

## **The Role of the Wettbewerbszentrale in the Enforcement System against Unfair Commercial Practices in Germany**

### 1. Introduction

Unfair commercial practices, directed either towards consumers or competitors, fall under the scope of the Unfair Competition Act (Gesetz gegen unlauteren Wettbewerb) and count as civil law. As a consequence, an advertisement or any kind of unfair commercial practice (i.e. misleadingness, unfair business terms, distance selling contracts, guarantees, e-commerce), independent of the media or business sector, can only be queried by civil action and are therefore dealt with before the civil courts.

In addition to legislation, some codes exist covering questions of taste and decency. Specific types of advertising, i.e. concerning alcohol and cars, discrimination and the role of women in advertising are dealt with by the German Advertising Council (Deutscher Werberat).

However, most commercial practices are regulated by law, such as misleading statements, sales promotions, prize competitions, unfair marketing practices, medical and food advertising, price labelling and shop opening hours.

### 2. Authorised bodies

From the beginning, the legislator gave the entire responsibility for surveillance of whether the rules are respected to the market participants; it is not the state with its authorities that intervenes when it comes to unfair marketing practices, but competitors, trade associations, the chambers of commerce and consumer organisations. According to § 8 Unfair Competition Act these parties have a legal right to take action against unfair commercial practices, including an individual right to forbearance. This right can also be claimed in court by means of civil proceedings. The most important and wide-reaching institution which has a formal, i.e. judicially authorised right to prosecute unfair commercial practices is the Centre for Protection against Unfair Competition (Zentrale zur Bekämpfung gegen unlauteren Wettbewerb e.V., abbr. Wettbewerbszentrale).

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### 3. The Centre for Protection against Unfair Competition (Wettbewerbszentrale)

The Wettbewerbszentrale was founded in 1912, immediately after the Unfair Competition Act was passed. It is an independent institution of the German industry and supports the self-responsibility of companies towards a fair and functioning market. It covers all sectors and branches of industry and is represented throughout the Federal Republic of Germany.

The Wettbewerbszentrale participates in legal consultations and provides opinions as a practitioner on planned legislation at national and European level. It is part of the working group within the Federal Ministry of Justice concerning developments of the Unfair Competition Act which is currently discussing the implementation of the Unfair Commercial Practices Directive.

One of the institution's main aims is to ensure that all marketing participants respect the relevant rules in the interest of competitors and consumers. Only then can the market function and fulfil the needs of competitors and consumers. The Wettbewerbszentrale achieves this goal by strengthening self-responsibility of companies in safeguarding consumer protection.

All chambers of commerce, most trade and craft corporations, about 800 other industrial or commercial associations and approximately 1200 companies are members of the Wettbewerbszentrale. Its head office in Bad Homburg and five regional branch offices (Berlin, Dortmund, Hamburg, Munich, and Stuttgart) deal with about 14.000 complaints a year.

In order to avoid legal disputes from the beginning, the association also gives advice to its members concerning advertising and marketing practices in the planning stage (copy advice).

Members of staff also give talks and seminars on current matters of interest concerning general and specific topics in competition law.

The Wettbewerbszentrale's main functions and aims can be summarized as follows:

- to maintain a functioning market
- to participate in consultation and to give statements on planned legislation at national and European levels
- to support fair competition by
  - \* participation in legal research
  - \* giving information to the public
  - \* holding seminars on competition matters
  - \* co-operating with competent judicial authorities

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- to contribute to the development of the law by
  - \* bringing test cases
- to investigate and pursue infringements of competition law

## 4. The way of action

### a) Extrajudicial action

Any member of the public (competitor or consumer) can submit a complaint to the Wettbewerbszentrale. It also receives complaints from public authorities such as the police, trade and health authorities. If the complaint is of substance, the Executive Directors write to the trader, asking him to sign an undertaking to amend or discontinue the advertising/commercial practice. This declaration contains a penalty clause. Legal action is threatened in the case of non-compliance. If the trader is unwilling to amend or discontinue the advertisement or commercial practice, the Executive Directors decide whether to institute legal proceedings. Before taking court action, the Wettbewerbszentrale will – in appropriate cases – try to reach an amicable agreement. The complaint can therefore be brought before the Board of Conciliation of the regional Chamber of Commerce.

