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***Schwerpunktseminar zum Thema:
Unfair competition in the US and Germany against the background
of the VW diesel scandal***

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Prof. Dr. Thomas M. J. Möllers

Lehrstuhl für Bürgerliches Recht, Wirtschaftsrecht, Europarecht, Internationales Privatrecht
und Rechtsvergleichung

Vorgelegt von: Lea Fischer [REDACTED]
E-Mail: [REDACTED]
Studiengang: Rechtswissenschaften
Anschrift: [REDACTED]
Fachsemester: [REDACTED]
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Bibliography

Anglo-American sources:

Annie Palmer, *Here's where Facebook's record \$5 billion fine goes*, CNBC (Jul. 25, 2019, 1:37 PM), <https://www.cnn.com/2019/07/25/heres-where-facebooks-record-5-billion-fine-goes.html>.

Archie B. Carroll, Jill A. Brown & Ann K. Buchholtz, *Business & Society: Ethics, Sustainability & Stakeholder Management* (10th ed. 2016).

Carolyn L. Carter, *A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, NCLC (Feb., 2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf.

Charles McManis, *Intellectual Property and Unfair Competition in a nutshell* (6th ed. 2009).

Courtland L. Reichman, Melissa M. Cannady, *False Advertising Under the Lanham Act*, 21 Franchise Law Journal 187 (2002).

David Adam Friedman, *Refining Advertising Regulation*, 49 Connecticut Law Review 837 (2017).

E. Deborah Jay, *Ten Truths of False Advertising Surveys*, 103 The Trademark Reporter 1116 (2013).

EPA, *Notice of Violation*, (Sep. 18, 2015), <https://www.epa.gov/sites/production/files/2015-10/documents/vw-nov-caa-09-18-15.pdf>.

Federal Trade Commission v. Volkswagen Group of America, Inc., Complaint for Permanent Injunction and Other Equitable Relief, (Mar. 29, 2016), https://www.ftc.gov/system/files/documents/cases/160329volkswagen_cmpt.pdf.

FTC, *Federal Judge Approves FTC Order for Owners of Certain Volkswagen, Audi, and Porsche 3.0 Liter "Clean" Diesels to Receive Refunds*, FTC Press Release (May 17, 2017), <https://www.ftc.gov/news-events/press-releases/2017/05/federal-judge-approves-ftc-order-owners-certain-volkswagen-audi>.

FTC, *Fiscal Year 2021 Congressional Budget Justification*, (Feb. 10, 2020), https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf.

FTC, *Volkswagen to Spend up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles*, FTC Press Release (Jun. 28, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating>.

FTC, *Volkswagen to Spend up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles*, FTC Press Release (Jun. 28, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating>.

Howard Langer, *Competition Law in the United States* (3rd ed. 2016).

Jane C. Ginsburg, *Trademark and unfair competition law* (5th ed. 2013).

Joan Claybrook, *Class Action Legislation: Bingaman Amendment Needed to Allow Nationwide Consumer Protection Suits*, https://www.citizen.org/wp-content/uploads/migration/bingaman_amendment_factsheet.pdf.

Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 UCLA Law Review 671 (1983-1984).

N.N., *Judicial Refusal to Imply a Private Right of Action under the FTCA*, 1974 Duke Law Journal 506 (1974).

Leslie Fair, *Billions back to consumers for VW's false "clean diesel" claims*, FTC Business Blog (Jun. 28, 2016, 9:33 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2016/06/billions-back-consumers-vws-false-clean-diesel-claims>.

Leslie Fair, *What the FTC Facebook settlement means for consumers*, FTC Blog (Jul. 24, 2019), <https://www.consumer.ftc.gov/blog/2019/07/what-ftc-facebook-settlement-means-consumers>.

NCLC, *Consumer Protection in the States A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS*, NCLC (2008), <https://www.nclc.org/images/pdf/udap/udap-appC.pdf>.

NCLC, *Consumer Protection in the States A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS*, NCLC (2018), <https://www.nclc.org/images/pdf/udap/udap-appA.pdf>.

Peter C. Ward, *Federal Trade Commission: Law, Practice and Procedure* (20th ed. 2005).

Thomson Reuters Practical Law Antitrust, *FTC Act Section 5: Overview*, [https://uk.practicallaw.thomsonreuters.com/7-586-7865?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/7-586-7865?transitionType=Default&contextData=(sc.Default)&firstPage=true).

Russel Hotten, *Volkswagen: The scandal explained*, BBC (Dec. 10, 2015), <https://www.bbc.com/news/business-34324772>.

German/European sources:

Boesche, Katharina Vera, Wettbewerbsrecht, 5th ed., Heidelberg 2016.

Brammsen, Joerg, Lauterkeitsstrafrecht, Sonderband zum Münchener Kommentar Lauterkeitsrecht (§§ 16–30 UWG), Munich 2020.

Emmerich, Volker/Lange, Knut Werner, Unlauterer Wettbewerb, 11th ed., Munich 2019.

Frigessi di Ratalma, Marco (editor), The Dieselgate, A Legal Perspective, Cham 2017.

Ganslmeier, Martin, Entschädigung läuft in den USA anders, Tagesschau 30 Sep. 2019, available at <https://www.tagesschau.de/wirtschaft/vw-usa-163.html>.

Germis, Carsten, Richter: Winterkorn hätte aufklären müssen, FAZ.NET 11 Sep. 2018, available at <https://www.faz.net/aktuell/wirtschaft/auto-verkehr/volkswagen-prozess-martin-winterkorn-haette-aufklaeren-muessen-15782543.html>.

Glöckner, Jochen, Über die Schwierigkeit, Proteus zu beschreiben – die Umsetzung der Richtlinie über unlautere Geschäftspraktiken in Deutschland, GRUR 2013, 224–238.

Hamacher, Karl, Der sog. Dieselskandal und die (fast) in Vergessenheit geratene Vorschrift des § 16 Abs. 1 UWG, WRP 4/2018, Editorial.

Harte-Bavendamm, Henning/Henning-Bodewig, Frauke (publishers), Gesetz gegen den unlauteren Wettbewerb (UWG), Mit Preisangabenverordnung, Kommentar, 4th ed., Munich 2016 (cited as: *author*, in: Harte-Bavendamm/Henning-Bodewig, UWG, 4th ed. 2016).

Henning-Bodewig, Frauke, Zur Sektoruntersuchung des Bundeskartellamts zu Vergleichsportalen, WRP 2019, 537–545.

Köhler, Helmut/Bornkamm, Joachim/Feddersen, Jörn/Alexander, Christian, Gesetz gegen den unlauteren Wettbewerb, Vol. 13a, 38th ed., Munich 2020 (cited as: *author*, in Köhler/Bornkamm/Feddersen, UWG, 38th ed. 2020).

Köhler, Helmut/Piper, Henning (publishers), Gesetz gegen den unlauteren Wettbewerb, 3rd ed., Munich 2002 (cited as: *author*, in: Köhler/Piper, UWG, 3rd ed. 2002)

Kühl, Johannes, Strafbare Werbung mit manipulierten Abgaswerten im Dieselskandal? WRP 2019, 573–582.

Lettl, Tobias, Wettbewerbsrecht, 3rd ed., Munich 2016.

Möllers, Thomas M.J./Heinemann, Andreas (editors), The Enforcement of Competition Law in Europe, Cambridge 2007.

Muenker, Reiner, Enforcement of unfair competition and consumer protection laws by a private business association in Germany: the Wettbewerbszentrale, *Journal of Intellectual Property Law & Practice* 2015, available at <https://www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=35283>.

N.N., Anklage gegen Volkswagen-Spitze, FAZ.NET 24 Sep. 2019, available at: <https://www.faz.net/aktuell/wirtschaft/auto-verkehr/anklage-gegen-volkswagen-spitze-wegen-marktmanipulation-16400567.html>.

N.N., Martin Winterkorn wegen schweren Betrugs angeklagt, *Zeit Online* 15 Apr. 2019, available at: <https://www.zeit.de/mobilitaet/2019-04/diesel-skandal-anklage-gegen-martin-winterkorn-wegen-betruges>.

N.N., Staatsanwaltschaft klagt weitere VW-Mitarbeiter an, *Legal Tribune Online* 14 Jan. 2020, available at: <https://www.lto.de/recht/nachrichten/n/sta-braunschweig-anklage-weitere-mitarbeiter-vw-betrug-dieselgate/>.

Ohly, Ansgar/Sosnitza, Olaf/Köhler, Helmut/Piper, Henning (founders), *Gesetz gegen den unlauteren Wettbewerb mit Preisangabenverordnung*, 7th ed., Munich 2016 (cited as: *author*, in *Ohly/Sosnitza, UWG*, 7th ed. 2016).

Peifer, Karl-Nikolaus, *Lauterkeitsrecht, Das Wettbewerbsrecht (UWG) in Systematik und Fallbearbeitung*, 2nd ed., Berlin/Boston 2016.

Podszun, Rupprecht/Busche, Christoph/Henning-Bodewig, Heike, *Die Durchsetzung des Verbraucherrechts: Das BKartA als UWG-Behörde?*, *GRUR* 2018, 1004–1011.

Reinking, Kurt/Egger, Christoph, *Der Autokauf, Rechtsfragen beim Kauf neuer und gebrauchter Kraftfahrzeuge sowie beim Leasing*, 13th ed., Munich 2017.

Schaumburg, Ellen, *Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht*, Baden-Baden 2006.

