Online Business, p. 59).

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## Water

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According to the prognosis of the ASSOCIATION OF NON-ALCOHOLIC BEVERAGES INDUSTRY {*VEREINIGUNG ALKOHOLFREIE GETRÄNKE-INDUSTRIE e.V., AFG*} from 10 November 2014, mineral water remains the most popular thirst quencher of the Germans with a per capita consumption of 140 litres (137 litres in the previous year), despite the absence of summer heat. The competition in this product segment is intense. In this segment, providers also attempt to generate competitive advantages with claims of especial quality. In one case, a mineral spring was prohibited from particularly highlighting the calcium content of its water in advertising with claims such as „best calcium value in (location)“, even though it did not even have the minimum content required by the Mineral and Table Water Regulation (M 4 0185/14 on the issue of he-

alth-related claims for mineral water if the minimum calcium content pursuant to the Health Claims Regulation has not been reached, see the Report on the Food Industry, p. 57 ).

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## Juices and soft drinks

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In the case of beverages containing juice, the focus was often on the classic question of what consumer expectation is linked to ingredient lists and product designs. For example, action had to be taken against one juice on the packaging of which it read „Mango-Carrot 100% Juice“. Below this were images of a carrot and mango slices, under which there was the statement „50% fruit—50% mild vegetable“. All the while, the proportion of carrot was 50% and 10% was mango pulp. The rest fruit content was composed of filler juices (M 2 0566/13). In another case, a business operator imported „100% Juice Blends“ from South Africa; the front side of the package only contained images of lychees or passion fruit, and the names of the fruits were highlighted. In fact, at most 10% of the beverage consisted of the fruits mentioned, while the rest consisted of pear juice (M 4 0086/14). In both cases, the products were objected to for being misleading. The company agreed to discontinuance. In addition, the Wettbewerbszentrale successfully went against nectars, which are beverages made of fruit juice or pulp, water and optionally sugar or honey according to the Fruit Juice Regulation and against fruit juice beverages

that were advertised as fruit juices, which usually consist of 100% fruit (M 4 0028/14; M 4 0029/14; M 4 0230/14).

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## Wine

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In addition to complaints about organic wines (e.g. M 4 0066/14; with regard to organics, see the Annual Report from the previous year, pp. 57 & 60 and the Report of the Food Industry, p. 57), the Wettbewerbszentrale was occupied primarily with the problem of the indication of geographical origin, which is the most strictly regulated form of origin indication. For example, sweet wines from South Africa were marketed and advertised as „port“ (e.g. M 4 0167/14 to M 4 0172/14). Port wine, also „port“, or „Porto“ can only be marketed as a designation of geographic origin as such if it is grown and made in the region „Douro“ or in the region „Vila Nova de Gaia – Porto“ in Portugal. Even the indications „type“, „method“ or „style“ are prohibited for imitations. While a discontinuance of the designation could be enforced out of court in most cases, the Regional Court in Frankfurt will have to decide in one case.

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## Beer

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The main focus of competition violations in the brewing industry again concerned misleading statements about the geographic and/or commercial origin, with which the importance of advertising with the relationship to region, tradition and hand-craft for beer is underlined. An increasing tendency is observed thereby that the beers depressed in the market base their label and packaging design on beer brands that already exist, i.e. they exploit their good reputation. Such was the case with two product designs that suggested a relationship to a non-existent monastery (M 2 0224/14) and each to lakes of Upper Bavaria (M 2 0361/14). In the latter case, in which the beer is marketed via distribution channels of a large brewing group, the action is pending before the Regional Court in Munich. Deception with regard to legendary places of origin, such as

the beer city Bamberg or a beer advertised in petrol stations as „real Brazilian“ on occasion of the World Cup but which was brewed in Bavaria, were also the subject of warnings (M 2 0167/14; M 2 0173/14). In addition, the topic „health claims“ also repeatedly played a role with beer, in spite of the prohibition on health-related claims for alcoholic beverages with more than 1.2% by volume. The Wettbewerbszentrale barred an advertisement from a brewery in which its beer was attributed a total of 23 health-related claims, including „Beer improves memory“ and „Beer provides pregnant women with folic acid“ (M 2 0114/14). Misleading statements about awards were again among the violation of competition law in the beer industry. One beverage retailer advertised the beer of a brewery that it had relabelled and renamed as having been awarded the honorary prize from the Federal Ministry and gold awards from the German Agricultural Society {Deutsche Landwirtschafts-Gesellschaft, DLG} for the years 2010, 2011, 2012 and 2013 (M 2 0574/14). The beer was never registered for awards at the DLG.

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## Spirits

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Spirits are protected primarily through the statutory designation. For the designation „rum“, the Spirits Regulation (Regulation (EC) 110/2008) requires it to have at least 37.5% alcohol by volume and may not be flavoured. In several cases, the Wettbewerbszentrale successfully objected to flavoured spirits from overseas with an alcohol content of less than what is required and that were sold and advertised as „mango rum“, „raspberry rum“ or „pineapple rum“, even though they had to bear the collective designation „spirits“ (M 4 0095/14 to M 4 0097/14). The in-spirit „gin“ with the trend originating in Munich of a city gin also occupied the Wettbewerbszentrale. For example, a „Hamburg Dry Gin“ was marketed, even though it was distilled 35km away in Schleswig-Holstein (M 4 0239/14). After being objected to by the Wettbewerbszentrale, the manufacturer will remove the locality in the future with the claim in the immediate vicinity.

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## Trade in beverages

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The Wettbewerbszentrale has received numerous complaints due to defective advertising of fan products for beverage brands with differing market significance (e.g. M 2 0320/14 and M 2 0405/14). For example, a well-known, global spirits manufacturer was prohibited by complain to offer fan shirts in its web shop on Facebook with mentioning their material composition. According to the European Textile Labelling Regulation, the fibres used to make the fabrics must be specified. If this information is not provided before the purchase, it could not only be a violation of the regulation mentioned but also a violation of the provision against misleading statements in Section 5a UWG due to the omission of significant information. Other complaints concerned violations of price information law, such as hidden surcharges by beverage delivery services that did not advertise to private customers with total prices but rather first charged floor or crate fees in the final invoice that were not communicated beforehand (e.g. M 2 0459/14).

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# Energy and utilities industry

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Peter Brammen, Lawyer, Hamburg Office

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## Water supply / water quality

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One case processed during the reporting year once again provided an opportunity to show that, in the energy and utilities sector, the Wettbewerbszentrale also deals with water supply issues. It was not the first time that the topic of water quality formed the focus of advertising efforts employed by manufacturers of technical aids meant to allegedly increase the quality of drinking water. For example, one provider of filter systems attempted to substantiate the necessity of its use with — in part — drastic criticism of the quality of drinking water. The statement *„The quality of drinking water in Germany is poor. In international comparison, we perform very poorly. Globally, we are number 57; by European standards, we are even only second to last.“* referenced the first World Water Development Report (WWDR), in which Germany at place 57 ranked behind Bangladesh. This was, however, a study conducted 10 years earlier that came to be without adequate coordination with German authorities and in which insufficiently developed indicators were also used specifically for the assessment of German water quality. The UNESCO and WHO have already distanced themselves from the resulting distorted picture, so that current references hereto in advertising violated the prohibition of misleading statements pursuant to section 5 Subsection 1 Sentence 2 Number 1 UWG.

The same competitive evaluation also applied to the

statement *„Even the WHO (World Health Organisation) classifies our water as no longer drinkable. Nevertheless, it flows out of our pipes and is consumed daily.“* The corresponding objection of Wettbewerbszentrale quickly led to the issue of a declaration of discontinuance by the provider of the filter systems (HH 1 0092/14).

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## Price comparisons / price competition

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Due to the fact that energy costs continue to make up a significant part of the cost of living for private households (according to a study by the Federal Ministry of Economy and Energy {*Bundesministerium für Wirtschaft und Energie*}, the annual spending on energy without fuels increased from EUR 826.00 in 1990 to EUR 1,032.00 in 2013), the competition between the energy suppliers is primarily a fierce price competition. It is that much more important that this takes place transparently and free from deception. A popular means of doing so are price comparisons, the permissibility of which under competition law depends of course on whether, taking into account all relevant circumstances, the products compared also actually appear on the market in a comparable way. In the opinion of the Wettbewerbszentrale, this can be at least doubtful if an energy supplier compares its special rates with the base supply rates of a competitor in its supply area. The permissibility of such a comparison of conditions depends significantly on whether the expectation of the customers

corresponding to the compared base supply rate can even still be considered to be representative for the group of persons addressed.

In one case successfully objected to out of court, the advertising company had already chosen an amount (7,000 kWh) far beyond the usual consumption values and an amount of consumption that just under 3% of the approximately 140,000 customers of the base supplier had at the time of the advertising. The significantly higher base supply rate in the comparison of conditions was thus no longer to be considered representative, so that the comparison was to be considered overall misleading within the meaning of Section 5 Subsection 3 UWG (HH 2 0040/14).

In another case currently being fought out in court between the Wettbewerbszentrale and an energy supplier, the consumption of 3,000 kWh underlying the comparison did correspond with the average demand for a normally structured private household. However, the base supply rate used in this area for the purpose of comparison only applied to 7.5% of the customers of the competitor. In its judgment from 16 September 2014 (Ref. 12 O 67/14), the Regional Court in Darmstadt found this to still be permissible and, in particular, determined that the requirement of objectivity pursuant to Section 6 Subsection 2 Number 2 UWG was fulfilled and, moreover, it was not misleading. The problem here is the approach taken, namely to base it on all customers covered by the base supply rate with a share of 30% of all electricity customers of the referenced competitor. The comparison referred explicitly only to the not unusual consumption of 3,000 kWh, and the crucial question should then also relate only to whether the corresponding base supply rate is still representative here.

The Wettbewerbszentrale has thus filed an appeal against this decision to clarify this important issue for the advertising practice of energy suppliers and, to this extent, to provide for legal certainty (HH 1 0567/13).

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## Competition between energy carriers

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An issue constantly revitalized for the Wettbewerbszentrale not least of all due to the energy transition is and remains the competition between energy carriers. Characteristic here is often the amalgamation of economic, technical and environmental arguments that the highly sensitized public encounters in extremely slogan-like design in advertising. For example, a gas supplier in northern Germany advertised with the statement that natural gas was an „economic and innovative [form of] energy“ with which the customer provides „for a good climate“. Even just the economic argument was not correct because, at the time of the advertising at the end of 2014, no real sustainable price advantage could be seen for the fuel natural gas compared, for example, to fuel oil EL, LPG and, in particular, wood pellets.

Natural gas is not at all particularly innovative as a fossil fuel in the generality contended here, but rather only when used in combination with renewable energy, which then however accounts for the advantage in the first place. As fossil fuel, natural gas is not particularly suited to provide a „good climate“ and therewith, of course in accordance with the intention of the advertisement, to give energy consumers a good conscience.

The Wettbewerbszentrale objected to this by way of warning due to misleading statements and was able to quickly bring the energy supplier to issue a declaration of discontinuance subject to contractual penalty fines (HH 1 0380/14).

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# The automotive industry

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Dr. Andreas Ottofüllung, Lawyer  
Silke Pape, Lawyer, Munich Office

The automotive industry includes the advertising of vehicle manufacturers and the automotive retail companies, the supplier industry, the spare parts and accessories trade, repair shops and service chains. The caseload was approximately 700 matters. More than 15% concerned advice provided to member companies and associations. In the remaining cases, the Wettbewerbszentrale was brought in to prevent anti-competitive advertising. There were 333 warnings issued and 31 notification letters, in which the advertiser was requested to remove the anti-competitive advertising subject to a warning in the event of non-compliance. In 56 cases, the conciliation boards for competition disputes were called on to give the advertiser the opportunity to amicably settle disputes. Only 11 cases required the use of the courts to enforce the claims asserted.

