

IT Ticker

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Revision of instructions on the right of revocation as of 11 June 2010

The statutory requirements regarding the instructions on the right of revocation in the distance selling business were amended as of 11 June 2010. Annex 1 to Article 246 of the Introductory Law to the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*, EGBGB) now contains standard instructions on the right of revocation, with force of law (sec. 360 para 3 of the German Civil Code, BGB). Therefore, the German courts may no longer dismiss these standard instructions as being inadequate.

Regardless of the above, new standards regarding content have been established. The "Regulations regarding the duties to inform and produce evidence under civil law" (*BGB-InfoV*), to which the instructions previously referred, no longer apply. The relevant duties to inform will in future result from Article 246, sec. 1 to 3 of the EGBGB. Therefore, all references must be adjusted. In addition, sec. 355, para 2 BGB provides that a revocation period of 14 days may also apply in future if the instructions on the right of revocation are not given in text form until conclusion of the contract, at the latest, but rather following the conclusion of the contract without undue delay. This relates to Internet auctions (eBay etc.), where it is not possible to give instructions in accordance with the formal requirements until conclusion of the contract, but it applies to all distant sellers. Consumers must, however, be comprehensively in-

structed about the right of revocation before they conclude the contract (such as by instructions on the website). "Without undue delay" means that the instructions must be given on the day after conclusion of the contract, at the latest, e.g. by email. There are also changes to the compensation for lost value pursuant to sec. 357 para 3 BGB.

Practical tip: To avoid legal risks, the new standard instructions on the right of revocation should be used verbatim as of 11 June 2010. Together with notes regarding their design, they can be downloaded from the [Website of the German Federal Ministry of Justice](#). If existing instructions shall continue to be used, these instructions must be adjusted to the current statutory standards. This relates, in particular, to the reference to Article 246 of the EGBGB, instead of the BGB-InfoV.

(Pia Odefey, Munich)

New duties to inform in relation to service providers on the Internet

The "Regulations regarding service providers' duties to inform" (*DL-InfoV*) entered into force on 17 May 2010. The regulations contain new provisions, which must now be observed by all service providers. The key provisions are summarised below.

Prior to concluding the contract or, if no written contract is concluded, prior to rendering the service, a service provider must provide the recipient of the service with the following information in a clear and understandable form:

- guarantees (if any) in excess of statutory warranties;
- if there is a professional liability insurance, details of the insurance, including the name and address of the insurer and the geographic scope of application; and
- details of the multi-disciplinary activities performed by the service provider, details of any existing professional associations with other persons directly affiliated with the service provider and, if necessary, details of the measures taken by the service provider to avoid conflicts of interests.

This information may be directly provided by the service provider to the service recipient, or may be made available at the place of the rendering of the service, or the place where the contract is concluded, such that the information is easily accessible by the recipient, or may be made

available in electronic form through an address provided by the recipient, or may be included in detailed information material on the service offered, which is provided to everyone. In addition, prices must be specified in advance in the B2B sector. Violations of the aforementioned duties to inform constitute an administrative offence and may trigger fines of up to EUR 1,000.

By no means does the *DL-InfoV* replace existing duties to inform under commercial, consumer protection, or telecommunications law, all of which continue to apply. Publication duties typical of an industry or profession (such as in relation to lawyers) also continue to apply.

Practical tip: To avoid fines or cease and desist letters by competitors, it is strongly recommended that service providers put the necessary information on their website, or include it in their detailed information material.

(Dr. Daniel Kaboth, Munich)

Admissibility of the use of thumbnails by Internet search engines

Owing to contradictory judgements by various courts regarding the lawfulness of the thumbnails used by Internet search engines, there has been uncertainty in the past. The German Federal Supreme Court (*Bundesgerichtshof*, BGH) has now ruled that the use of copyrighted images in the form of thumbnails (in the relevant case, by Google) is, as a general rule, admissible (judgement of 29 April 2010, case no. 1 ZR 69/08).

While the BGH did not consider the inclusion of the images on a website to constitute an explicit or implied permission to use those images, the court justified the admissibility of the use by Internet search engines on the basis of a "simple" consent. According to the court, such simple consent had been granted, as the holder of the rights was aware of the existence of image-based Internet search engines and had not taken any measures to prevent the images from being found by those search engines. Even though the decision, according to its wording, only relates to image files lawfully put on the Internet, the BGH held within the scope of an *obiter dictum* that Internet search engines are not prohibited from using images unlawfully put on the Internet unless and until they become aware of the unlawfulness.

