

## The New Law Against Unfair Competition: An Assessment

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### A. Introduction

July 8, 2004, marked a cornerstone for the German law against unfair competition. The amending Statute Against Unfair Competition (UWG 2004) came into force on that day.<sup>1</sup> That day also ended a long discussion among researchers who had called for a thorough modernization of the UWG. In particular, researchers criticized the prohibitions on sales promotion; these prohibitions are now abolished. Furthermore, the new UWG addresses European Union demands for greater liberalization and consumer protection, especially with respect to the electronic communications sector.<sup>2</sup> The new law is a complete reorganization of the old act of 1909.<sup>3</sup> The revised UWG is much more liberal, but still guarantees a high standard of protection for consumers and competitors.

This article will analyze the new law against the background of EC law and the legislative history (Section B.). The modified structure and provisions of the new UWG will be discussed in detail (Section C.). This analysis will include: a comment on the intent behind the UWG 2004, a description of the scope of the new provisions, a comparison with the old law, and an assessment of the new provisions. Critical comments on some aspects of the UWG 2004 will then be raised (Section D.).

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<sup>1</sup> Gesetz gegen den unlauteren Wettbewerb (UWG), BGBl. I 2004, 1414 of July 3, 2004.

<sup>2</sup> See e.g. the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), O.J. L 201, 37.

<sup>3</sup> Gesetz gegen den unlauteren Wettbewerb (UWG) of June 7, 1909, RGBl. 1909, 499, last amended July 23, 2002, BGBl. I 2002, 2852.

## B. Background – History of the Act

At the end of 2000, the German law against unfair competition still recognized significant restrictions on reduced-pricing sales of goods. Such sales, excepting a range of particular goods, were only allowed: on 12 days in the summer and winter, when a business celebrated its 25th year of foundation, or in the case of rummages.<sup>4</sup> Cash discounts, rebates and free gifts were restricted in special laws outside the UWG, namely the *Rabattgesetz* (statute on discounts)<sup>5</sup> and the *Zugabeverordnung* (regulation governing free gifts with sales).<sup>6</sup> Having hindered the application of modern advertisement practices applied in international trade, these particular provisions had proven a disproportionate constraint on the offer of goods.<sup>7</sup> The regulation governing free gifts with sales and the statute on discounts were effectively cancelled without substitution on July 25, 2001.<sup>8</sup> The enactment of the e-commerce directive was the specific impetus behind this amendment.<sup>9</sup> Despite this first step towards a liberalization of the German law against unfair competition, the UWG still restricted special reduced-pricing sales.<sup>10</sup> This remaining structure was inconsistent with the goal of creating a comprehensive, more entrepreneur-friendly, liberal legal framework concerning the offer of goods. Hence, an additional revision of the UWG was required to fully modernize Germany's law against unfair competition.

European demands also fueled the amendment of the UWG. While the European Union had not yet enacted competition legislation, it had demonstrated the desire to harmonize European laws against unfair competition. The proposal for a regulation concerning sales promotion in the internal market intended to unify the provi-

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<sup>4</sup> Sec. 7, 8 UWG 1909.

<sup>5</sup> *Rabattgesetz* of November 25, 1933, RGBl. I 1933, 1011, last amended July 25, 1986, BGBl. I 1986, 1172.

<sup>6</sup> *Zugabeverordnung* of March 9, 1932, RGBl. I 1932, 121, last amended July 25, 1994, BGBl. I 1994, 1688.

<sup>7</sup> See the explanatory statement of the new law, BT-Drs. 15/1487, 12.

<sup>8</sup> See The Regulation governing free gifts with sales of July 23, 2001 (BGBl. I 2001, 1661) and The Act on the Abrogation of the Statute on Discounts of July 23, 2001 (BGBl. I 2001, 1663).

<sup>9</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (O.J. L 178, 1). Pursuant to the country of origin principle in Art. 3 I entrepreneurs must only comply with the national laws at their business location. This provision could have resulted in a discrimination of German entrepreneurs, if the stringent provisions on discounts and giveaways had remained in force (see also <http://www.bundesregierung.de/artikel-413.26160/Rabattgesetz-und-Zugabeverordn.htm>).

<sup>10</sup> See sec. 7, 8 UWG 1909.

sions on free gifts, discounts, and games of luck.<sup>11</sup> The proposal for a directive concerning unfair business-to-consumer (B2C) commercial practices in the Internal Market<sup>12</sup> went one step further. Rather than simply addressing separate areas like the proposed regulation concerning sales promotions, it dealt with the entire law against unfair competition. The directive was based on the Green Paper on European Union consumer protection,<sup>13</sup> with the core aim of liberalizing the provisions on commercial practices without lowering consumer protection.<sup>14</sup> These two European harmonization approaches already emphasized the need to change the UWG,<sup>15</sup> although the final enactment of the directive may soon oblige the German parliament to revise the UWG a second time.<sup>16</sup> Similarly, the need to transpose the EC-Directive 2002/58 concerning data protection for electronic communications into national law further signaled the need for change.<sup>17</sup>

Due to these domestic and European demands, the German Government established an expert committee within the Department of Justice in 2001. This committee was tasked with making suggestions for a modernization of the UWG. The new law would conform to European standards and describe further developments towards a European law against unfair competition.<sup>18</sup> The committee's recommendations led to the reenactment of the UWG in its revised form.

