

**General Report Questionnaire for Working Session**

*“Claims about claims and disclaimers - welcome to the glamorous world of advertising!”*

**Distribution Commission**

**Technology, Media and IP Commission**

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## Questionnaire

Please note that the questions are rather monotonous in their formulation. The purpose thereof is to only set up a systemic framework for your answers, avoiding any implied direction or suggestion.

### 1. Questions regarding the content of advertisement law on a national level

*All of the questions in this section regard the regulations in your country.*

- 1.1 Can you describe in 100 words or less the legal framework regulating the advertising practice?

#### General Provisions

In Germany, there are a few Acts dealing with the advertising practice. The most important one is the *Gesetz gegen den unlauteren Wettbewerb* (UWG, act against unfair competition). This act has a long tradition and is applicable since 1909. In the past it was modified several times. The act underwent a massive revision in 2008 due to the implementation of the Directive 2005/29/EC.

#### Special law

Concerning advertisement to consumers additional provisions are applicable like the *Preisangabenverordnung* (PAngV, German Price Indication Ordinance). Depending on the kind of product, additional provisions have to be taken into consideration like *Arzneimittelgesetz* (AMG, German Medicine Act) and *Heilmittelwerbegesetz* (HWG, German pharmaceutical-advertising law) in health care issues. *Lebensmittel- und Futtermittelgesetzbuch* (LFGB, German Food and Feed Code) focusses on advertisement and distribution of food, feed and cosmetics.

As sec. 3a UWG refers to a statutory provision that is also intended to regulate market behavior in the interest of market participants, provisions typically not to be expected to regulate advertising have to be taken into consideration, too.

- 1.2 What is the general content of the regulations regarding health claims in advertisement?

Regulations regarding health claims are very strict in relation to correctness and clarity<sup>1</sup> as a high proportion of consumers trusts in the statements of health claims.<sup>2</sup> In case of advertising with health benefits the company is obliged to point to any adverse effects on health.<sup>3</sup>

It is forbidden to trivializing the risks associated with the use/enjoyment of the products, especially in case of advertising of alcohol.<sup>4</sup>

Further restrictions have to be taken into account especially in case of advertising with a recommendation of a scientist, commercials with prominent persons or a pictorial representation.<sup>5</sup>

1.3 What is the general content of the regulations regarding comparative claims in advertisement?

In the past, comparative advertising was generally unlawful<sup>6</sup> with certain exceptions. Against the background of harmonization of the regulations on comparative advertising by Directive 97/55/EC comparative claims are nowadays permissible if certain conditions are met.<sup>7</sup> Comparative claims must not conflict with the provisions of sec. 6 (comparative advertising), 5 (misleading commercial practices) and 5a (Misleading by omission) UWG to be permissible.

A comparison is in particular not allowed if the comparison does not objectively relate to one or more material, relevant, verifiable and representative features of the goods concerned or to the price<sup>8</sup> or it does not relate to goods or services meeting the same needs or intended for the same purpose.<sup>9</sup> According to sec. 6 para. 2 nr. 2 UWG a comparison has to be verifiable in order to check if it is factually justified. In addition any comparative advertisement is forbidden if it leads to a risk of confusion between the advertiser and a competitor or between the goods or services offered or the distinguishing marks used.<sup>10</sup> General competition principles like the general prohibition of disparagement of a competitor<sup>11</sup> or presentation of imitations or replicas have to be considered as well.

Most popular forms of comparative advertisement are the advertisement with a unique position or membership of a leading group. These kinds of advertisement are admissible if the relevant statement is true.<sup>12</sup> There must be a clear lead over the competitors which is additionally confirmed by certain consistency.<sup>13</sup>

1.4 What is the general content of the regulations regarding wrongful claims in advertisement?

Any advertisement that contains untruthful information or other information suited to deception is unlawful, especially if the essential characteristics of the goods or services<sup>14</sup> or the nature, attributes or rights of the entrepreneur<sup>15</sup> are concerned.

1.5 Is there a general regulation on the content, without a target audience being specified (for example, no "offensive" or "pornographic" or "political" advertisements)?

The general regulation is Sec. 3 UWG that states that unfair business acts are unlawful without any specific reference to offensive, pornographic or political advertisements. In the tradition of German provisions dealing with the admissibility of advertisement the accepted principles of morality have been the essential criteria. With the harmonization of the rules and the modification of the old-fashioned UWG the wording changed.