In the area of experts and test engineers with a focus on motor vehicles, the case load was approximately 300 matters. Nearly 230 matters concerned legal enforcement and around 70 matters concerned the provision of advice. A warning was issued in more than 115 cases, the conciliation boards were called on in 7 cases, and the courts dealt with 5 cases. In addition, the lacking conformity of promotional activities with the law was noted in 12 cases without having to initiate a formal warning process.

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## Performance data in automotive advertising, „kW“ and „hp“

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Manufacturers and motor vehicle dealers continue to advertise vehicles exclusively with the power rating „hp“ {*Pferdestärke*, PS}. For example, a French importer had advertised in a multi-colour, half-page newspaper ad for a leasing offer under the image of a vehicle and emphasized in print the engine power together with the model name with 68 PS VTI“. According to the Law relating to Units of Measurement and the Determination of Time {*Gesetz über Einheiten im Messwesen und die Zeitbestimmung*, EinhZeitG} with the corresponding Implementation Regulation {*EinhV*}, the designation „kilowatt“ of the corresponding abbreviation „kW“ must be used for the unit of power. The Wettbewerbszentrale usually first draws attention to the statutory regulations. Only when advertising exclusively with the power rating „hp“ is repeated does this result in a warning. That was also what happened in this case. However, in spite of this, the importer was not ready to issue a declaration of discontinuance so that the court had to be called on, resulting in the prohibition of the advertisement (LG Berlin, judgment of 21 January 2014, Ref. 15 O 251/13; upheld by KG Berlin, decision of 29 September 2014, Ref. 5 U 23/14; M 1 0126/13). The vehicle importer was ordered to refrain from engaging in the commercial traffic without providing the engine power of a vehicle in „kW“, as a violation of the information requirements

under European law also always has an appreciable effect.

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## New release advertising in automotive spare parts

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Numerous automotive parts — some showing images of original packaging — are offered online and often described as „Condition: new“, even though the some products are several decades old. Especially with ball bearings (wheel bearings), a market has developed that is critical for the industry. On the one hand, the manufacturers are subject to product liability, but on the other hand have no influence on the long-term storage by resellers. With such long storage times, deterioration of the usability cannot be ruled out, which is why manufacturers strongly recommend that the state of preservation be checked when storage times exceed three or five years to prevent damage, in particular to prevent „overheating with blockages“ in wheel bearings.

Even if such products are boxed and still unused, they may not be advertised as „new“ if they have been stored for more than three years (LG Hamburg, judgment based on acknowledgement of 2 December 2014, Ref. 312 O 218/14; M 1 0006/14) or five years (LG Saarbrücken, judgment of 19 December 2012, Ref. 7 O 127/12, upheld by OLG Saarbrücken, judgment of 2 April 2014, Ref. 1 U 11/13; M 1 0229/12; LG Kiel, judgment based on acknowledgement 10 November 2014, Ref. 17 O 159/14; M 1 0015/14). The age and length of storage are properties to which the customer attaches considerable importance, and the customer should thus be informed thereof. If three- or five-year ball bearings are advertised as „new“, this is misleading because it is suggested to the customer that the technically sensitive spare part could be used unseen.

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## Vehicle spare parts without E-mark

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In the interests of road safety, safety-related vehicle components are subject to design certification and may, if — as is usually the case — were produced in batches, only be „offered for sale, sold, purchased and used“ within the scope of application of the Road Traffic Licensing Regulation {*Straßenverkehrszulassungsordnung*, StVZO}, if they bear the officially granted certification mark (see Section 22a Subsection 2 StVZO). This also applies to design certifications issued under European standards (UN/ECE regulations; so-called E-mark).

LED festoon lamps for headlights, brake and tail-lights, side markers and license plate lights are often offered for sale online that do not bear the required E-mark and are thus not officially tested. The festoon lamps can, however, be used in the interior lighting of the vehicle, e.g. in the glove compartment. However, the design certification only applies to the exterior lights of a vehicle. According to the Court of Appeal in Hamm, judgment of 11 April 2014, Ref. 4 U 127/13 (foreign judgment), the sales prohibition pursuant to Section 22a Subsection 2 StVZO also applies to „multi-functional“ LED festoon lamps that can be installed in various lighting equipment of a vehicle, of which not all require a design certification. Only if it is based solely on the actual possibility to use a vehicle part can the risk be averted that defectively produced vehicle parts are brought to market and used by consumers.

In addition, the sales prohibition pursuant to Section 22a Subsection 2 StVZO only applies if the vehicle part in question is intended for use within the scope of applicability of the StVZO. Thus, LED festoon lamps are often marked with statements such as „Not approved for the scope of applicability of the StVZO“ or „Not for use within the scope of applicability of the Road Traffic Licensing Regulation“. Despite prominent placement and red bold face print, the Regional Court in Mönchengladbach, judgment of 3 November 2014, Ref. 8 O 37/14, allowed a corresponding action of the Wettbewerbszentrale. The dealer had argued that the festoons

were intended for vehicle lamps that would only be deployed at tuning events, so that they were used exclusively on private property where the StVZO did not apply. The court agreed with the position taken by the Wettbewerbszentrale that the „scope of application of the StVZO“ in Section 22s Subsection 2 StVZO is mean „territorially“ and thus refers to Germany. If it had been meant „substantially“, the formulation would have read „for use on public roads“ — as is the case, for example, in Section 16 StVZO. Despite the disclaimer, the offer of LED festoon lamps was thus to be qualified as anti-competitive. The other side has filed an appeal (M 3 0286/13).

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### Discount on the co-payment in comprehensive insurance contracts

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The number of repair shops that advertise for windshield replacement with vouchers that can be redeemed with a subsequent order remains unchanged. Advertising with vouchers is generally not to be objected to, but there are exceptions.

If the windshield replacement is settled through a comprehensive insurance, the voucher acts as a discount on the co-payment of the customer from the insurance contract and is likely to induce the customer to give the order to the advertising repair shop instead of a cheaper repair shop. In doing so, the customer is incited to disregard the obligations incumbent vis-à-vis the insurance company. Namely, the customer is obligated to keep the costs of the windshield replacement as low as possible. However, giving the order to a cheaper shop does not give the customer an advantage, as the customer always only pays the amount that is stipulated as co-payment in the insurance contract, regardless of the costs of replacing the windshield. In contrast, the customer pockets the voucher. In 2007, the Federal Supreme Court already ruled that it to be unfair if the customer is remitted from payment or reimbursed for the co-payment from the insurance contract, or if the customer is issued a petrol voucher, if the insurance company is not informed and consented thereto, or if the value of the benefit is insignificant and industry practice, because it

can then be assumed that the insurance company would not object thereto (see BGH, judgment of 8 November 2007, Ref. I ZR 192/06; BGH, judgment of 8 November 2007, Ref. I ZR 60/05; BGH, judgment of 8 November 2007, Ref. I ZR 121/06).

With judgment of 6 February 2014 and judgment of 11 December 2014, the Court of Appeal in Naumburg, Ref. 9 U 75/13, and the Court of Appeal in Hamm, Ref. 4 U 31/13, affirmed that the criteria of the Federal Supreme Court also continue to apply after the implementation of the European Directive 2005/29/EC against unfair business practices on 30 December 2008 and, upon the action of the Wettbewerbszentrale, prohibited vouchers for a subsequent order with a value of EUR 30.00 and of EUR 75.00 respectively (M 3 0561/12; M 3 0403/11).

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### Delivery costs alongside the vehicle price

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A perennial is the advertising for new vehicles with a price that only includes the price of the vehicle but not the mandatory costs of transporting the vehicle from the manufacturer to the automotive dealer. The transportation costs either appear next to the vehicle price or there is note that transportation costs will also be incurred. Legally, the question arises whether, when advertising to consumers, an automotive dealer must specify the total price, in which the mandatory costs incurred for the transportation of the vehicle from the manufacturer to the automotive dealer are already calculated.

In the past, the transportation costs had to be included in the total price of the vehicle, as the consumer does not consider them to be freight costs but rather a part of the price the consumer is to pay (BGH, judgment of 16 December 1982, Ref. I ZR 155/80 — Vehicle Total Price). The situation is only different if the customer is alternatively given the opportunity of picking up the vehicle his-/herself (BGH, judgment of 23 June 1983, Ref. I ZR 75/81 — Manufacturer Suggested Price in Automotive Dealer Advertising). The transportation costs can be shown separately where appropriate. In addition, both of the following

decisions of the Federal Supreme Court were published in 2014.

In a joint ad, ten automotive dealers advertised the special model of a PEUGEOT 308 with a price of EUR 14,990.00 and with the note that the price mentioned was a „non-binding price suggested by the manufacturer plus transportation costs“ and that the customer could learn what the total price of the vehicle was from the PEUGEOT dealer. With its judgment of 12 September 2013, Ref. I ZR 123/12 — „The New“, the Federal Supreme Court has ruled that the advertisement was not objectionable. The EUR 14,990.00 is explained to be the non-binding price suggested by the manufacturer, and the consumer knows that the automotive dealer is not bound there to and can set its own price. The formulation, according to which the customer can learn the exact price from the PEUGEOT dealer, also does not give the impression that the EUR 14,990.00 is a unit price and thus a price quote by the advertising automotive dealers. Thus, the specification of the total price for the advertised vehicle was not necessary.

The other case involved the advertisement of just one automotive dealer that had advertised a CITROEN C4 VTI 120 with a price of EUR 21,800.00 and the note „Price plus transportation: EUR 790“. Here, with decision from 18 September 2014, Ref. I ZR 201/12, the Federal Supreme Court decided to stay proceedings and refer the case to the ECJ. The Federal Supreme Court would like to carry on with its previous case law, but could be prevented from doing so due to the European Directive 2005/29/EC, in Article 7 Subsection 4 Letter c) of which it is provided that the price of the goods must be specified and any additional freight, delivery and shipping costs must be listed separately. Due to the circumstance that national regulations may neither be more restrictive nor less strict, it cannot be excluded that the previous application of the corresponding German statute by the Federal Supreme Court is no longer compatible with European law. Since only the ECJ is responsible for the interpretation of European directives, it must now answer the question whether the price in an advertisement for a new vehicle specifying the price to be paid must include costs incurred for the transportation of the vehicle from the manufacturer

to the automotive dealer.

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## No undershooting fees for the general inspection

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For years, there have repeatedly been disputes about whether the government-relieving job of a general inspection pursuant to Section 29 StVZO may be discounted or offered at special prices. In contrast to an emissions inspection, the general inspection may only be carried out by test engineers from officially recognised monitoring organisations, such as DEKRA, GTÜ or TÜV, but not by an automotive repair shop and, in addition, only for a fee that was previously made known by the competent authority (Number 6.2 of Annex VIII b to the StVZO). In one case, an automobile repair shop had advertised on a large-format folio under an image of a general inspection sticker that it could offer the general and emission inspection for EUR 59.00. The amount was less than the fee specified by the governmental authority. The Court of Appeal in Dresden (judgment of 9 September 2014, Ref. 14 U 389/14; M 1 0216/13) prohibited the special price because the provisions in Number 6.2 of Annex VII b to the StVZO is intended to prevent competition with dumping prices because it neither corresponds with the character of the vehicle inspection as a governmental activity nor is it transparent to the supervisory authority. The court stated, „This provision in the StVZO may not be undermined by the circumstance that the respective inspection organisation does not contract directly with the final customer, but rather concludes the contract with the repair shop as mediator and demands a lower price from it. This would open the door to an intensification of competition with dumping prices, which is exactly what the provision in Annex VIII b to the StVZO is intended to prevent.“ Moreover, the court conceded that the provision had market behaviour-regulating character, so that there is a claim to discontinuance pursuant to Section 4 Number 11 UWG.

