The New Unfair Competition Act

On 12 December 2007, the 2007 Amendment to the Act Against Unfair Competition entered into force in Austria, aimed primarily at implementing the Unfair Commercial Practices Directive. Apart from the Act on Deregulating Competition of 1992, this amendment constitutes the most important change to the Unfair Competition Act since it first became effective in 1923. Legislators opted to transpose the EU directive by copying most of its details so that the act now includes terms and wordings that have so far been alien to our legal system and may thus, at least in part, require a considerable effort at elucidation.

The 2007 Amendment to the Act Against Unfair Competition ("UWG") was triggered by Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market. The directive aimed at improving consumer protection ("B2C" in newspeak), so that it could have been transposed in the Consumer Protection Act. Legislators chose the Unfair Competition Act instead so that the innovations cover both B2C transactions and the relationship between competitors ("B2B").

Rather than "Sittenwidrigkeit" (violation of bonos mores), the Act now refers to unfair commercial practices which are suitable to affect competition "not just to an insignificant extent" or "substantially" affect the behaviour of the average consumer. Whether a change in terms brings about any change in content is still uncertain; jurists certainly maintain that this has introduced an objective measure of what is unfair, while a judgment regarding violation of bonos mores was based on a subjective measure. This distinction may become important in the large category of cases involving non-contractual breach of the law: according to previous rulings, an infringement of regulations under administrative law (such as the Industrial Code) also constituted an infringement of Section 1 UWG, except when there were good reasons to justify an (objectively incorrect) legal opinion. If the subjective element is no longer relevant, an infringement involving unfair competition will still be committed even when good reasons for another interpretation can be forwarded. In order to prevent any minor violation from leading to an unfair competition action, the courts might in future no longer perceive such violation as being automatically unfair but might (as they do in Germany) investigate whether the infringed law is actually of a competition-regulating nature. If not, the relevant conduct would not be unfair (except when the infringement is of a systematic and planned nature). Courts could also put greater emphasis on the "relevance criterion" and in the case of minor violations find that they have little effect on competition and consumer behaviour.

Where the law formerly used so-called general clauses that prohibit any conduct against bonos mores or of a misleading nature, the 2007 Amendment has presented us with an itemised "black list" of unfair commercial practices. The catalogue furnishes a detailed enumeration of misleading and aggressive practices, some of them so ludicrous as to make readers smile. Thus, it is deemed an aggressive practice to create the impression that the potential customer is not allowed to leave the premises until a contract is entered, or to explicitly inform the customer that the entrepreneur's job or livelihood is jeopardised if the consumer does not buy the product or service. Such practices were already unlaw-

ful in the past and they are now prohibited per se. The black list is intended to make it easier for lay persons to judge what is and what is not lawful. Since the list is the same throughout Europe it helps internationally operating businesses to review their advertising campaigns in the light of competition laws. Nevertheless, what looks very concrete at first glance becomes rather indeterminate at a closer look. As the list, for all its detail, does not finally regulate aggressive or misleading commercial practices the general clauses remain in place as subsidiary "catch-all" elements, and it will thus be necessary to continue to perform local examinations.

Where previously it was only the conduct before or at the formation of a contract that may have been anti-competitive, this has now been extended, under Para 2 of Section 1a UWG, to commercial practices used after contract formation, e.g. when an entrepreneur tries to prevent the consumer from exercising his/her contractual rights, in particular the right to cancel the contract.

The UWG amendment may well have considerably extended the protection afforded to marks and get-ups. Previously protection under such titles could be obtained only through the Trademark Protection Act and (in the case of acquired secondary meaning) under Section 9 UWG or possibly (in the case of deliberate imitation for the purpose of exploiting a reputation) under Section 1 UWG. As of now, any marketing of a product, including comparative advertising, which risks giving rise to confusion with a competitor's product or trade mark is deemed to be misleading within the meaning of Item 1 of Para 3 of Section 2 UWG. Nevertheless, the decisive criterion continues to be whether confusion is likely to arise; it remains to be seen whether courts will continue their rather restrictive course or will in future be readier to find for the likelihood of confusion.

Another novelty is the extension of the offence pursuant to Section 4 UWG from misleading to aggressive commercial practices. It continues to be an offence to be asserted in a private criminal action by competitors and associations established to promote the economic interests of businesses.

The Amendment was used to repeal Section 6a UWG on deceptive packages. In all its years of existence since its introduction in the early 1980s, this provision played a role in only a single supreme court decision. However, its repeal does not make deceptive packages legal – they are now misleading within the meaning of Section 2 UWG.

Offering and announcing gifts to consumers (and their granting to businesses) continues to be illegal, unless such gifts are covered by an exception pursuant to Para 2 of Section 9a UWG. Accordingly, extras are still basically banned in Austria.

Where formerly the Verein für Konsumenteninformation was authorised to sue only in the case of deceptive advertising practices, it has now been empowered to proceed against aggressive commercial practices as well. Furthermore, the UWG now provides for information on the names and addresses of unsound enterprises to be obtained from mail and telecoms services providers with a view to fighting letterbox companies and straw men. Another novel feature is that the business losing a suit must pay an advance on the judgment publication costs upon application by the victorious party. Previously, winning litigants had to advance the costs before they could recover from the losing party.

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New partners

After three partners (Dr. Barbara Bartlmä, Dr. Martin Bartlmä and Dr. Raimund Madl) left us last autumn, our long-time associates **Ing. Mag. Bernhard Wieczorek, LL.M.** and **Mag. Christian Podoschek** became partners of our law firm at the beginning of this year.

Bernhard Wieczorek is an expert with superior law skills as well as specific knowledge in electrical and mechanical engineering; Christian Podoschek contributes his expertise in bankruptcy and property laws, and both of them are highly welcome additions to our team.

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