- 1.6 Is there any regulation regarding types of audiences, regulating content (for example, no fast food advertisements targeted at children)? If yes, what is the general content of this regulation?

### **Children**

Any advertisement that includes a direct request to children to purchase the goods or services marketed or to persuade their parents or other adults to do so is an illegal commercial practice.<sup>16</sup> If an advertisement is also but not exclusively targeted at children under the age of 14 it is unlawful.<sup>17</sup> In assessing whether a direct request exists the specific wording, especially use of children's language or expressions as well as anglicisms, has to be taken into account.<sup>18</sup>

### **Health claims/medical claims**

False statements that goods or services are able to cure illnesses, dysfunction, or malformations are unlawful.<sup>19</sup> In addition specific regulations like German Medicine Act and German pharmaceutical-advertising law have to be respected. In general, health claims/medical claims have to be true and beneficial effect must be proved and adverse effects have to be mentioned.<sup>20</sup> Advertising of medicines that require authorization but do not have any authorization is unlawful.<sup>21</sup>

In addition there is a different legal framework depending if the advertisement is targeting expert groups or not.<sup>22</sup> If the advertisement of medicines in terms of sec. 2 *Arzneimittelgesetz* is not targeting expert groups the text „*Zu Risiken und Nebenwirkungen lesen Sie die Packungsbeilage und fragen Sie Ihren Arzt oder Apotheker*“ has to be added clearly separated.

### **Food**

Advertising in relation to food must not be misleading<sup>23</sup> and Information about food has to be correct, precise and easy to understand for consumers.<sup>24</sup> Labelling and presentation of food and its advertising must not create the impression that a specific ingredient is present even though it is not present and the consumer can figure out this fact only by checking the list of ingredients.<sup>25</sup>

- 1.7 What are the developments in your jurisdiction regarding *ad blockers*?

In 2004, the *Bundesgerichtshof* (German Federal High Court) decided that advertising and promotion of an ad blocker is permissible.<sup>26</sup> The use of an ad blocker does not deliberately obstruct a competitor. Moreover the use of an ad blocker does not violate copyright laws.<sup>27</sup>

- 1.8 What are the sanctions in the field of advertisement law in your jurisdiction? Please cover both public (fines etc) and private (damages claims etc) sanctions related to wrongful advertisement.

Sanctions for the use of unlawful a commercial practice can be elimination, and in the event of the risk of recurrence, cessation and desistance.<sup>28</sup> Where the contraventions are committed in a business by a member of the staff or by a person exercising a mandate, the claim to cessation and desistance and the claim to

elimination shall be deemed to apply in relation to the owner of the business as well. In case of an intentional negligently use of an unlawful illegal commercial practice (advertisement) there is also a sanction to compensate competitors for the damage arising therefrom.<sup>29</sup>

Whoever intentionally uses an illegal commercial practice, thereby making a profit to the detriment of numerous purchasers, can be sued for surrender of such profit to the Federal budget.

In specific cases unlawful advertising may lead to regulatory offences<sup>30</sup> or criminal liability.<sup>31</sup>

## 2. Questions regarding Intellectual Property Rights and advertisement

### 2.1 What is the general content of regulation in your jurisdiction regarding the use of Intellectual Property (such as trademarks) of competitors in advertisement?

Without the consent of the proprietor of the trademark the use of a trademark is prohibited, if a sign is used which is identical to the trademark for goods or services which are identical to those for which it enjoys protection.<sup>32</sup> According to the *Markengesetz* (MarkenG, German Trademark Act) the use of a trademarks of competitors is forbidden in case of likelihood<sup>33</sup> as well as in case of special reputation.<sup>34</sup> Concerning the admissibility of the use of a trademark of a competitor it is of vital importance if one of the functions of a trademark is affected.<sup>35</sup> If none of the functions of a trademark is affected, the owner of a trademark may not prohibit the use of the trademark.<sup>36</sup> Even though the objective conditions of a infringement are fulfilled, the use of a trademark of a competitor may be permissible due to a exhaustion of trademark<sup>37</sup> or descriptive indications.<sup>38</sup> The latter is especially the case if spare parts are distributed. Taking into consideration that aforesaid special provisions may allow the use of a competitor's trademark the *Bundesgerichtshof* decided that the emphasized use of a famous figurative mark may be an offence against accepted principles of morality as the use of the relevant word mark may less affect on legitimate interests of the trademark owner.<sup>39</sup>