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# Driving schools

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Peter Breun-Goerke, Lawyer, Bad Homburg Office

The reporting year 2014 presented new challenges for driving schools from an economic perspective, but also from a legal perspective. The number of learner drivers continues to decline. The legal framework for the professional activities of driving schools is constantly changing. The revision of the Point System that entered into force on 1 April 2014 and the introduction of a driving fitness seminar have an especially strong impact on driving instructors. The 10th Regulation amending the Regulation on the Right to Drive and other traffic law provisions were adopted only a few days earlier by the Federal Council {Bundesrat}. A fundamental reform of driving instructor law is planned for this legislative session and will bring further far-reaching innovations.

In addition, driving schools continued to be subject to stiff competition during the reporting year. With more than 370 procedures dealt with in the driving school sector, their number has remained practically the same. The slight fall in complaints is the result of years of clarifying work, which the Wettbewerbszentrale has carried out in conjunction with driving instructors. Presentations at professional events and within the scope of further training for driving instructors, as well as articles in professional journals helped participants and readers to avoid mistakes in advertising. More than 50 matters concerned requests for advice on planned advertisements from driving schools. Last but not least, the new edition of the book „Competition Law for Driving Instructors“ helps driving schools to avoid mistakes in planned advertising. This successful educational work shows that the good cooperation between the Wettbewerbs-

szentrale and the associations and companies in the driving school sector could also be continued in 2014.

The 320 complaints concerned 96 cases in which warnings had to be given. Of these, more than 90 percent could be ended with the issue of a declaration of discontinuance or another form of amicable settlement. Actions for discontinuance had to be filed in five cases. The number of cases initiated for arbitration before the conciliation board for the settlement of disputes under competition law at the respective Chamber of Commerce remained constant; all of these could be settled positively. 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.

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## Price advertising

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Again in the reporting year 2014, a large number of the cases processed by the Wettbewerbszentrale concerned issues of price advertising that is regulated by the special provisions in Section 19 of the Driving Instructor Act {*Fahrlehrergesetz*}.

Whilst promotional advertising with special offers is permitted, it is all too often forgotten to provide the further information required by law alongside the reduced price for the basic fee or additional hours. This omission of the complete price is not only a violation of Section 19 of the Driving Instructor Act,

but also a violation of competition law. In some cases, the driving school operators had already issued declarations of discontinuance for previous similar advertising so that the contractual penalty fines due were demanded (F 5 0421/14).

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## Voucher platforms

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In 2014, driving school companies used the coupon market, albeit to a lesser degree, and advertised for complete or partial driving license training with vouchers that were to cover certain performances of the driving schools. In doing so, it is overlooked that Section 19 of the Driving Instructor Act also applies to such offer advertising, so that all prices are to be specified in full, which often does not happen in the voucher advertising objected to.

In one case, the Wettbewerbszentrale went directly against the operator of a voucher platform, which advertised in a newsletter for the sale of vouchers with the heading „Mobile: Driving license, including base fee“. The coupon was to cost EUR 199.00 and, in addition to the base fee and the participation fees for the tests, only covered two hours of driving in practical lessons. Special driving lessons were not even included in the voucher. The Regional Court in Berlin (LG Berlin, judgment of 7 November 2013, Ref. 52 O 144/13; F 5 0225/13) agreed with the opinion of the Wettbewerbszentrale that this eye-catching title of the newsletter is misleading because significant parts of the driver training were not covered by the voucher, in spite of what was announced.

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## Total prices

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Last year, we already reported on the topic of total prices and the advertising that gives the impression that one could reliably predict the costs of driving training.

A driving school had hung in their showcase a pos-

ter on which it advertised a temporary offer of training for Class B at prices starting at 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 of presentation for tests. The Court of Appeal in Celle (OLG Celle, judgment of 21 March 2013, Ref. 13 U 134/12; F 5 670/11) considers such a formulation of a package price of EUR 1,450.00 and its emphasis in advertising to be multiple violations of Section 19 of the Driving Instructor Act, due to which this was simultaneously also an act violating competition law within the meaning of Section 4 Number 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 substantiated its opinion by finding that it is ultimately not at all predictable what costs would be incurred by the envisaged training in the Driving License Class B. That constitutes a violation of the price provisions of the principle of price clarity and price accuracy laid down in Driving Instructor Act. The decision became final in the reporting year because the appeal against refusal of leave to appeal filed by the driving school was dismissed by the Federal Supreme Court (BGH, decision of 22 January 2014, Ref. I ZR 71/13).

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## Cost estimates

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The topic „cost estimates“ kept driving schools busy time and time again. The courts consider cost estimates, especially in the form of advertising with fixed amounts, to be a violation of Section 19 of the Driving Instructor Act.

The situation for driving schools becomes difficult not if the driving learner poses an inquiry purely out of interest in estimating the costs of the training, but when a cost estimate is required to receive funding from the learner's employer or from the employment agency. The Job Centre requires job seekers, who are applying for funding to finance driving training to improve their employability, to usually submit three cost estimates. This serves to plan and receive the

so-called „funding amount as mobility aid“. The cost estimates serve as the basis of the approval decision served to the jobseeker, in which the Job Centre then also selects the driving school to be visited by the jobseeker and pronounces a decision with a specification of the costs of training there. Driving schools that refuse to provide a cost estimate for the Job Centre with a reference to the prohibition of a fixed price specification in Section 19 of the Driving Instructor Act are not represented within the scope of this selection process.

In a case with such facts, a judgment in 2008 from the Court of Appeal in Hamm (OLG Hamm, judgment of 28 February 2008, Ref. 4 U 168/07) did not contain a final decision because it remained unclear whether the cost estimate generally considered to be permissible could be handed over directly to the driving learner.

A decision of the Regional Court in Oldenburg (LG Oldenburg, judgment of 5 February 2014, Ref. 5 O 1044/13; F 5 0661/12) has now brought clarity to this issue, which refers to the decision of the Court of Appeal in Hamm and further develops the case law on cost estimates. In its decision, the court comes to the conclusion that it is also not a violation of Section 19 of the Driving Instructor Act if the cost estimate required by the social security authority is handed over directly to the driving learner. The court substantiated its decision on the non-application of Section 19 of the Driving Instructor Act also in this case in particular with the finding that the consumer that receives the cost estimate does not make his/her own decision based on this cost estimate. The selection of the driving school also with regard to the price offer in the concrete case is made by the employment agency that takes this decision as the basis for the approval decision. Thus, the court considers the handing over of the cost estimate to the driving learner to be a situation comparable to the facts in the case decided by the Court of Appeal in Hamm, if the cost estimate is sent directly to the authority. The court then states that it is not objectionable if a cost estimate, which ultimately ends up with the employment agency and was meant to do so, is handed over to the driving learner. Based on this judgment, driving schools can thus participate

in the competition for funded driving license training without the risk of being warned due to a violation of Section 19 of the driving Instructor Act. However, this only applies with the proviso that the preparation of the cost estimate is demonstrably done to obtain such funding. In this connection, the courts did not need to address the additional problems that occur if the costs proposed in the cost estimate do not suffice. The driving schools need to clarify these issues together with the social security recipient and the social security agencies.

Driving school operators can surely not be prohibited from making realistic statements on costs in discussions with the customers if such statements comply with Section 19 of the Driving Instructor Act. However, the new case law on cost estimates is definitely not a *carte blanche* for advertising with fixed total costs that are usually also unrealistic, which is and remains impermissible.

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### Misleading advertising for advanced seminars for drivers with points

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Once again, it was also necessary to object to misleading advertising during the reporting year. The Wettbewerbszentrale received several complaints about the advertising of driving schools, in particular on the Internet, that continued to advertise advanced seminars for drivers with points {*Aufbauseminare für punkteauffällige Kraftfahrer*, ASP seminars}, even though such seminars were abolished by the legislature with the introduction of the new driving fitness assessment system on 1 May 2014 and/or replaced by the new „Driving Fitness Seminar“. In addition to the traffic instruction given by the driving schools, the new seminar also includes traffic-psychological training. However, some driving schools gave the impression on their website that they — in contrast to other driving schools — could actually still offer an advanced seminar to reduce points, which however is not the case in reality. Even taking into account existing transition provisions, a reduction of points with an advanced seminar is actually no longer possible.

The courts consider a seminar offer that is actually no longer possible to be misleading. Upon a petition by the Wettbewerbszentrale, the Court of Appeal in Hamm determined in a judgment (OLG Hamm, judgment of 31 May 2012, Ref. I-4 U 15/12; F 5 0347/11) that the reference to the conduct of a seminar to reduce the probation period is misleading. In its decision, the court stated that the false advertising would not be understood correctly by all without exceptions. In any case, there is still a certain and not insignificant number of consumers who are not aware of the Amendment to End the Model Attempt 2nd Phase of Driving Training {*Gesetzesänderung zur Beendigung des Modellversuchs 2. Fahrausbildungsphase*} and would be misled by the unchanged announcement that such seminars are conducted. The court concludes that the fact that the advertised seminars to reduce the probation period are no longer available is at least not so well known that the risk of deception would be excluded thereby. The Court of Appeal thus ordered the driving school to discontinue further announcements of the seminar for the reduction of the probation period. The same applies to the advanced seminars. Again in this case, consumers are not aware of the details of the legal rules and the changes thereto. It gives the misleading impression that the corresponding courses to reduce points are still being offered, which is not actually the case (F 5 0345/14).

did not contain such an imprint (F 5 0215/14).

Some complaints were also directed at the circumstance that it was not sufficiently clear on the website that the providers were in fact multiple driving schools (some belonging to one company). The advertising was ultimately misleading if these various driving schools present themselves online as „branches“ of a company, even though they are not in fact branches of a company (F 5 0563/14).

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## Online advertising / imprint

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Even though the imprint obligation online is mentioned again and again in reports, presentations and essays, there were numerous complaints again in 2014 that the website of driving schools did not contain an imprint or that it was incomplete. The most common error was the omission of the information on supervisory authority pursuant to Section 32 Driving Instructors Act (F 5 0114/14). Driving schools are obligated to provide this information in accordance with the German Telecommunications Act {*Telemediengesetz*}. Similarly, it also had to be objected to if the websites of driving schools in social networks

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# Architects and engineers

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Susanne Jennewein, Lawyer, Stuttgart Office

During the reporting year 2014, the Wettbewerbszentrale processed around 100 inquiries and complaints in the area „Architects and engineers“. Compared to the previous year, the number of complaints declined slightly; the number of requests, however, increased. The focus of the inquiries was on the Act implementing the Consumer Rights Directive {*Gesetz zur Umsetzung der Verbraucherrechtlicherichtlinie*}, which also applies to architects and engineers.

As in previous years, the central issue in the complaints was the unlawful use of the legally protected occupational title „Architect“ as well as the unlawful use of word compounds that contain this occupational title (see Annual Report 2013, p. 74). Both violate the respective Architects' Act of all Federal States and competition law (Section 4 Number 11 UWG and Sections 3 & 5 Subsection 1 Sentence 2 Number 3 UWG).

