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Confectionery Industry Special

2020 edition



Confectionery Industry Special



Topic overview 2020 edition

Current case law on trademark, design and competition law, media & entertainment law, IT & digital business, employment law, tax law as well as commercial and distribution law

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01

Intellectual Property / Competition Law

“Sweet brands” – Current case law at German and European level

1. Decisions on registrability

“A brand is the most valuable property in the world: a corner in people’s memories” (Sir John Hegarty). As in real estate, that space is in high demand – more and more signs are courting attention. Pervading requires a distinctive mark.

The collective memory, the trademark register, therefore contains only space for trademarks which fulfil their proper function: to indicate the identity of the origin of the goods and services designated. The trademark offices have become stricter, especially for “speaking” trademarks: They often reject them on the ground that the public merely understands them as a reference to the goods and not to the manufacturer.

1.1 Unterscheidungskraft von Wortmarken

The Federal Patent Court granted protection to the word mark **VEGIPAN** applied for in respect of bread and confectionery.¹ The vagueness of the foreign-language term “PAN” (Spanish for “bread”) – despite the addition of the abbreviation “VEGI” known in trade for vegetarian products – was not clearly and meaningfully supplemented. On the contrary, it was a grammatically incorrect combination of words from which the foreign word “pan” did not emerge

without constraint. The sign could therefore not be regarded as devoid of all distinctive character.

The Norwegian word **EKTE** (in English: “genuine”) was deemed sufficiently distinctive.² Neither professional circles nor the average German consumer would understand the Norwegian term in its actual meaning. A possible lack of distinctive character abroad was not relevant for registration as a national trademark.

The **PLOMBIR** trademark, registered for dairy products and ice cream, was successfully challenged by a competitor at the General Court of the European Union (GC).³ The term means ice cream in Russian and was therefore merely descriptive of the goods claimed. According to the GC, relevant was the understanding of the Russian-speaking public within the EU.

Registration was also refused for the word **Powerkitchen**.⁴ The term was widely used in trade as a descriptive name for the preparation of particularly energy-rich dishes and could therefore merely serve as an indication that the goods on offer were suitable for the production of energy-rich dishes.

According to the Federal Patent Court, the word combination **Sport Suppe** (“Sport Soup”) was devoid of distinctive character if

1 Federal Patent Court, Decision of 04/03/2019, 25 W (pat) 502/19 – VEGIPAN.

2 Federal Patent Court, Decision of 12/04/2018, 28 W (pat) 597/17 – EKTE.

3 GC, Decision of 12/13/2018, T-830/16 – PLOMBIR.

4 Federal Patent Court, Decision of 07/10/2019, 27 W (pat) 508/18 – Power Kitchen.



it included goods which might be common substances or ingredients of a soup.⁵ The public would understand the term as an indication of the nature of soups or its ingredients if, because of their composition, they were particularly suitable for sports nutrition. On the other hand, the combination of words was sufficiently distinctive insofar as it included “dairy drinks and desserts” which were not normally associated with soup dishes.

The term **Backgold** (“Baking Gold”) was also regarded as descriptive.⁶ The public would understand it as a mere indication that products labelled as such were high-quality bakery products or were used in the manufacture of such products. The word “gold” was used in a variety of ways to refer to the particular quality of a product in the sense of a value proposition. As an example, the court referred to formulations such as “Gilds the moment” (Ferrero Rocher) or “The gold of the Emerald Isle” (Kerry gold).

The application for registration of the word mark **Bremer Osterwiese** (Bremen Easter Meadow) was unsuccessful.⁷ According to the Federal Patent Court, the average public would associate the term with the “Bremer Volksfest” (“Bremen folk festival”), a nationally known local fair. The public would hence understand the term as a mere reference to goods offered for sale or marketed at or in connection with that particular local fair. The room for entrepreneurial creativity for event-related signs is hence very limited.

In the case of the word mark **MYPROTEIN**, the Federal Patent Court refused the registration on the grounds that no indication of origin could be taken from it. On the contrary, the public would understand the designation as an indication for protein-rich foodstuffs individually tailored to consumers, particularly due to the use of the customer approach “My ...,” which was common in advertising.

According to the GC, the trademark **Exxtra Deep** by Intersnack also had a descriptive character for “preserved, dried and cooked fruit and vegetables” and was therefore not capable of being a trademark.⁸ The Board of Appeal of the EUIPO had initially found that the average consumer understood the sign only as an indication of the external shape and quality of the product with particularly

deep grooves (so-called “wave cut”), which were a common feature of chips. The EUIPO had therefore cancelled the already registered trademark only in respect of “vegetable and potato products for snacking purposes produced or prepared by extrusion or pelleting and by other means”. The applicant for cancellation, Pepsico, opposed this and also requested the deletion of “preserved, dried, cooked fruit and vegetables”. The GC found that chips could also consist of dried vegetables and that the sign was therefore descriptive. As a result, the Board of Appeal also cancelled the sign for those goods.⁹

According to the Board of Appeal of the EUIPO, the word sign **Bäckerkruste** (“Baker’s crust”) was also devoid of distinctive character in relation to pastry, in particular bread.¹⁰ A term whose meaning was limited to a simple reference to a particular type of food with a “crust” that had been professionally processed by a baker was not registrable. However, the German Patent and Trademark Office registered the trademark for sandwiches.¹¹

1.2 Word and figurative marks



The Federal Patent Court rejected the word and figurative mark application for **Paletas**. The Spanish expression for “popsicle” was at least sufficiently well known to German professionals in the food industry and had therefore to be understood as a merely descriptive indication of the goods.¹² In the view of the court, the graphic exhausted itself in the display of the claimed goods and remains within the scope of usual advertising. Also adding a geographical

reference “Paletas Berlin” could not help to reach registrability: A generally known geographical location was not capable of establishing the protectability of the sign.¹³

5 Federal Patent Court, Decision of 11/16/2018, 26 W (pat) 2/17 – Sport Suppe.

6 Federal Patent Court, Decision of 05/23/2019, 28 W (pat) 517/18 – Backgold.

7 Federal Patent Court, Decision of 02/21/2019, 29 W (pat) 506/17 – Bremer Osterwiese.

8 GC, Judgement of 11/21/2018, T-82/17 – Exxtra Deep.

9 EUIPO Board of Appeal, Decision of 05/20/2019, R 580/2019-5 – Exxtra Deep.

10 EUIPO Board of Appeal, Decision of 01/15/2019, R 1120/2018-2 – Bäckerkruste.

11 Trademark DE30 2017 027 725 Bäckerkruste.

12 Federal Patent Court, Decision of 05/14/2019, 25 W (pat) 569/17 – Paletas.

13 Federal Patent Court, Decision of 05/14/2019, 25 W (pat) 76/17 – Paletas Berlin.



Hearts are displayed on countless products. It is therefore not surprising that Lidl failed to register the word and figurative mark **For you** in a simple lettering surrounded by a heart.¹⁴ The Board of Appeal of the EUIPO stressed that the sign “resembles a banal gift tag” and

that the applied goods were suitable as gifts.



The EUIPO Board of Appeal also rejected the registration of a graphic illustration of the word combination **Hoch Genuss** (“Great Delight”).¹⁵ The term merely advertised positive properties of the product. The figurative elements were, in view of the EUIPO, common

and barely perceptible besides the word elements. Rather, the “stamp-like” logo had a purely decorative effect on the public and therefore only reinforced the perception of the mark as an indication of quality in the sense of a quality label.



DANISH BY DANISH CROWN was treated with little royalty – the EUIPO Board of Appeal confirmed the rejection of the application.¹⁶ In particular, the mark was deemed devoid of distinctive character by the Board, since the public would regard the sign either as directly

linked to the Danish royal family or as an indication of quality that the goods were worthy of a king. Against that background, the Board of Appeal also considered that there had been an infringement of public order and a deception as to the geographical origin of the goods. Public order required the use of cultural symbols with a positive connotation to be limited. The applicant was unsuccessful in arguing that “Danish Crown” had already been registered 50 times in Europe as a trademark or corporate sign, including similar EU trademarks.



According to the Board of Appeal of the EUIPO, **Golden Organic** was perceived by the public as an indication that the goods were of excellent quality and organic.¹⁷ The simple design elements could not invalidate this impression as well, but seemed rather like an ordinary advertising medium.



The GC confirmed the decision to refuse registration of **PRODUCED WITHOUT BOILING SCANDINAVIAN DELIGHTS ESTABLISHED 1834 FRUIT SPREAD** for fruit spreads.¹⁸ Even the widespread indication “established (...)” at the beginning referring to the company foundation did not enable the public to identify the company behind it.



The Board of Appeal of EUIPO was unable to find that the applied sign **Authentic Bakery Style / MADE EASY** possessed distinctive character.¹⁹

The verbal elements of the sign were immediately understood as a reference to “authentic bakery products” which were easy to consume. Overall, the figurative elements were not sufficiently conspicuous or unusual to alter the sign’s descriptive character.

14 EUIPO Board of Appeal, Decision of 11/16/2018, R 416/2018-2 – For you.

15 EUIPO Board of Appeal, Decision of 09/04/2019, R 673/2019-4 – Hoch Genuss.

16 EUIPO, Decision of 07/23/2019, R 911/2016-1 – DANISH BY DANISH CROWN.

17 EUIPO, Decision of 04/01/2019, R 1932/2018-1 – GOLDEN Organic.

18 GC, Judgement of 09/11/2019, T-34/19 – PRODUCED WITHOUT BOILING SCANDINAVIAN DELIGHTS ESTABLISHED 1834 FRUIT SPREAD.

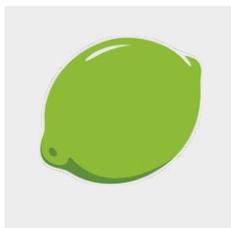
19 EUIPO Board of Appeal, Decision of 10/22/2018, R 604/2018-4 – Authentic Bakery Style / MADE EASY.



1.3 Figurative marks



Two modifications of the typical **Tegut** logo without the lettering of the supermarket chain of the same name were rejected. According to the Federal Patent Court, the public would see a (price) tag or label in the rectangle with three white dots.²⁰ The sign could not be seen as characteristic in account of its tilted position either, since there were already no reference points in the sign which would make the inclination apparent. Likewise, the Federal Patent Court saw a mere tag in the registration of the rectangle without dots.²¹



A complaint by **HelloFresh** GmbH against the refusal to register an image of a lime as a trademark was unsuccessful.²² The sign indicated, in relation to foodstuffs, that the goods in question were specifically intended for lemons or limes.



The EUIPO also rejected a figurative mark of **Jacobs Douwe Egberts** GmbH, showing a green cup.²³ The consumer was confronted with an incredibly large variety of corresponding designs. The sign applied for did not differ significantly from the standard design of a cup.