Practical tip: Owing to the characteristic features of the Internet, to which the holder of the rights deliberately ex-

poses himself, the BGH requires actual safeguards to prevent a use of images by Internet search engines. A mere objection to the use as a thumbnail is not sufficient.

(Julian Westpfahl, Frankfurt a.M.)

Independence of data protection control

In a recent judgement of 1 May 2010 (case no. C-518/07), the European Court of Justice (ECJ) held that the German data protection authorities did not have the required degree of independence, as they are supervised by the state (see *Kamlah*, in *MMR 2007*, Volume 9, V [Current topics], for details). According to the court, Germany had not accurately implemented the EU Directive regarding the protection of individuals in the processing of personal data and the free movement of data. Thereby, the court allowed an action based on the failure to fulfil an obligation, which had been initiated by the European Commission.

According to the court, data protection control authorities must be able to perform their functions with "complete independence". This does not only exclude the exertion of influence on the part of the controlled entities but also any (direct or indirect) orders or other external influences. As Germany exercises state supervision of the control authorities competent for the monitoring of personal data in the non-public area, that requirement of the Data Protection Directive had been implemented inaccurately.

Practical tip: The judgement strengthens the position of the data protection control authorities, and this will certainly affect regulatory practice. Data protection issues will, therefore, move to the fore.

(Dr. Wulf Kamlah, Frankfurt a.M.)

Safe Harbour Principles – Resolution by the Düsseldorf Circle in April 2010

Basically, the level of data protection in the USA is not adequate in comparison with the EU. Therefore, in principle, personal data may not be transmitted to recipients in the USA. To facilitate the transmission of personal data to the USA in a legally secure manner, the "Safe Harbour Principles" were agreed between the EU and the USA. If a business enterprise submits itself to the Safe Harbour Principles, an adequate level of data protection in line with the requirements set by the EU Data Protection Directive is assumed. Then, the transmission of personal data is admissible, if that would also be the case within the EU.

The supreme data protection supervisory authorities of the German federal states (the "Düsseldorf Circle"), however, have identified defects in the enforcement of the Safe Harbour Principles. Therefore, the *Düsseldorf Circle* requires from German data-exporting businesses that specific minimum criteria in relation to the recipients of data in the USA must be verified and documented. The German data exporter must verify, in particular, whether a recent Safe Harbour self-certification exists, and if it is actually being complied with. In addition, the US data recipient must substantiate the manner, in which it complies with its duties to inform the subjects of the data processing.

In case of doubt as to the compliance with the minimum criteria, the *Düsseldorf Circle* recommends that the EU standard contractual clauses, or binding corporate guidelines, be used, and that the Safe Harbour Principles should not be relied on. In addition, the German data exporter should inform the competent supervisory authority.

Practical tip: The transmission of personal data to the USA ought to be carefully protected by way of a contract. In addition, the minimum criteria ought to be verified in relation to Safe Harbour enterprises.

(Dr. Oliver Bühr, Frankfurt a.M.)

New EU standard contractual clauses for data processing in third countries

The new EU standard contractual clauses for the transfer of personal data to processors established in third countries entered into force on 15 May 2010. These clauses will now facilitate a simplified procedure in relation to the involvement of subcontractors.

While the data exporter had previously been required to agree the EU standard contractual clauses with each individual subcontractor, sub-subcontractor etc. in order to warrant an adequate level of data protection with the recipient in the third country, it is now possible to carry out "chain" commissioned data processing: Under the new EU standard clauses, the data recipient will be obliged to impose on the sub-contractor (etc.) the same contractual duties, and to obtain from the data exporter the prior consent to the subcontracting. In practice, the new EU standard clauses apply, for example, if a German business has its customer data stored and processed by a US data processor, and the latter, in turn, uses a subcontractor in India.

Practical tip: From now on, any new commissioned data

processing relationships must be based on the new EU standard contractual clauses. Existing agreements may be continued on the basis of the old EU standard contractual clauses, unless there are changes to the type of the processed data, or the scope of the processing. In such case, the new EU standard contractual clauses will apply.

