



Special information

Relevant provisions of the Act against Unfair Competition (UWG) in connection with the Corona crisis

The Act against Unfair Competition (UWG) is not mentioned in the "*Act to Mitigate the Consequences of the COVID 19 Pandemic in Civil, Insolvency and Criminal Proceedings Law*", which was passed by the Federal Government at the end of March and came into force on 28 March 2020. Nevertheless, this law contains numerous regulations which should be given special attention, especially in connection with Corona. If these regulations are not observed, the entrepreneur risks being confronted with injunctive relief and considerable claims for damages.

1. Overview

At present, the competition authorities receive numerous complaints in connection with the corona issue. The first interim injunctions and rulings on questions of the admissibility of advertising statements in this context have also been issued.

Some examples show that these are mainly health-related advertising statements.

According to the report of the competition headquarters, the LG (Regional Court) Gießen, in its decision of 6 April 2020, issued the advertising statement "*Corona infection: How we can protect ourselves with vital mushrooms!*" (Ref.: 8 O 16/20) as inadmissible prohibited. Also forbidden by the LG Essen by decision of 27 April 2020 was the slogan "*Full Power for your Immune System*" with the illustration of a stylized person who fights off corona viruses (Ref.: 43 O 39/20). By decision of 22 April 2020, the LG Düsseldorf banned advertising for products such as mouth rinses and ear drop gel with the image of a stylized corona virus and the statement "*99.9% germ reduction of all relevant germs including MRSA*" (Ref.: 34 O 26/20). In another preliminary injunction, the LG Flensburg stopped the advertising campaign of an optician who, referring to the relinquishment of many consumers, offered "spectacle lenses as a gift for everyone" in the Corona crisis. The Flensburg Regional Court considered this to be a violation of the ban on donations under § 7 HWG (Ref.: 6 HK O 20/20).

At the end of March, the consumer advice center of Saxony was confronted with numerous worried consumer enquiries about the possibility of infection with the SARS-CoV2 virus via drinking water. An advertisement for water filters had highlighted their special protection against Covid-19 infection.

An action for an injunction was filed with the LG Munich I (Ref.: 17 HK O 5079/20) by the competition authority against a product advertisement for a foodstuff enriched with vitamin C. The sued company



had advertised the product in a full-page newspaper advertisement depicting a woman wearing a mouthguard with the statements *"Protect your body. NOW!"* and *"An optimal immune system* - 365 days a year - protects you from multi-resistant bacteria and international viruses"*.

At the end of March 2020, the competition authority had already announced that it would proceed as usual against serious legal violations in the competition sector and, in particular, seek injunctive relief from companies that were trying to exploit the Corona crisis, its effects and the fear and uncertainty in the population by unfair means for sales purposes.

However, the provisions of the UWG do not only play a role in cases from the area of so-called "health-related" advertising. The regulations of the UWG as well as special legal regulations such as the Medical Devices Act must also be observed when it comes to the correct product designation, for example when selling the masks which are now prescribed.

The UWG plays another important role when it comes to compliance with the hygiene and corona protection measures prescribed for the retail, catering and hotel sectors. This can be a violation of the UWG which competitors can punish with claims for injunction and damages.

Anyone who operates an online shop must check their general terms and conditions to ensure that the delivery and processing times stated therein are correct. If not, this also constitutes a violation of the UWG.

Which regulations are particularly relevant in detail will be shown below.

2. Danger of being warned if the prescribed corona protection measures are not complied with

In order to contain the spread of the SARS Cov 2 virus, numerous hygiene and safety regulations, such as the obligation to wear a mask and to keep a safe distance, continue to apply to traders, despite the many relaxations that have already come into force.

For example, the Fourth Bavarian Infection Protection Measures Ordinance (4. BayIfSMV) contains numerous protection and hygiene regulations to be observed for business life in §§ 12 ff. § 12 "Trade and service companies", stipulates for companies in the wholesale and retail trade with customer traffic that the operator must take suitable measures to ensure that a minimum distance of 1.5 m between customers can be maintained and that the number of customers present in the shop at the same time does not exceed one customer per 20 m² sales area, in future 10 m². Masks must be worn by staff, customers and their accompanying persons.