In most cases, the demanded declarations of discontinuance were issued; the court had to be called on, however, in the following three cases:

In one case, a construction planner had signed a site plan with the occupational title „architect“ and with the designation „Architecture construction in existing contexts“ without being correspondingly entered in the list of architects at the competent Chamber of Architects. The Regional Court in Stuttgart ordered the construction planner as petitioned to discontinue using this designation (default judgment of 9 December 2014, Ref. 34 O 95/14 KfH; S 2 0745/13).

The second case is also pending before the Regional Court in Stuttgart. The subject matter here is the website of two brothers, both of whom are not or no longer registered in the list of architects, but whose imprint gave the following information: „xxx architects ... registered with the Chamber of Architects in Baden-Württemberg: AL-No. xxxxxx. Competent Chamber: Chamber of Architects in Baden Württemberg ... Occupational title: Architect (awarded in the Federal Republic of Germany) ...“ (S 2 0279/14). At the time this Report was closed for publication, oral discussion had not yet been scheduled.

In the third case, the official company name „Architecture and Construction“ {*Architektur und Bauen*} was objected to. After a declaration of discontinuance was not issued, the Wettbewerbszentrale filed an action for discontinuance with the Regional Court in Leipzig. The particularity of this case is that on 1 May 2014 a new Saxon Architects' Act entered into force with the consequence that now also in Saxony (as in most Federal States) it is not only impermissible to use the designation „Architect“ without being registered in the list of architects, but also „similar designations that could lead to confusion in legal transactions“. The Regional Court in Leipzig shared the view of Wettbewerbszentrale that the above mentioned company name violated this and passed down a judgment based on acknowledgment on 17 November 2014 (Ref. 05 O 2580/14; S 2 0492/14).

Another focus of the complaints concerned the charging of less than the minimum rates pursuant to the Regulation on Fees for Architects and En-

gineers {*Verordnung über die Honorare für Architekten- und Ingenieurleistungen*, HOAI}. The minimum price requirements contained in this regulation are intended to prevent ruinous price competition and, at the same time, create a level legal playing field for all competitors in the market. Ultimately, architects and engineers should not be defined by a price competition but rather a quality competition. It happens again and again that architects and engineers charge less than the minimum rates set by law in order to win a contract by offering the „cheaper price“. The principals also like to try pressing the fees down due to cost reasons; this applies both to private principals as well as to the public sector. For example, a structural engineer made the following offer to a municipal administration „Structural engineering calculation HOAI 2013 ... gross price: EUR 14,128.00 .. I offer a discount of 25% on this HOAI-fee“. The engineer obviously assumed that the contract would be awarded to him/her due to this discount. In the opinion of the Wettbewerbszentrale, this violated competition law. After a warning was issued, the engineer issued the demanded declaration of discontinuance (S 2 0304/14).

In another case, a construction planner offered the performances (input planning, building permit, masonry dimensions and heat-demand calculation) for EUR 1,000.00 on his/her website under the heading „Plan offers, planning for single-family homes“. The content of these performances is the performance phases 1–4 of Section 34 HOAI. Assuming a minimum of EUR 150,000.00 in eligible costs for a single-family home, the classification as Fee Zone III would result in a minimum rate of approximately EUR 5,820.00. The specified fee of EUR 1,000.00 was thus considerably below the statutory minimum rates of HOAI; accordingly, this was a violation of competition law pursuant to Section 4 Number 11 UWG. After the Wettbewerbszentrale issued a warning, the demanded declaration of discontinuance was issued (S 2 0561/14).

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# The real estate sector

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Jennifer Beal, Lawyer, Berlin Office  
Dr. Wolfgang Nippe, Lawyer, Berlin Office

In the reporting year, the Wettbewerbszentrale received about 400 inquiries and complaints concerning the real estate sector. The significant increase — compared to the year 2013 — with 260 cases is predominately due to the circumstance that in 2014 two statutory revisions and amendments entered into force that concern, above all, the real estate sector. The provisions of the Energy Saving Ordinance {Energieeinsparverordnung, EnEV} apply since the beginning of May 2014 and require those who offer real estate to provide various details about the energy consumption of a building. In mid-June 2014, amendments to implement the European Consumer Rights Directive {Verbraucherrechte-Richtlinie, VRRL} entered into force, according to which consumers in commissionable broker agreements that are concluded at a distance or off-premises of a store have a statutory right of withdrawal. This, in turn, results in information requirements for real estate agents. These new regulations have led to uncertainty in the sector, which is reflected in the number of cases. As in the past, the Wettbewerbszentrale also received inquiries and complaints about misleading advertising and nuisance advertising, as well as about other specific to real property, such as the Rental Property Act {Wohnungsvermittlungsgesetz}. The emphasis in 2014 was on the following case groups:

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## Energy Saving Regulation

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Since 1 May 2014, advertisements for the purchase, renting, hiring or leasing of buildings and apartments must contain certain mandatory information from the energy certificate for the building. These include the type of the energy certificate (Energy Performance Certificate {Energiebedarfsausweis} or energy consumption certificate {Energieverbrauchsausweis}), the value of the energy demand or energy consumption, the main energy source for heating, the year of construction and the energy efficiency class of the building (Section 16a EnEV). In some commercial real estate offers, it was found that the data from the Energy Performance Certificate were only listed incompletely or they were missing entirely. The reprimand procedures initiated could largely be ended with the issue of declarations of discontinuance (B 1 0285/14; D 1 0248/14; D 1 0324/14). Since the lack of information on energy consumption was not seldom the result of ignorance on the part of the provider with regard to the change in the legal situation, the Wettbewerbszentrale did not call on the courts directly in one case despite a declaration of discontinuance not being issued, but rather called on the Conciliation Board of the Chamber of Commerce. The case was, however, not yet completed at the end of the year (D 1 0496/14). Statements, such as „Energy performance certificate available“, do not fulfil the legal requirements; rather, the actual values must be provided (B 1 0306/14;

B 1 0394/14). Statements, such as „The data from the energy performance certificate can be found on our website“, are also insufficient and were objected to under competition law (B 1 0344/14).

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## Implementation of the Consumer Rights Directive

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It was made clear with the entry into force of the national provisions on the implementation of the European Consumer Right Directive that the consumer protection rules also apply to commissionable broker agreements between estate agents and consumers. Thus, for broker agreements that are concluded at a distance, e.g. online, or outside of the business premises of a broker, e.g. for real estate, the consumer has a statutory right of withdrawal. However, this right of withdrawal applies only to broker agreements, but not to tenancy agreements or purchase contracts for real estate.

In distance selling contracts and contracts concluded outside of business premises, the business operator must provide the consumer with comprehensive information on the statutory right of withdrawal. One broker who gave consumers the opportunity to conclude brokerage contracts on the broker's website only incompletely complied with this obligation. The broker had failed to provide the consumer with the model withdrawal form, which is mandatory under the new law. Thus, the Wettbewerbszentrale issued a warning at the end of the year. The case will continue on into 2015 (D 1 0458/14). In another case, any information about the consumer's right of withdrawal was lacking; the matter could be settled with the issue of a declaration of discontinuance (B 1 0393/14).

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## Commission information

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As in other industries, a number of complaints in the real estate sector also concern the price information in advertisements. In the case of advertisements from commercial real estate brokers, there is a particularity that these do not only advertise the purchase or rent of real estate they do not own, but also offer their own brokerage services. Thus, their real estate advertising always also contains an offer to conclude a brokerage agreement. If the advertisements target consumers, information on the amount of the brokerage commission is thus indispensable. The complaints received by the Wettbewerbszentrale on promotional advertisements that, in addition to the specification of the purchase price, also contain the statement „Commission: With commission“ were thus justified. The commission information must be clearly formulated in such a way that the concrete brokerage commission to be paid by the consumer can be calculated using the purchase price or rent. Thus, explanations stating that the „usual commission“ is to be paid or „Commission: negotiable“ are not permitted. Upon a corresponding warning, the companies issued declarations of discontinuance (D 1 0490/14; D 1 0272/14; D 1 0273/14). Contradictory information about the commission, such as „Commission for the buyer: 5.95% — buyer commission 4.76% of the purchase price“ do not meet the requirements of transparency and are thus also impermissible (B 1 0202/14).

The obligation to indicate the brokerage commission also applies to advertisements in classified ads. One broker had advertised in a newspaper ad for the brokerage of four homes for sale. The advertisement did not contain information on the brokerage commission, so that the reader could assume that it was without commission. The respective exposé showed, however, that the brokerage actually was subject to a commission of 5.95% of the purchase price for the prospective buyer. With regard to the lack of information on the commission obligation, the company issued a declaration of discontinuance (B 1 0187/14).

In a similar case, the Wettbewerbszentrale had to call on the courts. The Regional Court in Berlin agreed with the view of the Wettbewerbszentrale and found the lack of information on the commission obligation to be a withholding of significant information within the meaning of Section 5a Subsection 2 UWG (LG Berlin, decision of 10 October 2013 and judgment of 17 December 2013, Ref. 16 O 512/13; B 1 0322/13). The case was not yet completed at the end of the year.

All commission information for consumers must include the statutory VAT. Information that showed the commission plus VAT gave the Wettbewerbszentrale cause for issuing a warning. The cases could, however, largely be settled out of court with the issue of declarations of discontinuance (B 1 0079/14; B 1 0312/14; D 1 0049/14; D 1 0050/14; D 1 0220/14). In one case, the proceedings before the conciliation board for competition disputes was still ongoing at the end of 2014 (D 1 0496/14). In another case, the Wettbewerbszentrale enforced its claim to discontinuance before the Regional Court in Ulm — the matter could be ended with a default judgment (LG Ulm, Ref. 11 O 16/14 KfH; D 1 0218/13).

It is self-evident that the statement „free of commission“ is only permissible, inasmuch as the addressee of the advertising really does not have to bear any costs for the brokerage of the rental property. According to the exposé in one case, however, a commission of two months' rent was demanded for the brokerage of a rented apartment, even though it was advertised online with the statement „No Commission! First-time occupancy after renovation“. The company issued the demanded declaration of discontinuance and quickly remedied the violation (B 1 0012/14).

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## German Estate Agent Act

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Finally, with respect to brokerage activities, price deficiencies in connection with the Act Regulating the Brokerage of Rental Property {Gesetz zur Regelung der Wohnungsvermittlung, WoVermRG} are also to be mentioned. For the commercial brokerage of rental properties, the amount of commission is capped by the provisions of the Rental Property Act. It may not exceed an amount of two months' rent plus statutory VAT (Section 3 Subsection 2 Sentence 1 WoVermRG). Thus, the maximum brokerage commission may not be more than 2.38 times the monthly base rent. Occasionally, real estate brokers use a higher multiplier, which is not permitted by law. However, since declarations of discontinuance were issued, the Wettbewerbszentrale was not moved to initiate legal steps beyond the warning (B 1 0086/14; D 1 0027/14; D 1 0450/14).

Section 6 Subsection 2 is another important provision of the Rental Property Act. According to this provision, the rental property broker is to provide information whether, in addition to the specification of the rent for the rental property, ancillary performances are to be paid separately. The lack of such information on ancillary costs is a violation of competition law (B 1 0366/14).