The provisions concerning other Intellectual Property rights like patents<sup>40</sup> or design patents<sup>41</sup> also limit the use of Intellectual Property rights of a competitor as well as the provisions on trade and industrial secrets.<sup>42</sup>

### 2.2 Under what conditions would, based on the case law in your jurisdiction, the use of trademarks of others as 'Ad Words' in a Google ad word campaign be allowed?

As a result of the decisions of the ECJ<sup>43</sup> the main criteria concerning the admissibility of a Google ad word campaign is if using an ad word an adverse effect on the function of indicating origin. The question whether that function of the trade mark is adversely affected depends in particular on the manner in which that ad is presented. The function of indicating the origin of the mark is adversely affected if the ad does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by

the ad originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party.<sup>44</sup>

In 2011, the *Bundesgerichtshof* decided that the function of indicating the origin of the mark is not adversely affected if the search results (using the ad word) are presented in a separate list of advertisements whereas the search results without using the ad word are presented in another list.<sup>45</sup> The list displaying the search result using the ad word is clearly separated from the other list. In addition, there is no adverse affect as this list is under the heading *Anzeige*, the German word for advertisement. Moreover the link shown in the list did not contain any relation to the mark.<sup>46</sup>

In another decision the *Bundesgerichtshof* decided that using an ad word adversely affected the function of indicating the origin of the mark.<sup>47</sup> In this case the defendant did not clarify that it is not an undertaking economically connected to the trademark owner.

In conclusion admissibility of the use of trademarks of others as “Ad Words” in a Google ad word campaign depends on the concrete design of Google’s presentation of the search results if the mark itself is not used/displayed in the presentation.

### **3. Questions regarding a remarkable case regarding advertising claims**

Can you please describe a case from your (national) jurisdiction that concerns a claim used in advertisement, which claim (or statement) was allegedly wrongful, misleading or in any other way unlawful?

3.1 What was the claim or statement under dispute?

3.2 What was the outcome?

3.3 What are in your opinion the interesting points in this case?

### **4. Points of interest in the field of advertisement law and B to C communication**

*This final part of the questionnaire is an unusual one. As discussed with many of you in 2015 in Antwerp and in London, everyone of us has particular expertise and interests that cannot be captured in a traditional questionnaire. As you know, you will have the chance to speak during the Working Session in Munich. The answers provided to this part of the questionnaire will be used to shape and prepare the speakers panel of that Working Session.*

- 4.1 What would you like to be discussed during the Working Session?
- 4.2 What specific advertisement law related point of interest would you like to speak about yourself?
- 4.3 Do you have any suggestions of points of interest omitted in this questionnaire?

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- <sup>1</sup> Helmut Köhler and Joachim Bornkamm, *Gesetz gegen den unlauteren Wettbewerb UWG*, 33rd ed, Beck 2015, p. 372.
- <sup>2</sup> Helmut Köhler and Joachim Bornkamm, *Gesetz gegen den unlauteren Wettbewerb UWG*, 33rd ed, Beck 2015, p. 371.
- <sup>3</sup> Helmut Köhler and Joachim Bornkamm, *Gesetz gegen den unlauteren Wettbewerb UWG*, 33rd ed, Beck 2015, p. 372.
- <sup>4</sup> Cf. Landgericht Ravensburg “*bekömmliches Bier*” [25.08.2015], 8 O 45/15 KfH, LMuR 2015, p. 168.

