

## Questionnaire

### Directive 2005/29/EC on Unfair Commercial Practices (UCP)

#### - Stakeholders -

The European Commission is planning to issue guidelines on the application of the UCP rules and is inviting stakeholders to share their experience with the implemented rules. We would like to answer the questionnaire as follows:

#### **1. Unfair Commercial Practices – Frequency / Sector**

##### **a) Name of our organisation:**

Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. (abbr. Wettbewerbszentrale), Germany – Centre for Protection against Unfair Competition (contact details please see end of document)

##### **b) Area of activity / interest**

Before introducing our organisation and our area of activity, it is important to know that in Germany, unfair commercial practices fall under the scope of the Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb, abbr. UWG) 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), independent of the media or business sector, are queried by civil action.

From the beginning, the legislator gave the entire responsibility for surveillance of whether the rules are respected to 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

---

# Wettbewerbszentrale

---

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.

The most important and wide-reaching institution, which has a formal, i.e. judicially authorised right to prosecute unfair commercial practices is the Wettbewerbszentrale.

Our organisation is an independent institution in Germany for fair trading, founded by trade and industry in 1912. All Chambers of Commerce, most trade and craft corporations, about 600 other industrial or commercial associations and approximately 1200 companies are members of the Wettbewerbszentrale. We are judicially authorised to follow complaints from competitors as well as consumers concerning unfair marketing practices (i.e. misleading advertising, unsolicited direct marketing, misleading price indications) and also have the right according to § 8 UWG (Unfair Competition Act) to initiate court proceedings against companies in breach of competition and advertising law. Before taking a company to court we try to reach an out-of-court settlement by asking the company to sign a declaration of forbearance which includes a penalty clause in the case of recurrence. By this way of action, collective consumer interests as well as the interests of competitors are protected.

In addition to following complaints we also give legal advice to our members in matters of advertising law in order to avoid breaches from the beginning. A further task is to draft position papers concerning legislative acts on a national and European level from a practitioner's point of view. We belong to the expert group initiated by the German Ministry of Justice, which recently brought forward the implementation of the Unfair Commercial Practices Directive (2005/29/EC).

The Wettbewerbszentrale is also involved in the enforcement of the European Regulation on Consumer Protection Cooperation (EC 2006/2004). The Federal Office for Consumer Protection and Food Safety (Bundesamt für Verbraucherschutz und Lebensmittelsicherheit, abbr. BVL), being the single liaison office in Germany for intra-Community infringements and competent authority for cross-border infringements, instructs the Wettbewerbszentrale as an appropriate body having a legitimate interest in the cessation of infringements to take all necessary measures to cease the intra-Community infringement.

**The Wettbewerbszentrale deals with all aspects of unfair commercial practices, covering all media and all branches of trade and industry.** Our institution receives between 15.000 and 20.000 complaints and enquiries a year, mainly coming from competitors, but also from consumers and from authorities.

Apart from dealing with general aspects of competition law (misleading, comparative and harassing advertising, questions of transparency and information requirements), we also deal with specialised sectors such as health matters (medical law and law concerning advertising in the field of medical care),

law relating to professions and professional organisations, food law, tourism, general business terms, distance selling, e-commerce, advertising of organic and environmentally friendly products, energy sector and telecommunication, just to name some of the most important sectors.

In 2008, about 20%-25% of the complaints and requests directed to our institution dealt with misleading aspects according to § 5 UWG (for example related to price, product or company). Just under 10% of the cases dealt with matters of harassing advertising such as telephone calls or advertising via fax without prior consent (§ 7 UWG). Around 50% of the cases dealt with market related rules such as the Decree on Price Disclosure, Decree on Packaging, Law on Shop Closing Hours, Decree on Food Labelling, Law on Telemedia, Rules on Distance Selling, Medicines Law, Medical Treatments Advertising Law and Law on Food, Articles of Daily Use and Feed. For more details please see below under 3).

Germany finally transposed the UCP Directive only a few weeks ago in December 2008 by amending the Unfair Competition Act. For this reason, detailed experiences with the national interpretation of the UCP-Directive are limited. However, extensive rules on misleading and unfair commercial practices already existed before the transposition of the UCP-Directive, containing very similar prohibitions and rules. In addition, courts already interpreted the German Unfair Competition Act in the sense of the UCP-Directive, before it was finally transposed. We are therefore able to give an overview over many practices regulated by the UCP-Directive (see in particular the Annex).

## **c) Frequency or risk of unfair commercial practice**

In the last years we have been made aware of frequent misleading statements in connection with “free services” for ringtone and sms offers for mobile phones. We also receive complaints about direct mailings addressed to consumers, untruthfully announcing that they have won a prize.

## **d) Description of relevant practices mentioned under c)**

Some companies in the telecommunication sector have in recent years offered “10 sms for free” or free downloads for ringtones in the internet, without making clear that the user is about to conclude a 2-year-contract if he starts the download.

In the other case mentioned under c), the consumer receives a letter stating that he has for example won a 3-day-journey and is invited to a day-outing where he will receive the prize. There, the consumer is told that he will only receive the prize if he pays an administration fee of 30,00 €.

## **e) Matter of priority for authorities?**

The complaints concerning misleading downloads in the internet (10 sms for free) are already being dealt with as a matter of priority by our organisation, as a large number of market participants are affected by these unfair commercial practices (see press release attached).