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## Other price advertising

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Not only must the information provided on the brokerage commission be complete and accurate, it goes without saying that the price specifications for the brokered real estate must fulfil the statutory requirements. In this context, the Regional Court in Berlin affirmed the opinion of the Wettbewerbszentrale that the advertising of a real estate broker for the sale of individually described real properties with mere specifications of price ranges, such as „EUR 200,000–EUR 350,000“ or „EUR 350,000–EUR 500,000“ without indicating the actual final price to be paid violates Section 1 Subsection 1 Sentence 1

of the Price Indication Regulation {Preisangabenverordnung, PAngV} (LG Berlin, judgment of 6 May 2014, Ref. 16 O 64/14 – not yet final; B 1 0035/14). The defendant has filed an appeal against the decision — the case is now pending before the Court of Appeal in Berlin under the Ref. 5 U 75/14.

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 residual term of the hereditary building lease and the level of ground rent are factors of decisive importance in the decision by a prospective to buy. The mere indication of the presence of a hereditary building lease thus does not fulfil the legal requirements. A case on this issue, which was mentioned in last year's report, was successfully completed in 2014. The Regional Court in Karlsruhe followed the opinion of the Wettbewerbszentrale and found the term of the hereditary building lease to be significant information pursuant to Section 5a Subsection 2 UWG. In addition, the court made it clear that the amount of the ground rent is a price component that must be provided in the advertising pursuant to the requirements of the PAngV (LG Karlsruhe, Ref. 14 O 77/13 KfH III; D 1 0490/12).

However misleading pricing occurs not only with brokers, but also operators of real estate platforms. Real estate platforms play a significant role in the real estate sector. Their operators themselves do not offer real estate, but do solicit advertisers on their platforms. Some of this was done partly by unfair means. One platform operator attracted customers with a Google ad that read „List your apartment free of charge, advertisement www.....de. You want to let your apartment? Advertise now with the market leader“. However, if the user clicked on the link provided, it led to a website on which the ads were only offered for a fee of EUR 41.93. There was nothing „free“ about it. The platform operator issued the demanded declaration of discontinuance and changed the advertising without delay (B 1 0429/14).

A lawsuit against the same platform operator was still pending before the Regional Court in Berlin at the end of 2014. The subject matter of the proceedings is what the Wettbewerbszentrale considers to be insufficient price transparency for the placement of an advertisement. In order to place it online, the user is first sent to a login screen. There, it must be entered, for example, whether an apartment is to be let or sold. This is then followed by additional booking steps with descriptions of the real estate. Even though an easily overlooked price notification was displayed at the beginning of the ordering process in optical connection with an e-Komi evaluation, the advertiser only found out what the actual final price to be paid was at end of the numerous input steps. In the opinion of the Wettbewerbszentrale, this contradicts the principle of price clarity and price accuracy (LG Berlin, Ref. 52 O 236/14; B 1 0260/14).

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## Introduction bonus

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Due to the tight housing market in urban areas, the announcement of so-called “tip payments” for the naming of objects that can potentially be brokered remains very popular in 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. These cases are called lay advertising, as the consumer is involved as a „layperson“ in the sales efforts of the business operator. Lay advertising is not in principle prohibited. Rather, for the assessment of the permissibility under competition law, it depends on whether it is apparent for the person offering the real estate that the private tipper receives a commission for the recommendation and that the recommendation is thus not necessarily honest, but rather can be steered by economic interests. This is considered hidden lay advertising, if this is not apparent to the owner, which is problematic under competition law. If, for example, the advertising states „Your recommendation is worth EUR 1,000 to us .... Your recommendation will, of course, be treated discreetly and confidentially.“, such imper-

missible lay advertising is to be assumed. This legal assessment was affirmed by the Regional Court in Berlin with judgment from 14 November 2014 (Ref. 15 O 213/14 — not yet final; B 1 0494/13). In addition, the court considered the announcement „You know an owner who wants to sell their real estate? ... If you name the owner to us, you will immediately receive EUR 1,000 ... upon successful brokerage“ to be a violation of Section 28 Subsection 3 of the German Federal Data Protection Act {Bundesdatenschutzgesetz, BDSG}, as the consent to use the personal data for the purpose of advertising was lacking (B 1 0494/13). Other complaints regarding this issue could be resolved by the issue of declarations of discontinuance (B 1 0036/14; B 1 0069/14; B 1 0285/14; D 1 0140/14).

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## Misleading real estate and business-related advertising

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Since real estate purchase is a matter of trust, real estate brokers often use advertising which is intended to indicate their special position in the market. In this context, the Wettbewerbszentrale received complaints that concerned the attention-grabbing statements, such as „Best broker in Munich“, „40 years of experience in the region“, „The first address for real estate transactions“ or „Come to the number 1“. Such advertising with age, uniqueness or top positioning is not objectionable under competition law, if it is true. The advertising slogan „40 years of experience in the region“ was compliant with competition law, as the company was able to demonstrate 40 years of business continuity in the region (D 1 0218/14). The advertising statement „Best broker in Munich“ was also not objectionable in that particular case. In a test of real estate agents, to which the company referred, it had achieved the best result of the companies tested in Munich (D 1 0191/14).

Brokerage companies also want to express special seriousness by indicating their membership in business associations. Various companies drew attention to their membership in the Real Estate Associa-

tion of Germany {Immobilienverband Deutschland, IVD} and to be underscored this point by using the IVD logo. In reality, however, the advertising companies were not members of this association. Thus, the Wettbewerbszentrale issued warnings due to misleading statements regarding memberships. However, since declarations of discontinuance were issued, the initiation of further legal steps was unnecessary (D 1 0380/14; D 1 0381/14; D 1 0283/14).

In some individual cases, the deception regards the commercial nature of the offer. In one case, only a telephone number was provided as a contact in a classified ad for the renting of an apartment. The prospective tenant thus had to assume that it was a private listing, especially since the statement „from private“ was added to the advertisement. In fact, however, it was a commercial advertisement from a real estate broker, which was not apparent. This misleading advertising could be stopped by a declaration of discontinuance (B 1 0994/14).

As already reported in the previous years, real estate is advertised in particular in connection with the use of real estate portals with incorrect zip codes, as a result of which it is false and thus misleading information about the location of the property. It has even occurred that one and the same real property was entered on the platform with up to five different zip codes, so as to appear as often as possible in the lists of results that the user could determine using corresponding search parameters. In most cases, the violation of competition law could be removed by the issue of corresponding declarations of discontinuance (B 1 0324/14; B 1 0461/14). Another case was prepared for litigation before the Regional Court in Berlin at the end of the year (B 1 0462/14).

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## Violations of other provisions

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Commercial brokers of real estate should note that such activities are subject to licensing requirements under Section 34c of the German Trade, Commerce and Industry Regulation Act {*Gewerbeordnung*, GewO}. It is a violation of competition law if the activity is carried out without the corresponding license, as this provision is to be considered a market conduct rule within the meaning of Section 4 Number 11 UWG. A broker from Hamburg, who was demonstrated to have commercially brokered real estate without a license, issued the demanded declaration of discontinuance upon a warning by the Wettbewerbszentrale (B 1 0037/14).

It should also be noted that the imprint requirement in the online area governed by Section 5 of the German Telemedia Act {*Telemediengesetz*, TMG} obviously still poses problems for providers. Thus, it is often the case that information about the operator is incomplete, information on the legal form is lacking, the agency relationships or the street address are specified not at all or incorrectly; sometimes, contact data, such as e-mail address, that must be specified are lacking. The supervisory authority is also to be named in the imprint, because the commercial activity of the real estate agent is subject to the license requirement under Section 34c GewO. Violations of the imprint obligation can usually be settled expeditiously and out of court usually by issuing a declaration of discontinuance (B 1 0094/14; B 1 0105/14; B 1 0207/14; B 1 0208/14; B 1 0372/14; B 1 0386/14).

Estate agents sometimes also offer services relating to the preparation and conclusion of leases 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 (Section 5 Subsection 1 Sentence 1 RDG). The filling out of pre-printed standard-form contracts available on the market is unobjectionable. However, any additional contract

drafting is not permitted under statute. Thus, the Wettbewerbszentrale objected to the advertising of a real estate agent with the statement „Contact for tenancy law“ and „Real estate agent specialized in ... tenancy law“. The statements suggested individual legal advice, which a real estate agent is not allowed to give. The company issued a declaration of discontinuance (M 1 0231/14).

In the reporting year, individual impermissible clauses used by real estate agents in general terms and conditions were objected to in the Terms and Conditions. For example, blanket rules for the cost reimbursement of the brokerage performance used in general terms and conditions without corresponding proof thereof are impermissible in accordance with Section 307 of the German Civil Code {*Bürgerliches Gesetzbuch*, BGB}. Such proof-independent remuneration contradicts the statutory model of the real estate brokerage agreement pursuant to Section 652 BGB, according to which the brokerage remuneration is only due if the activity of the real estate agent was causal for the brokered transaction. For this reason, a clause was objected to with which the real estate agent wanted to secure an expense allowance also in the situation that the principal abandons the intention to sell during the term of the brokerage agreement (B 1 0485/14). In another case, the general exclusion of claims for damages was objected to due to a violation of Section 309 Number 7b BGB; this violation was successfully stopped together with an impermissible place of jurisdiction clause (D 1 0366/14).

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## Customer acquisition

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As most companies in other sectors do, real estate agents and other business operators in the real estate sector are actively trying to acquire new customers. In some cases, it is overlooked thereby that the advertising via e-mail is impermissible, inasmuch as the addressee has not issued the advertising company the prior explicit consent necessary pursuant to Section 7 Subsection 2 Number 3 UWG. The complaints filed with the Wettbewerbszentrale in this regard could largely be settled out of court with the signature of corresponding declarations of discontinuance (B 1 0231/14; B 1 0437/14). In one case, proceedings were still pending before the conciliation board for competition cases at the end of 2014 (B 1 0477/14).

In addition to legal enforcement and other advisory activities, the Wettbewerbszentrale also offers its members presentation on the real estate sector. This is particularly of interest for brokers' associations that want to train their own member companies on legal issues. In the reporting year, the Wettbewerbszentrale has given lectures for three real estate associations on competition law for real estate agents.

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# The security industry

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Dr. Friedrich Pfeffer, Lawyer, Berlin Office

In the reporting year, the Wettbewerbszentrale had over 400 complaints and advice cases to process. This is about the same amount as in the previous year. The areas of focus were again on misleading advertising by locksmiths and flawed general terms and conditions for business in the area of security technology and in the security industry.

In 2013, the Wettbewerbszentrale also initiated a court case against a locksmith company that operates nationwide and had advertised on a full page in the local telephone book in Stuttgart with a variety of locksmith services, stating the street names and areas of Stuttgart. The advertising also contained statements, such as „Einbruchschutz.be recommended by the police“ and „Kripoberatungsstelle.de“. No locksmiths actually existed at the addresses specified. There was also no cooperation with the police or even a recommendation by the criminal investigation department. Before the Regional Court in Dusseldorf Regional Court (Ref. 38 O 122/13), it came to a settlement on the recommendation of the court in the hearing on 14 February 2014, in which the opposing side agreed to discontinue the offending advertising statements subject to contractual penalty fines of EUR 8,000.00 (S 3 0532/13).