1.4 Shape marks



Square, practical, ... registrable? The Federal Patent Court had to decide this question in a very lengthy procedure in order to register the naked packaging of **Ritter Sport Schokolade** as a shape mark.²⁴

Background: Ritter Sport had already obtained trademark protection for the packaging of its square chocolate bars without imprint in 1995. The trademarks were then registered on the basis of acquired distinctive character. The Kraft Foods Schweiz Holding had taken successful action against the registration. The Federal Patent Court found that the contested design consisted merely of a (packaging) shape determined by the nature of the goods themselves.²⁵ Such forms should not be monopolized for a competitor. In 2017, the Federal Supreme Court annulled the contested decision following the legal appeal of the trademark owner and referred the proceedings back to the Federal Patent Court. The Federal Patent Court therefore again had to deal with chocolate packaging. This time it had to examine whether the square shape conferred a substantial value on the mark, which conflicted with its protectability. However, since "chocolate bars" were almost exclusively produced and packaged in rectangular form, the square was merely a special shape of the rectangle and did not confer any advantage of use on the product over other packaging, the court found that the special shape did not play a significant role in creating value in that regard. Therefore, it was also deemed innocuous that the company advertised its products with the slogan "Square. Practical. Good." with the special form. Accordingly, the registration of that shape mark was maintained.

20 Federal Patent Court, Decision of 10/11/2018, 25 W (pat) 64/17 – Figure of orange rectangle.

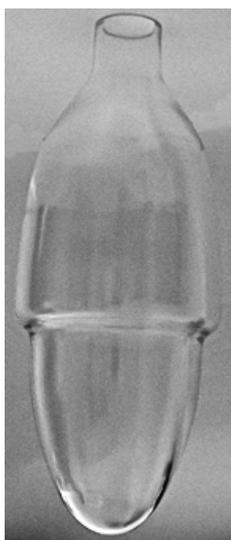
21 Federal Patent Court, Decision of 10/11/2018, 25 W (pat) 65/17 – Figure of orange rectangle with three dots.

22 EUIPO, Decision of 03/04/2019, R 1709/2018-2 – Figure of lime.

23 EUIPO Board of Appeal, Decision of 01/08/2019, R 1682/2018-2 – Figure of Green cup.

24 Federal Patent Court, Decision of 12/13/2018, 25 W (pat) 78/14 – Chocolate packaging Ritter Sport II.

25 Federal Patent Court, Decision of 11/04/2016, 25 W (pat) 78/14 – Chocolate packaging Ritter Sport I.



The GC takes the view that an amphora-like vessel can be distinctive and has therefore annulled the contrary decision of the EUIPO Board of Appeal in the **Wajos** case.²⁶ In the present case, the “bead” of the receptacle of the mark applied for, which was unusual in the sectors concerned, gave it an unusual character. The mark was therefore sufficiently distinctive, particularly since the goods were sold in scale replicas of those containers and were thus marketed in a particularly recognisable manner.

1.5 Reputation through use



In the dispute over the registration of the 3D trademark for **KitKat** (Nestlé), the European Court of Justice (ECJ) confirmed a decision of the GC²⁷ stating that the chocolate bar was not registrable.²⁸ The question the court had to answer was by when a mark had acquired distinctive character through use with the result that the public understood it as an indication of origin. The ECJ ruled that the trademark owner had to prove that the trademark was “well established” in all EU member states, i. e. sufficiently well known. However, proof of distinctive character did not necessarily have to be provided individually for each Member State. On the contrary, it could already be substantiated if several Member States were grouped together in the same distribution network and, for strategic marketing reasons, treated as a single and uniform market. Nevertheless, the decision sets high hurdles for the registration due to an enforcement of the mark. Even the lack of recognition in a single country, such as Malta, leads in case of doubt to the conclusion that the trademark in the EU as a whole does not have acquired distinctive character.

2. Conflicts between trademarks

Once the hurdles to registration have been overcome, this does not mean that the path for the trademark is already clear. Trademark offices and courts are particularly occupied with conflicts with older trademarks. There is a likelihood of confusion with an earlier trademark if the consumer might believe that the goods in question originate from the same company or, if applicable, from economically connected companies. The courts focus on the understanding of an average consumer who is reasonably well-informed and reasonably observant and circumspect.

2.1 Likelihood of confusion of word marks

The proprietor of the word mark **Naturherz** failed with an opposition against the trademark **NATUREX**.²⁹ The common features of the marks compared were essentially limited to one element which was not capable of protection. The immediately recognisable conceptual content of the earlier sign also overshadowed the phonetic similarities to such an extent that a likelihood of confusion was sufficiently neutralised.

An opposition of the trademark **HELLO** against the registration of **Hello Cupcake** was also unsuccessful.³⁰ According to the Federal Patent Court, the word marks differed substantially in their overall impression due to the additional component “cupcake”. Even in the case of goods such as cakes, that component did not lose its relevance due to its little distinctive character. The combination of the terms in order to form a consistent overall expression (“Hallo kleiner Kuchen”; in English: “Hello little cake”) argued against a sole imprint by “Hello”.

The Federal Patent Court confirmed the partial cancellation of the word mark **Honeysun** for certain goods in Class 31, including fruit and plants.³¹ With regard to the earlier identical mark **Honeysun**, registered inter alia for tea and vinegar, a partially only slight similarity of goods was sufficient. This was still applicable here, since tea could be made from forestry and garden products. Fruit, in turn, was used for fruit vinegar.

26 GC, Judgement of 10/03/2018, T-313/17 – Form of a container.

27 GC, Judgement of 12/15/2016, T-112/13 – Kit cat 4 fingers.

28 ECJ, Judgement of 07/25/2018, C-84/17 P, C-85/17 P, C-95/17 P – 4 Finger KitKat.

29 Federal Patent Court, of 02/14/2019, 25 W (pat) 90/17 – NATUREX.

30 Federal Patent Court, of 05/14/2019, 27 W (pat) 522/17 – Hello Cupcake.

31 Federal Patent Court, of 03/13/2019, 28 W (pat) 553/17 – Honeysun.



2.2 Likelihood of confusion of word and figurative marks



The Federal Patent Court did not see any likelihood of confusion between **PURE chocolate** and the earlier word and figurative mark **pure CHOCOLATE DRINK** by Tchibo.³² The overall written and visual impression already differed significantly because of the basic shape – round versus rectangular – and the display of cocoa fruits in the opposing mark. Conceptually, the opposing mark was, in view of the court, merely descrip-

tive and therefore can not give rise to a risk of confusion.



The Federal Patent Court did not find any likelihood of confusion between the word and figurative mark **barösta kaffeobar** and the earlier word mark **Rösta** by Norma either.³³ Despite being distributed in Norma food markets the earlier mark was considerably less well-known than

other coffee trademarks. With regard to the descriptive appeal of the mark, the court therefore classified “Rösta” as having a below-average distinctive character. The marks at issue were clearly distinguishable both visually and phonetically due to the recognisably different word lengths (five to seven letters and two to three syllables) and the strikingly different word beginnings. Conceptually, the court found a significant difference in the fact that the mark applied for did not refer to the process of “roasting” but rather to the profession of barista and espresso bars in general.



The Board of Appeal of the EUIPO stated that the mark applied for **TIRABACI** was not distinguishable for the consumer from the opposing trademark **BACI**.³⁴ Indeed, the signs conceal different Italian terms: “baci” means kisses, whereas “tirabaci” designates a person

who attracts kisses. However, parts of the public in the EU unaware of that meaning would assume that the goods bearing the trade-

marks come from the same company. With regard to the coincidence in the second part of the word “baci”, the customary nature of sub-brands and the average consumer’s attention, the marks were not sufficiently distinctive.



According to the Board of Appeal of the EUIPO there also consists a likelihood of confusion between the word and figurative marks **Frostino** and **FROSTA**.³⁵ Here, the principle applies according to which the public pays more attention to the word elements of word and figurative marks than to figurative elements. In Italy, for example, the English word “frost” is not part of the basic vocabulary, which is why “FRoSTA” does not only have slight distinctive character. The consumer

might therefore consider the mark applied for, “Frostino”, to be only a “special version” of the registered mark “FRoSTA” for certain goods. According to the Board of Appeal this was also supported by the fact that the ending “-ino” was used as a “miniaturization” in Italian.



A Russian trademark owner successfully intervened before the Board of Appeal against the registration of a similar figurative mark of a competitor. According to the board, the main characteristic of both signs was the figurative representation of the “Little Red Riding Hood” since the Russian characters were not understood by the public. Visually, the brands could be considered similar in terms of layout, colours and accessories such as basket and flowers, so that there was an “overwhelming” similarity. The inconspicuous word elements arranged sideways did not change this conception. In

fact, the challenged mark gave the impression of a mere “modernization” of the earlier mark.³⁶

32 Federal Patent Court, Decision of 11/15/2018, 25 W (pat) 598/17 – pure chocolate.

33 Federal Patent Court, Decision of 03/22/2019, 27 W (pat) 116/16 – barösta coffee bar.

34 EUIPO Board of Appeal, Decision of 10/10/2018, R 278/2018-1 – TIRABACI.

35 EUIPO Board of Appeal, Decision of 02/06/2019, R 1663/2018-2 – FROSTINO.

36 EUIPO Board of Appeal, Decision of 07/08/2019, R 2496/2018-5 – Krasnyj.



The Board of Appeal of the EUIPO found that there was no likelihood of confusion between the earlier word mark **Trader Joe's** of Aldi Einkauf GmbH and the word and figurative mark applied for **Potato Joe**.³⁷ Indeed, the goods were partly similar, such as potato chips and taco chips. Also, the differing elements “potato” and “trader” were only descriptive or slightly distinctive. Nevertheless, the concordance only in the word element “joe” was not sufficient to give rise to a likelihood of confusion. From the point of view of the public, “Potato Joe” and “Trader Joe” clearly depicted different persons or “sellers”.



Haribo lost its case against the chocolate manufacturer Ludwig Schokolade concerning the registration of the word and figurative sign **FRIZZI** because of its great similarity to the earlier mark **FRITTIS**.³⁸ According to the Board of Appeal of the EUIPO, the signs were phonetically very similar: they had the same number of syllables, the same rhythm and a very similar emphasis. Also, the first syllable was pronounced the same and the second in a very similar way. Finally, they shared the sound of the letters “t”, “i” and “s”.



The Board of Appeal of the EUIPO found that the earlier word and figurative mark **delikato** by Aldi and the word mark **DELCATO** which was applied for were phonetically highly similar.³⁹ Both the beginning of the word and the last two syllables were identical. The earlier trademark only had an additional syllable because of the additional “i”. In any case, there was conceptual similarity for parts of the public who understand both signs as an allusion to the word “delicacy”. Consequently, the Board of Appeal found that in principle there was a likelihood of confusion. However, the board denied the likelihood of confusion concerning the goods “wedding cakes” which regis-

tration was sought since there was no similarity with the savoury goods covered by the earlier mark.

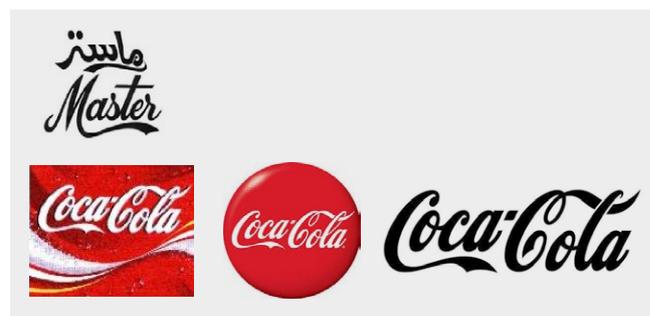


Lindt's opposition based on its word mark **Excellence** against the registration of the word and figurative mark **Eggcellence** was rejected.⁴⁰ Regarding confectionery, the visual appearance of marks was at the center of attention. The trademark applied for had very little similarity with the earlier mark due to the different word beginnings, which were particularly striking to the public, and therefore did not indicate likelihood of confusion.