Stadler, Astrid, *Musterfeststellungsklagen im deutschen Verbraucherrecht?* *VUR* 2018, 83–89.

vzbv, Annual report 2018, available at https://www.vzbv.de/sites/default/files/2018_vzbv_jahresbericht_0.pdf.

vzbv, Neufassung des Gesetzes gegen unlauteren Wettbewerb bringt kaum Änderungen für Verbraucher, Press Release from 11 Dec. 2015, available at <https://www.vzbv.de/meldung/neufassung-des-gesetzes-gegen-unlauteren-wettbewerb-bringt-kaum-aenderungen-fuer-verbraucher>.

Wabnitz, Heinz-Bernd/Janovsky, Thomas/Schmitt, Lothar (publishers), Handbuch Wirtschafts- und Steuerstrafrecht, 5th ed., Munich 2020 (cited as: *author*, in: Wabnitz/Janovsky/Schmitt WirtschaftsStrafR-Hdb, 5th ed. 2020).

Wettbewerbszentrale, Rückblick: Drittes Expertenforum Automotive Recht (EAR) der Wettbewerbszentrale, Press Release from 21 Feb. 2018, available at <https://www.wettbewerbszentrale.de/de/branchen/Kfz-Branche/aktuelles/news/?id=2975>.

List of Abbreviations

Abbreviation	German Translation	English Translation
AG	Aktiengesellschaft	Stock Corporation
Art.	Artikel	Article
BGB	Bürgerliches Gesetzbuch	German Civil Code
BGH	Bundesgerichtshof	Supreme Court of Germany
BT-Drs.	Deutscher Bundestag Drucksache	
Cir.		Circuit
C.F.R.	Sammlung der amerikanischen Bundesverordnungen	Code of Federal Regulations
ECJ	Europäischer Gerichtshof	European Court of Justice
ed.	Auflage	Edition
e.g.	Zum Beispiel	For example
et seq.	Folgend	Following item
et seqq.	Fortfolgend	Following items
e.V.	Eingetragener Verein	Registered association
EU	Europäische Union	European Union
EuZW	Europäische Zeitschrift für Wirtschaftsrecht	European Journal of Business Law
fn.	Fußnote	Footnote
GRUR	Gewerblicher Rechtsschutz und Urheberrecht	(Law journal)
Inc.	Eingetragene Gesellschaft	Incorporated
JuS	Juristische Schulung	(Law journal)
LG	Landgericht	Regional Court
NJW	Neue Juristische Wochenschrift	(Law journal)
N.N.	Nomen Nominandum	Unknown name
no	Nummer	Number
OJ	Amtsblatt	Official Journal
OLG	Oberlandesgericht	Higher Regional Court
p.	Seite	Page
para.	Absatz	
Sec.		Section

Slg.	Sammlung der Rechtsprechung des Gerichtshofes und des Gerichts Erster Instanz	Collection of the Judgments of the Court of Justice and the Court of First Instance
StGB	Strafgesetzbuch	German Criminal Code
TFEU	Vertrag über die Arbeitsweise der Europäischen Union	Treaty on Functioning of the European Union
UKlaG	Unterlassungsklagengesetz	German Forbearance Claims Law
U.S.C.	Bundesrecht der Vereinigten Staaten	United States Code
UWG	Gesetz gegen den unlauteren Wettbewerb	German Federal Act against Unfair Competition
Vol.	Band	Volume
VUR	Verbraucher und Recht	(Law journal)
WRP	Wettbewerb in Recht und Praxis	(Law journal)
ZIP	Zeitschrift für Wirtschaftsrecht	(Law journal)

A. Introduction

“Like really clean Diesel” in bold white letters on the screen of millions of Americans, a Volkswagen advertisement. In this online video “three old wives” discuss how dirty diesel is. But not this one, indicates one of them, a VW TDI – driver, as she pushes her white scarf against the exhaust pipe while the motor is running. After the “test”, the scarf is still white.¹

Years later, this advertisement belongs to one of many that caused one of the biggest false advertising cases in the US.² Several lawsuits and complaints were filed against Volkswagen Group of America, Inc. (VW USA), a subsidiary to Volkswagen AG (VW AG), inter alia for false advertising.³ VW AG paid billions of dollars in the US to satisfy its obligations of the settlement with the Federal Trade Commission (FTC).⁴ In Germany, VW AG is charged only for committing tort, fraud and other criminal conduct.⁵ No one talks about unfair competition charges. But why? In this paper, the situation of unfair competition in Germany and the US against the background of the VW-Diesel scandal will be discussed. The focus of this paper will be on the regulation of “false advertising” as this is the most relevant legal aspect for the deceptive and unfair acts committed by VW USA and VW AG in the scope of unfair competition in the US and Germany.

* All websites were accessible on 26 June 2020.

¹ VW USA (2015) “Old Wives’ Tale #6: Diesel is dirty”, available e.g. at <https://www.truthinadvertising.org/volkswagens-clean-diesel/>.

² David Adam Friedman, *Refining Advertising Regulation*, 49 Connecticut Law Review 837, 839 (2017); Leslie Fair, *Billions back to consumers for VW’s false “clean diesel” claims*, FTC Business Blog (Jun. 28, 2016, 9:33 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2016/06/billions-back-consumers-vws-false-clean-diesel-claims>.

³ Leslie Fair, *Billions back to consumers for VW’s false “clean diesel” claims*, FTC Business Blog (Jun. 28, 2016, 9:33 AM), *supra*, note 2; David Adam Friedman, *Refining Advertising Regulation*, 49 Connecticut Law Review 837, 839 (2017).

⁴ FTC, *Volkswagen to Spend up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles*, FTC Press Release (Jun. 28, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating>.

⁵ BGH, Judgment of 25 May 2020, VI ZR 252/19 (Juris); N.N., *Staatsanwaltschaft klagt weitere VW-Mitarbeiter an*, Legal Tribune Online 14 Jan. 2020, available at: <https://www.lto.de/recht/nachrichten/n-sta-braunschweig-anklage-weitere-mitarbeiter-vw-betrug-dieselgate/>; N.N., *Anklage gegen Volkswagen-Spitze*, FAZ.NET 24 Sep. 2019, available at: <https://www.faz.net/aktuell/wirtschaft/auto-verkehr/anklage-gegen-volkswagen-spitze-wegen-marktmanipulation-16400567.html>; N.N., *Martin Winterkorn wegen schweren Betrugs angeklagt*, Zeit Online 15 Apr. 2019, available at: <https://www.zeit.de/mobilitaet/2019-04/diesel-skandal-anklage-gegen-martin-winterkorn-wegen-betruges>.

After firstly outlining the situation that led to the NOx 198 emissions scandal I will talk about the perspective on the scandal under Anglo-American law, including examination of the general legal sources and law enforcement for false advertising in the US.

Within a critical comparative law approach, I will eventually talk about the perspective on the scandal under German law, examining the relevant legislature prohibiting false advertising in Germany as well as the enforcement of such *de lege lata* and *de lege ferenda*.

B. Dieselgate – What happened?

Starting in 2009, VW USA advertised, marketed, offered, sold and distributed over 550,000 vehicles, equipped with a defeat device, throughout the United States.⁶ In Germany, the number of defeat vehicles that had to be retrieved from the market by VW AG reached as much as 2.4 million.⁷ The defeat device was an illegal software designed to cheat the Environmental Protection Agency (EPA) emission testing procedures.⁸ Selling a vehicle in the US is only legal in the existence of a Certificate of Conformity (COC) since otherwise it is not ensured that the auto manufacturer's vehicles comply with the EPA's emission standards.⁹ The process of obtaining a COC includes "confirmatory testing" by the EPA's Office of Transportation and Air Quality (OTAQ).¹⁰ This involves testing in a laboratory setting.¹¹ The software installed in the Volkswagen vehicles made an impact on the engine control unit in such a way that the required emission standards could be maintained in the laboratory testing situation.¹² The "real on-road" nitrogen oxide (NOx) emissions of the Volkswagen vehicles, however, exceeded the limits imposed by the EPA by as much as 4,000 percent.¹³ All model year 2009 through 2015 2.0L (and 3.0L) diesel light-duty vehicles contained such software.¹⁴ VW USA heavily marketed

⁶ *Federal Trade Commission v. Volkswagen Group of America, Inc.*, Complaint for Permanent Injunction and Other Equitable Relief, (Mar. 29, 2016), https://www.ftc.gov/system/files/documents/cases/160329volkswagen_cmpt.pdf (FTC Complaint), p. 5; EPA, *Notice of Violation*, (Sep. 18, 2015), <https://www.epa.gov/sites/production/files/2015-10/documents/vw-nov-cao-09-18-15.pdf>.

⁷ Russel Hotten, *Volkswagen: The scandal explained*, BBC (Dec. 10, 2015), <https://www.bbc.com/news/business-34324772>.

⁸ FTC Complaint, *supra*, note 6, p. 4 et seq.

⁹ FTC Complaint, *supra*, note 6, p. 4.

¹⁰ FTC Complaint, *supra*, note 6, p. 4.

¹¹ FTC Complaint, *supra*, note 6, p. 5.

¹² *Kühl*, *Strafbare Werbung mit manipulierten Abgaswerten im Dieselskandal?* WRP 2019, 573, 578 margin no 37.

¹³ FTC Complaint, *supra*, note 6, p. 11.