Another case could also be settled the initiation of which was reported on last year. That case concerned eye-catching advertising for opening doors with the statement „only EUR 19.00“. In a concealed footnote, it was stated that the price specified applied for each 15 minute period worked, or part the-

reof, in addition to a call-out fee of EUR 189.21. In addition, the company advertised with „over 30 years of experience in the locksmith segment“ as well as with a seal „Verified Member of the Association of German Locksmiths“ without providing a possibility of receiving information on the type, scope and result of the assessment by the association. In fact, the company did not possess 30 years of experience in the field of locksmiths, nor was there a possibility for the consumer to review the assessment criteria. The Regional Court in Essen found this to be misleading advertisement in accordance with Sections 3, 5 and 5a UWG. Upon the recommendation of the court, the defendant then acknowledged the claim (LG Essen, judgment based on acknowledgement of 22 January 2014, Ref. 44 O 113/13; S 1 0317/13).

There were also a number of complaints about locksmiths in 2014. For example, one case concerned the online offer of locksmith services, whereby a locksmith company operating nationwide made use of the fact that consumers consider a company that works together with the police to be more serious than other companies. Services were offered under the domain „Kripoberatungsstelle.de“ and in Internet, inter alia, with images of vehicles the design of which were deceptively similar to police vehicles. The vehicles had a blue/white finish. A stylized emblem could be seen on the passenger door that gave the false impression of being a police emblem. The Wettbewerbszentrale considers this to be misleading for consumers who must assume that the advertising company works on behalf of the

police or at least in cooperation with the police. The court case is pending (S 3 0574/14) before the Regional Court in Dusseldorf (Ref. 37 O 55/14).

Another case against a company that has the same managing director was the case described above is pending before the Regional Court in Kleve (Ref. 8 O 88/14). This case also concerns images of police vehicles, whereby the word „police“ is explicitly visible on the vehicle shown (S 3 0678/14).

Time and again in the area „business in security technology“, there are complaints due to flawed general terms and conditions. Reference is made representatively to a case before the Regional Court in Regensburg. The opposing side was a dealer that offers locksmith services nationwide. The general terms and conditions used by the provider contained the provision according to which the provider was to be entitled to partial delivery without restriction. This clause violates Section 307 Subsection 2 & Section 309 Number 2 BGB.

In another clause, the provider limited the liability to cases of slight negligence as well as for breach of contract to intent and gross negligence. This clause violates Section 309 Number 7a BGB because it is not made clear that personal damages to life, body and health are excluded. The Regional Court in Regensburg agreed with the opinion of the Wettbewerbszentrale and ordered the locksmith company to discontinue using the offending general terms and conditions (judgment of 27 February 2014, Ref. 1 HK O 2360/13; S 1 0602/13).

Similar clauses are also occasionally found in the security industry. Here, the peculiarity is that business operators must take out liability insurance in accordance with Section 6 of the Security Regulation {Bewachungsverordnung}. A total limitation on the liability from security work is possible up to the minimum amount of insurance coverage. However, the possibility of limitation does not apply to personal damages. If the general terms and conditions contain such an impermissible limitation of liability, the limitation clause is invalid, so that the statutory provisions apply. Corresponding complaints could be settled out of court by issuing declara-

tions of discontinuance (S 1 0512/14; S 1 0527/14; S 1 0552/14).

# International activities of the Wettbewerbszentrale

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# Foreign relations of the Wettbewerbszentrale

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Jennifer Beal, Lawyer, Berlin Office

The Wettbewerbszentrale is well connected with competition law circles within the European Union. 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 on Brussels. These networks not only enable the exchange of developments relating to policy, legislation and case law, but also the provision of assistance for cross-border complaints.

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## International League of Competition Law (LIDC/League)

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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 industrialised countries by national associations and enables views to be exchanged once each year at a conference 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 membership.

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 at a central location all information and documentation dealing with anti-trust and competition law and industrial property protection 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 and industrial property protection;
- to carry out international comparative law studies in the area of antitrust and competition law and on current developments in competition law, associated with the drafting of proposals on the further development of competition law and industrial property protection;
- to publish the results of the work of the International League of Competition Law in the area of antitrust and competition law and industrial property protection;
- to promote research and legal defence in the area of antitrust and competition law and industrial property protection with the goal of protecting free trade and commerce.

### 2014 League Congress

The League organizes an annual congress to address and discuss two predetermined questions in a comparative legal form. The programme is enhanced by further presentations and panel discussions concerning interesting issues. In the reporting year,

the congress took place from 18 to 21 September 2014 in Turin, Italy; 109 persons from over 100 countries attended the congress to discuss the core topics of the conference in an international environment.

The conference was opened with welcoming speeches from Gianmaria Ajani (Rector of the University of Turin), Licia Mattioli (President of the Turin Industrial Union), Gusztáv Bacher (President of the League) and Giuseppe Sena (President of the Italian National Group of the League).

Before the two conference topics were presented and discussed, Ms. Martine Karsenty-Ricard (Lawyer in France), themes were presented and discussed, led attorney Mrs. Martine Karsenty-Ricard, France, panelled a first podium discussion on new practices online, in particular with regard to best price clauses and most favoured nation clauses / most-favoured customer clause, as well as on so-called reverse auctions / e-procurement, which is prohibited by law in France (Article L 442.10 of the French Commercial Code {Code de Commerce}). With regard to the most favoured customer clause, the case of the Federal Cartel Office {Bundeskartellamt} against HRS was mentioned inter alia (see [http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2013/20\\_12\\_2013\\_HRS.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2013/20_12_2013_HRS.html)). In this panel, Ms. Pinar Akman (Professor at the University of Leeds, Great Britain), Mr. Francesco Rosati (Lawyer in Belgium) and Mr. Marc Abenhaïm (Lawyer) discussed the matter.

Thereafter, the two working issues for the conference were presented by the international rapporteurs:

Question A:

Are settlement procedures (consensual fines), leniency programmes, informal agreements, commitments and other forms of consensual termination of antitrust and merger control procedures consistently compatible with the rule of law and the fundamental rights of the participants and/or parties affected?

(International rapporteur: Pranvera Këllezi (Lawyer, Switzerland); national rapporteur: Dr. Eckart Bueren, Max-Planck-Institute in Hamburg, Germany)

Question B:

To what extent is the principle of exhaustion of IP rights applicable to the online arena?

(International rapporteur: Vincenzo Franceschelli, Professor at the University of Milan, Italy; national rapporteur: Prof. Thomas Hoeren (University of Münster, Germany))

The respective resolutions drafted and passed on these topics can be accessed at <http://www.ligue.org/congres.php?lg=en&txtt=17>.

Both interesting questions of the conference were supplemented by a podium discussion on the tension between IP rights and the protection of the market. Under the moderation of Fabrizio Jacobacci (Lawyer, Italy), presentations on this were held by Paul Nihoul (Professor at the University of Louvain, Belgium), Laure Schulz (Autorité de la Concurrence, France) and Marco Braida (Senior Legal Specialist, Lavazza S.p.A., Italy).

In addition, the conference was enriched with two presentations: Eddy de Smijter (DG Competition, Belgium) presented the Directive on Actions for Damages in Antitrust Law and Mr. Tobias Maas (DG Competition, Belgium) presented on the topic of technology transfer agreements.

## 2015 League Congress

The next League Congress will take place from 1 to 3 October 2015 in Stockholm, Sweden. More information about the 2015 Congress can be found on the website of the League at <http://www.ligue.org/congres.php?lg=en&txtt=16>. In addition to a question related to antitrust on the abuse of a dominant market position, the question of protection and disclosure of know-how will be dealt with.

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## European Advertising Standards Alliance (EASA)

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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](http://www.easa-alliance.org).

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## Further cooperation

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In addition to the exchange within and above the networks mentioned, the Wettbewerbszentrale also receives inquiries about 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. In the reporting year, the Wettbewerbszentrale received representatives of the British CMA (Competition and Markets Authority) in August 2014 to discuss current case law and sets of circumstances in the legal field of general terms and conditions.

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# Individual cases with an international aspect

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Jennifer Beal, Lawyer, Berlin Office

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## Complaints relating to free enterprise

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Complaints were submitted to the Wettbewerbszentrale in more than 420 cases, in which the advertising company had its headquarters abroad. The complaints received concerned undertakings from 44 countries. In spite of being headquartered abroad, advertisers must observe German competition law, if the advertising is directed to customers in Germany. This results from the so-called „market location principle“. By contrast, undertakings based in the European Union may be subject to the so-called „country of origin principle“ in relation to cross-border advertising on television, over radio or on the internet. In these cases, the trader need only comply with the law of its country of origin.

More than half of the complaints with an international dimension were related — as in previous years — to acts by companies based in Switzerland, Austria, the UK and the Netherlands. Complaints about advertising by companies based in France, Italy, Spain and Luxembourg played a medium role in number.

The subject matter of the complaints was, in particular, aspects of misleading statements, such as the lack of a final price or essential characteristics of the goods. Lacking information obligations in connection with the imprint or the right of withdrawal under distance-selling law were also objected to. In addi-

tion, undesired and thus nuisance promotional activities were reported by e-mail and fax. In some cases, the Wettbewerbszentrale filed lawsuits by way of tort jurisdiction in Germany against companies with headquarters abroad (Switzerland, Sweden, the Czech Republic and Luxembourg).

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## Complaints relating to the European network of authorities

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Complaints about unfair business acts are submitted to the Wettbewerbszentrale not only by economic operators. In fact, additional complaints originating from abroad, which were directed against undertakings based in Germany, were furthered to the Wettbewerbszentrale as part of a European network of authorities. The basis for this is the Regulation on Cooperation in the Area of Consumer Protection (Regulation (EC) No. 2006/2004), which has launched the so-called Consumer Protection Corporation Network, i.e. the CPC Net. If there is a cross-border violation that originates from Germany, the foreign authority is first to contact the competent authority in Germany. As the predominately competent authority, the German Federal Office of Consumer Protection and Food Safety {*Bundesamt für Verbraucherschutz und Lebensmittelsicherheit*, BVL} then regularly commissions the Wettbewerbszentrale, inter alia, in accordance with Section 7 of the EC Consumer Protection Enforcement Act {*Verbraucherschutzdurchsetzungsgesetz*, VSchDG} to

stop the intra-community violation of competition law with the help of the private law claim to discontinuance. Thus, the network of authorities relies on the tried-and-tested private law system of enforcement 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). Since May 2014, these duties of the BVL will be performed by the German Federal Ministry of Justice and for Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*, BMJV) directly until the Amendment Act enters into force, which assigns this responsibility to the BMJV.

In 2014, the competent authority commissioned the Wettbewerbszentrale in eight cases to stop a cross-border violation. The complaints were submitted by the authorities in Austria, Great Britain, Spain, France and Norway. In two cases cease and desist orders under threat of damages were issued, whilst in one case the Wettbewerbszentrale initiated legal action. The other cases are being processed and coordinated with the competent authority.

In addition to the enforcement requests, so-called information requests can also be made within the network of authorities, which are often a precursor to an enforcement request. The Wettbewerbszentrale can also propose to the German authority information and enforcement requests for the competent foreign authority, if companies abroad violate national law to the detriment of competitors or consumers based in Germany, provided however that harmonised European consumer law is violated.

The most recent reports available from the German authorities that are regularly prepared in accordance with Section 3 Subsection 2 VSchDG with regard to the cooperation in consumer protection can be accessed at [www.bmjbv.de/DurchsetzungVerbraucherschutzgesetz](http://www.bmjbv.de/DurchsetzungVerbraucherschutzgesetz). Drawing on the national reports supplied to it, the Commission then also prepares its own report every two years on the cooperation in consumer protection.

The Commission's report published on 1 July 2014 with regard to the implementation of the Regulation (EC) 2006/2204 is the result of an evaluation within

the Member States and can be accessed at [http://ec.europa.eu/consumers/enforcement/cross-border\\_enforcement\\_cooperation/docs/140701\\_commission\\_report\\_cpc\\_reg\\_de.pdf](http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/docs/140701_commission_report_cpc_reg_de.pdf).

