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3. New Structure, same content – the new German unfair competition law

In December 2015 a substantial amendment of the “Gesetz gegen den unlauteren Wettbewerb” (short “UWG”) - the German codification of the laws of unfair competition – entered into force. The modification was necessary in order to eventually implement all requirements of the European directive concerning unfair competition (UCP Directive) from 2005. This amendment was preceded by a prior modification of the UWG in the year 2008, which also aimed to achieve the implementation of the requirements into German law. However, in 2008 the legislature was pursuing a minimalistic approach and decided that only minor alterations would be necessary to comply with the directive. The EU Commission did not share this opinion. As a consequence the EU Commission objected the amendment due to insufficiency because certain terms had not been adapted with the identical wording. The EU Commission initiated infringement proceedings against Germany. The changes newly introduced put the UWG in full compliance with the requirements of the EU directive.

Besides adapting the wording of several provisions the amendment provided extensive changes with regard to the order of the articles and therefore to the structure of the UWG. These changes have been conducted to enhance the systematic separation of consumer protection rules and regulations from protection of market participants amongst each other, particularly competitors. As consequence, the general rule of the German unfair competition law which is stipulated in sec.3 para. 1 UWG reads: “Unfair commercial practices are prohibited”. Sec. 3 para 2 UWG prohibits any commercial actions towards consumers that do not comply with due commercial diligence standards and are able to substantially affect the economic activities of the consumers.

To continue the structural separation between consumer protection and the protection of other market participants, the catalogue of exemplary unfair commercial practices which was listed in the old UWG to clarify the general rule, has been dissolved. The newly drafted regulations deal with the protection of competitors and comprise examples which had previously been listed in the old UWG (disparagement of the trademarks, products and services or business of a competitor, spreading negative facts about a competitor which are not demonstrably true, imitating products of a competitor, purposely impede a competitor). The newly introduced sec. 4a UWG prohibits aggressive business actions against consumers and other market participants which have been previously covered by sec. 4 no. 1 and no. 2 of the old UWG. Sec. 5 and 5a UWG prohibit certain actions to delude consumers or other market participants. The legislature integrated the definition of unfair commercial practices by breaching existing law in Sec. 3a UWG (formerly sec. 4 no. 11 UWG). In the past, the German UWG contained a specific prohibition of tying the participation on contests or competitions to the prior purchase of products or services. This regulation was deleted. In the new version, these actions are only covered by the general rule of sec. 3 UWG in specific cases.

Although the German UWG appears in an entirely new structure after the amendment, it does not lead to any substantive changes to the legal situation. The amendment merely adapts the formal requirements of the European directive, which actually have been respected by the German courts already for years when applying and interpreting the law. As a consequence the amendment leaves all those disappointed who were hoping that the amendment would eventually liberalize the very strict

rules on unfair competition in Germany. Hence, still every commercial action in Germany – particularly everything regarding promoting and advertising products and services – has to be checked carefully regarding its compliance with the laws of unfair competition.

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