¹⁴ EPA, *Notice of Violation*, (Sep. 18, 2015), *supra*, note 6.

the defeat vehicles as “Clean Diesel” vehicles, spending millions of dollars,¹⁵ when they were clearly the opposite of “clean”.

In 2013, the excess emissions of the Volkswagen vehicles were detected by the West Virginia University (WVU) while performing on-road testing on the vehicles in collaboration with the California Air Resources Board (CARB).¹⁶ After attempting to explain the discrepancy of the on-road testing results compared to the ones of the testing in a laboratory setting in various ways – and even continuing to market and sell the problematic vehicles – in 2015, VW USA finally admitted of having installed defeat vehicles in its 2.0L and 3.0L diesel vehicles.¹⁷ The obvious intention behind this was to bypass the EPA’s emission standards so that the diesel vehicles would get approved for the US market.¹⁸

C. Perspective under Anglo-American law

I. Promotion of “Clean Diesel” vehicles

VW USA claimed that the defeat device vehicles had low emissions, complied with emission standards, were environmentally friendly and that they would retain a high resale value.¹⁹ The claims were made in nationally-televised advertisements, online social media campaigns, press releases and public statements, print advertising, collaboration with environmental non-profit organizations and strategic product placement.²⁰ Catchphrases like “Diesel. It’s no longer a dirty world.”, “Clean Diesel” vehicles “meet the strictest EPA standards in the U.S.”, “Green has never felt so right” etc.²¹ were used to induce responsible American consumers to purchase the – until then not particularly well-deemed – diesel vehicles.²² As the claims were in contradiction to the actual truth,²³ they are all legally relevant in respect to VW USA’s misconduct.

¹⁵ Archie B. Carroll, Jill A. Brown & Ann K. Buchholtz, *Business & Society: Ethics, Sustainability & Stakeholder Management* 654 (10th ed. 2016).

¹⁶ FTC Complaint, *supra*, note 6, p. 11.

¹⁷ FTC Complaint, *supra*, note 6, p. 12.

¹⁸ *Frigessi di Ratalma*, *The Dieseldate*, 2017, p. ix.

¹⁹ FTC Complaint, *supra*, note 6, p. 13 et seq.

²⁰ FTC Complaint, *supra*, note 6, p. 6.

²¹ FTC Complaint, *supra*, note 6, p. 6 et seqq.

²² FTC Complaint, *supra*, note 6, p. 5.

²³ FTC Complaint, *supra*, note 6, p. 14.

II. *Unfair competition in the US*

I. *Statutory sources*

a) *Lanham Act*

Sec. 43(a) of the Lanham Act of 1946 establishes a federal cause of action for a big variety of false or misleading statements or representations of fact.²⁴ Inadequacies stemming from the common law of unfair competition have led to the desire of the enactment of a federal statute as an important supplement.²⁵ The Lanham Act provides parties with a statutory cause of action for false or misleading representations that was until then unavailable in common law.²⁶ The need for a uniform federal law of unfair competition was also due to the nature of the international economy.²⁷ Marketing and advertising of products and services do not happen on a state, but on a national level, so that protecting consumers merely by law varying from state to state has led to uncertainty; there had to be national consensus.²⁸ Now, the Lanham Act is applied to most false advertising-cases, as well as trademark infringement and trade dress simulation.²⁹ The elements of false advertising under the Lanham Act Sec. 43(a), 15 U.S.C. § 1125(a) are “(1) a false or misleading statement of fact; (2) that is used in a commercial advertisement or promotion; (3) that is material, in that it deceives or is likely to deceive; (4) that is used in interstate commerce; and (5) that causes, or is likely to cause, the claimant competitive or commercial injury”³⁰. Sec. 43(a) of the Lanham Act does not only prohibit claims that are literally, explicitly false or false by necessary implication (“the only possible interpretation of the advertisement is counterfactual”³¹) but also claims that are, though completely true, likely to mislead and confuse customers.³² The remedies under the Lanham Act include injunctive relief, preliminary

²⁴ Courtland L. Reichman, Melissa M. Cannady, *False Advertising Under the Lanham Act*, 21 Franchise Law Journal 187, 187 (2002).

²⁵ Charles McManis, *Intellectual Property and Unfair Competition in a nutshell* 16, 24 (6th ed. 2009).

²⁶ Charles McManis, *Intellectual Property and Unfair Competition in a nutshell* 24 (6th ed. 2009).

²⁷ Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 UCLA Law Review 671, 707 (1983-1984).

²⁸ Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 UCLA Law Review 671, 707 (1983-1984); *Unfair Competition. In General. Lanham Act Creates Federal Cause of Action for Unfair Competition Affecting Interstate Commerce*, 64 Harvard Law Review 1209, 1210 (1951).

²⁹ Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 70.

³⁰ Courtland L. Reichman, Melissa M. Cannady, *False Advertising Under the Lanham Act*, 21 Franchise Law Journal 187, 188 (2002).

³¹ E. Deborah Jay, *Ten Truths of False Advertising Surveys*, 103 The Trademark Reporter 1116, 1117 (2013).

³² Jane C. Ginsburg, *Trademark and unfair competition law* 596 (5th ed. 2013).

injunction, elimination, monetary damages, marketplace damages, defendant's profits and attorney's fees.³³

b) FTC Act

The Federal Trade Commission Act (FTC Act) was passed in 1914 by Congress³⁴ and is the primary statute of the FTC. The FTC is an independent agency of the United States Government and was founded in 1914,³⁵ created by statute (15 U.S.C. §§ 41 – 58), to protect consumers and promote competition.³⁶ The FTC Act empowers the Commission inter alia to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce, 15 U.S.C. § 45(a). However, it is exclusively in the hands of the FTC to raise claims on grounds of the FTC Act.³⁷ The FTC Act does not create a right of private actions,³⁸ like the Lanham Act does. On the grounds of Sec. 5(a) of the FTC Act, the FTC challenges business conduct that causes, or is likely to cause, substantial injury to consumers that cannot be reasonably avoided and is not offset by greater benefits to consumers or competition (unfair practices). In violation of Sec. 5(a) of the FTC Act is also business conduct that materially misleads, or is likely to mislead, consumers under reasonable circumstances and that misleading practice is material (deceptive practices). The FTC may challenge unfair methods of competition through administrative hearings, Sec. 5(b) of the FTC Act (15 U.S.C. § 45(b)), or by seeking a preliminary or permanent injunction in federal district court, Sec. 13(b) of the FTC Act (15 U.S.C. § 53(b)).

c) State law

In addition to federal law statutes, most states have implemented their own State Unfair Competition Acts.³⁹ These statutes, known as Unfair and Deceptive Acts

³³ Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 75 et seqq.; Courtland L. Reichman, Melissa M. Cannady, *False Advertising Under the Lanham Act*, 21 *Franchise Law Journal* 187, 193 et seqq. (2002).

³⁴ Howard Langer, *Competition Law in the United States* 56 (3rd ed. 2016).

³⁵ See <https://www.ftc.gov/> (see exactly: <https://www.ftc.gov/about-ftc/our-history>).

³⁶ FTC, *Fiscal Year 2021 Congressional Budget Justification*, (Feb. 10, 2020), https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf.

³⁷ N.N., *Judicial Refusal to Imply a Private Right of Action under the FTCA*, 1974 *Duke Law Journal* 506, 506 (1974).

³⁸ N.N., *Judicial Refusal to Imply a Private Right of Action under the FTCA*, 1974 *Duke Law Journal* 506, 506 (1974).

³⁹ Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 70.

and Practices (UDAP) statutes, prohibit unfair and deceptive practices.⁴⁰ The state law statutes are sometimes referred to as “Little FTC Acts” as they contain a similar language to Sec. 5 of the FTC Act;⁴¹ the FTC Rules and Guidelines are also used for orientation.⁴² Not only false advertising-cases are covered by the UDAP statutes, but also deceptive acts in connection with credits, real property, insurance etc. to provide bedrock protections for consumers.⁴³ Furthermore, UDAP statutes are of great importance as they also include private rights of action.⁴⁴ However, they differ from state to state which implicates legal uncertainty,⁴⁵ as mentioned above.⁴⁶

2. Law enforcement

Just as important as the fundamental legal principles in regard to false advertising is their enforcement. When a business conduct is considered unfair or deceptive under federal or state statutes, the respective law must be enforced to provide compensation for the injured parties, be they competitors or consumers.

a) Federal law enforcement

aa) Private actions under the Lanham Act

Under the Lanham Act, any person who believes that he or she is or is likely to be damaged by such act may bring civil claims regarding advertising in violation of Sec. 43(a). The plain meaning of this statute therefore includes both competitors and consumers as it provides a private right of action for “any person”. However, courts have held that mere consumers may not have standing to sue for false advertising under the Lanham Act.⁴⁷ This conclusion is based on the provision in

⁴⁰ See <https://www.nclc.org/> (see exactly: <https://www.nclc.org/issues/unfair-a-deceptive-acts-a-practices.html>).

⁴¹ Thomson Reuters Practical Law Antitrust, *FTC Act Section 5: Overview*, [https://uk.practicallaw.thomsonreuters.com/7-586-7865?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/7-586-7865?transitionType=Default&contextData=(sc.Default)&firstPage=true).

⁴² Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 70.

⁴³ See <https://www.nclc.org/> (see exactly: <https://www.nclc.org/issues/unfair-a-deceptive-acts-a-practices.html>); Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 70.

⁴⁴ Thomson Reuters Practical Law Antitrust, *FTC Act Section 5: Overview*, *supra*, note 41.