### C. The New UWG

The new UWG addresses the shortcomings of the UWG 1909. Such antiquated provisions as the restrictions on special sales found in Sec. 7-8 UWG 1909 have been

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<sup>11</sup> Amended proposal for a European Parliament and Council Regulation concerning sales promotions in the Internal Market (presented by the Commission pursuant to Article 250 para. 2 of the EC Treaty) as of October 25, 2002, COM (2002) 585 final.

<sup>12</sup> Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) of June 18 2003.

<sup>13</sup> COM (2001) 531 final.

<sup>14</sup> HILTRUD BREYER, REPORT ON THE POLITICS OF THE EU ON CONSUMER PROTECTION (September 20, 2004), at <http://www.hiltrud-breyer.de/breyer/breyer/themen/positionspapiere/2003-11-18.html>.

<sup>15</sup> See the explanatory statement of the new law, BT-Drs. 15/1487, 12.

<sup>16</sup> See Press Release of the EU, IP/04/1364 of Nov. 16, 2004; Graf-Peter Calliess, (*Conflict*) *Principles of (Consumer) Contract Law - An Update*, 5 GERMAN LAW JOURNAL 957, 962 f. (2004), at [http://www.germanlawjournal.com/pdf/Vol05No08/PDF\\_Vol\\_05\\_No\\_08\\_957-967\\_EU\\_Calliess.pdf](http://www.germanlawjournal.com/pdf/Vol05No08/PDF_Vol_05_No_08_957-967_EU_Calliess.pdf).

<sup>17</sup> Directive 2002/58/EC on privacy and electronic communications, O.J. L 201, 37.

<sup>18</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 12.

abolished. The revised structure is much more modern, provisions are more transparent, and the demands of Art. 13 of the EC-Directive 2002/58<sup>19</sup> concerning unsolicited communications have been met.

The revised UWG consists of five chapters. Chapter one contains the core of the substantive law, including the purpose of the UWG 2004 and the definition of fundamental terms. More specifically, this chapter determines which acts of competition are unfair and, thus, prohibited. Chapter two comprises both civil remedies as a legal consequence of an infringement upon competition and statutory limitation rules. Chapter three refers to procedural issues and chapter four deals with criminal sanctions. Chapter five contains the final provisions.

### *I. Purpose of the Act*

Unlike the UWG of 1909, the new UWG formally defines the purpose of the act in its first section. The former Sec. 1 UWG (the statutory ban of unfair acts of competition) persists, now as Sec. 3 UWG 2004.<sup>20</sup>

Section 1 UWG 2004 now explicitly provides that the law against unfair competition protects competitors, consumers and other market participants against unfair behavior. This tripartite protection accords with the hitherto existing scope of protection<sup>21</sup> and still secures the public interest in undistorted competition. For the first time, however, the parliament has explicitly mentioned the consumer as a subject of protection. Previously, the drafters had responded to the demands of consumers associations<sup>22</sup> by simply crafting the established case law into statutory law.<sup>23</sup>

### *II. Definitions – Scope of Protection*

The definitions in Sec. 2 UWG 2004 are important for the scope of protection provided by the new UWG. An “act of competition” is still broadly defined as any

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<sup>19</sup> Directive 2002/58/EC on privacy and electronic communications, O.J. L 201, 37, 45 f.

<sup>20</sup> See *infra* text at [3.3.1].

<sup>21</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 13, 15 f.; see also BGHZ 140, 134 (138) – Hormonpräparate; BGH NJW 2000, 864 – Giftnotruf-Box; BVerfG WRP 2001, 1160 – Therapeutische Äquivalenz; BVerfG GRUR 2002, 455 – Tier- und Artenschutz

<sup>22</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 13.

<sup>23</sup> E.g. BGH GRUR 1957, 365 – Suwa; BGH GRUR 1982, 425 (430 f) – Brillen-Selbstabbestellen; BGH GRUR 1999, 751 (753) – Güllerpumpen; BGH GRUR 2001, 354 (356) – Verbandsklage gegen Vielfachabmahner.

behavior aiming to foster marketing, distribution and the purchase of goods and services, either for intrinsic or extrinsic purposes.<sup>24</sup> By referring to other market participants,<sup>25</sup> the UWG 2004 still protects entrepreneurs who have no direct relationship to the party infringing upon fair competition. Similarly, the new UWG still provides protection for entrepreneurs who work in a branch of business different from that of the violating party.<sup>26</sup> The definition of “news” clarifies that the new UWG only regulates information distributed by electronic communication services to a limited number of persons, such as by telephone, fax and e-mail. Hence, “news” in radio and television remains the subject of special regulations and is especially protected by the law on telecommunications (TKG<sup>27</sup> and TDG<sup>28</sup>) and the media laws of the *Länder* (federal states).