While Intersnack had successfully filed an opposition based on its **Kelly's** trademark against the registration of the trademark **Welly** before the EUIPO in 2017, the company now had to take a defeat before the GC.⁴¹ Unlike the EUIPO, the Court did not identify any likelihood of confusion. The differences in the initial letters “w” and “K”, the apostrophe “s” only given for the “Kelly's” trademark and the fact that the two words were very short and therefore easily remembered by the public spoke against similarity. In addition, the EUIPO considered the signs to be significantly different on a visual level.

2.3 Exploitation of trademark reputation



37 EUIPO Board of Appeal, Decision of 05/16/2019, R 1722/2018-1 – Potato Joe.

38 EUIPO Board of Appeal, Decision of 04/26/2019, R 1813/2018 – FRIZZI.

39 EUIPO Board of Appeal, Decision of 10/23/2018, R 2169/2017-5 – DELCATO.

40 EUIPO Board of Appeal, Decision of 06/20/2019, R 359/2019-5 – Eggcellence.

41 GC, Judgement of 11/29/2018, T-763/17 – Welly.



Coca-Cola prevailed before the EUIPO against its Syrian competitor Mitico for taking unfair advantage of the reputation of its trademarks. After the GC had already objected to a decision of the EUIPO in 2014 and had found a relevant similarity between the trademarks,⁴² the EUIPO Board of Appeal again dismissed Coca-Cola’s action for exploitation of the trademark on the grounds that it was still unclear how the **Master-Cola** trademark would be used in the EU. Thus, it was not yet possible to establish any exploitation of the trademark reputation. The GC again overruled this decision and found that it had been taken advantage of the reputation of the well-known trademark.⁴³ It was inevitable that the trademark, which had previously only been used commercially in the Arab world, would be associated with Coca-Cola. It was necessary to take into account how the product was marketed outside the EU in order to represent the prospective use of the sign in the EU.



With regard to such use (see illustrations), the risk of taking advantage of the reputation of the Coca-Cola trademark was not only hypothetical, particularly since the proprietor of Master-Cola had not claimed to intend to use the trademark in a different way in the EU.

3. Conflicts with geographical indications and designs

In addition to purely trademark-related conflicts, there are further possible infringements that should be considered in the confectionery industry. Product names, for instance, may infringe geographical indications.



In 2012, the French Champagne Association brought an action against the use of **Champagner Sorbet** for ice cream arguing that it was infringing the protected geographical indication “Champagne”. The Federal Court of Justice presented the question regarding the scope of protection of a protected geographical indication to the ECJ. The ECJ ruled that the use of “Champagner Sorbet” did not constitute unjustified exploitation if the ice cream was substantially characterized by a taste produced mainly by champagne.⁴⁴ Accordingly, two conditions must be met: first of all, the product must taste like champagne, whereby a “wine product-like” taste is sufficient. Secondly, this taste must originate from champagne as an ingredient and not from food flavours.

The Federal Court of Justice ordered the Court of Appeal to make new findings on whether the ingredient champagne was flavour-determining for the ice-cream. If it was not, the use of the geographical indication was likely to be qualified as misleading. The Federal Court of Justice also clarified that the plaintiff, the French Champagne Association, had to prove that the ingredient champagne was not determining the taste of “champagne sorbet”. In a second step, which might require the obtaining of an expert opinion, the origin of the taste had to be investigated.⁴⁵

Finally, conflicts can also occur between trademarks and designs, so that not only trademark searches but also design searches should be carried out before launching a new product.



The owner of the trademark **Ozmo Cornet** successfully filed an opposition against the registration of two designs under the name

42 GC, Judgement of 12/11/2014, T-480/12 – Master.

43 GC, Judgment of 12/07/2017, T-61/16 – Master.

44 ECJ, Judgement of 12/20/2017, C-393/16 – Champagner Sorbet.

45 Federal Court of Justice, Judgement of 07/19/2018, I ZR 268/14 – Champagner Sorbet II.



BOBO cornet. In both cases, the GC ruled that the designs were confusingly similar to the earlier mark.⁴⁶ The word elements “ozmo” and “bobo”, standing out in both cases, were very similar in length, sound and at the visual level and followed the same rhythm of speech. For the part of the relevant Bulgarian public which understands the term “cornet” within the meaning of the English expression for the musical instrument “Kornett”, similar to the shape of the product, the two signs were therefore also conceptually similar. The graphical differences could not eliminate those similarities. The Board of Appeal of the EUIPO has meanwhile ordered the cancellation of the designs.⁴⁷

4. Right-preserving use

Trademark protection exists only for trademarks that are actually used. In case of doubt, the use of the trademark for the registered goods must be demonstrated after a grace period of five years in order to obtain the trademark rights. A purely symbolic use is not sufficient. The use must rather be economically sufficient to open up a market, in particular with regard to its geographical area, duration and extent. The mark must also be essentially used in the form that it was recorded in the register with the result that the consumer recognises the registered mark as such on the product.

Starbucks failed in its attempt to oppose the registration of the trademark **FREDDOCCINO MORE THAN ICE AND COFFEE!** since the company was unable to demonstrate that its own word mark **FRAPPUCINO** had been used in a way as to preserve its rights.⁴⁸ The company had submitted a large number of newspaper articles and blog contributions, Wikipedia articles, its own web and social media appearances, advertising material as well as an affidavit from the company’s marketing director containing sales figures. The Board of Appeal of the EUIPO criticised, inter alia, that Starbucks had not submitted any single evidence of sale. The affidavit did not provide any concrete sales figures either, since the information provided only allowed conclusions to be drawn on global sales and not on sales of certain products within the EU. Other documents submitted failed in part because they did not relate to the relevant period.

The case brings to mind the cancellation of McDonald’s European Union trademark **BIG MAC**, which attracted media attention at the beginning of the year.⁴⁹ McDonald’s had only submitted affidavits from company representatives and samples of advertising materials and packaging to prove the sales figures. This was not enough for the EUIPO, despite the turnover of millions. The Trademark Office considered that the scope of use had not been sufficiently demonstrated. In proceedings before the EUIPO it is therefore advisable to submit, in addition to affidavits, invoices or similar objective evidence of the sales generated with the trademark.⁵⁰



The proprietor of various word or word and figurative marks under the collective name **Battista** also failed to prove genuine use, which is why his opposition against the registration of the trademark **Battistino** was rejected by the GC.⁵¹ With regard to the fact that coffee was a mass product, the GC found a turnover of EUR 3,320.54 in the relevant period to be too low. Also the advertising documents submitted by the proprietor might, in general, justify the use of the earlier mark over a certain period of time. However, in the specific case they were geographically limited to a few Italian provinces which was, according to the court, an argument against genuine use.

46 GC, Judgment of 02/07/2018, T-794/16, T-793/16 – Cornet.

47 EUIPO Board of Appeal, Decision of 10/20/2018, R 1334/2018-3, R 1332/2018-3 – BOBO cornet.

48 EUIPO Board of Appeal, Decision of 05/13/ 2019, R 1382/2018-4 – FREDDOCCINO MORE THAN ICE AND COFFEE!

49 EUIPO, Decision of 01/11/2019, 14 788 C.

50 See also the review at <https://www.skwschwarz.de/en/news/articles/detail-of-article/news/schwer-zu-verdauen-euipo-loescht-die-marke-big-mac-von-mcdonald-s/4/detail/News/>.

51 GC, Judgement of 06/06/2019, T 221/18 – BATTISTA.



Opposing mark 1

Opposing mark 2

In the dispute over the use of a figurative mark, SKW Schwarz achieved a victory for the Japanese confectionery group Lotte: The GC dismissed Nestlé’s appeal against the registration of the Lotte application and annulled an EUIPO decision to the contrary.⁵² The judgment is one of the few high court rulings examining the extent to which a trademark must be used in order for use to be considered genuine.

More than ten years of litigation between Lotte, one of Japan’s largest confectionery manufacturers, and Nestlé revolved around cookie packaging depicting koala bears. In 2007, Lotte had

registered a European Union trademark for pastries, biscuits, fine bakery products, etc., which consisted of a figurative mark with koalas. In 2008, then-Nestlé Schöller GmbH & Co. KG objected to said trademark, referring, to packaging bearing the inscription **KOALA-BÄREN lustige Gebäckfiguren Schöller**, (in English: “KOALA BEARS funny pastry figures) for which it had a figurative mark 20 years earlier that also depicts koala bears (opposing mark 1) and a figurative mark containing the word “Schöller Koalas” (opposing mark 2).

Based on Lotte’s motion, EUIPO requested Nestlé to provide evidence of genuine use of the earlier mark, whereupon the company provided various pieces of evidence. The EUIPO Opposition Division initially granted the opposition. Following Lotte’s appeal, however, the Fourth Board of Appeal of EUIPO found that Nestlé had failed to provide legally effective evidence of genuine use of the earlier mark. Over the years, Nestlé had changed the appearance of the packaging, resulting in ten different versions. In 2015, the GC had already ruled that the shape of the packaging used by Nestlé was in part so different from the registered trademark that Nestlé could not rely on trademark protection.⁵³ For the opposing mark (2), the GC did not see in any of the evidence of use submitted a right-preserving use; for the opposing mark (1), the right-preserving use was only recognised with regard to packaging 2A, 5A and 5B.



Product packaging used by Nestlé 2A, 5A and 5B.

As regards the opposing mark (1), the GC found that the dominant features of the mark were the hexagonal shape of the packaging, the word “koala” and the illustration of koalas in their natural environment. Under this premise, the uses shown under 2A, 5A and 5B were right-preserving for the GC. The natural habitat was depicted, although not clearly recognisable. The GC also identified modifications, such as the absence of the terms “bears” and “Schöller”, as well as newly added features, which, however, did not alter the overall impression of the mark. With regard to the nature of use, the GC considered the use to be right-preserving.

The GC rejected all further evidence of use:



Product packaging 7A and 7B.

The product presentations shown under 7A and 7B were not recognised as right-preserving by the GC as the natural living environment of the koalas was hardly visible and newly added elements were dominating.

⁵² GC, Judgement of 07/12/2018, T-41/17.

⁵³ GC, Judgement of 09/15/2015, T-483/12.



Product packaging 10A, 11A and 11B.

Also regarding the packaging shown under 10A, 11A and 11B the GC found that new elements such as the blue mice disguised as pirates were dominating.



Product packaging
7C and 10B

The tubular packaging shown under 7C and 10B was already lacking the hexagonal shape, with the result that the distinctive character of the mark was significantly altered.

Subsequently, a decision was required as to whether the scope of use was sufficient in relation to the two product packaging under 2A and 5A (only for which invoices have been filed). After having been referred back to the Fifth Board of Appeal of EUIPO, the matter was remanded to the GC. In its decision, the GC found that the scope of use was insufficient to demonstrate genuine use of the Nestlé's trademark. Nestlé and its distribution partner "Kuchenmeister" had only been able to submit three invoices for the product packaging at issue for 2003 and 2005 covering some 1,400 units generating sales of 862 euros and some 5,800 units generating

sales of 3,709 euros for those two years. According to the GC, these sales figures were practically insignificant for low-priced goods and could not be regarded as sufficient in the confectionery industry. As a result, the GC accepted Lotte's plea of non-rightful use and dismissed Nestlé's appeal.