⁴⁵ Carolyn L. Carter, *A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, NCLC (Feb., 2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf; Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 *UCLA Law Review* 671, 707 (1983-1984).

⁴⁶ C. II 1. a).

⁴⁷ See e.g., *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1383 n.5 (5th Cir. 1996); *Stanfield v. Osborne Indus. Inc.*, 52 F.3d 867, 873 (10th Cir. 1995); *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1177 (3rd Cir. 1993); *Bacon v. Southwest Airlines Co.*, 997 F. Supp. 775, 780 (N.D. Tex. 1998);

Sec. 45 of the Lanham Act, stating that the statute was enacted “to protect persons engaged in (...) commerce against unfair competition”; therefore, a plaintiff or claimant under the Lanham Act must show some kind of commercial or competitive injury.⁴⁸ Due to the lack of commercial injury, consumers cannot derive a right of private action from Sec. 43(a) of the Lanham Act. Competitors can resort to proceedings offered by Sec. 43(a) of the Lanham Act.⁴⁹ Whether a person challenging advertising under Sec. 43(a) must actually be a competitor of the defendant “and allege a discernible competitive injury”⁵⁰ or if, for standing to bring an action, merely “requires the potential for commercial or competitive injury”⁵¹ is treated by courts differently.⁵²

bb) The FTC

The FTC began operating in 1915 and is funded by the government.⁵³ The Commission, headed by five Commissioners who are nominated by the President and confirmed by the Senate, is divided into the Bureau of Competition, the Bureau of Consumer Protection and the Bureau of Economics.⁵⁴ Still, the FTC is under no formal control by the executive branch and is prohibited by law from engaging in lobbying.⁵⁵

On the grounds of 15 U.S.C. § 43, the Commission is empowered to prosecute any inquiry necessary to its duties in any part of the United States. When the Commission “has reason to believe” that the FTC Act is being violated or about to be violated and that issuance of a complaint is necessary, it may file for administrative adjudication or it may file a complaint before a federal court.⁵⁶ The

Courtland L. Reichman, Melissa M. Cannady, *False Advertising Under the Lanham Act*, 21 Franchise Law Journal 187, 192 (2002).

⁴⁸ Courtland L. Reichman, Melissa M. Cannady, *False Advertising Under the Lanham Act*, 21 Franchise Law Journal 187, 192 (2002).

⁴⁹ Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 82.

⁵⁰ Courtland L. Reichman, Melissa M. Cannady, *False Advertising Under the Lanham Act*, 21 Franchise Law Journal 187, 192 (2002).

⁵¹ *Berni v. Int'l Gourmet Restaurants of Am., Inc.*, 838 F.2d 642, 648 (2nd Cir. 1988).

⁵² *Berni v. Int'l Gourmet Restaurants of Am., Inc.*, 838 F.2d 642, 648 (2nd Cir. 1988); *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 130 (2nd Cir. 2000); *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995).

⁵³ See <https://www.ftc.gov/> (see exactly: <https://www.ftc.gov/about-ftc/our-history>); FTC, *Fiscal Year 2021 Congressional Budget Justification*, (Feb. 10, 2020), *supra*, note 36; Peter C. Ward, *Federal Trade Commission: Law, Practice and Procedure* § 2.07[4] at 2-24 (20th ed. 2005).

⁵⁴ See <https://www.ftc.gov/> (see exactly: <https://www.ftc.gov/about-ftc/commissioners>; <https://www.ftc.gov/about-ftc/bureaus-offices>).

⁵⁵ Peter C. Ward, *Federal Trade Commission: Law, Practice and Procedure* § 2.07[1] at 2-23, § 2.07[6] at 2-25 (20th ed. 2005).

⁵⁶ Sec. 13(b) FTC Act, 15. U.S.C. § 53(b), 16 C.F.R. § 3.2.

FTC is not empowered to issue civil penalties without the aid of a court.⁵⁷ The administrative proceedings are adjudicated before an Administrative Law Judge (ALJ), 16 C.F.R. § 3.1., instead of a federal district judge but otherwise are very similar to proceedings before federal courts in the first instance.⁵⁸ The most common result of these proceedings is a cease and desist order by the ALJ.⁵⁹ The ALJ's initial decision can be appealed to the FTC Commissioners;⁶⁰ appeal against the final decision can be brought before a US court.⁶¹ The FTC may also seek equitable relief under Sec. 13(b) of the FTC Act in federal court; this includes preliminary and permanent injunction. If the court decides in favor of the FTC or the case is settled after an initial complaint filed by the FTC, the equitable remedies secured by the Commission – e.g. ancillary relief, restitution, refund of monies paid and disgorgement of ill-gotten monies – also cover consumer redress, Sec. 19 of the FTC Act, 15 U.S.C. Sec. 57b.⁶² If not otherwise “needed”, e.g. to fund consumer education, the money may go to the U.S. Treasury's general fund.⁶³

However, the FTC does not have exclusive jurisdiction when it comes to unfair practices.⁶⁴ Sec. 5 of the FTC Act merely authorizes the Commission to challenge business practices as far as interstate commerce is concerned.⁶⁵ False advertising-cases that are merely local are within the scope of state law.⁶⁶

b) State law enforcement

In most states, both competitors and consumers may challenge false advertising under the respective UDAP statutes.⁶⁷ To challenge false advertising as a consumer, there is the possibility to bring proceedings collectively as a class action.⁶⁸

⁵⁷ See <https://www.ftc.gov/> (see exactly: <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>).

⁵⁸ Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 83.

⁵⁹ Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 83.

⁶⁰ 16 C.F.R. § 3.52.

⁶¹ Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 83.

⁶² FTC Complaint, *supra*, note 6, p. 16; See <https://www.ftc.gov/> (see exactly: <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>).

⁶³ Leslie Fair, *What the FTC Facebook settlement means for consumers*, FTC Blog (Jul. 24, 2019), <https://www.consumer.ftc.gov/blog/2019/07/what-ftc-facebook-settlement-means-consumers>; Annie Palmer, *Here's where Facebook's record \$5 billion fine goes*, CNBC (Jul. 25, 2019, 1:37 PM), <https://www.cnbc.com/2019/07/25/heres-where-facebooks-record-5-billion-fine-goes.html>.

⁶⁴ Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 70.

⁶⁵ *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349, 61 Ct. 580, 85 L. Ed 881 (1941).

⁶⁶ *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349, 61 Ct. 580, 85 L. Ed 881 (1941); Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 70.

⁶⁷ NCLC, *Consumer Protection in the States A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS*, NCLC (2008), <https://www.nclc.org/images/pdf/udap/udap-appC.pdf>.

⁶⁸ Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 82.

However, joining together in class actions in state courts is prohibited in some states.⁶⁹ Some states allow to bring nationwide class actions when a deceptive or unfair practice has affected consumers identically on a nationwide basis and if there are only non-material differences in the states' laws.⁷⁰

Additionally, consumer associations partly have a right to sue under state law.⁷¹ In that respect, the National Consumer Law Center (NCLC), which began operations in 1969, is of high importance.⁷² Funded by private foundations, corporate sponsors and individuals, the association provides inter alia advocacy and litigation for consumers.⁷³ The NCLC also works with state policymakers and participates in important litigation nationwide.⁷⁴

Remedies for violation of UDAP statutes might include restitution, compensation for damages and reasonable attorney fees.⁷⁵

III. Violation of the FTC Act by VW USA and outcome

VW USA and related entities⁷⁶ claimed that its defeat device vehicles have low emissions, meet basic emissions standards, are environmentally friendly and have a high resale value. However, in truth and in fact these claims were contradictory to the actual situation.⁷⁷ The FTC alleged that these deceptive representations and the deceptive failure to disclose material information, precisely that the light-duty diesel vehicles contained defeat devices, is a violation of Sec. 5 FTC Act, 15 U.S.C. 45(a).⁷⁸ This was also unfair since VW USA's actions caused or are likely to cause substantial injury to consumers as the vehicles exceed emission standards and therefore have substantially reduced value.⁷⁹ By buying the defeat vehicles, consumers did not receive the benefit of their bargain and have collectively suffered

⁶⁹ See e.g., Alabama: Ala. Code § 8-19-10(f).

⁷⁰ Joan Claybrook, *Class Action Legislation: Bingaman Amendment Needed to Allow Nationwide Consumer Protection Suits*, https://www.citizen.org/wp-content/uploads/migration/bingaman_amendment_factsheet.pdf; See e.g., *Shutts v. Phillips Petroleum*, 472 U.S. 797 (1985); but see e.g., *Castano v. American Tobacco* 84 F.3d 734, 752 (5th Cir. 1996).

⁷¹ Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 82.

⁷² Möllers/Heinemann, *The Enforcement of Competition Law in Europe*, 2007, p. 82; <https://www.nclc.org/>.

⁷³ See <https://www.nclc.org/> (see exactly: <https://www.nclc.org/about-us/our-story.html>).

⁷⁴ See <https://www.nclc.org/> (see exactly: <https://www.nclc.org/about-us/our-story.html>).

⁷⁵ NCLC, *Consumer Protection in the States A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS*, NCLC (2018), <https://www.nclc.org/images/pdf/udap/udap-appA.pdf>.

⁷⁶ FTC Complaint, *supra*, note 6, p. 1.

⁷⁷ FTC Complaint, *supra*, note 6, p. 14.

⁷⁸ FTC Complaint, *supra*, note 6, p. 14 et seq.