### *III. Competition Infringement*

Section 3-7 UWG 2004 set forth the actions prohibited by law since they constitute infringements upon fair competition.

#### *1. The General Clause of Sec. 3 UWG 2004*

The former general clause of Sec. 1 UWG, the statutory ban of unfair acts of competition, is now included in Sec. 3 UWG 2004. This provision is the core of the substantial law against unfair competition. Whereas the former Sec. 1 UWG solely referred to a behavior “contrary to public policy” to define prohibited commercial practices, Sec. 3 UWG 2004 uses a more precise definition based on the term “unfair,” which has supplanted the antiquated term “public policy.” In this respect, the new law has become more compatible with EC law, which makes frequent use of the term “unfairness.”<sup>29</sup>

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<sup>24</sup> Sec. 2 para. 1 no. 1 UWG 2004.

<sup>25</sup> Sec. 2 para. 1 no. 2 UWG 2004.

<sup>26</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 16. See also to the hitherto existing law Baumbach/Hefermehl, Wettbewerbsrecht, 22. Aufl., Einl. UWG Rdn. 226 zum mittelbaren Wettbeverbsverhaeltnis.

<sup>27</sup> Telekommunikationsgesetz of July 25, 1996, BGBl. I 1996, 1120, last amended May 5, 2004, BGBl. I 2004, 718.

<sup>28</sup> Gesetz über die Nutzung von Telediensten of July 22, 1997, BGBl. I 1997, 1870, last amended December 14, 2001, BGBl. I 2001, 3721.

<sup>29</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 16.

Thus, the section 3 UWG 2004 prohibition can be broken down into the following terms: (1) acts of competition that are (2) unfair and (3) capable of materially distorting competition (4) by harming competitors, consumers or other market participants (5) are prohibited. With its reliance on an “act of competition,” Sec. 3 UWG 2004 maintains that the new law does not protect against ordinary torts in business.<sup>30</sup> The term “materially distorted”<sup>31</sup> points out that the new UWG provides no protection against irrelevant nuisances. Nonetheless, an infringement upon competition requires neither injury nor grievous harm under Sec. 3 UWG 2004. Thus, even though its structure has changed, the new UWG still guarantees a high standard of protection.

Since it has been successful in the past, the new law also uses a general clause as the principal means of protection.<sup>32</sup> Consequently, the determination of an infringement upon competition still requires an appreciation that thoroughly balances the affected values and interests of the injured party, the public interest, and the violating party. Fortunately, the general clause is now supplemented by a non-exclusive list of samples of unfair acts of competition, which helps to construe and to apply the new law.<sup>33</sup> The UWG 2004 thus follows the approach of modern laws on competition insofar as the numerous samples provide legal certainty. While they do restate established cases, they take up current issues as well. This approach makes the revised UWG much more transparent, but still allows for a flexible case-by-case resolution of new issues with which courts may be confronted in the future.<sup>34</sup> Small businesses and foreign companies, especially, may benefit from this greater legal certainty.

## 2. *Samples of Unfairness, Sec. 4-7 UWG 2004*

Section 4 UWG 2004 already includes a large list of samples of unfair competition.<sup>35</sup> Nevertheless, it must be stressed that the mere pertinence of a sample listed in Sec. 4-7 UWG 2004 does not constitute a *prima facie* case of an infringement upon competition. Rather, the other requirements of Sec. 3 UWG 2004 must also be ful-

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<sup>30</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 16.

<sup>31</sup> Sec. 3 UWG 2004.

<sup>32</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 13.

<sup>33</sup> See sc. 4-7 UWG 2004.

<sup>34</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 13, 16.

<sup>35</sup> See also Günter Zettel, *Verbotstatbestände im neuen UWG*, MONATSSCHRIFT DES DEUTSCHEN RECHTS 1099 (2004).