In accordance with § 13 "Gastronomy", the distribution of food and beverages for consumption on the spot outdoors, in particular in pub gardens or beer gardens and on open-air bar areas, is permitted between 6 a.m. and 10 p.m., if it is guaranteed that there is a good balance between all guests, who do not belong to the circle of members of their own household, spouses, life partners, partners in a non-marital partnership, relatives in a straight line, siblings and members of another household, either a minimum distance of 1.5 m is maintained or suitable separation devices are available. For the personnel in the service area or in areas where a minimum distance of 1.5 m cannot be maintained, as well



as for the guests as long as they are not in their place, masks are mandatory. The operator must draw up a protection and hygiene concept based on a framework concept for the catering industry announced by the State Ministries of Health and Care and of Economy, Regional Development and Energy, and submit it to the competent district administrative authority on request.

The question arises as to whether an entrepreneur can take action under Section 3a UWG against a competitor who, for example, violates one of the conditions described above. Under Section 3a UWG, anyone who contravenes a statutory provision which is also intended to regulate market conduct in the interests of market participants acts unfairly. The violation must be capable of significantly impairing the interests of consumers, other market participants or competitors.

The applicability of Paragraph 3a of the UWG depends on whether the regulation is a provision intended to regulate market conduct in the interests of market participants. The object of the regulation must be activities which serve to promote the sale or purchase of goods or services of an undertaking, including advertising and the conclusion and performance of contracts (see Götting, Hetmank, in Fezer/Büscher/Obergfell, Lauterkeitsrecht: UWG § 3a, 3rd ed. 2016, mn. 62).

Not only formal laws, but also ordinances are statutory provisions within the meaning of § 3a UWG. However, it is questionable whether such regulations such as the Bavarian Infection Protection Measures Ordinance are also intended to regulate market conduct. The aim of the ordinance is to protect health and infection, not to regulate market conduct. Due to the order of hygiene regulations to be observed, however, market conduct is also regulated at least indirectly. According to the recent case law of the BGH the explanatory memorandum to the Act states that it is necessary but also sufficient that the infringed standard must at least have a "secondary protective function" in favor of competition (cf. Götting/Hetmank, loc.cit., mn. 59).

Although the provisions of the infection protection ordinances primarily focus on health and infection protection, they also regulate how the company must behave in the marketplace by ordering business closures as well as hygiene and safety regulations. This is at least comparable to the regulations on closing times.

For the interest of the market participants required by Section 3a UWG, it is sufficient that the health or safety interest is affected by the market participation (cf. Götting, Hetmank, loc.cit., mn. 63a). This is undoubtedly the case.

There is therefore a strong case for considering the ordinances as regulations within the meaning of Section 3a of the UWG in accordance with the requirements of the BGH (German Federal Court), which have at least a secondary protective function in favor of competition.

A breach of opening restrictions and of the hygiene and safety regulations described above, for example, affects the interests of consumers in terms of protection against infection as well as those of other market participants and competitors, who suffer considerable disadvantages such as loss of sales.



Entrepreneurs can thus rely on § 3a UWG in conjunction with the infection protection ordinances to enforce injunctive relief and claims for damages against competitors. It is important to take rapid action against infringements in individual cases, as this is the only way to enforce the law by way of provisional legal protection in a short time.

3. Danger of warning with regard to health-related advertising

The UWG and, in addition, the Drug Advertising Act (HWG) and the Foodstuffs and Consumer Goods Act (LMBG) regulate in particular the admissibility and the requirements of health-related advertising. Inapplicable and inaccurate advertising statements in this area, as described above, can have serious consequences, especially for health issues, due to the increased sensitivity of consumers.

The aim of these legal provisions is therefore to protect the consumer, but also the competitor, against unfair practices in order to protect the consumer's freedom to make a purchase decision, especially in this sensitive area.

In particular, Article 3 (3) of Annex No 12 and No 18 of the UWG contain specific requirements in this respect. These provisions are supplemented by § 3 HWG and §§ 17 para. 1 no. 5 and 18 LMBG.

Paragraph 3 of the UWG regards as unfair and therefore inadmissible acts which are aimed at promoting the sale or purchase of goods or services (commercial acts) and which are not carried out with the diligence of a businessman and are likely to have a significant influence on the economic behavior of consumers. According to § 2 UWG, entrepreneurial diligence is the standard of expertise and care that can reasonably be assumed to be observed by an entrepreneur in his field of activity vis-à-vis consumers in good faith and in accordance with honest market practices.