On the one hand, the decision of the GC shows that a trademark should ideally be used as originally registered. This sets certain limits to the creativity of marketing. Companies should regularly set up meetings between marketing departments and brand experts to ensure that the appearance of the goods continues to be covered by trademark protection.

Second, the decision confirms that the use of trademarks is only genuine if the level of use is economically sufficient open up a market. Companies should therefore ensure that the sales figures for their goods reach an economically relevant level, or at least document the sales in detail.



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The Best an apple can become – Overview of the registrability of slogans

Slogans continue to enjoy great popularity in the consumer goods industry. Following the groundbreaking judgment of the European Court of Justice on the registrability of “**Vorsprung durch Technik**” (in English: “progress through technology”) for Audi, numerous applicants have apparently been speculating on a more generous registration practice in Germany and Europe. This became apparent in a recent decision of the Federal Patent Court on the protectability of the slogan “**Wir bringen die Zukunft in Serie**” (in English: “We bring the future into series”) by VW.⁵⁴

However, as far as the confectionery and food industries are concerned, most of the proceedings relating to provisional refusals of slogans have been unsuccessful. On the one hand, it may be an issue that everyday products were involved (in contrast to special services for which a slogan such as “**ALLE 11 Minuten**”, in English: “Every 11 minutes”, was recently considered eligible for protection).⁵⁵ On the other hand, the largely negative assessment regarding the protectability may result from the fact that the slogans applied for were simply not suitable to overcome the hurdles set by the higher courts:

It is true that the standards for other word signs are also applicable to slogans. A word sequence, for instance, does not need to be imaginative or follow a certain concept provoking an effect of surprise and, therefore, a memorizing effect. However, the public does not necessarily perceive slogans in the same way as other signs. Word sequences which only contain descriptive statements about the goods and services claimed or which are limited to general promotional claims and advertising statements are therefore devoid of distinctive character.

Nevertheless, a slogan can be an indication of origin if it shows, beyond a mere advertising message, a certain originality or conciseness, requiring a minimum of interpretation effort or setting off a cognitive process in the minds of the relevant public. Indicators of

distinctiveness are, for example, the brevity or ambiguity of an advertising message.

According to the Board of Appeal of the EUIPO,⁵⁶ the slogan “**Das Beste was ein Apfel werden kann**” (in English: “The Best an apple can become”) has a clear meaning for German-speaking consumers in connection with the goods concerned (including fruit drinks, fruit juices and syrups): the statement referred to drinks which contained apples or had an apple flavour and which were particularly good. The composition complied with the rules of syntax and German grammar, which is why the meaning of the statement could be perceived without much thinking or interpretation; the semantic content of the individual words was clear and precise and was not altered in a recognisable way by their combination. The sign conveyed an unambiguous message with a clearly promotional character for the goods claimed. Since it was common practice in advertising to use superlatives (“the best”) to highlight certain products, the consumers would understand the slogan as meaning that the alcoholic and non-alcoholic beverages contained apples or had an apple flavour and were of better quality than the competition.

The common argument that the word order requires interpretation and has several meanings is rejected by the Offices if a sign designates, in at least one of its possible meanings, a characteristic of the goods or services concerned.⁵⁷ Therefore, the overall impression of the mark applied for did not trigger any cognitive process because of the clearly positive advertising statement.

For similar reasons the Board of Appeal of the EUIPO rejected applications for slogans, although there was only – if at all – a distant connection between the signs and the goods applied for. For example, the board held that the slogan “**SHARE KOREAN FLAVOR**” could not be protected.⁵⁸ The public perceived this combination of words as an advertising message or invitation to

54 Federal Patent Court, Decision of 04/12/2019, 28 (W) 33/18 – Wir bringen die Zukunft in Serie.

55 EUIPO Board of Appeal, Decision of 02/14/2019, R 777/2018-5 – ALLE 11 Minuten.

56 EUIPO Board of Appeal, Decision of 10/07/2019 – Das Beste was ein Apfel werden kann.

57 ECJ, Decision of 10/23/2003, C-191/01 P – Doublemint.

58 EUIPO Board of Appeal, Decision of 30/07/2019, R 496/2019-5 – KOREAN FOOD FLAVOR.



consume food and beverages with a special Korean taste. The trademark was therefore devoid of any distinctive character and there was no need for a sufficiently direct and specific connection between the sign and the goods applied for.

The EUIPO could not conclude from the words **“LOVE FOOD AND PLANET”** either, that they were suitable for distinguishing the commercial origin of the goods.⁵⁹ According to the EUIPO, the expression conveyed no more than the general laudatory message that environmental aspects played an important role in production. The slogan therefore did not reach beyond its banal advertising character.

On similar grounds, **“#RETHINK HEALTH”** was rejected.⁶⁰ The public addressed would understand this slogan as an advertising appeal to rethink its own behaviour and to care more about its own health than before. Since the goods applied for had health-promoting properties, there was also a sufficiently direct connection between the goods and the sign. Hashtags were a widespread symbol nowadays, often used for advertising or decorative purposes.

The EUIPO Board of Appeal held that the slogan **“DAIRY FREE. AS IT SHOULD BE”** for, among others, protein drinks, milk substitutes and non-alcoholic drinks did not have any distinctive character.⁶¹ According to a more recent decision, the same applies to the word sequence **“THE ARTISAN DRINKS COMPANY”** for non-alcoholic drinks.⁶² The fact that the application **“Un gout de fou...jusqu’au bout”** for confectionery (in English: “An incredible taste...until the end”) rhymed was not sufficient for the EUIPO Board of Appeal to find that the EU part of the international trademark application had the necessary distinctive character. The EUIPO rather qualified it as a purely promotional statement which did not contain any indication of origin.⁶³

However, marketing strategists must not despair. There are still numerous slogans which are registered without difficulty by the offices in Germany and/or the EU. Examples of class 30 confectionery products include **“Kiss the Cook”**, **“Expedition ins Bierreich”** (in

English: “Expedition to the Beer Empire”), **“MORGEN BEGINNT HEUTE”** (“TOMORROW STARTS TODAY”), **“Daily Business”**, **“Licking for Freedom”**, **“Hero of the Day”**, **“Queen of Green”**, **“Sonnenschein im Glas”** (in English: “Sunshine in a glass”), **“Spießige Früchte”** (in English: “Stuffy fruit”), **“WONDERFUL WORLD”**, **“FROHE NASCH NACHT”** (in English: “HAPPY NIBBLING NIGHT”), **“statt fast food lieber food fasten”** (in English: “fasting food instead of fast food”), **“SPIRIT OF SUMMER”**, **“ORGANIC PEACE FOOD”**, **“ENCHANTED CREAM”**, **“SCHOOL APPROVED”** or **“Drawing Smiles”**.

Although prior registrations in a search – which must be carried out in any case – may provide valuable information, one must not rely on them. This is because once there has been a provisional refusal or an application for cancellation, neither offices nor courts will be impressed by similar prior registrations as there shall not be any binding effect of earlier decisions.

Dr. Oetker also had to learn about this: The slogan **“Qualität ist das beste Rezept”** (in English: “quality is the best recipe”) has been registered as a European Union trademark since 2001 for, inter alia, desserts and numerous other goods in Classes 29, 30 and 31. Oetker had been fighting for a long time for the French version of the European Union trademark **“La qualité est la meilleure des recettes”** for the same and similar goods until the General Court of the European Union (GC) finally refused its registration as a trademark.⁶⁴

As a general rule, advertising slogans that are clearly promotional for the goods or services claimed will generally not be registered. The more original the slogan is and the more it provokes a thinking process, the higher are the chances of registration and thus monopolisation.



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⁵⁹ EUIPO Board of Appeal, Decision of 22/11/2018, R 1198/2018-2 – E AT FOOD LOVE PLANET.

⁶⁰ EUIPO Board of Appeal, Decision of 20/03/2019, R 1607/2018-5 – #RETHINK HEALTH.

⁶¹ EUIPO Board of Appeal, Decision of 10/30/2018, R 997/2018-2 – DAIRY FREE. AS IT SHOULD BE.

⁶² EUIPO Board of Appeal, Decision of 10/09/2019, R 869/2019-4 – THE ARTISAN DRINKS COMPANY.

⁶³ EUIPO Board of Appeal, Decision of 07/10/2018, R 285/2018-2 – Un gout de fou... jusqu’au bout.

⁶⁴ GC, Decision of 02/12/2014, T 570/11 – La qualité est la meilleure des recettes.



Protection of geographical indications via collective marks in dispute

A dispute currently pending before the German Federal Supreme Court will determine the destiny and firepower of a few thousand collective marks, which essentially consist of an indication of geographical origin.⁶⁵

Legally, it is complicated. Indications of geographical origin can be protected in different ways, on the one hand by special regulations, on the other hand by trademark law. In the past, the German legislator in particular used special regulations to protect geographical indications against misleading information about origin and quality. In the meantime, the areas of agricultural products, foodstuffs and spirits have been exhaustively regulated by special EU regulations, which has been confirmed by the European Court of Justice. In these fields, indications that are not protected by EU law, are not protected at all.

But what happens if such collective marks get in the way of European regulations?

The German Federal Court of Justice will have to clarify this question in proceedings brought by the “Bäuerliche Erzeugergemeinschaft Schwäbisch Hall”. This producer organization for agricultural products is the proprietor of such collective marks with geographical content: “**Hohenloher Landschwein**” (“Swabian-Hall Swine”) and “**Hohenloher Weiderind**” (“Hohenlohe beefcattle”). The statutes of the trade marks specify strict requirements for the use of these trade marks with regard to origin, feed and species-appropriate husbandry. A butchery in Hohenlohe did not want to comply with these requirements and sold meat from mass animal husbandry as “Hohenloher Landschwein” and “Hohenloher Weiderind”. Whether the meat came from the Hohenlohe region remained a matter of dispute. The producer group claimed injunctive relief and damages from the butchery on the basis of its collective marks.

The first instance ruled against the producer group. According to the Regional Court, the protection of geographical indications by

the EU regulations is exhaustive in the agricultural sector. But Hohenlohe is not yet protected by such a regulation. Quality requirements could therefore not be introduced and enforced by collective marks. Only a crude misleading as to the origin of the products could be attacked legally, but no such deception could be proven in the specific case.

The Stuttgart Higher Regional Court⁶⁶, as the second instance, initially saw the matter in the same light and wanted to affirm the conclusive character of the EU regulations. It was only the question of the burden of proof for the geographical origin that the Court of First Instance wished to impose on the butchery and rule against it to that extent. Surprisingly, however, in the weeks following the oral hearing the Court was persuaded by the producer association to change and now assumed that the protection of the geographical name and the collective mark coexisted. The oral hearing was reopened – which hardly ever happens in practice – and the Court ruled fully against the butchery. The appeal was not admitted by the Higher Regional Court. However, an appeal for admission was successfully lodged with the Federal Court of Justice. The fundamental question on which the judges in Karlsruhe will now decide has significance for thousands of collective trademarks.

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⁶⁵ Federal Court of Justice, Decision of 05/10/2017, I ZR 163/19.

⁶⁶ Higher Regional Court of Stuttgart, Judgement of 25/07/2019, 2 U 73/18 – Hohenloher Landschwein/Hohenloher Weiderind II.



