



H. Unfair Competition Law in a Nutshell

Vorlesung Grundlagen des privaten Wirtschaftsrechts

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Grundbegriffe des Wettbewerbsrechts

Sommersemester 2024



Overview

1. Structures

- a) Regulatory structure different from Competition Law
 - (1) No provisions in primary EU law
 - (2) No parallel provisions in secondary EU law
- b) Part harmonization in secondary EU law



Overview

1. Structures
2. Main body of substantive law enshrined in Act Against Unfair Competition, last amended 2022
 - a) Unfair commercial practices with regard to consumers
 - (1) Misleading advertising, sec. 5 AUC
 - (2) Misleading omissions, secs. 5a, 5b AUC
 - (3) Aggressive commercial practices, sec. 4a AUC



Overview

1. Structures
2. Main body of substantive law enshrined in Act Against Unfair Competition, last amended 2022
 - a) Unfair commercial practices with regard to consumers
 - b) Unfair commercial practices with regard to opposite market side
 - (1) Misleading advertising, sec. 5 AUC
 - (2) Misleading omissions in part, sec. 5a AUC
 - (3) Aggressive commercial practices, sec. 4a AUC



Overview

1. Structures
2. Main body of substantive law enshrined in Act Against Unfair Competition, last amended 2022
 - a) Unfair commercial practices with regard to consumers
 - b) Unfair commercial practices with regard to opposite market side
 - c) Unfair commercial practices with regard to competitors, sec. 4 AUC



Sanctions and Procedure

1. Sanctions

a) Private, administrative and criminal enforcement

b) Private law sanctions

(1) Negatory remedies: prohibition and abatement,
sec. 8 AUC

(2) Compensatory remedies, secs. 9, 10 AUC

c) Standing to sue, sec. 8 para. 3, 8a, 8b AUC

d) Standing to be sued, sec. 8 para. 2 AUC



Sanctions and Procedure

1. Sanctions
2. Procedure
 - a) Jurisdiction of regional courts (Landgerichte), sec. 13 AUC, independent of value of the matter
 - b) „Flying venue“ restricted, sec. 14 para. 2 AUC
 - c) Assumption of urgency for preliminary injunctions, sec. 12 para. 1 AUC



Sanctions and Procedure

1. Sanctions
2. Procedure
3. Further peculiarities
 - Cease-and-desist notice („Abmahnung“), sec. 13 para. 1 s. 1 AUC
 - Duty to pay costs for cease-and-desist notice, sec. 13 para. 3 AUC
 - Declaration to comply („Unterwerfungserklärung“)



Handling the General Clause

Sec. 3 AUC

“(1) Unfair commercial practices shall be illegal.”

1. Significance of general clauses in the AUC
2. Interpreting „unfairness“
3. Appreciability?



Handling the General Clause

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1. Significance of general clauses in the AUC
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4. Amendment 2015
 - a) Independent general clause for B2B cases
 - b) Transmission rule for B2C cases, cf. sec. 3 para. 2 AUC



Impairment of Consumers' Interests

- I. Fact Patterns addressing misleading commercial practices**
 1. Misleading commercial practices, sec. 5 AUC
 - a) Development
 - b) Influence of EU law
 - c) Current structures of the prohibition of misleading advertising



Impairment of Consumers' Interests

Case 1: As a supplement to the „Berliner Tageszeitung“ on May 5 and 6, 1994, the defendant distributed its brochure „Huge selection of Chinese carpets.“ On page 4, under the heading „Consistent value for money,“ carpets were shown with Persian patterns bearing designations such as „K. Medallion-Moud,“ „K.-Birdjend“ or „K.-Herati.“ However, these carpets were machine-made and not oriental by origin.

The plaintiff, an association with legal capacity and which according to its articles of association monitors compliance with the rules of fair competition, objected to the advertising on page 4 of the brochure as misleading, and petitioned for injunctive relief. It submitted that the sequence in the brochure and the arrangement of the advertising would lead the reader, despite the absence of an express indication that these were woven carpets, to assume that the offer concerned hand-knotted oriental carpets. (BGH v. 20.10.1999, I ZR 167/97, WRP 2000, 517 - Orient-Teppichmuster)



Impairment of Consumers' Interests

I. Fact Patterns addressing misleading commercial practices

1. Misleading commercial practices, sec. 5 AUC
2. Misleading by omission, secs. 5a, 5b AUC



Impairment of Consumers' Interests

3. Aggressive commercial practices
 - a) Exploitation of commercial inexperience, sec. 4a para. 2 no. 3 AUC

Case 4: The plaintiff, a consumers' association, demands injunctive relief against the defendant which sells cooking ware in emigration shelters. On August 15, 1992, a salesperson of the defendant arranged for a sales event in an interim shelter for emigrants from former Soviet Union and Russia. One emigrant bought a set of cooking pots for a consideration of 3.870,-- DM. (BGH v. 7.5.1998, I ZR 85/96 = GRUR 1998, 1041)



Impairment of Consumers' Interests

3. Unacceptable nuisance, sec. 7 AUC



Impairment of Competitors' Interests

1. Denigration and badmouthing, sec. 4 no. 1, 2 AUC
2. Comparative advertising, sec. 6 AUC
3. Individual obstruction, sec. 4 no. 4 AUC
 - a) Obstruction of supply
 - b) Obstruction of sales
 - c) Obstruction of advertising
 - d) Obstruction of operation
 - (1) Removal of control numbers
 - (2) Systematic product imitation rendering R&D fruitless



Impairment of Competitors' Interests

1. Denigration and badmouthing, sec. 4 no. 1, 2 AUC
2. Comparative advertising, sec. 6 AUC
3. Individual obstruction, sec. 4 no. 4 AUC
4. General market obstruction, sec. 3 para. 1 AUC
5. Unfair exploitation
 - a) Complementary protection of industrial performance by imitation of products
 - (1) tension with limited IP protection
 - (2) scope of protection under sec. 4 no. 3 AUC



Impairment of Competitors' Interests

1. Denigration and badmouthing, sec. 4 no. 1, 2 AUC
2. Comparative advertising, sec. 6 AUC
3. Individual obstruction, sec. 4 no. 4 AUC
4. General market obstruction, sec. 3 para. 1 AUC
5. Unfair exploitation
 - a) Complementary protection of industrial performance by imitation of products, sec. 4 no. 3 AUC
 - b) Protection of reputation against unfair exploitation, sec. 3 para. 1 AUC



Impairment of Competitors' Interests

1. Denigration and badmouthing, sec. 4 no. 1, 2 AUC
2. Comparative advertising, sec. 6 AUC
3. Individual obstruction, sec. 4 no. 4 AUC
4. General market obstruction, sec. 3 para. 1 AUC
5. Unfair exploitation
6. Breach of statutory provisions, sec. 3a AUC