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## Sweeps in the CPC net

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Since 2007, the European Commission has initiated and coordinated sweeps, in which controls are carried out in the Member States on a pan-EU scale within a specific time window as to whether undertakings from a particular sector are complying with rules harmonised on EU level. Sweep 2014 was hosted by the BMJV. Given the fact that the Wettbewerbszentrale and the vzbv are involved in the enforcement of cross-border cases, these associations also take part in conducting national sweeps. In other Member States, these tasks are performed almost exclusively by the authorities.

In the past, sweeps were carried out on airlines, telecommunications providers (in particular ring tones), electronic products, ticket sellers for sporting and cultural events, consumer loans and digital products, such as online games. Offers for music downloads and services in the travel industry have also been investigated. In 2014, the sweep on guarantees and warranty rights was carried out. In Germany, approximately 30 websites from the BMJV, the vzbv and the Wettbewerbszentrale were investigated for possible violations. More information on the sweeps can be found at [http://ec.europa.eu/consumers/enforcement/sweeps/index\\_en.htm](http://ec.europa.eu/consumers/enforcement/sweeps/index_en.htm).

# Summary of activities in 2014

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# Overview of the spectrum of work

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Ulrike Gillner, Lawyer, Bad Homburg Office

The activities of the Wettbewerbszentrale in the field of competition and antitrust law was wide-ranging again in 2014. The competitive environment is characterized by an increasing density of regulations that pose great challenges to business operators of all sizes. Thus, the Wettbewerbszentrale does not only go against violations of competition law, but rather advises its members how to avoid any violations of competition law in advance before the advertising is published. It is increasingly responsible for trying to help providers on the market to be compliant in the area of fair business and consumer protection. The inquiries received by the Wettbewerbszentrale concern numerous different industries, such as health and foodstuffs, energy, banking and insurance, the automotive industry, security industry or telecommunications industry, just to name a few. In addition, it is the contact for the policies at the national and EU level, where it is available as an expert institution of the Society for Competition Issues {*Wirtschaft für Wettbewerbsfragen*} and is sought after for competition issues. It has established itself not least of all as a specialized information provider in the field of competition law by offering publications and seminars and thus regularly presents to the professional public the legal development in the area of competition and, in doing so, promotes fair competition.

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## Information services of the Wettbewerbszentrale

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Florian Weichsler, LL.M., Commercial Lawyer, Bad Homburg Office

### Seminars / in-house events

In 2014, the information services of the Wettbewerbszentrale organised seminars on

- open legal issues of the UWG — from the perspective of science & practice (Spring Seminar 2014);
- recent developments in competition law (Fall Seminar 2014)

with over 400 participants across Germany.

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, undertakings and professional associations. The particulars of the respective sector were identified and explained using corresponding case materials and the current case law. In-house seminars and presentations were held inter alia in relation to the following issues:

- distance-selling contracts for goods after the implementation of the Consumer Rights Directive;
- reprimand cases for real estate agents;
- competition Law in the security industry;
- marketing and competition law;
- sports marketing — introduction to competition law;
- update on competition law in the health care sector.

### Print and online publications / online database

The Wettbewerbszentrale provide regular information to more than 1,400 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 News - Newsletter;
- Competition Law News;
- Intellectual Property News.

The newsletter, which reports on current developments in competition law and Internet law at the national and international level, is available free of charge for members of the Wettbewerbszentrale. Subscribers receive access to the online database of the Wettbewerbszentrale and can do research using a simple search, as well as an expert search. The online database includes over 31,000 contributions on 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 over the Wettbewerbszentrale homepage: <http://www.wettbewerbszentrale.de/de/publikationen/print/>.

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## Provision of information to the public

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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 were mainly attended by the specialist public.

Any person may obtain information concerning the activities of the Wettbewerbszentrale through the website [www.wettbewerbszentrale.de](http://www.wettbewerbszentrale.de). Reports on recent court decisions or developments in individual sectors, for example can be found there. The start page contains various up-to-date reports on important novelties from competition law under the heading „current“. The website contains specific industry pages for the individual sectors. These contain an overview of all information relating to competition law within a particular sector. The information offered on the website is rounded out not least of all by summaries of important legal changes, such as the new development from the implementation of the Consumer Rights Directive.

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.

Again in 2014, the Wettbewerbszentrale was an important contact for matters of competition law: For example, it provides information to editors through press releases or in telephone discussions regarding important proceedings or court rulings. In addition, in 2014 it was also willing to grant interviews to journalists in response to numerous requests from the press.

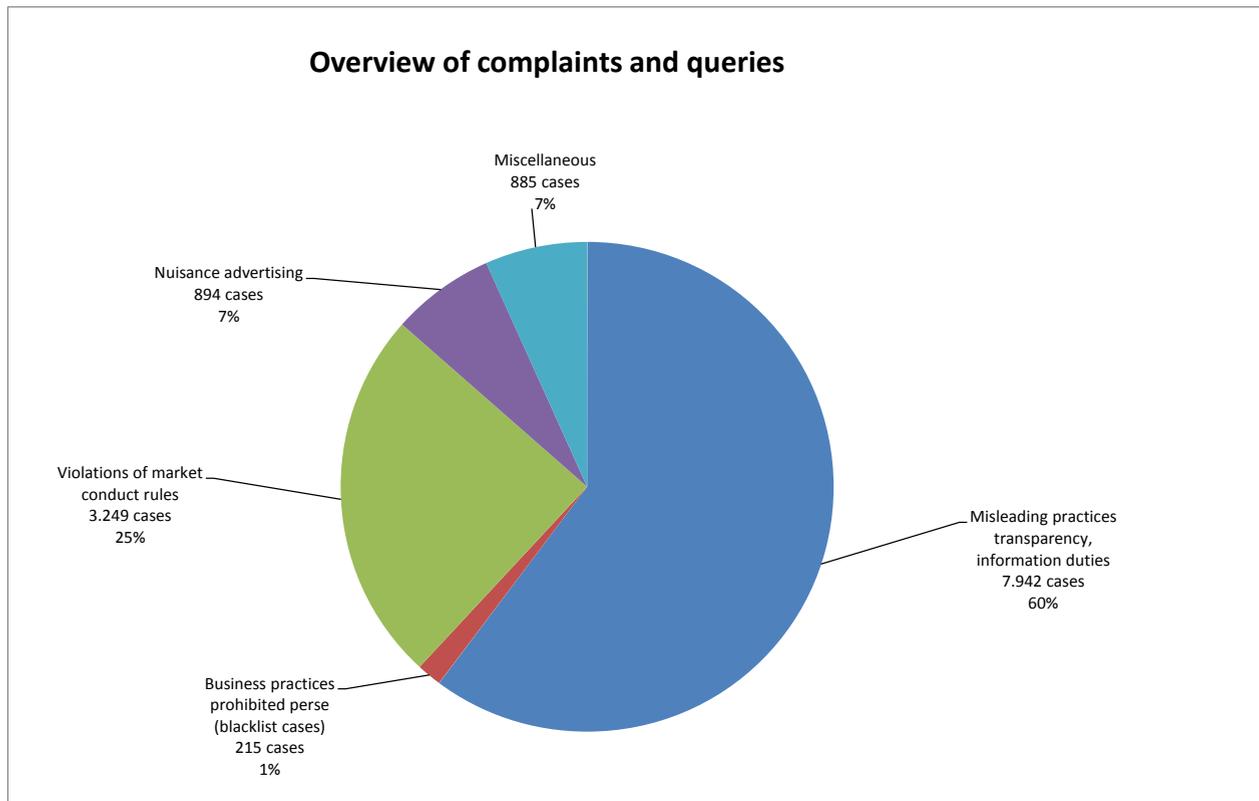
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## Advice and legal enforcement

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The advice provided to members on competition matters constitutes an important part of the activities of the Wettbewerbszentrale. This is because the progressive development of technical advertising opportunities and the development of competition law, including special statutory regulations outside of UWG, lead to an increased demand for information from and advice to companies. In 2014, the Wettbewerbszentrale received numerous written and telephone inquiries from members with regard to individual legal issues and current topics, on which the jurists of the Wettbewerbszentrale provided information, as well as prepared reports and opinions.

Overall, the Wettbewerbszentrale has again processed more than 13,000 matters, i.e. inquiries and complaints. Thus, compared to the previous year, the case load maintained a consistently high level. However, a single case, e.g. a complaint, could concern both a misleading advertising claim and the failure to comply with an information requirement, i.e. several relevant circumstances were to be reviewed under competition law per case. The following diagram provides an overview of the cases managed:



More than 60% of all cases processed by the Wettbewerbszentrale in 2014 concerned misleading and non-transparent advertising activities, as well as lacking or deficient fulfilment of labelling and information requirements. Overall, case numbers in this area amounted to 7,942 (previous year: 7,816). Thus, there was a renewed increase compared to the previous year with regard to the share of all processed cases, namely an increase of 1.24 percentage points. In recent years, a steady increase can be observed in this complex: Even in 2011, „only“ 51% of all cases concerned the case groups „misleading statements“ / „transparency“ / „labelling requirements“.

The recent increase compared to last year results primarily from an increase in the number of cases in the area of lacking compliance with statutory information requirements. In 2014, the information requirements that were established and/or changed by the implementation of the Consumer Rights Directive played a special role here. The provision in Section 5a UWG „misleading by omission“ also led to increased demand for advice and clarification.

The number of cases in the case group „transparency“ (Section 4 Nos. 3–5 UWG) remained at around the previous year’s level. In particular, cases concerning veiled promotional activities (Section 4 Number 3 UWG) and lacking transparency in sale promoting activities (Section 4 Number 4 UWG) play a role within this group.

In addition, the Wettbewerbszentrale processed 215 cases that dealt with misleading and aggressive business practices prohibited per se (so-called blacklist facts, Annex to Section 3 Subsection 3 UWG). This group of cases was recorded separately for the first time for 2013 (226 cases). 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 as to the fitness for sale of goods.

Moreover, as in the previous year, the violations of market conduct rules played a numerically significant role. With 3,249 cases, almost 25% of all cases processed by the Wettbewerbszentrale concerned violations of market conduct rules. After an observable increase within this group of cases in 2013, the numerical level in 2014 moved back to that in 2012. The market conduct rules in question here are occupation-related rules, such as the Crafts Act {*Handwerksordnung*} and the Trade, Commerce and Industry Regulation Act {*Gewerbeordnung*}, as well as business and product related rules, such as the Packaging Ordinance {*Verpackungsverordnung*}, the Drug Advertisement Act {*Heilmittelwerbegesetz*, HWG}, etc. These rules set out in special laws mostly serve to protect consumers. For example, the protective purposes of Drug Advertisement Act are to protect the public and to protect the health of the individual. Individual consumers should thus be protected against particular advertising practices within the drug sector.

Nuisance advertising, i.e. unauthorized telephone, fax or e-mail advertising, was the subject matter in 894 cases processed. This represents a slight decrease compared to the previous year (916 cases in 2013).

Finally, more than 800 cases concerned the areas of comparative advertising, imitation, restraint of competition, impertinent influence, antitrust issues, general terms and conditions, etc.