“Olympia-suspicious” marketing in view of the summer games in Tokyo?

Since Leipzig’s bid for the 2012 Summer Olympics, which took place in London rather than in Leipzig, the industry has repeatedly been concerned with the special legal protection of trademarks under the German Act for the Protection of the Olympic Emblem and Olympic Designations (OlympSchG).

Since the Act entered into force 15 years ago, it has repeatedly led to uncertainty in marketing departments and sometimes hectic calls to the legal departments, alternating between the Summer and Winter Games and in the run-up to the major sporting event. In the aftermath of the respective Olympic Games, the courts often deal with the legal issues of the so called ambusher, who, from the point of view of the German Olympic Sports Confederation (DOSB), seem all too creative by marketing their goods or services in the waters of the Games using “Olympic” images, logos or designations. According to the DOSB or the IOC, the mere associative link between the range of goods and services and the marks reserved for the Olympic Games should be prohibited. So the economic use of the pure thought of the games should be the sole responsibility of the DOSB/IOC.

The Federal Court of Justice has not been comfortable with this idea ever since. Since its first ruling on the OlympSchG in May 2014, which concerned the advertising of contact lenses for “**Olympic Pricing**” and the granting of an “**Olympic discount**”, made it clear how high the bar is for the DOSB, so that advertising can be covered by the protective purpose of the OlympSchG and banned as unfairly exploiting reputations. It is not enough for an advertising recipient to associate “Olympia” and somehow think or be reminded of the Olympic Games. What is required is “an image transfer contrary to the objectives of the Olympic movement”, i. e. a transfer of the “appreciation of the Olympic Games [...] to the goods or services advertised”. This, however, requires quite concrete clues in the individual case and their proof by the DOSB.

The Federal Court of Justice also gave clear instructions to the users of the law regarding the further infringement of the Olym-

SchG, the likelihood of confusion through mental association, which is to be understood and applied as in Trademark Law. There is only a danger of confusion if the advertising gives the impression that there are economic or organizational connections between DOSB/IOC, for which the simple idea of Olympia is not sufficient. The case-law is based on a consumer who distinguishes “between the advertising of a sponsor and other advertising references to the Olympic Games”. In a nutshell: Where the normally informed person recognizes that the advertisement is not an official sponsor advertisement, the OlympSchG does not apply either.

In 2017, the DOSB further failed before the Regional and the Higher Regional Court of Munich with its request to ban an event organiser from using the term “**Bauernhofolympiade**” (“Farmer’s Olympic Games”) for an event at which sporting competitions were held on a farm with materials and equipment typically available there (e.g. hay bales, horseshoes, wheelbarrows). According to the Higher Regional Court, there is no likelihood of confusion here either, because although the word “Olympiade” may trigger associations with the Olympic Games, no one seriously expects there to be economic and organisational links between the organiser of the “Bauernhofolympiade” and the DOSB/IOC.

The DOSB also lost before the Higher Regional Court of Stuttgart, where it fought against the advertising of a retail company in which **round barbecue patties were depicted on a grate (not quite unlike the Olympic rings)** and where a clear reference to the 2016 Summer Games in Rio de Janeiro had been established by a claim and the timing of the advertising.

This narrow radius was again confirmed by the Federal Court of Justice in March 2019 and the advertising with slogan “**olympia suspect**” und “**olympia ready**” was considered permissible.⁶⁷ The BGH also opposes the monetization efforts of the DOSB, which originally has a very strong connection to the Olympic Games, so that the idea of economic organizational connections would not

⁶⁷ Federal Court of Justice, Judgement of 07/03/2019, I ZR 225/17 – Olympic.



have been completely remote – unlike, for example, burger meat patties on a barbecue grill.

In the latest decision of the Federal Court of Justice, the focus was on online advertising for sportswear with the words: **“olympia suspicious: break your own records with the right sportswear”; “simply ready for the olympics... It doesn’t have to be Rio, there are small and big athletes all over the world! And with the right clothes, you feel like one of them. The great sports shirts and polo shirts are just Olympic.”** Here, too, the Federal Court of Justice saw the terms “olympia suspect” and “ready for the Olympics” more as a product-related synonym for an exceptionally good performance than as an unfair use of Olympic terms. Even the depiction of a medal in the hand of an athlete integrated in the website and advertising is permissible from the point of view of the Federal Court of Justice. Because medals cannot only be won at the Olympic Games.

A glance at the decisions of the Federal Court of Justice and the Higher Regional Courts shows that advertisers can use a broad toolbox to ignite Olympic fire for their (brand) products – even if they are not a contractually bound partner of the DOSB and IOC. Although it is not possible to reliably predict the DOSB’s future litigation behavior, the latest Federal Court of Justice ruling and the clear rulings from Munich and Stuttgart will certainly not remain without consequences. As long as advertising companies comply with the now once again extended legal limits of the OlympSchG, there is no threat of trouble from Frankfurt am Main – the seat of the DOSB.



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What's your secret? The new Trade Secret Protection Act and first cases of application in practice

At the end of April 2019, the new Trade Secret Protection Act implementing the corresponding European Directive (2016/943) came into force, which contains both civil claims and criminal provisions with regard to the disclosure of trade secrets.

Secret business information is to be better protected by the new law and industrial espionage and betrayal of secrets thus shall be effectively prevented. In the future, it will also be possible to effectively protect, for example, algorithms of artificial intelligence or innovative process sequences, which until now have been deliberately not disclosed in the course of patent applications for example due to a lack of protective mechanisms against copies. The instrument of whistleblowing, which is feared in corporate circles, is also regulated by law for the first time so that grievances in a company can be detected without the whistleblower having to fear corresponding legal consequences. Investigative journalism is now also protected by privilege.

“Trade secret” redefined

A prerequisite for a comprehensive protection of trade secrets is that companies have taken appropriate measures to maintain the confidentiality of secret information. Unfortunately, the law does not contain examples of concrete measures that the legislator considers appropriate. Furthermore, as soon as a secret information has been disclosed, it loses its secret character, so that the company concerned can no longer invoke the protection of the Trade Secrets Protection Act in case of doubt.

What we recommend

The higher the importance of the respective information for the company, the higher the demands on the confidentiality measures that are to be taken. It is therefore advisable to start by clas-

sifying existing trade secrets in a graduated manner in order to create a comprehensive protection concept in the next step.

Possible secrecy measures include, but are not limited to: Technical measures such as appropriate IT security systems, physical access barriers and encryption of communication between the co-knowns as well as organizational and legal measures such as confidentiality agreements in employment contracts with employees and in framework agreements with business partners.

Practical experiences

Half a year after the new law came into force, we have noticed that many companies have not yet adapted or amended their previous non-disclosure agreements (NDA) or corresponding nondisclosure clauses in employment contracts. When (departing) employees, in particular, pass on business secrets to their private e-mail addresses or make copies of secret documents in order to benefit from them, for example, in their next job (not unlikely for a competitor), we repeatedly see how important comprehensive protection concepts for business secrets would have been in these cases.

First of all, it can be difficult in the court proceedings to prove a measurable damage to the company concerned (owner of the secret) through the betrayal of the trade secret. Further on, the question influenced by labor law, what is the (former) employee's freely usable knowledge from experience as opposed to trade secrets requiring secrecy, still has to be answered on a case-by-case basis. When answering this question, we often find ourselves in a grey area. Additionally, (departing) employees often lack the awareness of injustice in cases of unauthorized use of trade secrets. We therefore recommend regular training courses



for employees in order to raise their awareness with regard to internal secrecy protection.

Conclusion

In principle, the new legislative situation has higher hurdles that companies have to overcome in order to benefit from the new act's protection, but it also rewards these companies with stronger protection of their trade secrets than was the case under the old legislative situation. If your company wishes to protect its trade secrets more efficiently than before, you should take a closer look at this topic.



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02

Media and entertainment law

Music in advertising: Heart or head – emotion or budget?

Advertising calls for the right kind of music. Well-known titles do not always have to be more expensive than budget-friendly, unknown songs. Companies starting early with planning and fine-tuning the contractual provisions relating to music rights are frequently reaping the rewards.

Music in advertising

As its introductory spot for the Dark Milk sub-segment has shown, Milka has proven yet again that an emotionally binding, appropriate selection of music has the ability to promote the brand or even make it a star. What Cadbury succeeded in achieving with the drum break feature from Phil Collins' hit "In the air tonight" or Coca-Cola with K'naan's percussive song "Wavin' flag" is also possible with a title that is more associated with musicals. The brand message reaches the target group. The objective has been accomplished.

Music's emotional power has the potential to tie customers more strongly to a brand than any other element of brand communication. Using the right combination of image and sound may provide a real turbo boost to introducing and successfully marketing the respective products. The briefing phase can already be used to find out whether the music is a fit with the product. The appropriate bonding is measurable. Research company september Strategie & Forschung measures key performance indicators (KPI) such as trust, sympathy, attraction, proximity, relevance, scepticism and stress to assess the impact of advertising media.

Clarifying rights at an early stage

Whether unknown library music or well-known titles, the use of suitable music in an advertising campaign requires long lead times. For international titles and artists or composers, up to 6, 9 or even 12 months should be scheduled until the contracts are signed.

As relates to the rights to the composition (composers, authors and music publishers), rights owners may be researched via the GEMA work database at gema.de. Names of the rights owners of the sound recordings, which need to be requested separately, can be found on the Internet by simply entering the title or on databases such as discogs.com.

Publishers and record labels should be involved at an early stage to convince them of the desired connection between product and music. This may result in opportunities for marketing the music in parallel to the advertising campaign and obtaining more favourable conditions for the own sync licensing deal.

Synch licensing deals with publishers and record labels

When clarifying and licensing advertising music, typically at least two rights holders must be asked for rights and paid. Dubbing and advertising rights for the composition are usually held by a music publisher, in cases of foreign collections usually represented by a German sub-publisher. The corresponding rights to the sound recording, usually held by a record label, must be requested separately. Both the



rights from the publisher and from the record company are therefore to be acquired and remunerated separately.

For the sake of simplicity, the following statements refer only to the acquisition of the rights to the composition, but are largely analogously applicable to the separate acquisition of the rights to the sound recordings.

Typical key data

Publishers typically list the respective works under different categories. Titles from ABBA are more expensive than unknown score titles. In addition, the price depends on the company using the music title. Large electronics companies will pay prices that are different from small businesses. Last but not least, the price also depends on the specific use of the respective title. It makes a difference whether the respective spot is used on TV, radio, on a YouTube channel with paid media or only as an image film and whether it will be shown worldwide or only in certain territories. Where it is used via YouTube, for example, pricing considerations will also need to be guided by the fact whether the exploiting company is able to block individual territories via a content management system.

Depending on the respective parameters, music publishers today typically expect a flat-rate minimum remuneration of 3,000 euros for dubbing and advertising rights to the musical work (music and text). This corresponds to computations in accordance with empirical rules of the German Music Publishers' Association Deutscher Musikverleger Verband (DMV). These empirical rules lead to market-driven licences for advertising and special uses. Given that the minimum remuneration is merely an entry price, it typically does not grant any additional rights of use beyond a very limited, simple online use. When more well-known titles for different media and territories are requested, the flat-rate minimum remuneration can no longer be used a price basis.