filled; market participants must be injured and competition must be materially distorted.<sup>36</sup> For example, Sec. 4 UWG nos. 3 and 4 addresses acts of competition that conceal their advertisement purposes and sales promotions methods that do not state explicitly the conditions wherein discounts and free gifts are granted. Not only do these provisions protect consumers, but they protect competitors as well. Furthermore, Sec. 4 UWG nos. 5 and 6 regulate competitions and games of luck. Pursuant to these provisions, it is unfair if an entrepreneur either fails to explicitly inform about the respective participation criteria or if he/she couples participation with the purchase of his goods or services. Such unfairness exists when participation in the competition is predicated on the consumer dialing a special number – like a 0190-number – for which higher rates are charged.<sup>37</sup> However, the true chances to win need not be disclosed. Furthermore, ordinary competitions or games of luck in periodicals are not prohibited.<sup>38</sup> It is important to emphasize that the commercial activities of municipalities cannot be enjoined by the means of the UWG. The parliament has clarified that the *Gemeindeordnungen* of the *Länder* (Local Government Laws of the federal states), which only allow municipalities to pursue commercial activities under special circumstances, are not laws that aim to protect fair competition in the sense of Sec. 4 no. 11 UWG 2004.<sup>39</sup>

Section 5 UWG 2004 continues the samples of unfair behavior. It declares that deceptive advertisement is unfair. This provision is an essential reorganization of the revised UWG.<sup>40</sup> First, it summarizes the hitherto existing law: the standard for deceptive behavior is the recognition of a reasonable and consumer possessing average information.<sup>41</sup> Moreover, it introduces two new sections, which specifically address advertising with price reductions and advertising by bait.<sup>42</sup> The new section concerning price advertisement<sup>43</sup> establishes the important presumption that advertising with a reduced price is a deceptive method, provided that the prior

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<sup>36</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 17, 19, 20.

<sup>37</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 18.

<sup>38</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 18.

<sup>39</sup> Statement of the Bundesregierung, BT-Drs. 15/1487, 41; Christian Scharpf, *Drittsschutz für die Privatwirtschaft?*, GEWERBEARCHIV 317, 318 (2004). See to the hitherto existing law BGH GRUR 2002, 825 (826) – Elektroarbeiten; BGH GRUR 2003, 164 (165) – Altauversorgung; BGH WRP 2004, 376 (381) – Strom und Telefon I; BGH WRP 2004, 382 (3859 – Strom und Telefon II.

<sup>40</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 13.

<sup>41</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 19.

<sup>42</sup> Sec. 5 paras. 4 and 5 UWG 2004.

<sup>43</sup> Sec. 5 para. 4 UWG 2004.

price was only offered for an inadequately short period. Given this presumption, the burden of proof of the non-deceptiveness of the price reduction lies with the advertiser. Other price reductions are generally allowed, unless the claimant can establish their deceptiveness. Similarly, Sec. 5 UWG 2004 declares advertising by bait to be an improper method<sup>44</sup> when the advertiser is incapable of satisfying the expected demand from the outset. The advertiser must prove that he/she had a sufficient quantity of goods available.

In addition, Sec. 6 UWG 2004 provides that comparative advertisement is unfair when, for example, it refers to goods and services that have a different purpose,<sup>45</sup> or when the comparison might lead to confusion among the market about the origin of goods and services.<sup>46</sup> Sec. 6 UWG 2004 conforms with Sec. 2 of the UWG 1909.

Section 7 UWG 2004 declares unambiguously that unreasonable harassment is an unfair practice. Until now, this interpretation was solely an unwritten practice based upon the construction of the general clause of Sec. 1 UWG 1909.<sup>47</sup> Section 7 UWG 2004 also transforms Art. 13 EC-Directive 2002/58 concerning data protection for electronic communications into national law.<sup>48</sup> This provision thoroughly grants protection to any market participant from advertising by e-mail, fax or automatic solicitation machines where it is obviously contrary to his will and occurs without prior consent.<sup>49</sup> The parliament has found unwanted solicitation by entrepreneurs *via* fax to be an especially disturbing advertisement method. Furthermore, the provision addresses the fact that private persons in their residences need special protection.<sup>50</sup> In particular, the parliament has banned unwanted phone solicitation of consumers,<sup>51</sup> without their prior consent to business conversation, such advertisement is impermissible. Until this point, the parliament has fashioned the restrictive

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<sup>44</sup> Sec. 5 para. 5 UWG 2004.

<sup>45</sup> No. 1.

<sup>46</sup> No. 3.

<sup>47</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 15. BGH GRUR 1970, 523 - Telefonwerbung I; BGH GRUR 1989, 753 - Telefonwerbung II; BGH GRUR 1990, 280 (281) - Telefonwerbung III; BGH GRUR 1991, 764 - Telefonwerbung IV; OLG Frankfurt GRUR 1983, 674 - Lästiger Anlageberater; BGH GRUR 1973, 211 (212) - Telexwerbung; BGH GRUR 1996, 208 - Telefax-Werbung.

<sup>48</sup> Directive 2002/58/EC on privacy and electronic communications, O.J. L 201, 37.

<sup>49</sup> Sec. 7 para. 2 no. 1, 3 and 4.

<sup>50</sup> Sec. 7 para. 2 no. 2 UWG 2004. See *infra* text at 4.4.