⁷⁹ FTC Complaint, *supra*, note 6, p. 15.

billions of dollars of injury.⁸⁰ The consumers could not have reasonably avoided this injury because they could not reasonably have been aware of the installment of defeat devices before purchasing the vehicle.⁸¹ Additionally, there is no cognizable benefit to consumers outweighing such injury as defeat devices are illegal.⁸² Eventually, VW AG and related entities have agreed to spend up to \$14.7 billion to settle the allegations of deceiving customers.⁸³ Over \$11 billion were spent to compensate consumers by fully reimbursing them under the FTC's 2.0 liter and 3.0 liter settlements.⁸⁴

D. Interface between Anglo-American and German law

The remarks made above make it evident that the FTC brought a very harsh, straight forward case and therefore demonstrated the importance of consumer protection in the US market, achieving a billion-dollar settlement in favor of the consumers. Even though consumers in Germany suffered at least identically,⁸⁵ a similar compensation for consumers is not in sight.⁸⁶ The different handling of consumer compensation in the US might indicate that German consumers are inadequately protected from deceptive practices like false advertising. To find out if that is the case, the legal perspective on false advertising under German law must be closely examined.

E. Perspective under German law

I. De lege lata

Firstly, it must be considered from the perspective of the current applicable law whether and to what extent the deceptive acts committed by VW USA and VW AG are regulated by unfair competition law in Germany.

⁸⁰ FTC Complaint, *supra*, note 6, p. 15.

⁸¹ FTC Complaint, *supra*, note 6, p. 16.

⁸² FTC Complaint, *supra*, note 6, p. 16.

⁸³ FTC, *Volkswagen to Spend up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles*, FTC Press Release (Jun. 28, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating>.

⁸⁴ FTC, *Federal Judge Approves FTC Order for Owners of Certain Volkswagen, Audi, and Porsche 3.0 Liter "Clean" Diesels to Receive Refunds*, FTC Press Release (May 17, 2017), <https://www.ftc.gov/news-events/press-releases/2017/05/federal-judge-approves-ftc-order-owners-certain-volkswagen-audi>.

⁸⁵ Russel Hotten, *Volkswagen: The scandal explained*, BBC (Dec. 10, 2015), *supra*, note 7.

⁸⁶ Ganslmeier, *Entschädigung läuft in den USA anders*, 30 Sep. 2019, available at <https://www.tagesschau.de/wirtschaft/vw-usa-163.html>.

1. *Unfair competition in Germany*

a) *Sources*

aa) *UCPD*

National unfair competition law is heavily influenced by European Union legislature,⁸⁷ mainly due to the vigorously pursued aim of the harmonization of competition laws of the Member States in the European internal market.⁸⁸ Similarly to the US, advertising does not stop at national borders. Unfair competition rules varying significantly from state to state would effectively prevent companies from engaging in cross-border activities which is contradictory to the objectives of the EU.⁸⁹ On the grounds of Art. 3 para. 1 lit. b TFEU, the EU is empowered to regulate the law against unfair competition. Directive 2005/29/EC⁹⁰ concerning unfair business-to-consumer commercial practices (UCPD) provides inter alia a high level of consumer protection, the promotion of development of cross-border activities and the smooth functioning of the internal market.⁹¹ According to Art. 5 para. 1, 4 UCPD, unfair commercial practices within business-to-consumer relations, which are misleading or aggressive, shall be prohibited. Misleading commercial practices are regulated in Art. 6 – 7 of the UCPD. The elements of a misleading action according to Art. 6 UCPD are (1) that it contains false information and is therefore untruthful or (2) in any way deceives or is likely to deceive the average consumer, even if the information is factually correct, (3) in relation to one or more of the listed elements in Art. 6 para. 1 UCPD (e.g. the main characteristics of the product) and (4) in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise. The benchmark for this directive is an average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.⁹² The UCPD also includes a so called “black list”⁹³ of commercial practices, which are in all circumstances considered unfair.

⁸⁷ See <https://www.wettbewerbszentrale.de/> (see exactly: <https://www.wettbewerbszentrale.de/de/institution/profil/gestaltungsraum/>).

⁸⁸ *Emmerich/Lange*, *Unlauterer Wettbewerb*, 11th ed. 2019, § 1 margin no 22.

⁸⁹ UCPD, Recital 2; *Emmerich/Lange*, *Unlauterer Wettbewerb*, 11th ed. 2019, § 1 margin no 22.

⁹⁰ Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC, 2002/65/EC and Regulation (EC) No 2006/2004 of 11 May 2005, OJ L 149, 22.

⁹¹ UCPD, Recital 1 – 3.

⁹² UCPD, Recital 18.

⁹³ *Emmerich/Lange*, *Unlauterer Wettbewerb*, 11th ed. 2019, § 1 margin no 25.

However, the Member States are only bound to implement the directives by the EU with regards to the result to be achieved whereas the exact choice of form and methods are left to the national authorities, Art. 288 TFEU. Therefore, the law of unfair competition remains within the responsibility of the states.⁹⁴ Though, the standard of protection of the UCPD may neither be undercut nor exceeded by the Member States (full harmonization).⁹⁵ To avoid contradiction of national law and the UCPD – like the UWG in 2004 before its amendment in 2015 – the law of the Member States should comply as closely as possible to the directive’s wording.⁹⁶ Furthermore, national law must always be interpreted in accordance with the Directive.⁹⁷

bb) UWG

The UWG, first enacted in 1896 and last amended in 2015, is the relevant legal text in regard to unfair competition in Germany. False advertising, now regulated by §§ 5, 5a UWG, has been prohibited since 1909.⁹⁸ The amendment of the UWG in 2015 (UWG Amendment 2015) served the purpose of an improved implementation of the UCPD in German law of unfair competition as it had not yet met the Commission’s standards of implementation.⁹⁹ However, there are still some deficits.¹⁰⁰ On the grounds of § 1 UWG, the act shall serve the purpose of protecting competitors, consumers and other market participants against unfair commercial practices. It shall also protect the interests of the public in undistorted competition. All unfair commercial practices are prohibited by § 3 UWG. Like the UCPD, § 3 para. 3 UWG also includes a “black list” of per-se prohibited acts in relation to consumers. False advertising is regulated in §§ 5, 5a UWG. A practice is unfair

⁹⁴ *Lettl*, Wettbewerbsrecht, 3rd ed. 2016, § 1 margin no 2.

⁹⁵ ECJ, Judgment of 23 Apr. 2009, C-261, C-299/07, Slg. 2009, I-2949 = EuZW 2009, 370 – VTB-VAB/Galatea/Sanoma; ECJ, Judgment of 14 Jan. 2010, C-304/08, Slg. 2010, I-217 = NJW 2010, 1867 = JuS 2011, 77 – Plus; ECJ, Judgment of 9 Nov. 2010, C-540/08, Slg. 2010, I-10909 = GRUR 2011, 76 – Mediaprint/Österreich Zeitungsverlag; BGH, Judgment of 14 Apr. 2011, I ZR 133/09, NJW 2011, 2653 margin no 18.

⁹⁶ *Emmerich/Lange*, Unlauterer Wettbewerb, 11th ed. 2019, § 1 margin no 27.

⁹⁷ *Glöckner*, Über die Schwierigkeit, Proteus zu beschreiben – die Umsetzung der Richtlinie über unlautere Geschäftspraktiken in Deutschland, GRUR 2013, 224, 228; *Kühl*, Strafbare Werbung mit manipulierten Abgaswerten im Dieselskandal? WRP 2019, 573, 578 margin no 36.

⁹⁸ *Peifer*, Lauterkeitsrecht, 2nd ed. 2016, margin no 93.

⁹⁹ *Köhler*, in: Köhler/Bornkamm/Feddersen, UWG, 38th ed. 2020, Introduction margin no 2.28.

¹⁰⁰ *vzbv*, Neufassung des Gesetzes gegen unlauteren Wettbewerb bringt kaum Änderungen für Verbraucher, Press Release from 11 Dec. 2015, available at <https://www.vzbv.de/meldung/neufassung-des-gesetzes-gegen-unlauteren-wettbewerb-bringt-kaum-aenderungen-fuer-verbraucher>; *Köhler*, in: Köhler/Bornkamm/Feddersen, UWG, 38th ed. 2020, Introduction margin no 2.28.

under § 5 para. 1 UWG where (1) a person engages in a misleading commercial practice (2) which is suited to causing the consumer or other market participant (3) to take a transactional decision he would not have taken otherwise. A commercial practice is regarded as misleading if it (1) contains false statements or (2) other information suited the deception regarding the listed circumstances in § 5 para. 1 UWG (e.g. the main characteristics of the goods or services). It may also be misleading to omit material information, § 5a UWG. Additionally, § 16 para. 1 UWG is imposing criminal liability (imprisonment up to two years or a fine) on whoever, (1) with the intent of creating the impression of a particularly favorable offer, (2) misleadingly advertises while using false statements (3) in public announcements or (4) in communications directed towards a wider audience. Criminal liability under § 16 para. 1 UWG requires that the challenged conduct is at least considered as misleading advertising within the means of § 5 UWG.¹⁰¹ Due to its nature of being a criminal norm,¹⁰² § 16 UWG is, however, discussed to be contradictory to the UCPD.¹⁰³ Additionally, merely penalizing “false statements” is in contradiction to Art. 6 UCPD, § 5 UWG (true statements may also be misleading).¹⁰⁴ Moreover, under § 16 para. 1 UWG, an examination of the commercial relevance is not required as it usually is.¹⁰⁵

Even if it seems like the consumer is strongly protected from false advertising, the consumer protection by German law regarding unfair competition is still considered to be inadequate.¹⁰⁶ This is mainly due to the fact that consumers have extremely limited standing under the UWG: exclusively competitors, associations and qualified entities, § 8 para. 3 UWG, may challenge misleading practices to claim elimination and injunctive relief (§ 8 UWG), compensation for damage (§ 9 UWG) and confiscation of profits (§ 10 UWG) before a court. The confiscated profits claimed by the parties are to be paid to the state, not the claimants.¹⁰⁷ Consumers

¹⁰¹ *Brammsen*, *Lauterkeitsstrafrecht*, 2020, § 16 margin no 24.