For larger and medium-sized campaigns in Germany, Austria and Switzerland, the media budget now serves as the basis for computing the respective sync licence. In Germany, this licence varies between 2.5% and 5% of the respective net media budget after deduction of discounts.

Licence pricing may also be computed purely on licence duration. This method is particularly common outside Germany, Austria and Switzerland and does not take into account media budgets or ad-

vertising frequency. It is a pragmatic pricing method that is largely free of invoicing modalities. It must be examined whether it is an appropriate arrangement for the individual case.

A specific licensing practice applies to Internet campaigns. It distinguishes between local, national and international use with freedom of design as relates to the territories to be blocked via a content management system. The price is usually based on the number of page impressions or page access. Typical cost per thousand (CPM) ranges between 0.005 Euro per access in individual cases and up to 0.05 Euro per access, depending on the value of the musical work.

The above-mentioned parameters are negotiable, even more so if the campaign offers the music rights holders options for further exploitation activities and revenues in addition to the sync licensing fee.

When the heart says "yes"

Advertisers who know early on which song fits the product and the planned spot and who are winning over the rights holders with a well-planned campaign stand a good chance of substantially negotiating the key data of a sync licensing deal, including for more well-known titles. Simply deciding for the seemingly most economical solution, however, irrespective of the actual "fit" with the brand, often also means deciding against the success of the promoted product.



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Influencer Marketing – Labelling requirements in Germany

Television advertising remains the means of choice for confectionery manufacturers.⁶⁸ However, they also have to look for alternative ways and channels because classic advertising is reaching consumers less and less. Branded content, consisting of well-packaged advertising that is not immediately recognisable as such, is therefore becoming more and more valuable. For example, “Ritter Sport” regularly manages to virally spread the introduction of new flavours and special editions on social media. Competitor “Milka” is countering this with large-scale influencer campaigns, for example under the hashtag #milkaschmecktwie. Legally, however, even on Instagram, YouTube & Co. advertising needs to be disclosed because the average consumer is less critical with regard to neutral statements than statements that are labelled as advertising. In Germany, this is regulated by the Unfair Competition Act (UWG), the Telemedia Act (TMG) and the Interstate Broadcasting Treaty (RfStV).

For many years, it has been unclear in Germany how to label influencer advertising on YouTube, Instagram or Facebook. Some recent decisions finally indicate a direction, although there is not always a clear line.

What has to be labelled as advertisement?

An online contribution must be labelled as advertising only if commercial communication is taking place.

Not every ad needs to be labelled explicitly. If the user can see at first glance that something is an advertisement, no further identification is required. In the case of a company channel, consumers will assume that the posts are advertising. Companies therefore do not need to label any content on their own YouTube or Instagram channels separately.

The situation is different with a channel or blog of an influencer where advertising must be labelled. Whether a specific content can be considered as advertising must be decided on a case-by-case basis.

When must an advertisement be labelled?

With regard to the question of when an advertisement needs to be labelled, a differentiation needs to be made depending on the circumstances:

Influencer buys the product

Until last year, it could be assumed that if the influencer buys the product and posts objective and neutral comments about it, this was basically not considered advertising and therefore did not have to be labelled. However, this assumption has now been confused by case law:

At the centre of these developments are three judgments of the Karlsruhe Regional Court,⁶⁹ the Munich Regional Court⁷⁰ and the Berlin Appellate Court.⁷¹

In the case against the fitness influencer Pamela Reif, the Karlsruhe Regional Court ruled that posts with embedded so-called “tap tags” (= links to other profiles/brands) without appropriate labelling were prohibited surreptitious advertising. It was irrelevant whether the influencer had received a payment for the individual posts because such non-sponsored posts also served at least the purpose of promoting the influencer’s own business. Non-sponsored posts were therefore directly related to paid advertising contributions and the influencer “was also acting commercially”.

This argumentation shows parallels with the judgment of the Berlin Appellate Court in the Vreni Frost case. The latter decided that a post did not contain any advertising subject to labelling if it only disseminated editorial content. However, a purely editorial content of the post could not be assumed if the “tap tags” in an Instagram article and the content on the tagged Instagram account did not contain any recognizable reference to the contribution in question and did not have any information content.

68 <https://lebensmittelpraxis.de/suesswaren/21101-werbung-ich-glotz-tv.html>.

69 Karlsruhe Regional Court, Judgement of 03/21/2019, 13 O 38/18 KfH – Pamela Reif.

70 Munich Regional Court, Judgement of 04/29/2019, 4 HK O 14312/18 – Cathy Hummels.

71 Berlin Appellate Court, Judgement of 01/08/2019, 5 U 83/18 – Vreni Frost.



The Munich Regional Court held a different view in the case against Cathy Hummels. The court did indeed consider influencer posts on Instagram, on which products were labelled and linked to the corresponding online presences of the product manufacturers, to be commercial acts within the meaning of sec. 2 para. 1 no. 1 UWG even if the bloggers had not received any compensation from the linked companies. This is in line with the view of the Karlsruhe Regional Court according to which the influencers promote by their posts both their own business activities and those of the linked companies.

However, the Munich Regional Court assessed the specific case differently and ruled that the commercial purpose of the post resulted directly from the circumstances and thus a labelling was not necessary. The informed consumer had become used to the fact that influencers earned money through their activity and that they therefore did not make their posts for purely private purposes. Given the number of followers and the fact that the Instagram profile in question was a public profile of a known influencer verified by a so-called blue tick badge, the commercial purpose of the post was therefore immediately recognisable.

However, caution is also required for products purchased by the influencer in case there exists a business relation between the manufacturer and the influencer. The Frankfurt Higher Regional Court⁷² ruled that the recommendation of a product by an influencer on social media would in any case constitute prohibited surreptitious advertising if the influencer was employed full-time in the business sector to which the recommended product belonged and if the influencer had business relations with the companies whose products he or she recommended.

Goods provided for free

If the influencer receives the product free of charge, whether it is chocolate bars, muesli or jelly babies, the following differentiation must be made:

a) The company **expects** the influencer to make a **positive reference** in the post. This is advertising and should be labelled as such.

b) If the company sends a product without any agreement and leaves it up to the influencer to comment on it, which may also include a negative assessment, there is no advertising and thus no labelling obligation. However, the company or the agency involved must **refrain from influencing** the blogger. In this case, it is not necessary to indicate that the products have been provided free of charge.

However: in cases of doubt, the influencer or the promoted company must prove that the influencer was free in his assessment and that the post was made without any intention of advertising. In practice, this is difficult so that in the end it depends on the objective design of the post. If in the contribution includes only positive comments on the product, a court will probably presume an advertising intention and will affirm a labelling obligation. Influencers are therefore advised to label their posts as advertising if they include only positive comments, even when only reflecting their own, independent opinion.

Payment

If the influencer is paid by the company to evaluate its products in a positive manner, this is always considered advertising and must be labelled as such.

How should the advertisement be labelled?

The labeling of a post as advertising must be so clear that it is immediately apparent that the post has a commercial purpose.⁷³ It is not enough if the average reader recognises the advertising effect of the article only after reading it carefully or through extensive scrolling.

To be on the safe side, the beginning of the post should include a statement in German such as “Anzeige” (advertisement) or “Werbung” (promotion).

It is questionable whether English terms such as “ad” or “sponsored by” are permissible in German advertising. Advertising on Instagram for the “Pantene” shampoo tagged “#sponsoredbypanteneprov” and for the fashion brand “Maxandco” with “#ad” was not sufficient for the Berlin Appellate Court.⁷⁴

⁷² Frankfurt/Main a.M. Higher Regional Court, Decision of 06/28/2019, 6 W 35/19.

⁷³ Celle Higher Regional Court, Judgement of 06/08/2017, 13 U 53/17, advertising for the drugstore chain Rossmann with “#ad”.

⁷⁴ Berlin Appellate Court, Decision of 10/11/2017, #sponsoredbypanteneprov and #ad.



The Federal Court of Justice issued a similar decision under slightly different circumstances. The case involved the labelling of paid editorial posts. The court held that the label “Sponsored by” was insufficient and that the German word “Anzeige” (advertisement) had to be used.⁷⁵ The Munich Regional Court also ruled that the notice “Acne – scars as an aftereffect (Sponsored – Acne Advisor)” was insufficient notice.⁷⁶

Labelling a post as an “#ad” is not sufficient in any event if the tag is included in a so-called hashtag cloud. In a case decided by the Celle Higher Regional Court, the reference on Instagram was as follows: “#blackfriday #ad #eyes #shopping #rabatt (in English: #discount) #40percent”. According to the Court, the commercial purpose of the post was not immediately apparent in the case of a label including so many hashtags. However, the Celle Higher Regional Court did not answer the question of whether a labelling as “#ad” would be sufficient.⁷⁷

The State Media Authorities now advise against the use of “#ad”, “#sponsored by”, “#powered by”.⁷⁸

No court has yet decided whether the labelling with the Facebook and Instagram Branded Content Tool provides sufficient notice of the commercial purpose. When using the tool, Facebook displays the name of the influencer followed by “with [name of the brand]” and the notice “Bezahlt” (paid). Instagram displays the German notification “Bezahlte Partnerschaft mit [name of the brand]” (paid partnership with [name of the brand]). Both of these labellings should probably suffice. In any case, the use of the English version is not recommended as German courts consider that the English phrase “sponsored by” would not be understood by Germans.⁷⁹

Infomercials have to be labelled throughout the entire duration as “commercial” or “infomercial”.⁸⁰ Infomercials are broadcasts lasting at least 90 seconds in which the advertising takes the form of an editorial, the promotional character is paramount and the advertising constitutes a significant component of the programme.⁸¹

In the case of product placement, a post must be labelled at the beginning and end for at least three seconds with the abbreviation “P” (for product placement).⁸²

Conclusion

The German courts require advertising to be clearly labelled. Influencers targeting their posts to Germans are advised to use the German terms “Werbung” (promotion) or “Anzeige” (advertisement) at the beginning of an advertising post and, in case of doubt, to rather label their posts than not to do so. Advertising companies should contractually oblige influencers to such legally compliant labelling as the activities of influencers can be attributed to the companies. Given the changing and sometimes divergent case law, current developments in this area should always be kept in view.



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⁷⁵ Federal Court of Justice, Judgement of 02/06/2014, I ZR 2/11, GOOD NEWS II.

⁷⁶ Munich Regional Court, Judgement of 07/31/2015, 4 HK O 21172/14 – “Sponsored – Akne-Ratgeber”, advertising for the trademark “Eucerin” by Beiersdorf AG with the reference “Akne – Narben als Folgeerscheinung (Sponsored – Akne-Ratgeber)” (in Engl: “Acne – Scars as an aftereffect (Sponsored – Acne-Advisor)”)

⁷⁷ Celle Higher Regional Court, Judgement of 06/08/2017, 13 U 53/17, advertising for the drugstore chain Rossmann using “#ad”.

⁷⁸ See Guidelines of the State Media Authorities, available at https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/Guideline_advertising_identification_social_media_offers_2019.pdf.

⁷⁹ Federal Court of Justice, Judgement of 02/06/2014, I ZR 2/11 – GOOD NEWS II; Munich Regional Court, Judgement of 07/31/2015, 4 HK O 21172/14 – “Sponsored – Akne-Ratgeber”.

⁸⁰ Sec. 3, para. 3, sentence 2, Advertising Directive/FERNSEHEN.