<sup>51</sup> Sec. 7 para. 2 no. 2 UWG 2004.



so-called “opt-in” solution into law.<sup>52</sup> Departing from this strictness, Sec. 7 para. 3 UWG 2004 provides an important exception for advertisement by e-mail. This provision encompasses both entrepreneurs and consumers. Advertisement by e-mail is presumed to be legal provided that: (1) the advertiser previously received the customer’s electronic address in connection with the sale of goods and services; (2) the advertiser has fully informed the customer that the solicitation can stop at any time; and (3) the customer need not pay higher rates as basic transfer rates to terminate further solicitation. Although this provision still restrains advertisement by e-mail, it does give considerable advantage to advertisers by explicitly carving out such an exception. In this way, the new UWG clearly fosters the utilization of new promotion methods by e-mail.

Lastly, the new UWG no longer explicitly prohibits special sales. Where regulation is required, the legislator rightly acknowledges the prohibition of deceptive advertisement<sup>53</sup> and grants sufficient possibilities to enjoin unfair behavior.<sup>54</sup> Consequently, reductions of the entire line of goods are now permissible, as well as year-round and rummage sales.<sup>55</sup> Moreover, advertisement with the term “sales” is allowed.<sup>56</sup> Previously restricted,<sup>57</sup> reduced-price sales of insolvency goods are also admissible now. In modern markets characterized by informed and self-responsible consumers, such antiquated restrictions are no longer reasonable.<sup>58</sup>

#### *IV. Consequences of an Infringement Upon Fair Competition*

A party infringing upon fair competition may fear civil remedies as well as criminal sanctions.

##### *1. Civil Remedies*

The civil remedies against unfair acts of competition can be found in Sec. 8-10 UWG 2004.<sup>59</sup> The injured party may demand injunctive relief or sue the violating party

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<sup>52</sup> For a critical assessment of this solution see *infra* text 4.4.

<sup>53</sup> Sec. 5 UWG 2004.

<sup>54</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 14.

<sup>55</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 14.

<sup>56</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 14.

<sup>57</sup> Sec. 6, 6a, 6b UWG 1909.

<sup>58</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 15.

<sup>59</sup> *See, e.g.*, formerly sec. 13, 19 UWG of 1909.

for damages. As before, injunctive relief is expeditiously enforceable by preliminary injunction.<sup>60</sup>

The main change in the civil remedies section is the implementation of a third civil claim: the right to claim the violating party's profits.<sup>61</sup> In addition, since it was seen as irrelevant,<sup>62</sup> the right of revocation due to false and deceptive advertisement<sup>63</sup> has been abolished. The short statutory limitation period for damages was lengthened from 6 months to 10 years, provided that the claimant had no knowledge of the infringement or the violating party.<sup>64</sup> In this respect, the parliament has responded to the very critics who had challenged the overly-short period of the statute of limitations for claiming damages.<sup>65</sup>

The civil remedies of the new UWG are still exclusive.<sup>66</sup> Furthermore, standing remains limited to competitors, consumers associations, chambers of commerce and other associations.<sup>67</sup> Nevertheless, standing was the subject of controversial discussion within the legislative procedure leading to the enactment of the UWG 2004.<sup>68</sup> Consequently, a consumer can only complain to a consumer's association, which can then bring a suit on behalf of the consumer. Similarly, individual entrepreneurs cannot sue unless they compete directly with the violating party. This stipulation follows from the definition of competitors in Sec. 2 para. 1 no. 3 UWG 2004.

*a) Injunctive Relief and Compensatory Damages*

The hitherto existing remedies – injunctive relief and the right to claim damages – have undergone some changes. The arrangement of the respective provisions has become clearer.

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<sup>60</sup> Sec. 935, 940 ZPO (German Code of Civil Procedure) can more easily prove the urgency of a preliminary injunction (sec. 12 para. 2 UWG 2004).

<sup>61</sup> Sec. 10 UWG 2004, see below under [3.4.1.2].

<sup>62</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 14.

<sup>63</sup> Sec. 13a UWG 1909.

<sup>64</sup> Sec. 11 para. 2 UWG 2004.

<sup>65</sup> Statement of the Bundesrat, BT-Drs. 15/1487, 35 f.

<sup>66</sup> Günter Zettel, *Das neue Gesetz gegen den unlauteren Wettbewerb*, MONATSSCHRIFT DES DEUTSCHEN RECHTS 1040, 1042 (2004).

<sup>67</sup> Sec. 8 para. 3 UWG 2004.

<sup>68</sup> See, e.g., sec. 13 para. 2 UWG of 1909.