¹⁰² *Brammsen*, *Lauterkeitsstrafrecht*, 2020, § 16 margin no 21 et seq.

¹⁰³ *Hamacher*, *Der sog. Dieselskandal und die (fast) in Vergessenheit geratene Vorschrift des § 16 Abs. 1 UWG*, WRP 4/2018, Editorial; *Kühl*, *Strafbare Werbung mit manipulierten Abgaswerten im Dieselskandal?* WRP 2019, 573, 574 et seqq.

¹⁰⁴ *Hamacher*, *Der sog. Dieselskandal und die (fast) in Vergessenheit geratene Vorschrift des § 16 Abs. 1 UWG*, WRP 4/2018, Editorial.

¹⁰⁵ *Hamacher*, *Der sog. Dieselskandal und die (fast) in Vergessenheit geratene Vorschrift des § 16 Abs. 1 UWG*, WRP 4/2018, Editorial.

¹⁰⁶ *Emmerich/Lange*, *Unlauterer Wettbewerb*, 11th ed. 2019, § 14 margin no 8; *vzbv*, *Neufassung des Gesetzes gegen unlauteren Wettbewerb bringt kaum Änderungen für Verbraucher*, Press Release from 11 Dec. 2015, fn. 100.

¹⁰⁷ § 10 para. 1 UWG.

cannot even resort to basic civil law protection via § 823 para. 2 BGB for violation of UWG standards because the unfairness offenses of the UWG are not recognized as protective statutes.¹⁰⁸ § 16 UWG, however, is the only exception, providing consumers with a right to claim damages and injunctive relief via § 823 para. 2 BGB since the protective character of this norm is to be assumed.¹⁰⁹

b) Law enforcement

Given the inadequacies of consumer rights under the UWG in regard to false advertising, it is even more important to examine whether the enforcement of the law provides more protection to consumers.

aa) Private actions

Private actions in unfair competition-cases can be brought before a court by competitors, § 8 para. 3 no 1 UWG. In the consequence of court proceedings being very time-consuming and costly, settling disputes out-of-court has become common practice.¹¹⁰ There are several options for parties to claim their rights out-of-court. The first one is to assert a cease and desist undertaking by the violating party, § 12 para. 1 UWG. If a preliminary injunction has already been issued, the dispute might be resolved definitively by a so-called concluding proceeding where the violating party accepts the preliminary injunction as final by means of a concluding letter and declaration.¹¹¹ Civil law disputes regarding unfair competition can also be settled by conciliation boards at the Chambers of Industry and Commerce, § 15 UWG. Conciliation boards are composed of a chairperson who is qualified to hold judicial office and persons sitting as assessors.¹¹² Criminal law may only be enforced as the ultima ratio for serious infringements like §§ 16, 20 UWG.¹¹³ As criticized above,¹¹⁴ consumers cannot derive a private right of action for violations of the UWG unless there is a case of advertising incurring criminal liability under § 16 UWG.

¹⁰⁸ *Boesche*, Wettbewerbsrecht, 5th ed. 2016, § 1 margin no 6; *Möllers/Heinemann*, The Enforcement of Competition Law in Europe, 2007, p. 210.

¹⁰⁹ BGH, Judgment of 30 May 2008, GRUR 2008, 818, margin no 87.

¹¹⁰ *Köhler*, in: *Köhler/Bornkamm/Feddersen*, UWG, 38th ed. 2020, Introduction margin no 2.41; *Muenker*, Enforcement of unfair competition and consumer protection laws by a private business association in Germany: the Wettbewerbszentrale, Journal of Intellectual Property Law & Practice, available at <https://www.wettbewerbszentrale.de/media/getlivedoc.aspx?id=35283>, p. 2.

¹¹¹ *Sosnitzka*, in: *Ohly/Sosnitzka*, UWG, 7th ed. 2016, § 12 margin no 183.

¹¹² § 15 para. 2 UWG.

¹¹³ *Köhler*, in: *Köhler/Bornkamm/Feddersen*, UWG, 38th ed. 2020, Introduction margin no 2.41.

¹¹⁴ E. I. 1. a) bb).

bb) The WBZ

The Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. (WBZ), founded in 1912 by merchants and entrepreneurs, is the largest and most influential self-regulatory institution for enforcing the law against unfair competition in Germany.¹¹⁵ The WBZ is of great importance in the German law enforcement system.¹¹⁶ On the grounds of § 8 para. 3 no 2 UWG, § 3 para. 1 no 2 UKlaG, the WBZ is empowered to challenge misleading commercial practices by claiming injunctive relief or bringing a suit before a court in the event of violations of § 3 UWG and § 7 UWG.¹¹⁷ It can also resort to settlements through conciliation boards at the Chambers of Industry and Commerce, § 15 UWG.

The WBZ is not a consumer association, however by providing “fair play” for competitors and the promotion of fair business transactions and fair economic competition, the consumers may be protected indirectly.¹¹⁸

Unlike the FTC, the WBZ is not funded by government but by its members which are about 2000, including approximately 800 associations (e.g. almost all German Chambers of Industry and Commerce) as well as 1.100 companies including e.g. VW AG.¹¹⁹ The WBZ only takes action in response to specific complaints from members. As the agency only claims for injunction,¹²⁰ it receives no equitable remedies from the courts to either compensate the violated parties or fund their own operations. Though, the WBZ receives legally prescribed fees for justified warnings as well as contractual penalty payments for violations of cease-and-desist declarations, which is transferred into a litigation cost-fund of the agency and then used to cover litigation expenses.¹²¹

¹¹⁵ Köhler, in: Köhler/Bornkamm/Feddersen, UWG, 38th ed. 2020, Introduction margin no 2.45; See <https://www.wettbewerbszentrale.de/> (see exactly: <https://www.wettbewerbszentrale.de/de/institution/profil/auftrag/>).

¹¹⁶ Köhler, in: Köhler/Bornkamm/Feddersen, UWG, 38th ed. 2020, Introduction margin no 2.45.

¹¹⁷ Köhler, in: Köhler/Bornkamm/Feddersen, UWG, 38th ed. 2020, Introduction margin no 2.45.

¹¹⁸ See <https://www.wettbewerbszentrale.de/> (see exactly: <https://www.wettbewerbszentrale.de/de/institution/profil/auftrag/>).

¹¹⁹ Muenker, Enforcement of unfair competition and consumer protection laws by a private business association in Germany: the Wettbewerbszentrale, *Journal of Intellectual Property Law & Practice*, fn. 110, p. 2; See <https://www.wettbewerbszentrale.de/> (see exactly: <https://www.wettbewerbszentrale.de/de/institution/mitgliedschaft/mitgliederverzeichnis/>).

¹²⁰ See <https://www.wettbewerbszentrale.de/> (see exactly: <https://www.wettbewerbszentrale.de/de/institution/profil/taetigkeitsfelder/>).

¹²¹ See <https://www.wettbewerbszentrale.de/> (see exactly: <https://www.wettbewerbszentrale.de/de/institution/profil/anspruch/>).

Other services by the WBZ, mainly for members, include legal advice and information services.¹²² Despite of the fact that the agency is exclusively funded by specific corporations and institutions, the WBZ claims to be completely independent and neutral.¹²³

cc) Consumer associations

The most promising option for actually or allegedly injured consumers to pursue their interests is by consumer associations.¹²⁴ Consumer associations are qualified entities, § 8 para. 3 UWG, § 4 UKlaG – which is based on Art. 4 para. 3 of the Directive 2009/22/EC¹²⁵ – and are therefore entitled to challenge misleading commercial practices in violation of § 3 para. 1 UWG. For a consumer association to be recognized as a qualified entity under § 8 para. 3 UWG, it has to be registered in the list of qualified institutions at the Federal Administrative Office, § 4 UKlaG, or in the list of the EU Commission, Art. 4 para. 3 of Directive 2009/22/EC. Additionally, the objects in the statutes of such associations have to set forth the aim to protect consumer interests by means of education and advice.¹²⁶ Merely preventing unfair competition is not sufficient as an association's objective.¹²⁷ Due to a possible conflict of interests, consumer associations may not represent commercial interests as well.¹²⁸ Consumer associations must have sufficient financial, technical and personnel resources to represent the interests of the consumers.¹²⁹

One example of a consumer association in Germany is the Verbraucherzentrale Bundesverband e.V. (vzbv). It is a member of the European consumer association BEUC and the Consumers International.¹³⁰ It is funded by the Federal Ministry of Justice and Consumer Protection as well as from project funds and membership

¹²² See <https://www.wettbewerbszentrale.de/> (see exactly: https://www.wettbewerbszentrale.de/de/unsere_leistungen1/).