⁸¹ Sec. 3, para 3, sentence 1, Advertising Directive/FERNSEHEN; see also the complaint of June 2017 about three YouTube videos by the influencer “Flying Uwe” filed by the Media Council of the Hamburg/Schleswig Holstein State Authority (MA HSH), press release available at <https://www.ma-hsh.de/infotehk/pressemitteilung/widerspruch-von-youtuber-flying-uwe-zurueckgewiesen-und-bussgeldverfahren-eingestellt.html>.

⁸² Sec. 4, para. 3, sentence 4, Advertising Directive/FERNSEHEN.



Esport as a hot opportunity also for “sweet” brands? – A short guide!

The medial excitement surrounding electronic sports, the competition between human players in computer games, has not only been continuing for some time now, but is also steadily taking off for its next flight to new heights. The economic indicators are at times climbing so rapidly that even the last esports sceptics are slowly thinking about whether this topic is really just a temporary hype or whether esports is a permanent factor and a new value chain.

The worldwide growth rate of the esports since 2015 is around 36%⁸³ per year. Global sales increased from 308 million euros in 2015 to the forecast of 1.4 billion euros for 2020. Already 32%⁸⁴ of Germans have watched an esports match – compared to only 12%⁸⁵ in 2015. By 2022, the number of people who occasionally follow an Esport match is expected to rise to 347 million⁸⁶. In 2018, Esports tournaments collected approximately 50 million euros in entry fees and payed out 140 million euros in prize money to the athletes.⁸⁷

While the sceptics are still in doubt⁸⁸, the first snack-manufacturers are already establishing themselves as international pioneers in the field of esports.

High attractiveness of the Esport sector also for snack-manufacturers

The industry is particularly attractive for snack-manufacturer as viewers and players of the esports alike are a young and dynamic target group that has become difficult to reach via classic media and advertising. Especially, the main advertising medium television hardly reaches this target group nowadays.

Esportlers are (still) predominantly male, between 18 and 34 years old, well-educated and have above-average technical affinity. The

electronic competitions are still mostly consumed via different streaming offers on the Internet. Accordingly, Amazon had already bought the streaming top dog Twitch.tv in 2014 for approx. 1 billion US dollars and has continuously expanded it since then. The German TV station SPORT1 launched the first German 24-hour sports channel, eSPORT1, at the beginning of this year in order to reach the esports target group by offering appropriate content.

However, the commercial significance of “physical” events is simultaneously growing rapidly. The biggest titles – League of Legends and Overwatch – are now organized in large franchise systems and in some cases require the participating teams to have a home stadium. The major tournaments for the title Counter-Strike: Global Offensive (CS:GO) in Germany fill the LANXESS arenas in Cologne and the Mercedes-Benz Arena in Berlin with between 12,000 and 15,000 live visitors.

It is therefore not surprising that even large international companies, including the food, energy drink and confectionery industries, are keen to take advantage of this opportunity. As an example, Snickers, Coca-Cola, Pringles and Nestlé’s Lion Cereal have already launched a successful engagement in esports.

Computer game as the basis of esports

The respective computer game as the underlying “electronic sport” is also the crucial point of the esports from a legal point of view. A computer game is classified as a so-called complex work and as a so-called hybrid work by the Federal Supreme Court (BGH).⁸⁹ A computer game is referred as a complex work as the various elements such as the story, the music, the software code and the graphics are partly subject to their own copyright rules. The BGH describes the computer game as a hybrid work – a work which is

83 <https://www.game.de/marktdaten/esports-umsatz-weltweit-bis-2020/>.

84 Deloitte, Continue to Play – The German eSports Market in Analysis, p. 12.

85 <https://www.game.de/marktdaten/esports-bekanntheit/>.

86 Newzoo, 2019 Global esports market report, p. 23.

87 Newzoo, 2019 Global esports market report, p. 6.

88 Jung von Matt/SPORTS already coined the term COMO – “the cost of missing out”.

89 Federal Court of Justice, Judgement of 27/11/2014, I ZR 124/11 – Videospiel-Konsolen II.



basically protected as a computer program (software) and at the same time contains various other elements protected by copyright law (story, music, graphics) which are embedded in the software code and thus embodied as software code.

With the computer game as a copyrighted work, the electronic sport, unlike traditional sport, always belongs to an individual or company – regularly the publisher.

With the intellectual property of the underlying sport, the publisher also holds the (legal) reins of the respective esports in his hands. This specifies the rules of the game, the playing field, the grandstands as well as the permission to play. On the other hand, the publisher is also the biggest beneficiary of a growing and flourishing community around his electronic sport. In any case, companies that want to participate in this community and esports cannot avoid the respective owner.

From the big franchise...

On the one hand, there are publishers who keep a firm grip on the reins and completely define the esports around their games “from top to bottom”. Recently, esports has increasingly been organized in franchise systems. The publishers specify, among other things, fixed competition regions, the rules of the game and the schedule of the league. The participating teams buy their place in the franchise for huge amounts of money and contractually submit themselves to the given franchise regime – but can no longer fall out of the league by way of a relegation.

Naturally, this results in very extensive and complex legal constructions and contract chains for all parties involved. The roles of involved companies are usually fixed from the outset in a franchise system. The sizes and scope of the advertising and sponsorship packages available are predefined with all parties involved and amendments are difficult to negotiate.

Even smaller contractual adjustments can quickly generate greater costs in order to enforce or renegotiate the adjustments at the other levels and with the other partners of the franchise system – the (commercial) incentive to take up these efforts must be correspondingly large. The publisher’s copyright situation gives him a very pronounced negotiating position from the outset. As a result, there will regularly be few possibilities for individual adjustments.

However, as soon as one can get involved in the regime of the franchise system, one is rewarded with comparatively high legal certainty as well as calculability of one’s investment. The legal agreements are regularly made with the publisher, the owner of the electronic sport. As master of the franchise system, the publisher can most effectively protect the interests of the participating company such as brand safety, sector exclusivity in large international regions and ultimately the value of the investment made and enforce it “from above”. However, these advantages usually also have their corresponding price.

As a result, esports can offer less flexibility in franchise systems, but relatively high securities.

...to the tournament flood of international third party organizers

On the other side of the spectrum, there are also publishers who leave their games and esports to the community in a largely self-regulating way. These publishers generously license their games for electronic competitions to anyone who wants to organize a proper tournament. As a result, a large number of such third-party organizers have established themselves all over the world in recent years. For computer games such as “Counter-Strike: Global Offensive” this has led to a veritable flood of competitions of every size and form. The spectrum ranges from local city matadors to major international events.

For companies that want to establish themselves in the esports industry or simply give it a try, this primarily means a lot of freedom. The large spectrum and high number of tournaments and tournament organizers offers numerous investment opportunities in the form of advertising and sponsoring commitments. Depending on budget, target group and risk tolerance, there is something for everyone. The contractual negotiating positions are also generally much more flexible.

Freedom and flexibility come at the price of increased (legal) uncertainty. Contracts are no longer concluded with the right holder himself, but with licensing third parties. During the negotiations, particular attention must be paid to legal safeguards and guarantees as well as to a firmly agreed claims settlement. Of course, the reputable third-party organizers are also interested in a legal environment that is as secure as possible. However, this is only in their hands up to a certain point. Due to the multitude of different



organizers in the same “electronic sport” – in the same computer game – the controllability of the community by the individual is rather limited. For example, a company can already establish itself in the entire community of the respective esports through cooperation with a larger organizer, but is not in control of how the community develops among the other organizers at the same time – the risk for its own brand safety and the intrinsic value of the investment in esports is correspondingly higher for participating companies. This can only be legally controlled to a very limited extent, if at all.

Conclusion

The opportunities for establishing oneself in esports are very diverse and extensive. Depending on the budget and willingness to take risks, this up-and-coming industry represents a great oppor-

tunity even for the snack section to reach a target group that is very difficult to reach via traditional media. However, with the right balance between risk and legal protection as well as an adapted strategy, even in this fast-moving jungle of this rapidly growing and promising industry, calculable and ultimately worthwhile investments for snack manufacturers are possible.



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03

IT & Digital Business

Data protection does not like cookies

Especially confectionery lovers are frequently dealing with the topic of cookies. This article (rather regrettably) is not about delicious cookies, but discusses the small text files containing information that can be stored on the users' devices via the browser when visiting a website.

The European Court of Justice recently issued two rulings on data protection matters relating to the use of cookies and plug-ins.

The ECJ judgment of 29/7/2019⁹⁰ related to a case brought by the North-Rhine Westphalian Consumer Association, Verbraucherzentrale NRW, against German online retailer "Fashion ID". The consumer association had complained that "Fashion ID" had embedded Facebook's "Like" button on its own website without website users having to consent to the data transfer to Facebook or at least being informed about it. Against this backdrop, the ECJ had to decide whether the online retailer is (jointly) responsible for the data transfer and possibly for the processing of the personal data by Facebook.

The website operator uses the Facebook "Like" button to embed a programming code in his website, which starts an application on Facebook's servers. Facebook is also able to collect data from visitors to the website who do not click on the "Like" button (IP address, data about the device used). The case still had to be decided in accordance with the provisions of the old EU Data Protection Directive from 1995 (Directive 95/46/EC);

however, the decision can be applied to the legal situation under the GDPR.

The ECJ ruled that the website operator is not jointly responsible if he has no influence over the actual data processing by another controller, i.e., if he does not participate in the determination of the purposes and means of that processing. In the case at issue, this means that the online retailer is not jointly responsible for all data processing by Facebook. However, the ECJ holds that the retailer exerted a decisive influence over the data processing by embedding and configuring the plug-in on its website and has therefore jointly determined the means of processing with Facebook. With respect to the purposes of the processing, the ECJ expects that the embedding of the plug-in serves to improve the visibility of the retailer's goods on Facebook and that the retailer and Facebook have therefore also jointly defined a purpose (advertising).

If the mere fact that another data controller is able to collect the data leads to joint responsibility, this would likely be the case with any embedding of third-party content such as videos, images, weather reports, stock market prices etc. Where the data processing is to be based on a legitimate interest, such legitimate interest must exist with each of the joint data controllers. If the processing is based on consent, the operator only needs to obtain it for the operations for which he is the controller, i.e., where he actually decides on the purposes and means.

90 ECJ, Judgement of 29/7/2019, C40/17 – Fashion ID.



The decision of the Court of Justice of the European Union of 1 October 2019⁹¹, entails new information for the specific design of the consent to cookies. Accordingly, a website operator cannot obtain consent to the setting of cookies for advertising purposes by means of a pre-ticked checkbox. Rather, users must actively tick a checkbox to give their consent. The ECJ judgment applies irrespective of whether the data stored in the cookie constitute personal data or not. It is another prerequisite for effective consent for the user to have been informed about the duration of the operation of cookies and whether or not third parties may have access to those cookies.

Regrettably, liability risks are increasing considerably due to the above-mentioned decisions relating to the use of cookies. We therefore recommend to first obtain an overview of the extent of the cookies used on your own website. If external content such as social media plug-ins, map services, videos, images, web fonts etc. are to remain embedded in your website, they should only be reloaded after an active visitor action (e.g., by embedding preview images that load the active content only after a click). In any event,

the Privacy Policy should be reviewed and supplemented with references to the storage period of cookies and with statements listing third parties who have access to the cookies.