The new provision on injunctive relief constrains the claimant insofar as he/she might try to resolve the dispute out of court. Although the claimant is not absolutely obliged, failure to do so risks the awarding of court costs when the violating party immediately acknowledges the propriety of the claim.<sup>69</sup> This procedure thus recommends that claimants should now warn the violating party before they bring an action for injunctive relief.<sup>70</sup> The violating party must compensate the claimant for the cost of such notice.<sup>71</sup> Pursuant to the explanatory report to the new law, the violating party may not have to pay for legal expenses if the claimant is an association or a chamber, which ordinarily have well trained staff to handle legal issues.<sup>72</sup>

Concerning the new provisions on compensatory damages, competitors are also now entitled to charge a violating party with negligible breaches.<sup>73</sup> Previously, they could only charge a violating party with willful acts under the old UWG.<sup>74</sup> Newspaper publishers are the sole category of potential violators whose liability remains limited to willfulness.<sup>75</sup>

*b) Right to Claim the Violating Party's Profits*

The right to claim the violating party's profits addresses prior prosecution inefficiencies experienced when unfair acts of competition harmed many persons, but each individual suffered damages of a negligible quantum. In such instances, even though the violating party had gained considerable profit, neither consumers associations nor competitors could justify bringing claims compensatory damages.<sup>76</sup> The parliament has now resolved this inefficiency in Sec. 10 UWG 2004, which allows claims for the profits that a violating party has willfully achieved by injuring a multitude of customers.<sup>77</sup> The requirement of injury to a multitude of customers excludes cases where the injured party is only an individual, e.g. in the instance of

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<sup>69</sup> See sec. 93 ZPO (German Code of Civil Procedure). Explanatory statement of the new law, BT-Drs. 15/1487, 25.

<sup>70</sup> Sec. 12 para. 1 UWG 2004.

<sup>71</sup> Sec. 12 para. 1 UWG 2004.

<sup>72</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 25.

<sup>73</sup> Sec. 9 cl. 1 UWG 2004.

<sup>74</sup> Sec. 13(6) UWG 1909.

<sup>75</sup> Sec. 9 cl. 2 UWG 2004.

<sup>76</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 23.

<sup>77</sup> Sec. 10 para. 1 UWG 2004.

direct marketing by phone.<sup>78</sup> The key feature of the right to claim the violating party's profits is that the profits do not belong to the claimant, but must be transferred to the Federal treasury.<sup>79</sup> Moreover, compensatory damages or fines already paid by the violating party are deducted from the profits subject to the claim.<sup>80</sup>

## 2. *Criminal Sanctions*

Except for a structural rearrangement, the criminal provisions of the UWG 1909 have been mostly unaffected by the reenactment. Deceptive advertisement is still liable to prosecution without proof of damages.<sup>81</sup> Thus, the criminal liability of the UWG goes beyond the *Strafgesetzbuch* (StGB - German Criminal Act), which prohibits fraud only if the claimant suffers from financial disadvantages.<sup>82</sup> Furthermore, the new UWG prohibits betrayal of trade secrets,<sup>83</sup> as well as the unauthorized use of technical drafts.<sup>84</sup> Punishment takes the form of fines and prison sentences of up to 5 years.

## V. *Procedural Questions*

Turning towards the procedural rules, the new law does not change much. As in the UWG 1909, courts at the seat of the violating party have jurisdiction to hear the case.<sup>85</sup> Competitors may also bring their case at the place where the infringement was committed. Chambers of commerce, consumers associations, or others are only entitled to bring their case where the infringement occurred when the violating party has neither a business location in Germany nor a German domicile.<sup>86</sup> Alternatively, disputes may be resolved by arbitration.<sup>87</sup>

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<sup>78</sup> Explanatory statement of the new law BT-Drs. 15/1487, 24.

<sup>79</sup> Sec. 10 para. 2 UWG 2004.

<sup>80</sup> Sec. 10 para. 2 UWG 2004.

<sup>81</sup> Sec. 16 UWG 2004.

<sup>82</sup> Sec. 263 StGB.

<sup>83</sup> Sec. 17, 19 UWG 2004.

<sup>84</sup> Sec. 18, 19 UWG 2004. *Cf.* sec. 17, 18, 20, 20a UWG of 1909.

<sup>85</sup> Sec. 14 para. 1 UWG 2004. *Cf.* sec. 24 UWG of 1909.

<sup>86</sup> Sec. 14 para. 2 UWG 2004.

<sup>87</sup> Sec. 15 UWG 2004, *cf.* sec. 27a UWG of 1909.

#### D. Critical Evaluation

The new UWG seems to strike a careful balance between entrepreneurial flexibility and protection for consumers and other competitors. However, some newly enacted provisions have been criticized, such as the lack of standing for individual consumers. The remainder of this article discusses these asserted deficiencies.