¹²³ See <https://www.wettbewerbszentrale.de/> (see exactly: <https://www.wettbewerbszentrale.de/de/institution/profil/anspruch/>); *Muenker*, Enforcement of unfair competition and consumer protection laws by a private business association in Germany: the Wettbewerbszentrale, *Journal of Intellectual Property Law & Practice*, fn. 110, p. 2.

¹²⁴ *Boesche*, Wettbewerbsrecht, 5th ed. 2016, § 1 margin no 11; *Möllers/Heinemann*, The Enforcement of Competition Law in Europa, 2007, p. 210.

¹²⁵ Directive 2009/22/EC of the European Parliament and of the Council concerning injunctions for the protection of consumers' interests of 23 Apr. 2009, OJ L 110/30.

¹²⁶ *Piper*, in: Köhler/Piper, UWG, 3rd ed. 2002, § 13 margin no 28; *Goldmann*, in: Harte-Bavendamm/Henning-Bodewig, UWG, 4th ed. 2016, § 8 margin no 347.

¹²⁷ *Piper*, in: Köhler/Piper, UWG, 3rd ed. 2002, § 13 margin no 28.

¹²⁸ *Möllers/Heinemann*, The Enforcement of Competition Law in Europa, 2007, p. 211.

¹²⁹ *Piper*, in: Köhler/Piper, UWG, 3rd ed. 2002, § 13 margin no 29.

¹³⁰ *Köhler*, in: Köhler/Bornkamm/Fedderson, UWG, 38th ed. 2020, Introduction margin no 2.48.

fees.¹³¹ In the event of a possible violation, consumers can contact the vzbv directly.¹³² The vzbv also observes the market itself.¹³³ The vzbv then issues warning letters and brings actions, particularly against competition law violations.¹³⁴

For an action to be challengeable under the UWG by an association, it must have had significant impact on the economic behavior of the consumer;¹³⁵ the mere violation of a norm, which is aimed to protect consumers, does not suffice for the vzbv to get involved.¹³⁶ If all requirements are met, consumer associations may sue nationwide.¹³⁷

As mentioned earlier,¹³⁸ confiscated profits on grounds of § 10 UWG claimed by the parties are to be paid to the state, not to the claimants. This is highly inadequate, especially when one takes a look at the Anglo-American system where the received compensation of class action settlements is used to benefit consumer protection (cypres doctrine)¹³⁹ and where equitable remedies received by the FTC are also used for consumer redress and education.¹⁴⁰ Consumer associations have been fighting in vain for years for an improvement of § 10 UWG so that there exists a financial incentive to bring high-risk actions before a court.¹⁴¹

2. Violation of the UWG by VW AG and outcome

To be liable for false advertising claims, VW AG has to have violated German law, precisely, the UWG.

a) “Clean Diesel” advertisements in the US, § 16 para. 1 UWG

The “Clean Diesel” advertisements were only broadcasted in the US and aimed towards US customers and therefore had no effect, or at least no intentional,

¹³¹ vzbv, Annual report 2018, available at https://www.vzbv.de/sites/default/files/2018_vzbv_jahresbericht_0.pdf; Köhler, in: Köhler/Bornkamm/Feddersen, UWG, 38th ed. 2020, Introduction margin no 2.48.

¹³² See <https://www.verbraucherzentrale.de/> (see exactly: <https://www.verbraucherzentrale.de/wissen/vertraege-reklamation/kundenrechte/unlauterer-wettbewerb-10836>).

¹³³ See <https://www.verbraucherzentrale.de/> (see exactly: <https://www.verbraucherzentrale.de/marktbeobachtung>).

¹³⁴ Köhler, in: Köhler/Bornkamm/Feddersen, UWG, 38th ed. 2020, Introduction margin no 2.48.

¹³⁵ § 3 para. 2 UWG.

¹³⁶ Boesche, Wettbewerbsrecht, 5th ed. 2016, § 3 margin no 70.

¹³⁷ BGH, Judgment of 22 Sep. 2011, I ZR 229/10 NJW 2012, 1812.

¹³⁸ E. I. 1. a) bb).

¹³⁹ Stadler, Musterfeststellungsklagen im deutschen Verbraucherrecht? VUR 2018, 83, 85.

¹⁴⁰ C. II. 2. a) bb).

¹⁴¹ Stadler, Musterfeststellungsklagen im deutschen Verbraucherrecht? VUR 2018, 83, 85.

measurable effect, on the German market.¹⁴² Consequently, claims based on civil law in respect to the “Clean Diesel” advertisements in the US, like a violation of §§ 5, 5a para. 1 UWG, are not available to German claimants, according to Art. 6 para. 1 Rome II-Regulation¹⁴³.

However, this does not exclude criminal liability for false advertising under § 16 para. 1 UWG. On the grounds of §§ 3, 9 StGB, German criminal law is applicable if the offender has acted in Germany or was required to act there in the case of an omission (Principle of Territoriality)¹⁴⁴. In this respect, it is sufficient for a criminal liability due to false advertising in the US that there is a connecting factor in Germany.¹⁴⁵ Prof. Dr. Martin Winterkorn, former chairman of the Board of Management of VW AG, and other responsible persons from VW AG are accused of being aware of the discrepancies in the emission tests at least since May 2014 and of having decided at a meeting in Wolfsburg in July 2015 to not make it public.¹⁴⁶ Therefore, a criminal liability on grounds of § 16 para. 1 UWG due to the “Clean Diesel” advertisements in the US is possible.

The “Clean Diesel” advertisements contained literally false statements.¹⁴⁷ The content of the claims made by VW USA is therefore in contradiction to the actual truth; the claims are untrue within the meaning of § 16 para. 1 UWG.¹⁴⁸ This also created the impression of a particularly favorable offer as the defeat vehicles were claimed to be particularly environment-friendly compared to other diesel-vehicles.¹⁴⁹

However, it is still unclear whether the offenders in Germany, as a joint offender by means of organizational control, § 25 para. 2 StGB, also had the respective intent.¹⁵⁰ Though, it seems very likely that there had to be an intent to create such

¹⁴² *Kühl*, Strafbare Werbung mit manipulierten Abgaswerten im Dieselskandal? WRP 2019, 573, 578 margin no 41.

¹⁴³ Regulation (EC) No 864/2007 of the European Parliament and of the Council concerning the law applicable to non-contractual obligations (Rome II) of 11 July 2007, OJ L 199, 40.

¹⁴⁴ *Möhrenschläger*, in: Wabnitz/Janovsky/Schmitt, WirtschaftsStrafR-Hdb, 5th ed. 2020, 3rd chapter margin no 34 et seq.

¹⁴⁵ *Kühl*, Strafbare Werbung mit manipulierten Abgaswerten im Dieselskandal? WRP 2019, 573, 578 margin no 40.

¹⁴⁶ *Germis*, Richter: Winterkorn hätte aufklären müssen, FAZ.NET 11 Sep. 2018, available at <https://www.faz.net/aktuell/wirtschaft/auto-verkehr/volkswagen-prozess-martin-winterkorn-haette-aufklaeren-muessen-15782543.html>.

¹⁴⁷ FTC Complaint, *supra*, note 6, p. 13 et seq.

¹⁴⁸ *Brammsen*, Lauterkeitsstrafrecht, 2020, § 16 margin no 51.

¹⁴⁹ *Kühl*, Strafbare Werbung mit manipulierten Abgaswerten im Dieselskandal? WRP 2019, 573, 580 margin no 60.

¹⁵⁰ *Kühl*, Strafbare Werbung mit manipulierten Abgaswerten im Dieselskandal? WRP 2019, 573, 580 margin no 61 et seq.

an impression or, at least, to deliberately ignore the excessive promotional “Clean Diesel” activities of the subsidiary VW USA, § 13 StGB.

b) EURO 5-indication in Germany, § 16 para. 1 UWG

When it comes to the EURO 5-indication, § 16 para. 1 may also be applicable, since this may create the impression that the defeat VW diesel-vehicles are environmentally friendly.¹⁵¹ The EURO 5-indication can be considered untrue in the sense that, according to Regulation (EC) No 715/2007¹⁵² concerning type approval of motor vehicles with respect to emissions, the EURO-indications of vehicles are to be assumed to be associated with a declaration of the vehicle manufacturer that there is no defeat device installed to bypass testing procedures.¹⁵³ It is questionable, however, if the EURO 5-indication was made by VW AG to create the impression of a particularly favorable offer. As German consumers are not particularly cautious when it comes to emissions¹⁵⁴ and because all new vehicles must comply with the EURO 5-standard, the EURO 5-indication of the defeat Volkswagen diesel vehicles might not be perceived as a particularly favorable offer by consumers.¹⁵⁵

Evidently, § 16 para. 1 UWG is not the focus of law enforcement authorities. This may be due to the fact that a violation of the norm is a private-prosecution offense (relatively high barriers) or merely because the norm creates difficulties of interpretation that is in line with the UCPD.¹⁵⁶

¹⁵¹ *Kühl*, Strafbare Werbung mit manipulierten Abgaswerten im Dieselskandal? WRP 2019, 573, 579 et seq.

¹⁵² Regulation (EC) No 715/2007 of the European Parliament and of the Council concerning type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information of 20 Jun. 2007, OJ L 171/1.