(Dr. Matthias Nordmann M.A., Munich)

German Federal Supreme Court: An Internet system agreement is a contract for work

Within the scope of a judgement regarding the question whether the agreement of a duty to render an advance performance is admissible under the laws on General Terms and Conditions of Business in relation to the customer of a web service provider (judgement of 4 March 2010, file no. III ZR 79/90), the BGH dealt with the legal classification of Internet service agreements and also expressed its view on a number of other typical "Internet agreements" (e.g., Access, ASP, webspace).

In the relevant case, the creation and support of a website, the registration of a domain, web hosting, and the set-up of e-mail accounts had been agreed. The BGH considered the main objective of the agreement to be the (future) accessibility of the website so created. According to the court, all other components of the agreement served that objective, so that the agreement as a whole must be considered to be a contract for works.

The decision is also important against the background of the judgement regarding the application of the law on contracts of sale to agreements for the delivery of movables (judgement of 23 July 2009, file no. ZR 151/08, see also our IT Ticker no. 14). Owing to the duty to examine and notify defects stipulated in sec. 377 of the German Commercial Code (*Handelsgesetzbuch*, HGB), businesses might lose warranty rights. In its current judgement, the BGH focuses on the question whether there is a duty to "deliver" in relation to the website and software.

Practical tip: It is of particular importance for business enterprises to ensure that unequivocal contractual arrangements regarding warranty are made in Internet system agreements, as they might otherwise lose their warranty claims. General references to the laws on contracts for work will not be sufficient.

(Nikolaus Bertermann, Berlin)

Internal

SKW Schwarz, Frankfurt: Practice Update - IT law

On 16 June 2010, a "Practice Update - IT law" will take place in "Villa Kennedy" in Frankfurt am Main; by that update, we will inform you of current developments and case law relating to IT law.

Lecture at the *Mobile Summit 2010*

Stefan Schicker will give a lecture on 1 July 2010 in Düsseldorf regarding "Legal pitfalls in Mobile Commerce" in relation to General Terms and Conditions of Business, advertising, data protection, and Mobile Commerce, etc..

Lectures at the 11th Autumn Academy 2010 of the DSRI

The Autumn Academy of the DSRI will be held from 8 to 11 September 2010 in the *Künstlerhaus* in Munich. Martin Schweinoch will present current case law regarding the classification as contracts of agreements for the creation of software and transfer agreements. Udo Steger will give a legal and practical overview of the new EVB-IT system delivery. Both lectures will be given on 10 September 2010.

Workshop - "Law regarding IT contracts for non-lawyers"

Martin Schweinoch will give a lecture on 23 September 2010 at the workshop, "Law regarding IT contracts for non-lawyers", of *BITKOM-Akademie* in Frankfurt/Main. BITKOM member enterprises will be granted a discount.

Workshop - "Software and hardware agreements in practice"

Martin Schweinoch will give a lecture on 27 October 2010 at the workshop, "Software and hardware agreements in practice", of *BITKOM-Akademie* in Frankfurt/Main. BITKOM member enterprises will be granted a discount.

Comments in "Data Protection Comments"

In the middle of 2010, the 42nd supplement of the work edited by Bergmann/Möhrle/Herb will be published, to which Dr. Wulf Kamlah has made contributions.

"Internet Law": Latest supplements

In September 2010, the 28th supplement of the work edited by Prof. Dr. Mathias Schwarz and Dr. Andreas Peschel-Mehner will be published.

Awards

In the supplement to *Handelsblatt*, "Legal Success", of 27 May 2010, our Practice Group members, Dr. Daniel Kaboth and Dr. Matthias Nordmann M.A., were named in

the category, "Best Lawyers - IT Law". "Corporate Intl Magazine" has named SKW Schwarz as "Full Service IP Law Firm of the Year in Germany" for 2010.

Other newsletters of SKW Schwarz

Do you know the other newsletters of SKW Schwarz from our practice groups such as regarding Intellectual Property, Corporate Law or Employment Law? Relevant details can be found at www.skwschwarz.de, „Newsletter“.

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Competent chamber of lawyers: Chambers of lawyers of Berlin, Düsseldorf, Frankfurt a.M., Hamburg and Munich.

The professional regulations may be retrieved at <http://www.brak.de> under the heading "Professional Regulations" - duties to inform pursuant to § 5 German Telemedia Act.

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