##### I. No Obligation to Inform

Starting with likely criticisms of the UWG 2004 from the consumer's point of view, it can be argued that the lack of comprehensive obligations to inform results in insufficient protection.<sup>88</sup> Such obligation to inform would have clearly benefited the consumer. This advantage, however, would have been outweighed by the constraints on competition. Furthermore, comprehensive obligations to inform were not really necessary, since the consumer is already sufficiently protected by the numerous prohibitions of Sec. 3-7 UWG 2004.<sup>89</sup> Moreover, comprehensive obligations to inform would have been inconsistent with the parliament's acknowledgment that the consumer is a self-responsible and prudent person.<sup>90</sup> Since the European Court of Justice also adheres to this impression of a consumer,<sup>91</sup> the absence of such obligation to inform was also consistent with European standards.

##### II. No Special Right of Revocation

The new law has also been criticized for failing to provide for a consumer's right of revocation.<sup>92</sup> However, the creation of such a right in the UWG was not needed. Indeed, while the UWG 2004 does not itself recognize a right of revocation, a consumer is not necessarily bound to a contract. Rather, the *Bürgerliches Gesetzbuch* (BGB - Federal Civil Code) grants rights of revocation in the case of unfair acts of business. The consumer has a right of revocation pursuant to Sec. 312 and 312d BGB. Furthermore, the provisions implementing the e-commerce directive in na-

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<sup>88</sup> See, e.g., Federation of German Consumer Organisations (vzbv), [http://www.vzbv.de/start/-index.php?page=themen&bereichs\\_id=5&themen\\_id=24&mit\\_id=407&task=mit](http://www.vzbv.de/start/-index.php?page=themen&bereichs_id=5&themen_id=24&mit_id=407&task=mit).

<sup>89</sup> Günter Zettel, *Verbotstatbestände im neuen UWG*, MONATSSCHRIFT DES DEUTSCHEN RECHTS 1099, 1102 (2004).

<sup>90</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 19.

<sup>91</sup> EuGH GRUR Int. 1998, 795 - Gut Springenheide; EuGH GRUR Int. 1999, 345 - Sektkellerei Kessler; EuGH GRUR 2003, 533 (536) - Pippig Augenoptik/Hartlauer.

<sup>92</sup> Federation of German Consumer Organisations (vzbv), [http://www.vzbv.de/start/index.php?page=themen&bereichs\\_id=5&themen\\_id=24&mit\\_id=407&task=mit](http://www.vzbv.de/start/index.php?page=themen&bereichs_id=5&themen_id=24&mit_id=407&task=mit).

tional law grant protection for unwanted advertisement. Moreover, the guarantee provisions of soundness protect the consumer against insufficient information. Courts may also find lack of proper quality of goods<sup>93</sup> if the purchased good does not fulfill the promises made by the entrepreneur.<sup>94</sup> Considering this broad bundle of revocation rights, the legislator has rightly avoided the creation of a special right of revocation in the UWG 2004.

### *III. No Standing for Consumers*

Within the legislative procedure, some drafters of the UWG argued that the reenactment should have provided standing for consumers.<sup>95</sup> Yet, enforcement considerations did not require such a right. In fact, consumers have standing and are not left unprotected since they can initiate a suit by way of consumer's associations. In the past, such associations have effectively protected individual consumers. It is also extremely doubtful that, if individual consumers had standing, the UWG could be better enforced. Given the burden of preparing for trial and the related expenses for legal advice, it is unlikely that individual consumers would enforce such individualized rights (even if provided the legal opportunity to do so).

### *IV. Profits only for the Federal Treasury*

Within both the legislative proceedings and the legal literature, the newly-created right to claim the violating party's profits has been the most controversial topic for discussion.<sup>96</sup> It was argued that Sec. 10 UWG 2004 should allow claimants to keep the profits, since the transfer to the Federal treasury involves a cumbersome bureaucracy that will result in additional costs.<sup>97</sup> This argument is not convincing. Because it can make use of the civil proceedings initiated by private entities, the Federal treasury actually saves costs when spared the expense of claiming profits directly from the violating party.

However, criticism of the right to claim the violating party's profits is apposite insofar as the claimant bears the costs of litigation while the Federal treasury reaps

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<sup>93</sup> See sec. 434 paras 1, 3 BGB.

<sup>94</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 14 f.

<sup>95</sup> Explanatory statement of the new law, BT-Drs. 15/1487, 22.

<sup>96</sup> Astrid Stadler/Hans-W. Micklitz, *Der Reformvorschlag der UWG-Novelle für eine Verbandsklage auf Gewinnabschöpfung*, WETTBEWERB IN RECHT UND PRAXIS 559 (2003); Stefan Engels/Thomas H. Salomon, *Vom Lauterkeitsrecht zum Verbraucherschutz – UWG-Reform 2003*, WRP 32, 42 f. (2004).