Complaints are handled free of charge. In average, the queried advertisement or unfair commercial practice is withdrawn or amended within 1 to 2 weeks from receiving the complaint. If the Wettbewerbszentrale claims a preliminary injunction before the civil courts, a settlement can be achieved within a day by immediate order.

In order to take action effectively, the Wettbewerbszentrale is authorised by law (§ 13 Unterlassungsklagengesetz / Law on injunctions; implementation of the Directive 98/27 EG on Injunctions for the Protection of Consumers' Interests) to request information from postal and telephone authorities and companies on a customer's personal data. Therefore the Wettbewerbszentrale has the powers to disclose the identity of the owner of a German P.O. Box or telecommunication service.

The way of action mentioned above enables an effective withdrawal or amendment of the unfair commercial practice with minimum delay and costs. The danger of recurrence is minimal as a conventional penalty must be paid to by the trader if he contravenes competition law with the same commercial practice.

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Offences by members of the association are dealt with in the same way as those by non-members. The Wettbewerbszentrale has its own legal right to follow up complaints and does so in its own name. The complainant's identity is treated in the strictest confidence.

## b) Court action

An extrajudicial settlement cannot always be achieved. This means that often court action is necessary. In the year 2011 court action was initiated in more than 600 cases (from 14,000 complaints).

Two possible ways can be chosen:

In urgent cases, the Wettbewerbszentrale can claim a preliminary court injunction prohibiting the unfair commercial practice. Concerning competition law, the urgency of the case is usually assumed. Therefore, this is the most usual way of taking court action. The court will normally issue the preliminary injunction within a day by immediate order. In the case of contravention, the court can charge the opponent with an administrative fee of up to 250.000€.

In fewer cases, the Wettbewerbszentrale will initiate main proceedings in court. This is usually only necessary if the opponent does not accept the preliminary court injunction as a final agreement. This course of action is also chosen in rare cases in which the case is not claimed to be urgent.

The party that loses the case must pay all costs, including the court as well as the solicitor's fees of both parties.

The result of the complaint is communicated to the member complainant. In several cases the court decisions are published.

## 5. Cross-border complaints

The Wettbewerbszentrale deals with cross-border complaints in the way described for national complaints.

In 2011, the Wettbewerbszentrale received over 170 complaints from German competitors and consumers concerning marketing practices of companies abroad (mainly Austria, Switzerland, Great Britain and the Netherlands).

The Wettbewerbszentrale is also involved in the enforcement of the European Regulation on Consumer Protection Cooperation (EC 2006/2004).

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The Federal Office for Consumer Protection and Food Safety (Bundesamt für Verbraucherschutz und Lebensmittelsicherheit- BVL) has been nominated as the single liaison office in Germany for intra-Community infringements of consumer protection law; it is also one of the main competent authorities for cross-border infringements. Art 8 of the European Regulation permits the national authority to fulfil its obligations under the Regulation by authorising an appropriate body with a legitimate interest to take all necessary measures to stop the infringement. The Wettbewerbszentrale is such a body.

The equivalent German legislation is the Law on Consumer Protection Enforcement (Verbraucherschutzdurchsetzungsgesetz).

## 6. Publications

The Wettbewerbszentrale publishes a monthly journal, *Der Wettbewerb: Aus der Praxis - Für die Praxis*, which is addressed to its members and the public, to inform them of significant changes, developments and judgements in the area of competition law. Furthermore, the Wettbewerbszentrale publishes an analysis of the most important court decisions and essays concerning competition law on a monthly basis (Urteils- und Literaturlauswertung).

Press releases are issued regularly on current cases as well as on developments in legislation and jurisdiction. The Wettbewerbszentrale also publishes an annual report which gives an overview on developments in different branches of trade and industry (i.e. tourism, telecommunication, e-commerce, financial sector, health sector, energy sector) and outlines the most important cases dealt with by the Wettbewerbszentrale. The annual report also includes information on political developments in competition law on national and European level.

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