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- 5 Sec. 11 HWG.
- 6 Helmut Köhler and Joachim Bornkamm, *Gesetz gegen den unlauteren Wettbewerb UWG*, 33rd ed, Beck 2015, p. 1039.
- 7 Helmut Köhler and Joachim Bornkamm, *Gesetz gegen den unlauteren Wettbewerb UWG*, 33rd ed, Beck 2015, p. 1039.
- 8 Sec. 6 para. 2 nr. 2 UWG.
- 9 Sec. 6 para. 2 nr. 1 UWG.
- 10 Sec. 6 para. 2 nr. 3 UWG.
- 11 Sec. 6 para. 2 nr. 5 UWG; sec. 4 nr. 1 UWG.
- 12 Helmut Köhler and Joachim Bornkamm, *Gesetz gegen den unlauteren Wettbewerb UWG*, 33rd ed, Beck 2015, p. 806.
- 13 Helmut Köhler and Joachim Bornkamm, *Gesetz gegen den unlauteren Wettbewerb UWG*, 33rd ed, Beck 2015, p. 806.
- 14 Sec. 5 para. 1 sentence 2 Nr. 1 UWG.
- 15 Sec. 5 para. 1 sentence 2 Nr. 3 UWG.
- 16 Sec. 3 para. 3 UWG, Annex to Section 3 para. 3 nr. 28 UWG.
- 17 Bundesgerichtshof, „*Runes of Magic I*“ [18.09.2014], I ZR 34/12 (KG), GRUR 2014, p. 1211 ff.
- 18 Bundesgerichtshof, „*Runes of Magic*“ [17.07.2013], I ZR 34/12, NJW 2014, p. 1014 ff.
- 19 Sec. 3 para. 3 UWG; Annex to Section 3 para 3 nr. 18 UWG.
- 20 Sec. 3 HWG; Andreas Spckhoff, „*Medizinrecht*“, 2nd ed, Beck 2014, HWG § 3, Rn 2ff.
- 21 Sec. 3a HWG.
- 22 Sec. 11 HWG, sec. 2 HWG.
- 23 Sec. 11 LFGB, Art. 7 para 1 and 4 LMIV.
- 24 Art. 7 para 2 and 4 LMIV.
- 25 Bundesgerichtshof, „*Himbeer-Vanille-Abenteuer*“ [02.12.2015], I ZR 45/13, <<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=cd7d85f45bdcc177d1477da437062463&nr=72999&linked=pm&Blank=1>>, visited 10 February 2016.
- 26 Bundesgerichtshof, „*Zulässigkeit von Fernseh-Werbeblockern*“ [24.06.2004], I ZR 26/02, GRUR 2004, p. 877 ff.
- 27 Landgericht München I, „*Zulässigkeit von Werbeblockern*“ [27.05.2015], 37 O 11673/14, MMR 2015, p. 660 ff.
- 28 Sec. 8 UWG.
- 29 Sec. 9 UWG.
- 30 Sec. 15 HWG.
- 31 Sec. 16. UWG; sec. 14 HWG.
- 32 Sec. 14 para 2 Nr. 1 MarkenG.

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- 33 Sec. 14 para 2 Nr. 2 MarkenG.
- 34 Sec. 14 para 2 Nr. 3 MarkenG.
- 35 Bundesgerichtshof, "*Große Inspektion für alle*" [14.04.2011], I ZR 33/10, GRUR 2011, p.1135 ff.
- 36 Europäischer Gerichtshof, "*Portakabin/Primakabin*" [08.07.2010], C-558/08, GRUR 2010, p. 841 ff.
- Europäischer Gerichtshof, "*Google ad words*" [23.03.2010], C-236/08, C-237/08, C-238/08, GRUR
- 37 Sec. 24 MarkenG.
- 38 Sec. 23 MarkenG.
- 39 Bundesgerichtshof, "*Große Inspektion für alle*" [14.04.2011], I ZR 33/10, GRUR 2011, p.1135 ff.
- 40 Sec. 9 PatG.
- 41 Sec. 38 DesignG.
- 42 Sec. 17 UWG.
- 43 Europäischer Gerichtshof, "*Google ad words*" [23.03.2010], C-236/08, C-237/08, C-238/08, GRUR 2010, p. 445 ff.
- 44 Europäischer Gerichtshof, "*Google ad words*" [23.03.2010], C-236/08, C-237/08, C-238/08, GRUR 2010, p. 445 ff.
- 45 Bundesgerichtshof, "*Bananabay II*" [13.01.2011], I ZR 125/07, GRUR 2011, p. 828 ff.
- 46 Bundesgerichtshof, "*Bananabay II*" [13.01.2011], I ZR 125/07, GRUR 2011, p. 828 ff.
- 47 Bundesgerichtshof, "*Fleurop*" [27.06.2013], I ZR 53/12, GRUR 2014, p.182 ff.