According to point 12 of the Annex to Paragraph 3 (3) of the UWG, 'untruthful statements about the nature and extent of a risk to the personal safety of the consumer or his family in the event that he does not purchase the goods offered or does not make use of the service offered' are inadmissible. This must involve significant risks to the physical integrity or even the life of the consumer or his family, for example through illness, accident or criminal offences committed by third parties. This is particularly relevant in the event of a pandemic. Advertising with products which, for example, suggests protection against corona, together with a reference to the fact that only their use protects against a serious course of corona infection, falls under point 12 of the Annex and is therefore to be considered inadmissible.

According to point 18 of the annex to Paragraph 3 (3) of the UWG, a false claim that a product or service can cure diseases, dysfunctions or malformations is to be regarded as inadmissible. For example, premature advertising with a remedy for Covid 19, which is not scientifically proven, would fall under this point and would therefore be considered inadmissible.



In addition, the conduct described above met the requirements of Paragraph 5 II No. 1 of the UWG, according to which, inter alia, false statements about the fitness of a product or service for a particular purpose are misleading (see BT-Drucksache 16/10 145, p. 33).

Not to be forgotten is also Paragraph 4a of the UWG, which qualifies an aggressive commercial act as unfair if it causes the consumer, by undue influence, to take a commercial decision which he would not have taken otherwise. When assessing a conduct as aggressive, it must be taken into account whether there is a deliberate exploitation of specific misfortune situations or circumstances of such gravity that it impairs the consumer's or other market participant's judgement in order to influence his decision. This provision could also apply in individual cases.

With regard to the correct naming of products, the provisions of the Medical Devices Act must also be observed in individual cases. In case of violation, unfair conduct according to § 3a UWG could otherwise again be present. It would not be permissible to designate the mouth-nose cover prescribed in accordance with the above-mentioned Ordinance on Measures to Prevent Infection, for example, as mouth or respiratory protection, as it is not a medical device in the sense of the relevant regulations.

In conclusion, therefore, it must be stated that advertising which refers in any form to the subject of corona must meet very high standards of care in order not to be considered unfair and thus inadmissible under the provisions of the UWG and the relevant special provisions. If it meets these standards, advertising which makes reference to the subject of Corona is permitted.

4. Risk of warning in case of incorrect price indication and non-compliance with delivery periods

In the current situation, Section 5 (1) sentence 2 no. 1 and no. 2 UWG in particular plays an important role for online trading. According to this provision, anyone who engages in a misleading commercial activity which is likely to lead the consumer or other market participant to take a commercial decision which he would not have taken otherwise is acting unfairly.

Misleading statements are to be presumed, for example, if the commercial act contains false information about the essential characteristics of the goods or services, such as the availability or delivery of the goods or services, or the price or the way in which it is calculated.

In order to strengthen domestic demand in Germany, the "Corona Economic Stimulus Package" will reduce the VAT rate from 19 percent to 16 percent and from 7 percent to 5 percent respectively for a limited period from 1 July to 31 December 2020.

According to the specifications of the Price Indication Ordinance (PAngV), both the prices to be paid including VAT and other price components (total prices) and, in the case of commercial or business suppliers or distance selling contracts (especially online offers), that the prices demanded for goods or services include VAT and other price components must be indicated.



If the turnover tax is not correctly stated here, this constitutes an unfair act within the meaning of Section 5 para 1 sentence 2 no. 1 UWG.

The restrictions still in place to contain the corona pandemic may result in delivery times of goods being considerably extended or goods currently not available at all. Offer details which are not adjusted in this respect and contain incorrect information on delivery times or the availability of products fall under § 5 para. 1 sentence 2 no. 1 UWG and are inadmissible as unfair information.

Whether the prerequisites for an infringement of the UWG are met must be examined carefully in each individual case. We will be pleased to advise you if you perceive a violation of the UWG regulations by a competitor as described above and wish to take action against it. We will also advise you if you are sued for injunctive relief and damages and wish to defend yourself against such claims.

The above statements are only a non-binding compilation according to the current status. No liability is assumed for the correctness and completeness. We would be pleased to support you in checking and, if necessary, implementing the above measures in your company.

Your familiar contact persons are at your disposal regarding these matters

In addition, you will find the contact persons who have dealt with the above topics in particular.



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Concluding remarks

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