The cases of misleading prize statements are also dealt with by our organisation. However, the cases are not frequent. They therefore do not need to be dealt with as a matter of priority.

## **2) Interpretation/application of the UCP Directive at national level**

### **a) Inadequacies / discrepancies**

No, we are not aware of inadequacies or discrepancies in the way member states have transposed the Directive.

### **b) Problems with interpretation**

As already mentioned, many of the regulations included in the UCP-Directive already existed before in the German Unfair Competition Act. Only slight modifications were therefore necessary (for example change of the General Clause, modification of rules concerning misleading omissions and introduction of a black list). As far as we know, no court cases are pending concerning these specific changes concerning the UCP-Directive. One reason for this may be the fact that the Directive was finally only transposed in December 2008. We are therefore not aware of current problems with the legal interpretation of the Directive in Germany.

However, we understand that different interpretations exist amongst the member states concerning black list number 20:

According to this regulation, “describing a product as “gratis”, “free”, “without charge” or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for the delivery” is considered unfair.

We understand this rule in such a way that claims like “10 free flights to London” would be regarded as misleading, if the consumer has to pay taxes and administrative fees in order to profit from the offer.

However, we assume that premiums and free gifts (as an extra service to the main product) do not fall under the scope of the black list. We therefore presume that offers like “buy two and get one free” are

allowed and not covered by the UCP Directive, as it is transparent that the word “free” is only related to the premium and that naturally the main product needs to be paid for. A clarification may be helpful.

The technical expression used in number 26 of the black list is also unclear:

It regulates that “making persistent and unwanted solicitations by telephone...or other remote media...” are forbidden.

It is not clear what “other remote media” are. Which other technical devices are meant? A clarification may be helpful.

**c) Helpful guidelines**

At this point, guidelines are not seen to be necessary.

**d) Existing guidance**

No, we have not yet provided guidance. As the German transposition has only just taken place (December 2008), we are not aware that best practices have already developed.

**e) Other observations / comments**

No further observations or remarks.

**Contact**

Wettbewerbszentrale Büro Berlin

Jennifer Beal

Danckelmannstr. 9

D – 14059 Berlin

Telephone: 0049 – 30 – 326 5656

Telefax: 0049 – 30 – 326 5655

E-mail: [beal@wettbewerbszentrale.de](mailto:beal@wettbewerbszentrale.de)

Berlin, February 13, 2009

## **ANNEX / Table of unfair commercial practices**

In 2008, our institution received about 15.000 complaints and information requests. We estimate that around 50% of these cases (complaints and enquiries) fall under the scope of the UCP-Directive. The figures given relate to complaints and enquiries as a whole; without taking into account whether the complaint was of substance.

As already mentioned, the UCP-Directive was transposed into German law in December 2008. However, extensive rules on misleading and unfair commercial practices already existed before the transposition of the UCP-Directive, containing very similar prohibitions and rules. We are therefore able to give the following overview of case categories:

### **a) Unfair commercial practices under the General Clause (Art. 5)**

The German Unfair Competition Act (UWG) provides detailed rules on all kinds of unfair commercial practices (i.e. misleading advertising, transparency rules). Because of this detailed legislation the majority of cases fall under specific rulings and not under the General Clause. The General Clause is only needed in few cases.

### **b) Misleading actions and omissions (Art. 6 and 7)**

In 2008, about 3500 cases dealt with misleading actions and omissions, reaching from misleading statements about the company size, composition of product, price of product, test results, attributes of the trader such as his qualifications to missing material information, just to name the main aspects. According to our experience, misleading actions and omissions occur in all branches and media.

### **c) Incomplete information in invitation to purchase**

About 2000 cases dealt with incomplete information to purchase, such as missing information on the identity of the seller, the rights of withdrawal (distance selling), the final price including taxes and other costs (such as delivery expenses) and the unit price. Most of these breaches occurred on-line.

### **d) Black list – false claims about curative capacity**

We only received few complaints about non-sufficient availability of advertised products (i.e. special offer for DVD-player when only 2 products were available for consumers).

### **e) Black list – false free offers**

Apart from the cases mentioned under 1 c) and d) (free sms and free ringtones), our institution only receives few complaints concerning false free offers.

**f) Black list – Unwanted commercial solicitations**

In Germany, commercial e-mails, faxes and telephone calls are only permitted if the addressee has given prior consent (opt-in). German courts have ruled that in general, a single unsolicited commercial fax, phone-call or e-mail is already a breach of law; therefore, persistence, as mentioned in number 26 of the black list, is not required.

In 2008, we received around 1400 complaints concerning unsolicited commercial solicitations. Only a small percentage of these cases can be defined as persistent solicitations. We estimate that about 10% of the solicitations (especially faxes and e-mails) originated from outside Germany.

**g) Black list – others: advertorials (No. 11)**

About 120 cases in 2008 dealt with advertorials. In these cases, the commercial nature of the editorial content was not clearly stated.

In all other cases listed in the Table of unfair commercial practices (Annex) we received no complaints at all or only very few complaints.

**Contact**

Wettbewerbszentrale Büro Berlin  
Jennifer Beal  
Danckelmannstr. 9  
D – 14059 Berlin

Telephone: 0049 – 30 – 326 5656

Telefax: 0049 – 30 – 326 5655

E-mail: [beal@wettbewerbszentrale.de](mailto:beal@wettbewerbszentrale.de)

Berlin, February 13, 2009