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91 ECJ, Judgement of 01/10/2019, Az. C-673/17 – Planet49.



Is my company GDPR compliant?

Companies have invested a lot of time and money in implementing the GDPR. After the initial implementation hustle and bustle has evaporated, companies should now subject their status quo to a critical review. The supervisory authorities support such critical self-observation.

For example, the State Commissioner for Data Protection of Lower Saxony has published the “Criteria Catalogue for Cross-Sectional Audits in Business 2018/19”.⁹² It does not only ask how the company prepared for the GDPR. The Supervisory Authority also wants to know how the company ensures that all business processes involving the processing of personal data are included in a register of processing activities and that the register is kept up to date. It also asks how the rights of those concerned are guaranteed.

A total of about 200 individual criteria are surveyed in the questionnaire. More unpleasant topics are also discussed, such as the measures taken to delete data and so-called technical data protection. Here, the company must not only prove that technical and organizational measures exist to protect personal data. It must also be documented that the processing risk has been determined beforehand and that the measures taken correspond to this risk. It must also be explained how to determine whether or not so-called data protection impact assessments are necessary for certain processing operations. The supervisory authority wants to know how cases are identified which pose a high risk to the

rights and freedoms of the data subjects. Experience shows that not everything is documented in the company when it comes to these topics. In addition, numerous questions are asked about contracts with processors.

The Bavarian State Office for Data Protection Supervision has also already begun examining the implementation of the GDPR in small and medium-sized enterprises. A corresponding list of questions was also published.⁹³ The sensitive payment obligations threatened by non-compliance with the GDPR can be read in the recently published concept of data protection supervisory authorities for the assessment of fines.⁹⁴

Practical tip

Check the implementation of the GDPR in your company using the published questionnaires. We are happy to support you with the expert analysis of existing processes and documentation.



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⁹² https://fd.niedersachsen.de/startseite/datenschutzreform/ds_gvo/kriterien-querschnittspruefung-179455.html; last accessed: 01/11/2019.

⁹³ https://www.lida.bayern.de/media/pruefungen/201811_kmu_fragebogen.pdf; last accessed: 01/11/2019.

⁹⁴ https://www.datenschutzkonferenz-online.de/media/ah/20191016_bu%C3%9F-geldkonzept.pdf; last accessed: 01/11/2019.



04

Employment law

New Work 4.0: The use of digital signatures in the employment relationship

Digital change and globalisation know no borders. The desire to send contracts or other agreements worldwide in a matter of seconds and, above all, to sign them is continuing to grow. The use of digital signatures seems to be a simple solution to this problem.

Using digital signatures requires at least a certain amount of care, however, especially when it comes to establishing and carrying out employment relationships. In some cases, the law stipulates the written form, which may only be replaced in part by what is referred to as qualified electronic signatures. In some cases, the electronic form is even entirely excluded.

Types of electronic signature

Generally, there are three types of digital signature:

- (simple) electronic signature
- advanced electronic signature
- qualified electronic signature

Each of these three signatures is linked to different requirements that correspond to different security levels. The requirements placed on the respective signature arise from the European eIDAS Regulation, which due to its character as a Regulation, is directly applicable in Germany without transposition by the legislator.

According to the legal definition, (simple) electronic signatures are data in electronic form which are attached to or logically associated with other data in electronic form and which are used by the signatory to sign (Article 3(10) eIDAS Regulation). This may even be the case, for example, for an e-mail signature or a scanned signature.

The requirements for advanced electronic signatures are already significantly higher. This signature must be uniquely linked to the signatory and be capable of identifying the signatory (Articles 3(11), 26 eIDAS Regulation). It must also be ensured that any subsequent changes are detectable.

The qualified electronic signature (Articles 3(12), (15), (23) eIDAS Regulation) must meet all the characteristics of an advanced signature. In addition, it must be created by a qualified electronic signature creation device and based on a qualified certificate for electronic signatures. Qualified certificates can only be issued by trust service providers which identify the applicant by suitable criteria. In addition, they can only be issued to natural persons, not to legal entities such as a German limited liability company or public limited company. A list of German trust service providers is available on the website of the Federal Network Agency.

Where the law stipulates the written form, thus the handwritten signature, it may, if at all, be replaced by the qualified electronic signa-



ture because only the qualified electronic signature meets the requirements of the electronic form in accordance with Section 126a Civil Code. The electronic form is the only legally permissible alternative to the written form, unless stipulated otherwise by the statutory provisions.

Effects on practical use in employment contracts

In principle, employment agreements and amendment agreements may be concluded without adherence to a specific form, including the parties' freedom to decide how they want to sign (electronically). This makes it conceivable, for example, to conclude employment contracts using advanced electronic signatures.

In Employment Law overall, however, there are a large number of declarations and agreements for which the legislator has provided for written form. Some key examples include:

- rejection of an application for part-time work
- post-contractual non-compete obligations
- contracts between the supplier and the hirer in the case of temporary workers

It is the prevailing opinion that these declarations and agreements may only be signed effectively and digitally by means of qualified electronic signatures in addition to handwritten signatures. If the respective declaration or agreement fails to comply with the necessary form, it will be null and void.

In addition, in some cases the replacement of the written form by the electronic form is even entirely excluded. The most important examples include:

- notices of termination
- cancellation agreements
- information according to the Documentation of Material Employment Conditions Act

In these cases, handwritten signatures are mandatory and may not even be replaced by qualified electronic signatures. According to the statutory provisions (Section 2(1) sentence 1 Documentation of Material Employment Conditions Act), employers are obligated to set down the material contractual terms in writing, sign the appropriate records and hand them over to employees no later than one month after the agreed commencement of the em-

ployment relationship. If this does not happen, employees are entitled to receive the documentation at a later time and, if applicable, to compensation for damages. The likelihood for these claims to be asserted and the consequences resulting from an infringement will be limited, however, particularly in ongoing employment relationships.

For termination or cancellation agreements, breaches of form entail a much more serious effect. If these agreements are only signed electronically, they will be ineffective in terms of form and thus null and void. This will initially lead to the continued existence of the employment relationship, including the claim for remuneration. In the case of extraordinary dismissals, this may even lead to the two-week period stipulated for extraordinary termination elapsing. Not only will the employment relationship then continue to apply, but the extraordinary termination for this breach of duty may not even be issued retroactively.

Special case of fixed terms

Finally, there is a special case associated with fixed-term employment relationships. Effective time limits require compliance with the written form (Section 126 Civil Code). Whether qualified electronic signatures are permissible in these cases is controversial in literature and has not yet been decided by the Federal Labour Court. Although there are convincing arguments in favour of the applicability of electronic form, considerable legal uncertainty remains for corporate practice until the Federal Labour Court has issued an appropriate decision.

The legal consequence of fixed-term employment contracts concluded without formal compliance would be for the provisions on the fixed term to be null and void, but not the entire contract. This would lead to an unlimited employment relationship with the respective employee. For safety's sake, cautious employers will therefore refrain from using electronic signatures for fixed-term contracts.

Practical application cases are, on the one hand, the classic cases of fixed-term employment, such as the replacement of employees on parental leave or the limiting of fixed-term contracts not based on objective reasons for a period of up to two years. Frequently, however, supposedly unlimited employment contracts also contain a clause according to which the employment relationship is to end automatically when the employee reaches



the standard pension age. According to a recent Federal Labour Court decision, this is also considered a fixed term of the employment contract which must meet formal requirements. Although it is currently not foreseeable whether this individual decision will develop into settled jurisdiction, cautious employers will adhere to the classic written form. The risk of using electronic signatures becomes apparent when the agreed age limit is reached only after many years and then a dispute arises as to whether a time limit exists and, if so, whether the required form has been complied with.

Conclusion

Electronic signatures have become an indispensable part of everyday business and found their way into the work of HR departments. Electronic signatures represent a practicable alternative to paper-based signatures, in particular for entirely form-free agreements. In the case of agreements that are subject to a formal requirement, however, it must be meticulously ensured that the correct type of signature is adhered to. This applies in particular to notices of dismissal and cancellation agreements, which are always

subject to the written form. For fixed-term contracts, the use of the electronic signature requires a certain willingness of employers to take risks. Cautious employers will continue to use the tried and tested handwritten signatures for fixed-term contracts.



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05

Tax law

Tax liability for gifts in kind

“Influencer marketing” is a current trend in the advertising world. It is now common for companies to use influencers for advertising purposes and offer them products as gifts. In return, the influencers undertake to write about the new skin cream or diet product in their own beauty blog or on Instagram.

In terms of Tax Law, however, such product transfers are not regarded as gifts, since they are not made available free of charge. An exception applies only to gifts in kind whose acquisition costs do not exceed 10 euros. The transfer of objects in expectation of consideration is therefore a so-called “monetary advantage” and taxable as such.

The value of a surrendered object, which is used as a basis for the assessment of the tax, is the purchase price of the object. In the case of second-hand goods, the amount used shall be that which would have been obtained by selling the goods at the time of delivery. In the case of sponsored trips, the equivalent value of the trip is deemed to be income.

The influencer must tax the value of these gifts as income. Even if he uses the property privately, he must enter it in his accounts and tax records because he has only received it because of his self-employment.

Some companies that issue gifts in kind pay tax on them at a flat rate. However, you must then declare in writing that you will assume the tax burden. With this declaration, the influencer can prove to the tax office that taxation has already taken place. In this way, gifts in

kind worth up to a maximum of 10,000 euros may be accepted per business year without having to be stated again in the influencer’s tax return.

Practical tip

Advertising companies should either draw their influencers’ attention to the resulting tax obligations or apply a lump-sum taxation, as they are often held responsible for the influencers’ behaviour in external relations. The influencers themselves should comply with their tax obligations in order to avoid penalty interest and penalties for tax evasion.



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06

Commercial and Distribution Law

INCOTERMS 2020 released

The INCOTERMS 2020 come into force on 1 January 2020. These standard terms are of great importance in foreign trade, but also for deliveries within Germany and therefore also for every company in the confectionery industry. According to an estimate by the International Chamber of Commerce in Paris (ICC), they are used in 90 % of all international sales contracts.

The INCOTERMS regulate the transfer of risk in the event of damage to goods to be delivered, but also, for example, the costs of transport, packaging and insurance. They thus lay down many important conditions, the detailed negotiation of which in each individual case would be inefficient. The clear definition of the individual clauses enables the parties to a sales contract to carry out standardised international and national commercial transactions and thus save transaction costs.

The new version contains many changes in detail, but no real upheavals compared to the previous version of 2010. In particular, contrary to earlier rumors, the much-used "EXW" (ex works) clause, which can lead to customs difficulties in cross-border deliveries, has not been abolished. The DAT clause has been reformulated to DPU (Delivery At Place Unloaded). Those who have used the DAT clause in their contracts should now adjust it.

In general, every company should take the release of new version of the INCOTERMS as an inducement to check whether the clauses used so far still make sense. The rules issued by the ICC for the interpretation of INCOTERMS 2020, which contain very detailed and clear explanations (a clear improvement over the previous version), are a great help here. The text of the contract templates should also refer to the new version. Contrary to the generally less exact practice, it is also advisable not only to point out the location, but ideally also the exact address, so that it is clear where exactly the risk passes from the supplier to the buyer. An example of a good formulation is: "FCA Sample Street 1, 12345 Sample City, Germany (INCOTERMS 2020)".



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