### Misleading practices, lack of transparency, information duties

Of the 7,942 cases in this area, 3,375 of them were cases in which it concerned a lack of transparency, lack of labelling or omission of information prescribed by law. It was 2,604 cases in 2013, so that a significant increase of almost 30% was recorded here. The increase in the number of cases in this area is primarily due to the increased demand for advice after the entry into force of the provisions after the implementation of the Consumer Rights Directive. The number of cases has almost doubled with inquiries about information concerning the right of withdrawal or instructions on the right of withdrawal.

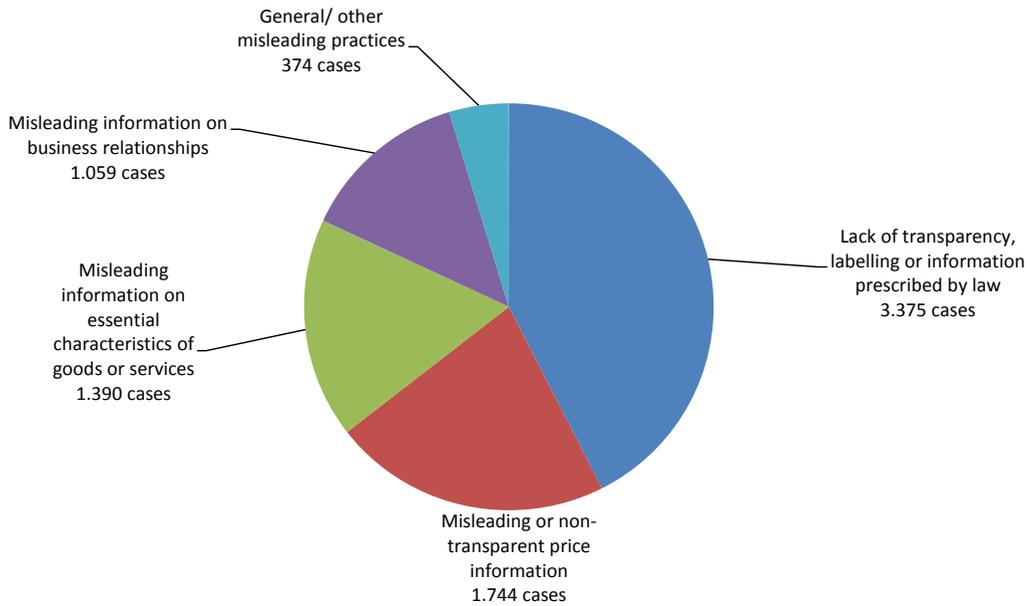
In total, 42.5% of the cases in the entire complex of inquiries „misleading practices and transparency“ concern lack of information or lacking labelling, with the exception of inquiries on price transparency (see below).

Price cheating, i.e. misleading and non-transparent price information, was the subject matter of 1,744 cases. Compared to the previous year (1,962 cases), this means a decrease of around 11%.

Misleading practices about business relationships (e.g. unjustified advertising with uniqueness) was the subject matter in 1,059 cases. This was 1,219 cases in 2013, so that there was a slight decrease by about 13% here.

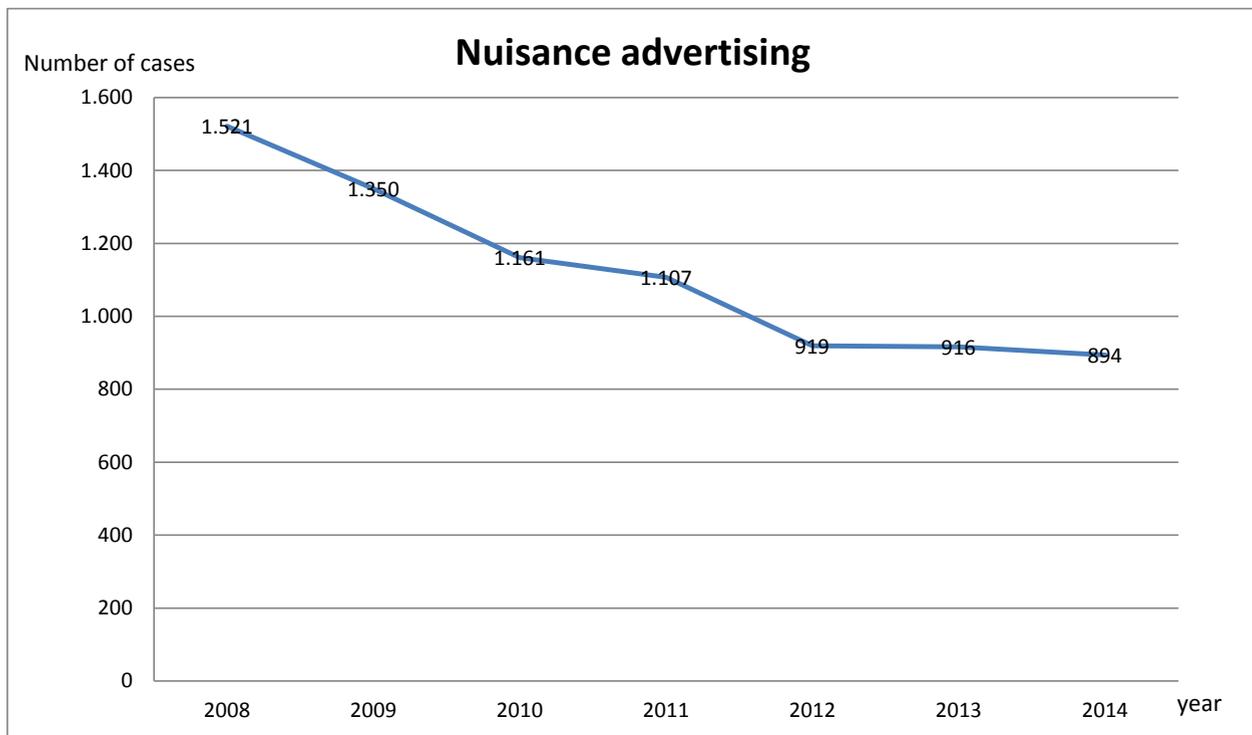
The number of cases in the case group „misleading claims about essential characteristics of goods and services“ were also decreased: the number of cases here in the reporting year was 1,390 (1,657 cases in 2013).

### Misleading practices, lack of transparency, information duties



### Nuisance advertising

The number of cases for nuisance advertising in 2014 year declined in comparison with last year: A total of 894 cases were processed in this regard (916 in 2013). The overall downward trend in case numbers for nuisance advertising has operated as follows over recent years:



## Overview broken down according to sector

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:

<b>Sector</b>	<b>Number of cases</b>	<b>2013</b>	<b>2014</b>
Healthcare sector (doctors, pharmacists, health insurance funds, pharmaceutical industry, healthcare sector mechanical work such as opticians, etc.)		1,099	1,133
Auction platforms (e.g. eBay, my-hammer, etc.)		1,034	1,315
Craft trades		824	783
(stationary) trade		1,104	1,033
Food and drink		473	597
Tourism/travel		955	881
Automotive industry		971	707
Online trading (without auction platforms)		531	491
Driving schools		368	358
Security industry		378	451
Professional experts		345	293
Media/publishing		248	277
Finance (banks, insurance, insurance brokers, financial service providers)		151	147
Telecommunications		317	322
Vending machine industry/amusement arcades		338	213
Architects / engineers		125	136
Energy/utilities industry		143	161
Real estate		258	400
Mail-order selling (offline)		342	452

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## Overview of cases

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As always, the Wettbewerbszentrale has also acted in 2014 with the goal of eliminating violations of competition law out of court and to resolve dispute amicably. A very high rate of settlements is also overserved in the more than 550 conciliation proceedings carried out before the conciliation board in 2014. These conciliation proceedings offer the advantage that topics of competition law can be discussed without recourse to the courts (and the associated costs). In addition, the conciliation boards are also filled with merchants as assessors, so that - in addition to legal expertise - practical experience from the industry also flows directly into the dispute resolution.

Nonetheless, the Wettbewerbszentrale was forced to pursue a total of more than 600 court proceedings in 2014. During the reporting period, 340 proceedings were completed. 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

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# Governing bodies and management

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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

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## The Board of Governors

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Friedrich Neukirch (Präsident)  
MCM Klosterfrau Vertriebsgesellschaft mbH  
Köln

Harald Meilicke (kooptiert)  
Beiratsvorsitz Breuninger  
Düsseldorf

Michael Wiedmann (Schatzmeister)  
Metro AG  
Düsseldorf

Wilfried Mocken  
Unterberg AG  
Rheinberg

Uwe Bergheim  
Falke KGaA  
Schmallenberg

Stephan Nießner  
Ferrero Middle and Eastern Europe GmbH  
Frankfurt am Main

Ulrich Leitermann (kooptiert)  
SIGNAL IDUNA Gruppe  
Dortmund

Josef Sanktjohanser  
PETZ REWE GmbH  
Köln

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

Dr. Stefan Zoll  
eBay GmbH  
Europarc-Dreilinden

Dr. Daniel Terberger  
KATAG AG  
Bielefeld

Dr. Reiner Münker  
(Geschäftsführendes Präsidiumsmitglied)  
Wettbewerbszentrale

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## The Management Board

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

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## The Advisory Board

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Michael Adel  
Industrie- und Handelskammer zu Dortmund

Dr. Thomas Gerhardus  
Karstadt Warenhaus GmbH

Jakob Stephan Baschab  
Bundesinnung der Hörgeräteakustiker KdöR

RAin Cornelia von Gierke  
Von Gierke & Rohnke  
Rechtsanwälte beim Bundesgerichtshof

RAin Kerstin Dahlke  
GALERIA Kaufhof GmbH

Christian Graf  
Handelskammer Hamburg

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

Dr. Roswitha Grießmann  
Sächsische Landesapothekerkammer

Jens Dohmgoergen  
Canon Deutschland GmbH

Dr. Jürgen Hoffart  
Landesärztekammer Rheinland-Pfalz

RA Dr. Alexander Dröge  
Markenverband e.V.

RA Thorsten Höche  
Bundesverband deutscher Banken e.V.

RA Peter Feller  
Bundesvereinigung der Deutschen  
Ernährungsindustrie e.V.

Dr. Kathrin Janke  
Zahnärztekammer Nordrhein

Dr. Ute Jähner  
Industrie- und Handelskammer Halle-Dessau

Dr. Peter J. Schröder  
Handelsverband Deutschland - HDE e.V.

Peter Kalb  
Bayerische Landesärztekammer

RAin Dr. Ine-Marie Schulte-Franzheim  
Schulte-Franzheim Rechtsanwälte

RAin Corinna Kleinert  
Deutscher ReiseVerband e.V.

RA Holger Schwannecke  
Zentralverband des Deutschen  
Handwerks e.V.

Dr. Axel Koblitz  
Zentralverband Deutsches Kraftfahrzeug-  
gewerbe e.V.

Matthias Schwering  
Metro Cash und Carry Deutschland GmbH

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

Dr. Peter Spary  
Verein zur Förderung der  
Wettbewerbswirtschaft e. V.

Martin Mildner  
Otto (GmbH & Co KG)

Ass. Manfred Steinritz  
Handwerkskammer Düsseldorf

Prof. Dr. Martin Müller  
Rechtsanwalt

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BDI Bundesverband der Deutschen  
Industrie e.V.

RA Christoph Wenk-Fischer  
Bundesverband des Deutschen  
Versandhandels e.V.

RAin Hildegard Reppelmund  
DIHK Deutscher Industrie- und Handels-  
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Der Mittelstandsverbund – ZGV e.V.

Dr. Christof Riess  
Handwerkskammer Rhein-Main

## STATUTORY NOTICE

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