¹⁵³ BGH, Judgment of 8 Jan. 2019, VIII ZR 225/17, margin no 10 et seq. (Juris); *Kühl*, Strafbare Werbung mit manipulierten Abgaswerten im Dieselskandal? WRP 2019, 573, 580 margin no 57; see contra e.g.: LG Ansbach, Judgment of 2 Jun. 2017, 2 O 1074/16, margin no 47 (Juris); LG Passau, Judgment of 20 Apr. 2017, 4 O 666/16, margin no 79 (Juris).

¹⁵⁴ *Reinking/Eggert*, Der Autokauf, 13th ed. 2017, margin no 1895c.

¹⁵⁵ *Kühl*, Strafbare Werbung mit manipulierten Abgaswerten im Dieselskandal? WRP 2019, 573, 580 margin no 60.

¹⁵⁶ *Wettbewerbszentrale*, Rückblick: Drittes Expertenforum Automotive Recht (EAR) der Wettbewerbszentrale, Press Release from 21 Feb. 2018, available at <https://www.wettbewerbszentrale.de/de/branchen/Kfz-Branche/aktuelles/news/?id=2975>.

c) EURO 5-indication in Germany, §§ 5, 5a para. 1 UWG

Even if § 16 para. 1 UWG may not be applicable in regard to the EURO 5-indication, civil claims based on the “basic offenses” §§ 5, 5a para. 1 UWG are still available as such an indication is clearly misleading. Though, it seems like a violation of those UWG standards is not the focus of anyone that has standing under the UWG since no notable complaint or lawsuit has been filed.

d) Outcome

Considering the possible violations of the UWG standards by VW AG, it becomes very unclear as to why there is not a single verdict let alone settlement in favor of German consumers in respect to granting civil or criminal claims on the grounds of unfair competition. In most verdicts by the German courts, a possible violation of UWG standards is not even mentioned and if it is, claims based on § 823 para. 2 BGB, § 16 para. 1 UWG are easily dismissed due to “lack of sufficient substantiation and conclusive evidence”¹⁵⁷.

Consequently, the question arises: does the UWG have systematic deficiencies or are claims based on unfair competition merely getting lost in the shuffle as the “spotlight” in the German jurisdiction seems to be on convictions in regard to fraud or defect liability claims. In latter case, why is no association acting on behalf of German consumers like the FTC?

II. De lege ferenda

Evidently, existing law and its enforcement is not capable to protect consumers in the scope of unfair competition adequately. Accordingly, it is necessary to discuss whether and how unfair competition law can be adapted to provide sufficient consumer protection in Germany.

1. Necessity of changes in the UWG

a) Standing under the UWG

Basically, to eliminate inadequacies in consumer protection, it might be a reasonable approach to provide consumers with a private right of action for civil claims under the UWG. De lege lata, consumers may merely raise claims on the

¹⁵⁷ LG München II, Judgment of 7 Jul. 2017, 10 O 2708/16; See also e.g. OLG Celle, Judgment of 29 Jan. 2020 – 7 U 575/18, margin no 70 et seqq. (Juris); LG Braunschweig, Judgment of 26 Jun. 2017 – 8 O 3689/16, margin no 79 (Juris).

grounds of § 16 UWG, which is highly questionable as this criminal norm has proven to be hardly applicable¹⁵⁸ and is even referred to as “(almost) forgotten”¹⁵⁹. Consumer associations like the vzbv have been urging the need for another reform in the enforcement of consumer rights.¹⁶⁰

The argument that creating a private right of action for anyone who has been supposedly harmed by an unfair commercial practice could open floodgates¹⁶¹ seems not entirely convincing. An unlimited number of costly and time-consuming proceedings brought by consumers might not be manageable which would be a burden to competition on the market and economy. Though, a lot of EU Member States have introduced a private right of claim for consumers and have not been flooded by claims.¹⁶² Such fear might therefore be unjustified.

However, providing consumers with a general right to bring action under the UWG might be problematic in other ways. Firstly, according to its Recital No 9, the UCPD does not contain any provisions on individual rights of action brought by those who have been harmed by an unfair commercial practice. In the light of full harmonization, the creation of special individual rights of action for consumers in the UWG might be contradictory to the UCPD. Additionally, it is questionable whether action brought by one consumer against a large company will ever even have a chance of success.

b) Law enforcement

Given the reasons as to why a general private right of action might not be as efficient, an improvement consumer protection might be based on an improvement of the law enforcement.

aa) Consumer associations

Generally, consumer associations seem to be the best option for consumers to pursue their interests. However, the consumer is very unlikely to receive any form of compensation from this as consumer associations may merely sue for elimination/injunctive relief, § 8 UWG, and confiscation of profits, § 10 UWG,

¹⁵⁸ E. I. 2. a), b).

¹⁵⁹ *Hamacher*, Der sog. Dieselskandal und die (fast) in Vergessenheit geratene Vorschrift des § 16 Abs. 1 UWG, WRP 4/2018, Editorial.

¹⁶⁰ *vzbv*, Neufassung des Gesetzes gegen unlauteren Wettbewerb bringt kaum Änderungen für Verbraucher, Press Release from 11 Dec. 2015, fn. 100.

¹⁶¹ BT-Drs. 15/1487, p. 22.

¹⁶² *Möllers/Heinemann*, The Enforcement of Competition Law in Europe, 2007, p. 279.

which is paid to the German Treasury. In view of the high risk of litigation, consumer associations should not merely take on the role of “bounty hunters” for the State’s treasury if there is no financial incentive for them to do so.¹⁶³ To bring an action on the ground of § 10 UWG – which currently seems like a “placebo norm”¹⁶⁴ – would be way more attractive for consumer associations if they were able to take equitable remedies received themselves.

Of course, privileging consumer associations with a right to claim compensation for damages in the first place would be even more effective. After deduction of the costs of the injured party, received remedies from compensatory claims should be used to benefit the general public.¹⁶⁵

It is desirable for received equitable remedies by the courts to be taken by the consumer associations so that it can be used for restitution, compensation, refund and even education of consumers. Such handling of equitable remedies, like it is done in the US,¹⁶⁶ seems way more apparent given the importance of consumer protection.

bb) Public enforcement

What might be even more attractive for consumer associations is, instead of claiming themselves, to join public law proceedings.¹⁶⁷ Like in the Anglo-American system on state level, it would be efficient to privilege state authorities as well as private parties with a right to proceed against infringements of unfair competition law (double competence).¹⁶⁸ To close gaps in legal consumer protection, it would make sense if there was supervision by official bodies of the state.¹⁶⁹ If proceedings against infringements of the UWG by private parties cannot be or are not brought in courts, public enforcement of such could serve as a supplement to protect consumers still.¹⁷⁰

¹⁶³ *Schaumburg*, Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht, 2006, p. 123.

¹⁶⁴ *Stadler*, Musterfeststellungsklagen im deutschen Verbraucherrecht? VUR 2018, 83, 89.

¹⁶⁵ *Möllers/Heinemann*, The Enforcement of Competition Law in Europe, 2007, p. 242.

¹⁶⁶ C. II. 2. a) bb).

¹⁶⁷ *Möllers/Heinemann*, The Enforcement of Competition Law in Europe, 2007, p. 242; *Köhler*, in: *Köhler/Bornkamm/Feddersen*, UWG, 38th ed. 2020, Introduction margin no 2.41.

¹⁶⁸ *Möllers/Heinemann*, The Enforcement of Competition Law in Europe, 2007, p. 251.

¹⁶⁹ *Henning-Bodewig*, Zur Sektoruntersuchung des Bundeskartellamts zu Vergleichsportalen, WRP 2019, 537, 542 margin no 29; *Möllers/Heinemann*, The Enforcement of Competition Law in Europe, 2007, p. 249 et seqq.

¹⁷⁰ *Podszun/Busch/Henning-Bodewig*, Die Durchsetzung des Verbraucherrechts: Das BKartA als UWG-Behörde? GRUR 2018, 1004, 1008 et seqq.; *Köhler*, in: *Köhler/Bornkamm/Feddersen*, UWG, 38th ed. 2020, Introduction margin no 2.41.

F. Overall conclusion

Under Anglo-American law, consumers harmed by the VW diesel scandal were fully reimbursed under the FTC's \$11 billion settlements. Even if consumers can merely derive a private right of action from state law, their interests are adequately protected by law enforcement. The FTC as an independent authority of the United States Government as well as consumer associations protect consumers from unfair competition under federal law. Additionally, there is the possibility to bring proceedings collectively as a class action. Competitors may bring proceedings under the Lanham Act. Equitable remedies received by the courts may also be used to benefit consumers as by providing restitution, refund, ancillary relief, consumer education and redress. It is therefore evident, that consumer protection in the US is not merely theoretically considered to be important but also executed by an effective law enforcement system.

Under German law, the compensation under unfair competition law for consumers harmed by the VW diesel scandal is handled differently, respectively not handled at all. Competitors can resort to several proceedings under the UWG and are well protected from infringements of competition law. Consumer protection, however, has several legal gaps. Consumers have extremely limited standing under the UWG. This cannot be compensated by law enforcement as consumer associations may merely resort to the "placebo" § 10 UWG to confiscate profits as an equitable remedy which however is then taken by the State. Additionally, there are no official bodies of the State supervising possible infringements of competition law. It became clear that competition law *de lege lata* is not capable of providing adequate protection of consumers. It is therefore necessary to make proceedings under the UWG more (financially) attractive for consumer associations by providing them with the possibility to receive equitable remedies. Public enforcement of competition law as a supplement would be an effective possibility to protect consumers as well since it seems to have success in the US.

Erklärung:

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Augsburg, den 26.06.2020



Lea Fischer