<sup>97</sup> Statement of the Bundesrat, BT-Drs. 15/1487, 34.

the rewards. It was stressed that this transfer of profits may lessen consumer's associations or competitors' will to sue.<sup>98</sup> Although the UWG might be better enforced were claimants to receive the profits, the former number of claims does not support such fears.<sup>99</sup> If all profits belonged to the claimant, the right to claim the violating party's profits would be rendered into some form of punitive damages. Such a transformation would be contrary to the entire German civil law.<sup>100</sup> Instead, an acceptable compromise would have been to grant claimants some percentage of the profits. Without such claimant incentives, it is doubtful that the new right to claim the violating party's profits will fulfill its very purpose – the resolution of enforcement inefficiencies with regard to negligible individual damages. Indeed, the absence of such benefits leads to a prediction that the provision will remain an inefficient paper tiger.<sup>101</sup>

#### V. *Opt-in Solution*

The new law has chosen the opt-in solution to regulate direct marketing.<sup>102</sup> "Opt-in" means that direct marketing is only permissible with a consumer's prior consent. Alternatively, direct marketing could have been declared permissible, provided that the consumer has the right to end the marketing at any time ("opt-out" solution). It could be argued that the opt-in solution is not liberal enough and, in fact, constrains innovative commercial practices. Since EU-law did not require such a conservative solution, most other European countries have more liberal laws.<sup>103</sup> Thus, the opt-in solution may involve the spectre of a distortion of competition within Europe.

Supporters of the opt-in solution have argued that merely allowing consumers the right to end the call (the opt-out solution) would have been insufficient consumer protection.<sup>104</sup> Theoretically, consumers may end the call at any time. In practice,

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<sup>98</sup> Statement of the Bundesrat, BT-Drs. 15/1487, 34 f.

<sup>99</sup> Statement of the Bundesregierung, BT-Drs. 15/1487, 43.

<sup>100</sup> Stefan Engels/Thomas H. Salomon, *Vom Lauterkeitsrecht zum Verbraucherschutz – UWG-Reform 2003*, WETTBEWERB IN RECHT UND PRAXIS 32, 43 (2004).

<sup>101</sup> Astrid Stadler/Hans-W. Micklitz, *Der Reformvorschlag der UWG-Novelle für eine Verbandsklage auf Gewinnabschöpfung*, WETTBEWERB IN RECHT UND PRAXIS 559, 562 (2003); Günter Zettel, *Das neue Gesetz gegen den unlauteren Wettbewerb*, MDR 1040, 1043 (2004).

<sup>102</sup> Sec. 7 para. 2 no. 2 UWG 2004.

<sup>103</sup> Statement of the Bundesrat, BT-Drucks. 15/1487, 31 f.

<sup>104</sup> Also see the current case law. See Explanatory statement of the new law, BT-Drs. 15/1487, 21. Statement of the Bundesregierung, BT-Drs. 15/1487, 42.

though, it might be difficult to do so, particularly if consumers are elderly persons. Moreover, it was emphasized that efficient protection of privacy does not allow for a mere opt-out solution. Up to this point, it has been stressed that privacy is strongly protected by the constitutional right to the free development of one's personality provided by Article 2 para. 1 of the *Grundgesetz* (GG – Basic Law / Constitution), especially as that right interacts with the right to human dignity protected by Article 1 para. 1 GG.<sup>105</sup> Correspondingly, it was rightly concluded that direct marketing requires prior consent. By installing the phone line, the consumer does not impliedly permit solicitation. Rather, it must be assumed that the installation occurred for private, and not commercial, purposes. The force of this logic is especially apt in the context of a market comprised of a multitude of entrepreneurs that can constantly solicit unwilling consumers. One might further contend that privacy is already disturbed in the minute that the consumer answers the call. In this scenario, the opt-out solution only provides the means to halt an ongoing violation of the right of personality; it can neither prevent nor undo the infringement. Thus, from a constitutional point of view, the opt-in solution is the proper regulating method for direct marketing by phone.

Additionally, economic considerations do not militate against the opt-in solution. There are two reasons why it is doubtful that there will be a negative impact on the German market with the opt-in solution. First, entrepreneurs who decide to use the German market are likewise bound to the UWG. Second, entrepreneurs employing direct marketing usually operate outside of Germany. In these respects, the opt-in solution will not have detrimental effects on investments in a German direct marketing industry.

### E. Conclusion

The revised UWG 2004 profits both entrepreneurs and consumers. The act stands for flexibility and liberalization. It is more clearly arranged than the former law and thus more transparent. This added transparency does not, however, sacrifice the flexibility requisite to coping with new challenges resulting from new business practices. The UWG 2004 allows the offer of goods in attractive ways, but still guarantees consumer protection. Compared to the old law, the new UWG is an acceptable framework for the regulation of business practices. Indeed, the careful work that characterizes this framework may yet fulfill the large ambitions of its drafters to spur the German economy by transforming it into a flexible business location.

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<sup>105</sup> Explanatory statement of the new law BT-Drs. 15/1487, 21, 42.